REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 487 OF 2018

BILLY AMUGUNE AMENDI T/A

BILLY AMENDI & CO. ADVOCATES.....APPELLANT

-VERSUS-

VALENTINE JOSEPH OMOLO.....RESPONDENT

(Being an appeal from the decision and order of the subordinate court of 23rd September, 2018 in CMCC No. 3049 OF 2017)

JUDGEMENT

1. The respondent filed an action against the appellant by way of the plaint dated 3rd May, 2017 before the Chief Magistrate's Court seeking for payment of Kshs.11,863,719/= together with interest at the rate of 25% p.a. from 4th August, 2016 until payment in full, plus costs of the suit.

2. The respondent pleaded in his plaint that he was at all material times the registered owner of the property known as Nairobi/Block 32/200 located at Golf Course in Nairobi and that he was desirous of selling the said property and had therefore assigned his son, Charles Omollo to act as his agent in finding a suitable buyer.

3. The respondent then pleaded that sometime in the month of November, 2015 his son approached him with information of an interested buyer named Daniel Muriithi Migwi intending to purchase Nairobi/Block 32/200 through his company known as Techno Aid Limited *("the purchaser")* at the consideration of Kshs.14,000,000/= and that his son recommended the appellant to act as his advocate in facilitating the sale and transfer process.

4. It was averred in the plaint that upon meeting with the respondent, the appellant agreed to act for him in the transaction and that the purchaser paid the deposit of the purchase price by way of two (2) cheques for the sum of Kshs.1,400,000/= issued to the appellant and the sale agreement was duly executed.

5. The respondent pleaded that soon thereafter, he availed all the completion documents to the appellant for purposes of concluding the transaction.

6. The respondent went further to plead that upon discussing the appellant's legal fees, it was agreed that the said appellant would remit the sum of Kshs.11,863,719/= to the respondent following the successful transfer of Nairobi/Block 32/200 to the purchaser, but that the appellant failed to release the said sums even after the transfer was effected, causing the respondent to suffer loss and damage.

7. The appellant entered appearance and filed a statement of defence and counterclaim on 14th June, 2017. In his defence, he admitted the existence and nature of the transaction relating to Nairobi/Block 32/200, save to add that subsequently, the respondent expressed a desire to purchase another property known as LR No. 209/10480/107 belonging to the appellant using the sums which were being held by the said appellant, thus denying that the balance of the consideration was to be released to the respondent.

8. In his counterclaim, the appellant restated the above, urging the trial court to not only dismiss the respondent's suit but make an order to the effect that the property known as LR NO. 209/10480/107 transferred to the respondent be deemed as full settlement of the claim less the excess value of the said property.

9. In his reply to the defence and defence to counterclaim, the respondent denied the averments set out hereinabove in respect to the appellant's property LR NO. 209/10480/107 or that the balance of the consideration was to apply in purchase of the said property.

10. When the matter came up for hearing, the respondent's son, Charles Omollo, testified as *PW1* before close of the plaintiff's case.

11. However, before the appellant could call any witness to give evidence for the defendant's case, the said appellant filed a Notice of Motion dated 7th September, 2018 seeking for an order to the effect that the respondent be called to give his testimony in court and be cross examined on his witness statement. The same was opposed by way of the replying affidavit sworn by *Maurice Muli Nzavi* on 12th September, 2018.

12. In the end, the trial court heard and dismissed the appellant's Motion with costs vide its ruling delivered on 23rd September, 2018.

13. The appellant has now lodged an appeal against the aforementioned decision vide the memorandum of appeal dated 15th October, 2018 raising eight (8) grounds.

14. The parties filed written submissions on the appeal. On his part, the appellant contends that no order was made allowing the respondent's testimony to be adopted without requiring his attendance, adding that instead; his son named Charles Omollo; testified as the sole witness for the plaintiff's case in the absence of a power of attorney donated to him by the respondent. In this regard, the appellant submits that the said witness was incompetent to testify.

15. The appellant faulted the trial court for dismissing his application without basis, given that the respondent did not testify at all in the suit, going further to submit that his erstwhile advocate made a mistake by consenting to have the respondent's testimony adopted without calling him in the absence of clear instructions to that effect. On this note, the appellant urged this court to consider the principle that the mistakes of an advocate ought not to be visited upon his or client; the authorities of *Julia Wambui Mwangi v Family Bank Limited & 2 others [2018] eKLR* and *Belinda Murai & 9 others v Amos Wainaina [1978] eKLR* where the respective courts acknowledged the principle.

16. Finally, the appellant argues that the respondent will not at all be prejudiced should he attend court for cross examination, adding that in contrast, the appellant himself stands to suffer grave prejudice if the respondent is not re-called for cross examination.

17. In his opposing submissions, the respondent conveyed his support for the trial court's decision on the basis that the appellant is merely trying to avoid the consent order, maintaining that the parties had consented to the adoption of the respondent's statement and that thereafter, his son testified in his capacity as an agent of the respondent. In this sense, the respondent has taken the position that the appellant has not met the threshold for setting aside the consent order. The cases of *Hirani v Kassam (1952)19 E.A.C.A. 131* and *Brooke Bond Liebig (T) Ltd v Mallya [1975] E.A. 266* were cited in this respect, among others.

18. Further to the above, the respondent in citing *Juma v Khaunya & 2 others [2004] eKLR inter alia*, urges this court to take judicial notice that advocates have the right to compromise and/or settle a matter on behalf of their clients and that in any event, the appellant has not adduced any evidence to support his allegation that his former advocate acted without his authority.

19. The respondent also submits that the appellant, having never raised the issue of the consent before the trial court, cannot now purport to raise it on appeal months later and in the absence of tangible evidence to support his argument that the consent was entered into without his authority, adding that none of the appellant's constitutional rights were violated in the process as claimed.

20. The respondent maintains that the appellant is merely engaging in a delaying tactic, going further to argue that the appellant has failed to establish bias against him by the trial court.

21. The eight grounds of appeal are interrelated hence they will be determined together. The lower court record discloses that when the parties appeared before the trial court on 14th February, 2018 for hearing, counsels for the respective parties adopted the contents of the plaintiff's witness statement by consent. Thereafter, *Charles Omolo* (PW1) testified and was cross examined and re-examined on his evidence, following which the appellant's advocate sought for an adjournment as his client was not present in court, which request was granted. The matter subsequently came up in court on several occasions before the appellant filed the notice of motion dated 7th September, 2018.

22. In the aforementioned notice of motion, the appellant challenged the adoption of the respondent's witness statement without requiring his attendance for cross-examination on the basis that he did not consent to such adoption. Consequently, the appellant sought for an order that the respondent be recalled for cross examination on the contents of his statement.

23. In opposition thereto, *Maurice Muli Nzavi* learned advocate for the respondent swore the replying affidavit on 12th September, 2018 averring *inter alia*, that the appellant has not established the grounds for setting aside the consent order and is only seeking to delay the proceedings.

24. In presenting oral arguments before the trial court, *Miss Keya* counsel for the appellant argued *inter alia*, that her client did not consent to having the respondent's statement adopted, hence the mistake of his advocate on record then should not be visited upon him. She went further to submit that the respondent will not be prejudiced if the order sought is granted.

25. *Mr. Gikunda* learned advocate for the respondent argued that the appellant has not met the criteria for having the consent set aside since it has not been shown that the same was entered into fraudulently or by omission, neither has it been shown that the appellant's erstwhile advocate acted in bad faith. He also contended that the appellant did not raise this issue earlier on despite having appeared in court on various occasions through his advocate, hence urging the trial court to order that the parties proceed with the defence case.

26. In delivering its ruling on 23rd September, 2018 the trial court stated that following the consent order, the respondent adduced his oral evidence and was cross examined on the same, hence the averment that no cross examination took place is a fallacy. The trial court proceeded to dismiss the motion for lacking in merit.

27. According to the trial court's typed proceedings, it would appear the consent entered into, related to the adoption of the respondent's witness statement.

28. The record also shows that immediately thereafter, *Charles Omolo* (PW1) and adopted his witness statement and was thereafter re-examination. It is clear that this witness was not the respondent but the respondent's son, thereby contradicting the position taken by the learned trial magistrate.

29. I have also looked at the record of appeal and it is clear that at the pre-trial stage, two (2) witness statements were filed in support of the plaintiff's case: that is, the statement by the respondent himself and Charles Omolo (PW1).

30. From the foregoing, it would appear the learned trial magistrate misdirected herself in finding that the statement being referred to in the consent was that of Charles Omolo (PW1) when it was not. In any event, the respondent in his replying affidavit did not dispute the fact that it is the witness statement of the respondent which was adopted by consent and that he never attended the hearing to give evidence.

31. The record shows that Charles Owino (PW1) had filed his witness statement independently and was thus giving evidence on that basis and not necessarily in place of the respondent.

32. The question which should be answered is whether the appellant established proper grounds for having the consent set aside for the reason that it was not entered into with the appellant's authority. The witness statement of the respondent was adopted by consent and the appellant has not denied that Mr. Nyangau who participated in executing the consent was his duly appointed advocate.

33. It is trite law that an advocate participating in a matter, does so under the authority of his or her client, hence creating an implied authority to bind such a client unless the contrary is proved. In the case of ***Juma v Khaunya & 2 others [2004] eKLR*** the court held inter alia as follows:

> ***"I refer to the case of Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd [1982] KLR P 485 where it was held inter alia:***
>
> ***(a) That 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.***
>
> ***(b) An advocate has general authority to compromise on behalf of his client, as long as he is acting bonafide and not contrary to express negative direction. In the absence of express direction, the order shall be binding."***

34. In this case, the appellant has challenged the consent on the basis of lack of authority to enter into the same. Upon re-evaluating the record, I note that on the date the consent was entered into, the appellant was not present in court. There is nothing to point out that he was consulted prior to the consent or that he had given the go-ahead to enter into the same.

35. In this regard, I am of the view that whereas advocates may possess the implied authority to bind their clients, they also ought to act in good faith and ensure that their clients are consulted prior to making decisions that will affect their interest. In the present instance, the impact of the consent was such that the respondent would not attend court for purposes of being cross examined, hence the need to have the appellants consulted beforehand. The learned trial magistrate ought to have taken this into account in making her ruling but did not.

36. The principles for setting aside a consent order were restated by the Court of Appeal in the case of ***James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR*** inter alia as follows:

> ***"It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, for example on grounds of fraud, mistake or misrepresentation. (See Brooke Bond Liebeg (T) Ltd v. Mallya [1975] EA 266; Flora Wasike v. Destimo Wamboko [1988] KLR 429, and Kenya Commercial Bank Ltd v. Benjoh Amalgamated & Another, CA No. 276 of 1997)."***

37. On his part, the appellant argued that his erstwhile advocate made the mistake of failing to consult him and obtain his authority to enter into the consent.

38. I am doubtful that the absence of instructions or authority by the appellant to his advocate prior to entering into the consent would amount to mistake in the purview of contract law since there is nothing to show that such mistake was mutual/common to both parties. Consequently, I am not persuaded that the appellant has established the grounds for having the consent of 14th February, 2018 set aside. It is evident from the ruling of the trial magistrate that the court did not address her mind to the subject of setting aside the consent in line with the relevant principles notwithstanding the fact that the same had been raised before her.

39. There is no doubt that the respondent's witness statement - produced without calling its maker ordinarily has little if any evidential value since the maker cannot be examined on the same. In that case, I am satisfied that the respondent's witness statement would carry limited evidential or probative value.

40. The upshot is that the appeal is consequently dismissed with no order as to costs.

Dated, signed and delivered at NAIROBI this 11th day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent