

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E243 OF 2024

MEHBOOB ESMAIL JAMAL APPELLANT

- VERSUS -

NAV CONSTRUCTION LTD RESPONDENT

(Being an appeal from the Ruling/Order of the Honourable D. Onyango (CM) at
Kisumu in Kisumu CMCC No. E049 of 2023 delivered on 6/11/2024

JUDGMENT

1. By a plaint dated **23/2/2023**, the appellant sued the respondent seeking amongst others reliefs, a refund of **Kshs. 19,565,385.30** with interest being monies already paid up under a building contract together with costs of the suit. The appellant was represented by the firm of **Lugano & Achar Advocates**.
2. On the **10/5/2023**, the respondent through the firm of **K.K. Njenga & Associates** entered appearance and filed a statement of defence and counterclaim dated **4/4/2023**.
3. Consequently, on the **3/8/2023** the trial court discovered that the respondent had failed to pay the court fees and directed its advocates on record to settle the same within 30 days' failure of which the defence and counterclaim would be struck off the record.
4. On the **14/9/2023** the trial court proceeded to strike out the respondent's defence and counterclaim for failure to pay court fees and on the **5/10/2023**, it entered interlocutory judgment in favour of the appellant. On the **31/1/2024**, the trial court delivered judgment in favour of the appellant for **Kshs. 19,565,385.30** together with costs and interest.

5. Subsequently, the appellant's advocate instituted execution proceedings against the respondent and warrants of arrest were issued against the respondent's director. He was presented in court on the **23/9/2024** in the presence of counsel for both parties who entered into a consent whereby the judgment of **31/1/2024** was compromised and the respondent ordered to pay an agreed decretal sum of **Kshs. 6,000,000/-** in installments as well as advocate's fee of **Kshs. 2,000,000/-**.
6. By a Motion on Notice dated **3/10/2024**, the appellant through his new advocate, **Messrs. Sala & Mudany Advocates** moved the trial court seeking to set aside the consent order of **23/9/2024** on the grounds that the same was obtained on his behalf without instructions to his previous advocate and further that the advocate who signed the consent on behalf of the respondent was not properly on record thus the consent was *void ab initio*.
7. The appellant's application was opposed vide a replying affidavit sworn on the **16/10/2024** by his former advocate **Anthony Achura of Messrs. Lugano & Achura Advocates** who detailed how he had received instructions from the appellant to enter into the consent and further that the advocate who signed the consent on behalf of the respondent was properly on record.
8. In its ruling, the trial court found that the elements/principles for setting aside of a consent had not been proved and proceeded to dismiss the appellant's Motion.
9. Aggrieved by the said decision, the appellant appealed to this Court setting out 5 grounds of appeal which can be summarized into one broad ground; ***'that the trial court erred in failing to find that the consent was obtained through fraud and collusion as the same was unopposed and the replying affidavit sworn by his former advocate was sworn without instructions.'***

10. This being a first appellate Court, its duty is well defined, that is; to re-evaluate and analyse the evidence tendered before the trial court with a view to arriving at its own independent findings and conclusions at all times having in mind that it did not see the witnesses testify. (See **Selle & Another –vs- Associated Motors Boat Company Ltd & Others**).
11. I will consider whether there were plausible grounds raised by the appellant warranting the setting aside of the consent orders of **23/9/2024** as that is his solitary complaint. According to the appellant, he did not instruct his Counsel to execute the consent judgment.
12. In **James Kanyiita Nderitu & Hellen Njeri Nderitu v Marios Philotas Ghikas & Mohammed Swaleh Athman (2016) KECA 470 (KLR)**, the Court of Appeal held 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.
13. The solitary reason which the appellant argues warrants the setting aside of the consent judgment is that, he did not give his erstwhile counsel, **Anthony Achura of Messrs. Lugano & Achura Co. Advocates** express instructions to sign the consent judgment.
14. The general assumption, unless otherwise proved, is that, an advocate being the authorised agent of a party, is deemed to be fully authorised by his/her client and that whatever he/she transacts is assumed to be within the full knowledge and authority of the client.
15. In this case, the appellant failed to substantiate the allegation that his Advocate did not have authority to execute the consent judgment. The element of fraud or misrepresentation on the former appellant's advocates was not demonstrated.

Allegations of fraud must be strictly pleaded and proved. It is even evident from the proceedings that the appellant, even after filing the Motion to set aside the consent judgment, sought to rely on the same judgment and demand payment of the remaining balance.

16. In contrast, the impugned replying affidavit filed by **Mr. Achura Advocate** clearly detailed the process leading up to the signing of the consent. The same was not controverted by the appellant. The appellant only impugned the said affidavit on grounds that he was no longer on record. However, I do note that the elements of the appellant's Motion touched on the veracity of the actions undertaken by his former advocate on record thus it was in the interest of justice that the said advocate respond to the same.

17. Having made the above observations, I find that there were no grounds at all to set aside the consent judgment of **23/9/2024**. I do not think that the learned trial magistrate erred in his ruling of **6/11/2024**.

18. In the upshot, I have arrived at the inescapable conclusion that this appeal is devoid of merit and hereby dismiss it with costs of **Kshs.20,000/-** to the respondent.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **9th** day of **October, 2025**.

A. MABEYA, FCI Arb

JUDGE