



REPUBLIC OF KENYA



**KENYA LAW**  
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**Cheruiyot v Korir (Civil Appeal 131 of 2017)  
[2021] KECA 222 (KLR) (5 November 2021) (Judgment)**

Neutral citation: [2021] KECA 222 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL 131 OF 2017  
W KARANJA, MSA MAKHANDIA & S OLE KANTAI, JJA  
NOVEMBER 5, 2021**

**BETWEEN**

**WALTER KIPYEGON CHERUIYOT ..... APPELLANT**

**AND**

**STANLEY KORIR ..... RESPONDENT**

*(An appeal against the Ruling and Order of the Environment and Land Court at Kericho (J. M. Onyango, J.) delivered on 14th July 2017 in ELC Case No. 61 of 2014)*

**JUDGMENT**

1. Walter Kipyegon Cheruiyot (the appellant) was the registered owner of a parcel of land described as L.R No. Kericho/Silibwet/264 (the suit land). He entered into a sale agreement with Stanley Korir (the respondent) on 3rd March, 2014 for the sale of the suit land at a consideration of Kshs. 600,000/= . The respondent paid a deposit of Kshs. 300,000/= upon signing the agreement and agreed that the balance would be paid in 3 equal installments of Kshs. 100,000/= within the months of May, July and September 2014.
2. The respondent fulfilled his part of the agreement but the appellant refused to hand over vacant possession of the suit land and effect transfer of the title to the respondent.
3. Consequently, by a plaint dated 26th November, 2014 the respondent filed a suit against the appellant seeking specific performance of the agreement to compel the appellant to transfer the suit land to him.
4. In his defence, the appellant denied that the respondent had honoured his part of the agreement and stated that the respondent only paid Kshs. 300,000/= upon signing the agreement and promised to pay the balance of Kshs. 300,000/= in 3 equal installments of Kshs. 100,000/= by September, 2014 but failed to do so. Further, that in May 2014, the respondent took advantage of the appellant's wife's illiteracy and made her sign that she had on behalf of the appellant been paid Kshs. 170,000/= whereas the respondent had only paid Kshs. 70,000/=.



5. When the matter came up for the plenary hearing before the trial court on 22nd November, 2016 both parties and their counsel appeared and counsel for the respondent informed the court that the parties had a consent to record. The court then recorded a consent dictated by the advocates in the following terms:
- “By consent of the parties, this suit be compromised on the following terms:
- a) That the plaintiff do pay to the defendant a sum of Kshs.100,000 within the next seven days being the balance of the purchase price.
  - b) That the defendant do execute transfer documents in favour of the plaintiff of 0.2 acres comprised in L.R number KERICHO/SILIBWET/264 which should be done within seven days from today.
  - c) That the sum of Ksh. 130,000 which is held by the firm of M/S J.K Koech & Company Advocates be released to the defendant immediately.
  - d) That each party to bear his own costs.
  - e) That upon the terms being complied with, the case be marked as settled.”
6. According to the court record, the appellant’s advocate confirmed the said terms of the consent and both advocates signed against their names. The court then adopted the consent as the judgment of the court and marked the suit as settled.
7. Subsequently, the appellant herein filed a motion on notice on 3rd February, 2017 under Section 3A of the *Civil Procedure Act* and Order 10 Rule 11 of the *Civil Procedure Rules* seeking in the main the following orders:-
- a) That pending the hearing and determination of this application inter partes, this honourable court be pleased to stay execution of the decree herein.
  - b) That this Honourable court be pleased to set aside the consent Judgment and decree entered herein against the defendant/applicant and any consequential orders thereof and allow the defendant/applicant leave to defend the suit herein.
8. The application was premised on grounds as appeared on its face and supported by the appellant’s affidavit of even date in which the appellant deposed that he was unhappy with the consent that was recorded in court on 22nd November, 2016 and that even though he was present in court when the consent was recorded, his former Advocate did not explain to him the terms of the consent before it was signed and only explained the same to him when they left the courtroom.
9. Further, that the terms of the consent had not been honoured and bad blood had developed between his family and that of the respondent. As a result of the foregoing, the appellant stated that he was ready to refund the purchase price of Kshs. 370,000/= already paid by the respondent.
10. Upon hearing the application, the learned Judge deduced the issues for determination to be:-
- a) Whether the consent recorded in court on 22nd November 2016 was valid and binding on the parties; and
  - b) Whether there are sufficient reasons to warrant the said consent being set aside.



11. In his findings, the learned Judge expressed that if indeed the appellant was opposed to the consent, it beat logic why he did not protest immediately and why it took him three months to apply to have it set aside.
12. The Court found that it was baseless to argue that the consent was not a valid consent; and that the consent could not be set aside in the circumstances as it was trite that a consent order once adopted by the court 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.
13. Ultimately, the learned Judge held as follows:-

“I have carefully considered the pleadings, the instant application, affidavits and submissions of both counsel together with the authorities cited to me. I find no sufficient reason why the consent should be set aside ....

In my assessment the only reason why the defendant wants to set aside the consent is probably due to pressure from his family members who have since fallen out with the Plaintiff. That in my view is not a good enough reason to set aside a valid order of the court.

It is not lost to me that the defendant was present in court on the date the consent was recorded and signed by his advocate and at no point did he raise any objection. Parties should not abuse the process of the court at whim.

The upshot is that the defendant's application fails and is dismissed with costs to the plaintiff. I further direct that the plaintiff satisfies the terms of the consent order within the next seven (7) days failing which the defendant shall be at liberty to seek an appropriate remedy.”
14. Aggrieved by the above finding, the appellant proffered the instant appeal on grounds, inter alia, that the learned Judge erred: by awarding what was not prayed for; by failing to consider the evidence of the appellant and critically analyze the same despite the fact that it was overwhelming; by holding that the respondent had proved a prima facie case but failing to award what was prayed for and by misapprehending the evidence before him hence arriving at erroneous findings.
15. In his submissions in support of the appeal, the appellant submits that it is trite law that an Advocate can enter into a Consent on behalf of his client provided he acts bona-fide, that the Consent should not be contrary to express negative directions; it should not be made through misrepresentation or in ignorance of material facts; that the Record of appeal discloses fraud, collusion and lack of bona-fide on the appellant's former advocate in entering into the consent; that these facts were not considered although the appellant made it clear that he was illiterate and thus placed reliance on his Advocate who in turn failed to make him understand the consent terms although he was present in court on the day the said consent was entered.
16. He submits that the Judge ought to have considered the facts and affidavits placed before him and find that the Advocate had abused trust placed on him by entering into an agreement without honestly disclosing all material facts prior to the consent and relies on the case of *Kenya Commercial Bank vs. Specialised Engineering Co. Ltd (1982)*.
17. Opposing the appeal, the respondent too filed submissions in which he submits that the learned trial Judge in her ruling considered the entire application by setting out the orders sought, the grounds



upon which the application was premised, the supporting affidavit and then crystalized the issues for determination and cannot be accused of having failed to consider any aspect of the application.

18. He further submits that the appellant does not cast any aspersion on the terms of the consent but instead states that he was no longer interested in selling the suit land and that his wife and children had very strong objections to the sale transaction and the terms of the compromise and that he and the respondent had since developed bad blood.
19. It is the respondent's submissions that it can be inferred from the averments that the appellant was not basically complaining about the terms of the consent, but has his own personal reasons which were not enough to set aside a duly executed consent and therefore the court was right in dismissing the application.
20. He submits that the alleged lack of bona fides on the part of the advocate, the abuse of trust, the alluded mischief and or fraud were never substantiated in the said application nor has the appellant sought to substantiate the same in his appeal; that the appellant is falsely tainting the image of his former Advocate when in essence he is aware that the consent was voluntarily entered into with his full knowledge and consent.
21. Lastly, he submits that the authorities relied on by the appellant are good in law but they do not aid the appellant's appeal since the facts and circumstances of this appeal are different and cannot be supported by the cited authorities.
22. We have considered the entire record of appeal along with the rival submissions and the relevant law including the caselaw cited by the parties. This being a first appeal, it is our duty to re-analyze and re-assess the evidence on record and reach our own conclusions as stated in *Selle vs. Associated Motor Boat Co. [1968] EA 123*, where the Court expressed itself as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270.”

23. The crux of this appeal is whether the learned Judge erred in law and fact in declining to set aside the consent order. Posited as a question, is there sufficient evidence on record establishing grounds for setting aside the consent order?
24. The appellant in his grounds of appeal averred that the learned Judge erred by awarding what was not prayed for. Having prayed for setting aside of the consent in his application, it did not sit well with him when the court dismissed the application and further ordered that the respondent satisfies the terms of the consent order within the next seven (7) days failing which the appellant would be at liberty to seek an appropriate remedy. It is clear to us, however, that this order naturally flowed from the dismissal of the application and thus it is not accurate to aver that the Judge awarded that which was not prayed for.
25. Other grounds of the appeal were that the Judge failed to consider the evidence of the appellant and critically analyze the same despite the fact that it was overwhelming and that he misapprehended the evidence before him hence arriving at erroneous findings. We note that the evidence given by the



appellant was that even though he was present in court when the consent was recorded, his former advocate did not explain to him the terms of the consent. Further, that the terms of the consent had not been honoured and bad blood had developed between his family and that of the respondent. As a result of the foregoing, the appellant stated that he was ready to refund the purchase price of Kshs. 370,000/= already paid by the respondent.

26. The Judge aptly covered these pieces of evidence in her judgment where she held:-

“I find no sufficient reason why the consent should be set aside as I am not persuaded that the threshold set out in the LIEBIG case has been met.

In my assessment the only reason why the defendant wants to set aside the consent is probably due to pressure from his family members who have since fallen out with the Plaintiff. That in my view is not a good enough reason to set aside a valid order of the court.

It is not lost to me that the defendant was present in court on the date the consent was recorded and signed by his advocate and at no point did he raise any objection. Parties should not abuse the process of the court at whim.”

27. There is no doubt from the foregoing that the learned Judge did consider all the material that was placed before the court and after applying the relevant law found the evidence adduced by the appellant to be insufficient. The fact that she did not allow the application does not mean that the learned Judge failed to consider the evidence placed before the court.

28. The appellant also submits that the record discloses fraud, collusion and lack of bona fides on the part of the appellant’s former advocate in entering into the consent. We have re-evaluated the record and note that other than alleging fraud, there is no substantive evidence to support the allegations of fraud, collusion and lack of good faith on the appellant’s former advocate as alleged.

29. Did the appellant’s application meet the threshold for setting aside a consent order/judgment to entitle us to interfere with the learned Judge’s orders? We revisit our earlier decisions on this point. This Court in *Kuwinda Rurinja Co. Limited vs kuwinda Holdings Limited & 13 others [2019] eKLR*, Civil Appeal No. 8 of 2003, reiterated and buttressed the law as set out earlier as follows:-

“In the seminal case of *Flora N. Wasike vs. Destino Wamboko [1988] eKLR* this Court stated:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in *J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.*”

In *Purcell vs. F C Trigell Ltd [1970] 2 All ER 671*, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons...”



*In Kenya Commercial Bank Ltd vs. Specialised Engineering Co. Ltd [1982] KLR 485*, Harris, J correctly held, inter alia, that -

“1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. 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.” (Emphasis supplied)

See also *Contractors Ltd vs. Margaret Oparanya* \_\_ [2004] eKLR.

30. In a more recent decision in *Intercountries Importers and Exporters Limited vs. Teleposta Pension Scheme Registered Trustees & 5 others*[2019] eKLR, this Court pronounced itself as follows:-

“Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside...” (Emphasis Ours)

31. If we juxtapose these requirements to the reasons proffered by the appellant, which we have referred to earlier in this judgment, it becomes evident that his application did not pass muster and was consigned for dismissal. We also wonder why if indeed the appellant was being sincere with his averments of bad faith by his advocate, given that the consent judgment was entered on 22nd November, 2016 and he says the advocate only explained the contents after the Court had adjourned, why he waited until 3rd February, 2017 to file an application to seek to set aside the consent.

32. This lapse of time connotes that the appellant did in fact understand what he was getting himself into but after consultation with his family or other third parties, he changed his mind for the reasons given in his application which include existence of bad blood between him and the respondent and his family having strong objections. These are certainly not valid reasons for the court to set aside a consent judgment.

33. We think we have said enough to demonstrate that this appeal is devoid of merit. The same is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**



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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

DEPUTY REGISTRAR

