REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 118 OF 2009

LOCHAB BROTHERS LIMITED.....APPELLANT

VERSUS

HENRY KIPKOECH MISIK.....1ST RESPONDENT

ELDORET EXPRESS.....2ND RESPONDENT

RULING

[1] The Notice of Motion dated **10 July 2018** was filed herein by **Eldoret Express**, the 2nd Respondent/Applicant, pursuant to **Article 25(c)** and **Article 50(1)** of the **Constitution of Kenya, 2010**, **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 45** and **Order 51 Rules 1 and 10** of the **Civil Procedure Rules**, for orders that:

> **[a]** The Court be pleased to review, vary and set aside the consent entered into between the Appellant and the 1st Respondent on **24 April, 2017,** allowing the application to amend the Memorandum of Appeal out of time, as well as all the consequential orders made thereafter in as far as they relate to the 2nd Respondent/Applicant.
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> **[b]** That the application dated **29 June 2012** be fixed for hearing on merit;
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> **[c]** That the costs of the application be provided.

[2] The application was premised on the grounds that the Appellant filed this appeal as well as **Eldoret High Court Civil Appeal No. 119 of 2009** from the decisions of the Chief Magistrate; and that contemporaneously, the Appellant filed similar applications dated **29 June 2012** in both appeals seeking leave to amend the Memorandum of Appeal to enjoin the 2nd Respondent; and for leave to appeal out of time against the 2nd Respondent. That, since the applications were opposed, directions were given for them to proceed by way of written submissions; which submissions were filed in both matters on **19 November 2012** and **12 March 2013**, respectively.

[3] It was further the contention of the Applicant that, later on, a ruling was delivered in **Eldoret HCCA No. 119 of 2009** disallowing the Appellant's application dated **29 June 2012**. That it came as a surprise to it that it had been enjoined to this appeal without being given a hearing; and on the basis of a consent order to which it was not a party, yet the two appeals arose from similar circumstances. Hence, it was posited by the Applicant that the said consent order was obtained by collusion and non-disclosure of material facts and therefore should not be allowed to stand; and that it is only fair and just that the said consent order be set aside for the application dated **29 June 2012** to be heard on merit.

[4] The application was premised on the affidavit of one of the directors of the Applicant, **Joseph Ng'ang'a Thungu**, sworn on **10 July 2018** to which were annexed copies of the application dated **29 June 2012;** Grounds of Opposition to the application, as well as the written submissions filed by Learned Counsel in respect thereof. Also annexed to the Supporting Affidavit was a copy of the Ruling delivered by **Hon. Kimondo, J.** in **Eldoret HCCA No. 119 of 2009**, whereby the Appellant's similar application for joinder of the 2nd Respondent was dismissed on **18 November 2014**. The ruling was therefore annexed to support the contention by the 2nd Respondent that since the two appeals arose from the same facts, there is no reason why it should be required to defend this appeal; and therefore that it should be heard in opposition to the application for joinder for a determination to be made on the merits.

[5] The application was opposed by the Appellant and a Replying Affidavit filed in that regard on **16 July 2018**, sworn by **Mr. Joseph Songok,** Advocate. His averment was that the consent order of **26 April 2017** between the Appellant and the 1st Respondent was entered regularly; and that all facts, law and applicable procedures were followed and/or considered. **Mr. Songok** further averred that since the 2nd Respondent was, initially, not a party to this appeal, it ought not to have participated in the application dated **29 June 2012,** were it not for

the court order of **14 March 2017,** which directed that the 2nd Respondent be served to attend court on the material date.

[6] It was further the averment of **Mr. Songok** that the 2nd Respondent was indeed served but declined to receive process; and was consequently well aware of the proceedings, and in particular the proceedings of **26 April 2017;** and should not be heard to complain about the consent order. Counsel further averred that the application has been brought after unreasonable delay and without full disclosure of service of the application dated **26 June 2012**. He further averred that the application has not been brought in good faith and is therefore a waste of the Court's time, since it is in the interest of justice and fairness that the 2nd Respondent remains on board for the hearing and determination of the appeal.

[7] The application was canvassed by way of written submissions. The 2nd Respondent's submissions, filed on **24 July 2018**, focused on the **Articles 25(c) and 50(1)** of the **Constitution** and urged the viewpoint that the 2nd Respondent was entitled to participate in the consent by which its right to a hearing was extinguished. The cases of **Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd [1982] KLR 485; Julius Motokaa Arela vs. Stephen Mugwira [2017] eKLR** and **Invesco Assurance Co. Ltd vs. Commissioner of Insurance & Another [2017] eKLR** to support the contention that a consent order made without sufficient material facts or in misapprehension, or ignorance of such facts, or without the participation of a party adversely affected thereby such as is the case herein, ought, in all fairness, to be set aside.

[8] The Appellant's submissions were that, since liability was apportioned at 90:10 in favour of the 2nd Respondent, the 2nd Respondent is a necessary party to this appeal; and that it beats logic that it should want to extricate itself from this appeal. It was further the contention of the Appellant that the substratum of this appeal is largely pegged on the joinder of the 2nd Respondent as a party; and that it will be an exercise in futility and a waste of precious judicial time for the appeal to proceed without the 2nd Respondent.

[9] I have given due consideration to the application, the Supporting Affidavit, the Replying Affidavit as well as the written submissions filed by the parties. At this point in time, the issue is not whether or not the 2nd Respondent is a necessary party to this appeal; which appears to be the gist of the Appellant's written submissions. The question is whether sound basis has been made for review or setting aside of the consent order dated **26 April 2017** to pave way for the hearing and determination of the application for joinder, dated **26 June 2012,** on the merits.

[10] Order 45 Rule 1(1) of the **Civil Procedure Rules**, pursuant to which the application was filed provides that:

> **Any person considering himself aggrieved-**
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> **(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or**
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> **(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

[11] Since what is sought to be reviewed is a consent order, it was imperative for the 2nd Respondent to prove either fraud or mistake. In **Flora Wasike vs Destimo Wamboko [1988] 1 KAR 625, Hancox, JA**, reiterated this principle thus:

> **"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."**

[12] As to what would justify the setting aside of a contract, guidance was given in the case of **Brooke Bond Liebig (T) Ltd vs Mallya [1975] EA 266** in which a passage from **Seton on Judgments and Orders, 7th Edition, Vol. 1 p. 124** was quoted with approval thus:

> **"Prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if 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 the court to set aside an agreement."**

[13] A perusal of the record shows that, as far back as **10 July 2012**, it was manifest to the Court that the party that would be affected by the application dated **29 June 2012** was the 2nd Respondent; hence the order that the application be served on the 2nd Respondent. Indeed, on the **9 October 2012,** the 1st Respondent's Counsel made it clear that the said application did not affect the 1st Respondent. It was therefore imperative that the 2nd Respondent be served for the proceedings of **26 April 2017**. There is no proof that the 2nd Respondent was served for the hearing of the application; and although the Appellant has insisted that service was done but declined, no affidavit of service was filed in that regard. Instead the Appellant urged the court to rely on the letter dated **28 March 2017,** annexed to the Replying Affidavit as **Annexure JK**, which, in my view, is not good enough. Indeed the Appellant's Counsel acknowledged as much by stating in that letter that it would file a return of service to the Court and proceed accordingly. No such return was ever made or alluded to on **26 April 2017.**

[14] I am therefore satisfied that sufficient cause has been shown for the setting aside of the order of **26 April 2017**, and would agree with the expressions of **Hon. Odunga, J.** in **Invesco Assurance Co. Ltd vs. Commissioner of Insurance & Another** (supra) that a person who is a non-party to a consent which adversely affects him personally cannot be bound by the same. Hence, I would allow the application dated **10 July 2018** and grant orders as follows:

[a] That the consent entered into between the Appellant and the 1st Respondent on **24 April, 2017** allowing the application to amend the Memorandum of Appeal out of time, as well as all the consequential orders made thereafter in as far as they relate to the 2nd Respondent/Applicant, be and are hereby reviewed and set aside.

[b] That the application dated **29 June 2012** be fixed for hearing and determination on merit;

[c] That the costs of the application to abide the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF FEBRUARY 2019

OLGA SEWE

JUDGE