**Atogo v Wamboye & 6 others (Civil Appeal 53 of 2019)**
**[2025] KECA 327 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 327 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CIVIL APPEAL 53 OF 2019**

**HM OKWENGU, JM MATIVO & JM NGUGI, JJA**

**FEBRUARY 21, 2025**

**BETWEEN**

**KWENA ATOGO ..... APPELLANT**

**AND**

**FRANCIS OKUMU WAMBOYE ..... 1ST RESPONDENT**

**CLEOPHAS CHESSA OKUBASU ..... 2ND RESPONDENT**

**BONFACE KUYADI OUMA ..... 3RD RESPONDENT**

**MARY ACHIENG ..... 4TH RESPONDENT**

**JANE ROSSY LWABIA ..... 5TH RESPONDENT**

**FRANCIS OKUMU NYANGWESO ..... 6TH RESPONDENT**

**FRANCISCA AUMA MAKOKHA ..... 7TH RESPONDENT**

***(Being an Appeal from the Ruling of the Environment and Land Court at Busia, (Kaniaru, J.) dated 11th December, 2018 in ELC No. 58 of 2017)***

## JUDGMENT

1. On 11th December, 2018, the Environment and Land Court (ELC), (Kaniaru, J.), delivered a ruling in which it dismissed an application that had been filed by Kwena Atogo, (the appellant herein). In the application, the appellant, who was the plaintiff, sought to have a consent judgment that had been entered against the defendants revised and or set aside. The consent judgment which was recorded by

the court was duly signed by both the advocate for the plaintiff and the advocates for the defendants. It was in the following terms:

> "Judgment is entered as against the defendants for a perpetual injunction restraining the defendants, their agents and assignees from trespassing on the plaintiff's land parcel No. Marachi/Elukongo/46. No orders as to general damages in trespass."

2. In dismissing the application, the learned Judge relying on Samuel Mbugua Ikumbu -vs- Barclays Bank of Kenya Ltd [2015] eKLR, held that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract; that such grounds include fraud, mistake or misrepresentation; and that although the appellant had alleged fraud and collusion on the part of his counsel and the respondents, he was not able to establish such allegations. The learned Judge also found the application incurably defective as it was brought under Section 3A of the Civil Procedure Rules and not Order 45 of the Civil Procedure Rules which provides for review. Consequently, he dismissed the application.

3. The appellant has filed a memorandum of appeal in which he has raised four grounds of appeal, in which he faults the learned Judge for failing to observe that the record of proceedings made on 10th March, 2016, concerning the consent orders in question, was ambiguous; in failing to realize that the appellant's advocate colluded with the respondents to defeat an order of contempt made against them on 22nd October, 2015; in failing to find that the consent order was obtained by collusion in order to undermine the contempt order; and in failing to determine material issues of law or usages having the force of law.

4. The appellant filed written submissions in which he reiterated that the consent order was ambiguous and that the authorities relied on by the learned Judge were distinguishable, as there was no committal order for contempt of the respondents as was the case in the matter before the court. He faulted the learned Judge for failing to revise the consent order so as to prevent abuse of the court process. He maintained that the conduct of his advocate implied that there was collusion between the advocates and the defendants, and that such collusion was not something that he, the appellant could testify on. He stated that his advocate concealed this consent from him and that it was contrary to natural justice for a consent order to be entered into without the client's consent, and, therefore, allowing such a consent to stand would occasion a serious miscarriage of justice.

5. Although the respondents were duly served with the appeal, they did not file any response to the appeal, nor did they attend the court for the hearing of the appeal.

6. We have carefully considered the appeal and the written submissions filed by the appellant. It is not disputed that the consent order which the appellant sought to set aside, was duly signed by both his advocate and the advocates for the respondents. Although the appellant maintained that the consent order was signed without his instructions, there is nothing other than his word to confirm that position. Be that as it may, the appellant admits that the advocate was his advocate. This means that the advocate was his agent having ostensible authority to enter into such a consent on his behalf.

7. In Samson Munikah practicing as Munikah & Company Advocates -vs- Wedube Estates Limited [2007] eKLR, the Court of Appeal addressing a similar issue stated as follows:

> " This appeal raises the vexed question: (of) what are the circumstances in which a consent judgment may be set aside? In Brook bond Liebig (t) Ltd -vs- Mallya [1975] EA 266, the then Court of Appeal for East Africa set out the circumstance in which a consent judgment freely

entered into by the parties to a dispute in court would be set aside by the court. Delivering the leading judgment of the court, Law Ag. P expressed himself thus:

> 'the circumstances in which a consent judgment may be interfered with were considered by this Court in Hirani -vs- Kasam [1952] (19 EACA 131) where the following passage from Senton on Judgments and Orders 7th Edition 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 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.'"

8. In Flora Wasike -vs- Destimo Wamboko [1982 – 88] 1 KAR 266, the Court of Appeal held that:

   i. "It is settled law that the consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation.

   ii. An advocate would have ostensible authority to compromise a suit or consent to a judgment so far as the opponent is concerned.

   iii. The court would not readily assume that judgment recorded by a Judge as being by consent was not so unless it was demonstrably shown otherwise."

9. The learned Judge properly directed himself on the law, maintaining that the consent could only be set aside if there was fraud, mistake or misrepresentation. From the circumstances that were before the learned Judge, the appellant's advocate had ostensible authority to enter into the consent judgment on his behalf. As the appellant was not able to prove that there was any fraud or mistake or misrepresentation, there was no ground upon which the learned Judge could set aside the consent judgment. The appellant's redress lies in pursuing an action against his advocate for failing to follow his instructions in order to recover whatever damages he may have suffered.

10. We note that the learned Judge also rejected the application on the ground that it was fatally defective, having been brought under Section 3A of the *Civil Procedure Act* instead of Order 45 of the Civil Procedure Rules. While it is true that the appellant failed to cite the correct provision of the law under which his application was brought, the appellant is covered by Article 159(2)(d) of *the Constitution*, which precludes the court from paying homage to undue procedural technicalities.

11. As Ouko, JA (as he then was), stated in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission, Wilfred Rottich Lesan, Robert Siolei, Returning Officer, Bomet County, Kennedy Ochanyo, Wilfred Wainaina, Patrick Wanyama & Mark Manzo [2013] KECA 113 (KLR):

> " Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an

invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."

12. Therefore, the appellant's failure to anchor the application on Order 45 of the Civil Procedure Rules, was not a fatal infraction, but a procedural lapse that could not occasion any prejudice. Nevertheless, the appellant having failed to demonstrate any ground upon which the consent judgment could be set aside, his application was properly dismissed. We, therefore, find no merit in this appeal. It is accordingly dismissed. As the respondent did not file any submissions nor attend court for the hearing of the appeal, we make no order as to costs.

**DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MATIVO**

**.....**

**JUDGE OF APPEAL**

**JOEL NGUGI**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**