REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 31 OF 2016

MURSAL GULEID.....1ST APPELLANT

MASLLAH BUS CO LTD.....2NDAPPELLANT

HASSAN ATHMAN TUMBO.....3RD APPELLANT

VERSUS

DANIEL KIOKO MUSAU.....RESPONDENT

(Being an appeal from the ruling of C.K. Kisiangani R.M) in Machakos CMCC 544 of 2013 delivered on 9.12.2015)

JUDGEMENT

1. Pursuant to leave granted by this court on 30th March, 2016, the appellants represented by M/S Kairu & McCourt Advocates filed this appeal against the respondent represented by M/s B.M. Mungata & Co. Advocates. The appeal challenges the decision by the trial court declining the setting aside of a consent judgment on liability that was entered in Machakos Chief Magistrates **Court Civil Suit No.544 of 2013** on 3.7.2015.

2. The grounds of the appeal are elaborately set out in the memorandum filed on 7th April, 2016.

3. The background to this appeal as gleaned from the pleadings in the trial court are that the appellants approached the trial court vide two applications. The application dated 11th September, 2015 sought that the consent judgement recorded on 8th July, 2015 be set aside. In support of the application was an affidavit wherein it was averred that the applicants had obtained information that the treatment notes relied upon did not originate from the facility that was indicated therein and a copy of the Hospital Register indicative of the same was annexed to the application. The 2nd application is dated 8th October, 2015 where the appellants sought that they be allowed to amend their defence and that they be allowed to recall the Plaintiff's witnesses.

4. The applications were opposed by the respondent who averred in respect of the 1st application that the allegations raised were false and a delaying tactic. In respect of the 2nd application that there was no indication of any reply. The trial court vide ruling delivered on 9.9.2015, found that there was no demonstration of mistake or error apparent on the record or sufficient reason and that the parties were represented during trial hence the appellants could not get themselves out of the consent. It was found that no draft amended defence had been annexed to the application and that no sufficient reason was shown why the respondent's case should be reopened and that the appellant's advocate did not attend court on the date when the matter was called for hearing despite being aware of the hearing hence the hearing proceeded ex-parte. Both applications were dismissed and this prompted the instant appeal.

5. The appeal was canvassed vide written submissions wherein learned counsel for the appellant submitted that the consent was entered into through misrepresentation and as such the same was material to the determination of quantum. Counsel urged the court to reevaluate the magistrate's ruling and placed reliance on the case of **Flora N. Wasike v Destimo Wamboko (1988) eKLR.**

6. Learned counsel for the respondent submitted that the appellant sent the respondent for a 2nd medical examination and that the report was filed in court and when the matter was scheduled for hearing, the appellants did not attend court. Counsel agreed with the finding of the trial court in dismissing the application to amend the defence for failing to annex a draft defence. Counsel in placing reliance on the case of **the Board of Trustees NSSF v Michael Mwalo (2015) eKLR** submitted that there was no proof of fraud in entering into the consent and urged the court to dismiss the appeal.

7. I am cognizant of my duty as a first appellate court and I have considered the appeal as a whole and the affidavits in support of the application in the trial court. I have also considered the affidavits in reply. I have related the same to the submissions by respective counsel in support of their respective cases. I have related all this to the law applicable and the authorities for my assistance and have established the

following:

> a) *A judgment or order by consent is binding on the parties until set aside. It also acts as an estoppel (**Kinch v Walcott [1929] AC 483; Law v Law [1905] 1 Ch 140, at 158**).*
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> b) *The parties can appeal against it. They, however, need the leave of the court. The order can be set aside, but only by a fresh action on the same premise as would invalidate a contract (**Huddersfield B Co v Lister [1895] 2 Ch 273; Re S American Co [1895] 1 Ch 37, at 44**).*
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> c) *A court has no jurisdiction to vary a consent judgment or order made previously in that court and therefore the only means open to a party to set aside a consent order or judgment on fraud, mistake or misrepresentation is by a fresh action for that purpose (**de Lasala v de Lasala [1980] AC 546**).*

8. The law governing setting aside consent judgments or decrees has been correctly put by learned counsel on both sides. A consent judgment can only be set aside if the consent was actuated by illegality, fraud or mistake. Consent judgments can be set aside on limited grounds. (**Hirani v Kassim [1952] EA 131)**. A consent judgment is not an *ex-parte* judgment.

9. The principle upon which the court may interfere with a consent judgment was outlined by the Court of Appeal of East Africa in **Hirani v Kassam [1952] EACA 131,** in which it approved and adopted the following passage from **Seton on Judgments and Orders 7th Edition Vol.1 page 124;**

> ***"prima facie, any order made in the presence and with a consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to policy of the court …… or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable court to set aside an agreement."***

10. Reasons that would enable court to set aside an agreement are fraud, mistake, misapprehension or contravention of court policy must be furnished by an applicant before the court can embark on the journey towards interfering with the subject consent. The rationale behind this strict rule is to prevent litigants from turning around afterwards after changing their minds to the prejudice of their adversaries who had acted on the consent in good faith. It is therefore a sound principle.

11. Fraud has been defined as "actual fraud or some act of dishonesty." In **Waimiha Saw Milling Co. Ltd. v. Wagon Timber Co. Ltd.** [1926] AC 101 at p. 106. Lord Buckmaster said that *'fraud implies some act of dishonesty.'* The rules of procedure require that where fraud is alleged it must be specifically pleaded and the particulars thereof given in the pleading. From the evidence on record, I am not satisfied that the respondent did actual fraud being that he changed figures or altered a letter head; what is on record is a letter that has been placed before the court and the court is left to find out for itself what the respondent did so as to amount to fraud. The letter in itself falls short of the standard required for proof of fraud and I am not satisfied that there was fraud committed by the respondent so as to induce the appellants' advocates to record the consent.

12. With regard to misrepresentation, the Law Dictionary defines Misrepresentation as:

> "*An intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally; also :an act or instance of making such a representation*" See also **Esso Petroleum Company Limited Vs Mardon [1976] 2 All ER 5**.

13. My take is that misrepresentation is a false statement of fact or law which induces a party to enter into a contract. There must be a false statement of fact or law as opposed to opinion or estimate of future events (See **Bisset v Wilkinson [1927] AC 177**). Once it has been established that a false statement has been made it is then necessary for the affected party to demonstrate that the false statement induced them to enter the contract (**See Horsfall v Thomas [1862] 1 H&C 90**). If the affected party does an act to adopt the contract, or demonstrate a willingness to continue with the contract after becoming aware of the misrepresentation they will lose the right to rescind it (**See Long v Lloyd [1958] 1 WLR 753**).

14. The questions that come to mind are, how did the appellant know that the respondent was not treated at the said facility? Was it possible to verify the information allegedly provided to the appellant by the respondent before the appellant entered into the consent or to put it another way, how could a stranger give the appellant facts about the accident and they accepted them? Did the stranger know more about the accident than the appellants? Why didn't the appellants verify before concluding the consent? Why didn't the appellant attend the trial that was conducted on 1.7.2015 only later to come up with the said letter? Did it affect the nature of injuries considering that the respondent underwent a 2nd medical examination? I note that the letter that brought suspicion was authored on 20th July, 2015. The suit in the trial court stalled since then. However this was after the parties had closed their case. I note that there is a 2nd medical report that forms part of the list of documents that the appellants intended to rely upon. However the same was not tendered and no explanation was given for the appellant's failure to do so. I am of the view that the issue of the medical report had a bearing on the quantum and yet the consent was related to liability and therefore it had no bearing on the consent and cannot be said to have induced the appellants to enter into the consent. In the interests of speedy justice, the matter be allowed to proceed to the logical conclusion where once the court makes its final decision then if dissatisfied the appellants can appeal against the same. The evidence by the appellants is not enough to meet the legal criteria for setting aside a consent judgment.

15. The appellants seem to fault the trial court for entering a consent judgement. However from the record, I am satisfied that the consent judgment was entered by the court after due consideration of the circumstances of the case. It was therefore done diligently. Once parties present consents either written or oral the court's duty is to adopt the same and thereafter it becomes an order of the court and binding upon

the parties.

16. With regard to the application to amend the defence, I am in agreement with the decision of the trial court in rejecting the application for failure to annex a draft defence and I am guided by the case of **Institute for Social Accountability & Another V Parliament of Kenya and 3 Others (2014) eKLR** where a three judge bench of Lenaola, Mumbi and Majanja J stated that "the object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action and proceedings."

17. The appellant sought to reopen the respondent's case after the same was closed. The record indicated that the trial was conducted on 1.7.2015 and that the appellant was absent. The appellant's case was closed and then the application to reopen was made on 5.10.2015 well over three months after the matter was closed. The pleadings indicate that the appellant filed a defence, participated in pretrial and was present when the matter was certified ready for hearing; the appellant took the hearing date by consent and having actively participated in the suit cannot be seen to use the reopening of the case as an opportunity to challenge the respondent's case. The appellant has not given satisfactory reasons to warrant the reopening of the plaintiff's case and I see no reason to interfere with the decision of the trial court to that extent.

18. In view of the foregone the appeal lacks merit and is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 4th day of February, 2020.

D. K. Kemei

Judge