



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 19 OF 2013

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

REGINAULD NGALA.....DEFENDANT

CORAM: Hon. Justice R. Nyakundi

Munyao, Muthama & Kashindi Advocates for the Plaintiff

Githinji & Associates for the Defendant

RULING

The plaintiff bank by way of a Complaint dated 4.9.2013 and filed in Court on 11.9.2013 sued the defendant **Reginauld Ngala** seeking the following orders:

- (a). That Judgment be entered against the defendant for Kshs.5,457, 709,65/=.*
- (b). In the Euros Kshs.16,443,07/=.*
- (c). Any accrued interest from 11.2.2013 till the date of Judgment on both orders issued in (a), (b) and (c) above.*

On 16.10.2017 in the presence of **Weldon J.** parties through their respective advocates consented to an order in the following terms:

Ruttoh: *My instructions from Mr. Sewe is that he requests for ninety (90) days within which to come up with a proposal on the mode of payment of the claimed amount.*

Omondi: *They should have done that long ago in the circumstances Judgment can be entered as prayed in the Complaint and they be given ninety (90) days within which to settle the debt.*

Court: *Advocates are granted five (5) minutes upon their requests to clarify their consent.*

Final order of the Court:

“By Consent Judgment be entered for the Plaintiff as prayed in the Complaint dated 4.9.2013. The defendant to come up with a proposal of settlement of the decretal sum; and start paying within ninety (90) days from today. We pray for a mention date after the ninety (90) days to confirm payment.”

This declaration made by the parties has never been complied with on the appointed dates and time. The terms of this purported consent were later to be challenged by the defendant who filed a notice of motion dated 19.10.2018 seeking a substantive order to set aside. The consent Judgment entered to compromise the suit on 16.10.2017. The motion is supported by an affidavit which raises fundamental evidential material that legal counsel **Mr. Sewe Habil** representing the defendant did not have instructions to enter into any consent on his behalf to liquidate the debt due and owing to the plaintiff.

That on the material, neither **Mr. Sewe** nor the defendant was personally in Court. With respect to the appearance of **Ms. Ruttoh** advocate holding brief for **Mr. Sewe**, legal counsel on record for the defendant did not have any such express instructions to make any representations before the Court altogether as emanating from **Mr. Sewe**. The defendant also pointed out that **Ms. Ruttoh** had no instructions nor the jurisdiction to enter into any consent at the time. He also stressed that at the day of recording the consent instructions came from a clerk and

not **Mr. Sewe advocate** who had been retained to represent the defendant.

In particular, the defendant prompted **Mr. Sewe** to swear a further affidavit dated 13.2.2020 in respect of the instituted proceedings by the plaintiff and the purported consent of 16.10.2017.

Mr. Sewe deposed that at no time did he instruct **Ms. Ruttoh advocate** to hold his brief on 16.10.2017 to record any consent in the pending suit. This according to counsel was an act done behind his back and without any instructions given by the defendant. He went on to start when he contacted **Ms. Ruttoh** on the circumstances which made her appear in Court to record a consent. She referred to an authority having been received from a clerk by the name **Cosmas**.

In essence **Mr. Sewe** deposed that **Ms. Ruttoh** had no such instructions to enter into any negotiations on his behalf as it relates to the suit to record a consent Judgment. That the course of the pendency of this proceedings **Ms. Ruttoh** has failed to exonerate herself as to the exact source of her instructions to compromise the suit whilst she was not the legal counsel on record for the defendant.

The plaintiff in objecting to the notice of motion to vary or set aside the consent Judgment filed grounds of opposition dated 2.10.2019.

The defendant counsel submissions

Mr. Githinji submitted that the impugned consent Judgment undertaken by **Ms. Ruttoh** advocate on behalf of **Mr. Sewe** on record for the defendant should be set aside as of right. **Mr. Githinji** submitted that the consent as deduced from the material filed in Court amounted to a fraud and or collusion of counsel not duly instructed by the defendant to enter into any such agreements or terms. Counsel also argued and submitted that the defendant at the time had the benefit of **Mr. Sewe** advocate who was better placed to make any representations on the matter and not **Ms. Ruttoh** nor one clerk by the name **Cosmas**.

In this regard counsel referred to the dictum in **Flora Wasike v Deshmo Wamboko {1982-88} 1KAR 625, Hirani v Kassam {1952} 19 EACA 131**. **Mr. Githinji** argued that the orders sought by **Ms. Ruttoh** on behalf of the defendant were made in total contravention of the Law and in absence of any such instructions from the party to be adversely affected by such final orders in the form of a consent Judgment. In that case counsel made out a case for grant of the orders to set aside the consent Judgment.

The plaintiff counsel submissions

Mr. Omondi counsel for the plaintiff submitted that there is clearly cogent material that the consent Judgment was entered into in the suit with full instructions from **Mr. Sewe** on record for the defendant. Counsel further submitted that the Court should refuse the orders sought as the criteria set out in the cases of **Board of Trustees National Security Fund v Michael Mwalo {2015} eKLR and SMN v ZMS & 3 Others {2017} eKLR** has not been demonstrated by the defendant.

Determination

The focus in this application on the consent Judgment or order being attacked is whether it was given, entered, or made irregularly, illegally, fraudulently, mistakenly, or on false representations or pretense. Based on the broader principles in **Flora N. Wasike v Deshmo Wamboko {1982 – 88} (supra), Brooke Bond Lie Big T (Limited) v Nallya {1975} EA 266, Samson Mumkah practicing as Munichah & Company Advocates v Weaube Estates Limited {2007} eKLR, Kinuta v Wakibiru {1985} KLR 317:**

“In many of these decided authorities there is no dispute contractual terms like fraud or misrepresentations are applied to consent Judgments. This can be seen clearly where in Flora case the Court of Appeal observed that: “It is now settled Law that a consent Judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out. In Brooke Bond Lie big “a court cannot interfere with a consent Judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

Conceivably in the **Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd {1982} KLR 485** the Court of Appeal laid down the following principles which connotes that:

“A consent order entered into by Counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts the general for a reason which would enable the Court to set aside an agreement. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.” (See also **Contractors Ltd v Margret Oparanya {2004} eKLR**).

I pause here to remark on this threshold scope on consent Judgments as expounded in the persuasive decision in **Vulcan Gases Ltd v Okunota {1993} 2 NWLR 274 P 142** the Court held:

“That a consent Judgment presupposes out of Court settlement reached by the parties, and that the terms of the said settlement or agreement are furnished to the Court and forms the basis of the Courts Judgment in the suit. Such Judgment is intended to put an end to further litigation between the parties just as much as if the Judgment was the result of a decision of the Court after the matter had been fought to the end.”

As far as I can see the nature of the defendant's motion, it is plain given the breadth of the proceedings captured on 16.10.2017. The defendant did not participate in the actual merits of the consent order. Unsurprisingly, when the matter came before the Judge, it was **Ms. Ruttoh advocate** who placed herself on record as holding brief for **Mr. Sewe advocate** for the defendant. It should be noted that **Mr. Sewe** has taken oath in his affidavit that no such instructions were issued to **Ms. Ruttoh advocate** to hold his brief on the whole object of such an order which comprised the suit with finality. It deserves in highlighting that **Ms. Ruttoh** advocate admits receiving instructions from a clerk by the name **Cosmas** to assume responsibility to hold brief in the matter promptly in the circumstances which shortly ended up to an adoption of a consent.

In this context **Ms. Ruttoh** disclosure shows that the source of information to act was obtained by misrepresentation as the defendant nor his counsel gave no such instructions to mutually consent to any terms of the suit.

The first difficulty therefore supported by the record is the fact that the consent Judgment was obtained without prior authority. In order for this Court to validate it as a contract evidence must show meeting of minds to resolve matters in dispute. The agreement must be free, voluntarily and unambiguous. However, from the record the defendant though a party to the suit was never represented by his appointed counsel **Mr. Sewe**. The temporary advocate **Ms. Ruttoh** ostensible authority to comprise the suit that far came from a **Mr. Cosmas** who is neither the defendant nor legal counsel under Article 50 (2) (G) of the Constitution. There is no material before the Court that on the date consent Judgment was entered, the defendant participated in drawing the existence of its terms. That on the strength of what is stated by the defendant and further rejoinder by the plaintiff, the writ of the consent and endorsement of it by the Court in all its terms was tainted with elements of fraud, mistake and misrepresentation sufficient at enough to set it aside as an invalid and irregular Judgment.

Under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules the Court is permitted to depart from its previous decision or to overturn it where the facts pleaded discharges the following evidential burden:

(a). Discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time, the decree was passed or the order was made or

(b). There was a mistake or error apparent on the face of the record or

(c). There were other sufficient reasons.

Initially, it appears there was a consent between the plaintiff and the defendant, but a major source of the confusion that has arisen at the first instance exhibit lack of jurisdiction for **Ms. Ruttoh** to enter into any agreement on behalf of the defendant. The essential character of legal representation is clearly spelt out in Article 50 (2) (G) of the Constitution. It invokes a party vesting power to an advocate to maintain representation in a Court of Law. That procedural tool to represent the defendant in the pending cause of action incidental and ancillary to the hearing and determination of the suit was never accorded **Ms. Ruttoh** on assumption of her role to record the impugned consent Judgment. I am therefore persuaded that the position taken by the plaintiff bank has no key support of the Law or facts. With that the plaintiff bank is estopped from relying on the consent Judgment dated 16.10.2017 to enforce any rights against the defendant.

In the result, I would allow the notice of motion dated 18.10.2018 by setting aside the consent Judgment dated 16.10.2017.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF JULY, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Omondi for the plaintiff