



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 214 OF 2012**

**MISTRY JADVA PARBAT & CO LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL OIL CORPORATION OF KENYA.....DEFENDANT**

**RULING**

1. On the 25/6/2018 the counsel for both parties attended before

court on a date set for case conference and recorded a consent order to the following effect:-

By consent.

i) This suit shall proceed to hearing on the basis of the witness statements and copies of documents filed.

ii) At trial the plaintiffs shall only call one witness Mr. Versani who shall adopt his witness statement as evidence in Chief, produced the documents filed and then be cross examined.

iii) At trial the defendant shall call only one witness Ms. Bery Adhiambo to adopt the witness statement as evidence in chief produced any document filed and be cross examined.

iv) The documents filed shall be produced in the format filed and by consent without any objection including the need to call the makers.

v) Hearing on 15/10/2018.

2. When the matter came up for hearing on the date set parties entered into a further consent by which leave was granted to both sides to file any additional documents and witness statements not later than the 25/10/2018. The parties were equally encouraged to consider having the matter determined by mediation by a mutually appointed mediator.

3. The next time the matter came before court parties still agreed to have the same adjourned to enable the plaintiff serve the recently filed documents and witnesses statements with the clear understanding that the defendant continued to enjoy the liberty to file any further papers so desired. Of importance and note for this determination is the address to court by Mr. Koech who appeared for the defendant. The counsel said:-

“We already have the liberty to file. Once served then we will take a position on the way forward”

4. On that day the court once again made the following order:

“Let the defendant be served with the documents filed yesterday to enable it also file any additional documents within 15 days from the date of service”.

5. I have set out that history of events to give light on what steps parties have taken to push this matter forward. Soon after the further directions given on 7/2/2019 the defendant did on the 27/3/2019 file the current application seeking that the directions given on 25/6/2019 and all consequential orders be set aside.

6. The reasons given for setting aside are that on the date set for case

conference a junior counsel was sent to court to conceded to a consent which fundamentally compromised the suit even before hearing on the basis of being ignorant of facts including the fact that correspondence exchanged between the defendant and counsel after the date of directions raised doubt as to the genuineness of some of the documents filed by the plaintiff. It was a further ground that the consent is null and void and does not bind the parties because they did not append their signature thereto hence the consent is tainted with illegality as it limits the defendant's right to a fair hearing by calling only one witness.

7. That application was supported by the Affidavit of the counsel MR.

SAMUEL KEENGWE which asserts that he did not give any instructions to Mr. Magero Advocate to undertake anything beyond taking of a hearing date and reiterate the accusations that Mr. Magero was ignorant of material fact and did not engage him before recording the consent. Premium was then placed on the alleged fact that the dispute is over a binding contract which involved complex engineering documents that court have severally emphasized the need to refer for interpretation or arbitration.

8. That affidavit then acknowledges that post the 25/6/2018 there had been liberty to the parties to file any additional statements and documents but did not come out to confirm that the defendant indeed filed additional documents in the supplementary list of documents dated 31/01/2019. Reading that application and the Affidavit one sees a script tending to insinuate that the trial directions given by consent of the parties was skewed in favour of the plaintiff as against the defendant when in fact the said orders has been fundamentally altered when the doors were opened for the parties to file any additional statements and documents as desired by them including the suggestions by the court that parties go for mediation.

9. The application was opposed by the plaintiff who filed a replying affidavit sworn by Mr. Kishore Nanji the advocate on record. In that Affidavit the fact of a valid consent entered at a trial conference was reiterated with a firm denial of the assertion by the defendant that the same was not binding. It was then asserted that there would have been need to file an Affidavit by Mr. Magero Advocate which had not been done to confirm what brief he had on the material day. Counsel also took issue with what he calls lack of clarity in stating and identifying the complex engineering documents which make it impossible to refute the inference of the ostensible authority by counsel who attended court and recorded the consent.

10. In summary the plaintiff opposes the application for being nothing more than an attempt at delay. the delay between the date the orders were made and date of filing the application was highlighted and point taken that the sole purpose was to abort the hearing set for the 1/4/2019 (now passed).

11. I have read and appreciated what each party say in the papers filed and the oral submissions offered in court. The question for determination is whether or not a case has been made out for this court to set aside the consent orders made on the 25/06/2018 by way of trial directions.

11. The law is that a consent order made before court is in the nature of a contract and can only be set aside or rescinded on the same grounds as would merit upsetting a contract. There must be a vitiating factor in the nature of an illegality, misrepresentation or fraud. In this matter there is no accusation against the opposite side from having unfairly or improperly influenced the recording of the consent.

12. To the contrary the defendant seem to only accuse its counsel for having acted out of ignorance of facts and then makes a veiled attack upon the court that the order is not binding because it was not signed by the parties like to insinuate that the order was arbitrarily given by the court.

13. The law on the capacity of an advocate to enter into negotiations and even compromise a client's case, which I think is a derivative of the freedom to an advocate of one's choice is that an advocate has at all times the ostensible authority to settle and even compromise a client's case. In **Flora Wasike vs Destino Wamboko [1982-1988] KLR**, the Court of Appeal approved an opinion expressed in **Setton on Judgments and Orders** (7<sup>th</sup> Edition) Vol. 1, page 124, on the latitude an advocate enjoys in handling a client's brief to the effect that:-

**"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 on 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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."**

14. There being a consent to which no vitiating factor has been proved to the satisfaction of the court, I hold that the current application is wholly misconceived and cannot succeed but must fail.

15. However a keener look at the proceedings reveal that the subsequent proceedings after the 25/6/2018, by consent, did alter and amended the directions given on that date by opening the gates and allowing all sides to file additional witness statements and documents and the defendant indeed did derive a benefit from the same order when it did file its supplementary documents on the 4/2/2019.

16. More fundamentally, the law, under Order 7 rule 5, is that expert witness are not bound to file witness statements but are entitled to attend court and produce their expert reports or opinions. Maybe, if counsel had regard of the provisions of the applicable law, this application would have been avoided.

17 All in all I do find no merit in the application as the thresholds and pre-requisites of setting aside a consent order have been met and order that the application be dismissed with costs.

**Dated and Delivered at Mombasa this 8th day of May 2019.**

**P.J.O. OTIENO**

**JUDGE**