

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPELLATE DIVISION
CIVIL APPEAL NO. E802 OF 2021

N.T EXPRESS LAUNDROMAT LTD.....1ST

APPELLANT

MOURINE WANJIKU THIONGO.....2ND

APPELLANT

-VERSUS-

MAYFAIR BANK LTD.....

RESPONDENT

*(Being an appeal against the Ruling of the Hon. H. Nyaga (CM)
delivered on 3rd December, 2021 in Nairobi Milimani CMCC No. 2096
OF 2022)*

JUDGMENT

1. This appeal emanates from the ruling delivered 03.12.2021 by the lower Court in **Nairobi Milimani CMCC No. 2096 OF 2022** (*hereafter the lower Court suit*). The history leading to the instant appeal vide a plaint dated 08.03.2020, **Mayfair Bank Ltd**, the plaintiff before the lower Court (*hereafter the Respondent*) filed suit as against **N.T Express Laundromatt Ltd** and **Mourine Wanjiku Thiong'o**, the defendants before the lower Court (*hereafter the 1st & 2nd Appellant/Appellants*) seeking judgment as against the Appellants in the sum of Kshs. 9,859,105.56/- being the outstanding loan amount as at 29.01.2020; interest on the above at the prevailing rates from

the date of the demand until payment in full; and any other relief the honorable Court may deemed fit.

2. On 21.01.2021, the lower Court adopted the consent dated 29.10.2020 and filed on 02.11.2020 as an order or judgment of the Court.
3. The Appellants thereafter moved the lower Court vide a motion dated 18.10.2021 seeking among other orders that the judgment and decree of the lower Court issued on 19.02.2021 be set aside on grounds amplified in the supporting affidavit deposited by one **Alfred Mwarimu Namu**. The gist of his deposition was that the Appellants were never served with Court summons, plaint and other pleadings meanwhile do not owe the Respondent any money given that the latter was holding over Kshs. 17,000,000/- towards the Appellants credit having liquidated the collateral to the loan to the tune of Kshs. 27,000,000/- on 03.05.2021. That the Appellants were that, the consent dated 29.10.2020 was entered into on accord of misrepresentation and concealment of material facts by the Respondent.
4. The Respondent opposed the motion vide replying affidavit deposited by **James Ngigi** dated 28.10.2021 and in rejoinder **Alfred Mwarimu Namu** filed a supplementary affidavit dated 16.11.2021. It would further appear from the record of appeal, that in the course of proceedings, **Equity Bank (K) Ltd** (*hereafter the Objector*) filed objection proceedings vide an

application dated 27.10.2021 seeking among other orders that the Appellants goods/assets proclaimed by the Respondent and or its agents together with motor vehicle KCR 555B be unconditionally released to the Objector.

5. Both the Appellants and Objector motions were disposed of by way of written submissions. The lower Court in its ruling dismissed both motions with costs in favour of the Respondent. Aggrieved with the dismissal, provoked the instant appeal by the Appellants premised on the following grounds in their amended memorandum of appeal-;

“1. That the honorable trial Magistrate erred in law and in fact by failing to find and uphold the fact that the Appellants were never served with Court summons to enter appearance and therefore could not possibly have been expected to file their defence or at all in the matter.

2. That the honorable trial Magistrate erred in law and in fact by failing to appreciate that the draft defence presented by the Appellants raised serious triable issues that merit to be tried at full hearing.

3. That the honorable trial Magistrate erred in law and in fact by failing to give the Appellants the opportunity to be heard on their defence by dismissing the application dated 18.10.2021.

4. That the honorable trial Magistrate erred in law and in fact in failing to find the consent letter entered into by the parties was out of misrepresentation of facts to the Appellants by the Respondent and by failing to appreciate that it did not take the form of Court consent but a bank variation form.

5. That the trial Magistrate erred in law and in fact in failing to find that the director of the 1st Appellant, Alfred Mwarimu Namu had proper locus standi and was suited to swear an affidavit in support of the Appellants said notice of motion application dated 18.10.2021.

6. The honorable trial Magistrate erred in law and in fact in deciding the case on technicality and failing to consider and uphold the wider interest of substantive justice.” (sic)

6. The appeal was canvassed by way of written submissions of which this Court has duly considered together with the record of appeal and pleadings before the trial Court. The duty of this Court as a first appellate court is to re-evaluate the evidence adduced in the lower Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See **Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212, Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; and Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.**

7. The Appellant’s motion leading up to the impugned ruling was expressed to be brought *inter alia* pursuant to **Section 3A** of the **CPA, Order 10 Rule 11** and **Order 22 Rule 25** of the **CPR**. And as earlier noted in this judgment, it sought among other orders setting aside the judgment and decree issued by

the lower Court on 19.02.2021. The lower Court in dismissing the said motion, stated in part in its ruling that:

“Issues for determination

1. Whether Alfred Mwarimu Namu had locus standi to bring the 1st application on behalf of the 1st and 2nd defendant.

2. Whether the defendant have met the criteria required for setting aside the consent judgment.

3. Whether the property attached by the plaintiff/decree holder can be sold in light of fixed and floating debentures facility issued by the defendants/judgment debtor in favour of the objector.

Locus standi of Alfred Mwarimu Namu to bring application on behalf of 1st defendant company and 2nd defendant.

....No search from company’s registry was attached by Alfred Mwarimu Namu to show that at the time of filing the application he was a director of the 1st defendant as together with the 2nd defendant. The plaintiff in its replying affidavit to the application has attained searcher for company registry dated 27.06.2018 and 22.10.2021 showing the 2nd defendant as the sole director of the 1st defendant. It therefore follows that the Alfred Mwarimu Namu was not a director at the time of bringing the instant application hence has no locus standi to bring the application. According to his documents he only became a director on 18.11.2021.....

Alfred Mwarimu Namu does not hold such power of attorney on behalf of the 2nd defendant. For these reasons the application dated 18.10.2021 should

and ought to be struck out to fail. The same is struck out.

However, the Court is legally required to determine the other issues raised in the application.

Whether the defendants have met the criteria required for setting aside the consent order.

The Applicantadmits that there was a meeting on 27.06.2020 where himself and 2nd defendant visited the offices of the plaintiff bank whereby the loan was restructured as per the attached letter of variation. The terms of this letter is what is captured in the consent filed in court.

In fact the said consent makes reference to the said letter. The Applicant being a party to the meeting that gave birth to the letter cannot purport to say that the consent letter dated 29.10.2020 was not explained to them.

.....

The applicant has not shown that the consent was entered into out of misrepresentation of material facts. The terms of the consent are word for word the terms in the letter of variation of loan in which he denies he was party to. In any case the applicant is not in a position to claim that the consent was obtained by way of misrepresentation of facts as he was not a party to the consent. To this end this court rejects the prayer to set aside the consent judgment. The upshot of this is the defendants application dated 18.10.2021 is dismissed with costs to the plaintiff.” (sic)

- 8. Evidently, the Appellants motion before the lower Court invoked the relevant provisions of the CPR providing for the setting aside of the default judgment among others.**

Nevertheless, specific to latter is **Order 10 Rule 11** of the **CPR** which provides that: -

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

9. It is trite that the grant or refusal of an application to set aside or vary such judgment or any consequential decree or order, is discretionary. The discretion is wide and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. Further, the principle for consideration concerning an application for setting aside or varying a judgment or any consequential decree or order has since been settled. See **Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] KECA 220 (KLR)**. The Court therein highlighted the exhortation or object of the discretion conferred by **Order 10 Rule 11** of the **CPR** as addressed in the case of **Shah -vs- Mbogo & Another [1967] E.A 116**:

“The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

10. That said, before I proceed any further, it would be apposite to note that the judgment in question was as a result of a consent

filed on 02.11.2020 and adopted as judgement or order of the Court on 21.01.2021. And not an *ex-parte* or default judgment endorsed or entered by the Court. It is trite that a consent judgment or order may be set aside only in certain circumstances, for instance, of fraud or collusion, misrepresentation of the facts, lack of consensus, public policy or for such reasons as would normally lead to the setting aside or rescinding of a contract.

11. The Court of Appeal in **Samson Munikah practicing as Munikah & Company Advocates v Wedube Estates Limited [2007] KECA 176 (KLR)** cited the decision of the Court of Appeal for Eastern Africa in **Brooke Bond Liebig (T) Ltd v. Mallya [1975] E.A. 266** where it was stated that -:

“The circumstances in which a consent judgment may be interfered with were considered by this Court in Hirani v. Kassam [1952] 19 EACA 131 where the following passage from Seton on Judgments and Orders, 7th Edn., Vol 1, P. 124 was approved:

Prima facie, any order made in the presence and with the consent of the 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 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.

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion.

All material facts were known to the party who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham, J. said in the introduction to the passage quoted above from Hiranis' case, a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding it. ..."

12. Ag. Vice President **Mustafa** stated in his judgment that:

"The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could have been no mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed." (Emphasis added).

13. The circumstances leading up to the instant appeal are quite peculiar. However, what I gather from the record of the appeal before me, is that upon filing of the lower Court suit, a consent was filed and later adopted as an order of the Court. Notably, from the proceedings, the executed and filed consent was adopted in the presence of the Respondent's counsel and in the absence of the Appellants. That said, what I garner to be the Appellants salient contestation both on appeal and before

the trial Court, is that, on one hand they were never served with Court summons, plaint and any other documents filed by the Respondent whereas they have a triable defence; and on the other limb that the consent letter dated 29.10.2020 was not explained to them before execution. Further, they did not know that the said consent letter was to be filed in Court and executable in default as such there was misrepresentation on the part of the Respondent. I propose to contemporaneously address the above twin issues.

14. Firstly, it is well-trodden that the onus was on the Appellants to prove misrepresentation, of which they assert, on the backdrop of the adopted consent the resulted into a judgment of the Court. By the Appellants affidavit material in support of the motion before the lower Court, it is not in dispute that the Respondent advanced a facility to the Appellants, to wit, there was consensus vide a letter of variation dated 24/06/2020 towards settlement of accounts. Secondly, it is not in dispute that the terms of the consent as executed by the respective parties were clear and unambiguous, considering -; the consent adopted as an order of the Court was duly executed by the Appellants and captured the specific case number appertaining the subject matter; the consent captured the parties as they appear in the said suit; the terms of the consent. Particularly, Clause (7) and (8) thereof captured the consequential effects of the consent due to none compliance. Therefore, it is difficult to fathom that either the Appellants did

not read what they were consenting to and or failed to understand the same. Adjunctly, the Appellants have not demonstrated that they were induced by duress or fraud at execution of the consent.

15. Thirdly, I agree with the trial Court's analysis that at all material times relevant to the variation agreement, the Appellants were party to the meeting leading thereto and that as a result of the said meeting, led to the consent that was duly executed by the parties therefore the Appellants have failed to demonstrate that the Respondent induced them by misrepresentation of material facts to execute the consent in question. The Appellants failure to explicable demonstrate misrepresentation on the part of Respondent bring to mind the decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others (2014) eKLR**, where it was held *inter alia* that;

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

- 16.** Having failed to demonstrate misrepresentation on the part of Respondent, it would be difficult in the circumstance to fault the decision of the trial Court. At the risk of repetition, it warrants reminder that the judgment sought to be set aside was as a result of a consent as between the disputing parties. That said, it has repeatedly been held that the discretion to set aside a judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, as stated in **Shah v Mbogo** (supra). While the right to be heard is a matter of justice and an integral part of the rule of law and should not be treated lightly, it also follows that onus was on the Appellants to satisfy the considerations pertinent to the exercise of the discretion to set aside. This said discretion is exercised judicially and based on known principles, rather than whimsically.
- 17.** Consequently, the trial Court was not in error by dismissing the Appellants motion notwithstanding its approach. In the end the instant appeal lacks merit and ought to suffer the unfortunate providence of dismissal with the attendant costs issuing in favor of the Respondent.
- 18.** Orders Accordingly!

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16H DAY OF OCTOBER 2025.

**HON. L. P. KASSAN
JUDGE**

In the presence of:

Mosio holding brief Nzavi for Appellant

Orare for Respondent

Carol - Court Assistant

ORIGINAL