



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MURGOR & ODEK, JJA)

CIVIL APPEAL NO. 8 of 2003

BETWEEN

KUWINDA RURINJA CO. LIMITED.....APPELLANT

AND

KUWINDA HOLDINGS LIMITED.....1ST RESPONDENT

COLLIN DAVIES2ND RESPONDENT

JOINT LIQUIDATORS OF NDUMBERI

FARMERS CO. LTD (IN LIQUIDATION).....3RD RESPONDENT

SIMON KIMANI.....4TH RESPONDENT

NYAWIRA KARIUKI5TH RESPONDENT

SAMUEL MUCHOKI.....6TH RESPONDENT

CULUMANIS MLURE NGUGI.....7TH RESPONDENT

DAVID KAGURU.....8TH RESPONDENT

WAIRIMU KARIUKI.....9TH RESPONDENT

MWAURA WAMUTI MUTHEE.....10TH RESPONDENT

MBUGU NGIGI.....11TH RESPONDENT

FRANCIS NDUNG’U.....12TH RESPONDENT

NJERI MBUGUA.....13TH RESPONDENT

G.R. MUIHURI14TH RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Ole Keiuwa, J.) dated 5th December 1997

in

Nairobi HCCC No. 5261 of 1988)

JUDGMENT OF THE COURT

(1) The principle for setting aside consent orders is well settled. Notwithstanding, this is an appeal against a ruling of the High Court declining to review and set aside a consent order compromising a suit entered into by counsel for the parties. Of pivotal bearing to this appeal, the impugned consent was signed by counsel for all parties to the suit. This appeal contests the authority of counsel to sign and record a consent order on behalf of a client. Ideally, any order made in the presence and with the consent of 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, collusion or by an arrangement contrary to the policy of the court or if it was given without sufficient material facts or in misapprehension or ignorance of such material facts, or in general for a reason which would enable the court to set aside an agreement. (See **Isaac Kinyanjui Njoroge vs. National Industrial Credit Bank Limited [2018] eKLR**).

(2) In **Hirani vs. Kassam (1952) 19 EACA 131**, relying on a passage from **Seton on Judgments and Orders**, 7th Edition, Vol. 1 at page 124, it was expressed:

“... Although an advocate has ostensible authority to compromise his client’s case, employing such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which a client has given him... And if it is shown to the court that the client was not even aware of the application that gave rise to those consent orders leave alone having consented to the recording of the orders, in the absence of any satisfactory explanation ... a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent order issued.”

BACKGROUND FACTS

(3) The dispute in this appeal relates to two parcels of land namely LR No. 10262 (IR. 17163) measuring 25.5 acres and LR No. 11694 (IR 21143) measuring 4.3 acres, situated within Karen area in the County of Nairobi and the disputed parcels are otherwise commonly referred to as ***Kuwinda Village***.

(4) There are three separate entities using the name Kuwinda and it is necessary to distinguish between the three entities. One of the entities is a business name, the other is a Limited Liability Company and the third is a Holding Limited Liability Company. The role of each Kuwinda entity will be appreciated once the contextual facts on the disputed ownership of the suit properties is appreciated, in the later part of this decision.

(5) The disputed two parcels of land forming the suit property were owned by one ***Ms Sarah Fosdic***. In the late 1960s, ***Ms Fosdic*** was desirous to leave Kenya and decided to sell the two parcels of land. She gave her workers the first option to purchase the land. In addition, she wanted to give her workers 2.5 acres of the bigger parcel LR No. 10262 (IR. 17163); the 2.5 acres was that portion of the land then physically occupied by the workers.

(6) The workers under the leadership of the 5th respondent, ***Simon Kimani*** (deceased) organized themselves into a partnership under the name and style of ***Kuwinda Rurinja Company*** (hereinafter referred to as the partnership). A letter of offer dated 23rd February 1985 was made to the partnership. The partnership was unable to pay any deposit or purchase price for the two parcels of land. No sale agreement was signed with the partnership.

(7) In the interim, ***Simon Kimani*** and 4 others incorporated ***Kuwinda Rurinja Company Limited***, (herein referred to as the company) the appellant company herein. They intended to purchase the two parcels of land. The said company was also unable to pay any deposit towards purchase of the suit properties.

(8) The two parcels of land were eventually purchased from ***Ms Sarah Fosdic*** by ***Ndumberi Farmers Company***, the 3rd respondent in this appeal. Subsequently, ***Ndumberi Farmers Company*** went into voluntary liquidation and the liquidators decided to sell the two parcels of land. An advertisement was placed in the local dailies. Among other bidders was the 1st respondent company ***Kuwinda Holdings Limited*** (herein referred to as Holding) whose director is the 2nd respondent, Mr. Collin Davies.

(9) At all material times in this suit, the 3rd respondent, the Liquidators of ***Ndumberi Farmers Company*** are the vendors of the suit properties. A sale agreement dated 31st October 1988 was entered into between the 3rd respondent and the 1st and 2nd respondent wherein the 1st and 2nd respondents were to purchase the two parcels of land. In light of this, the company lodged a caveat over the suit properties expressing a purchaser’s interest. Upon execution of the sale agreement dated 31st October 1988, three different suits were filed at the High Court. These were HCCC No. 5261 of 1988, HCCC No. 5262 (OS) of 1988 and HCCC No. 3070 of 1989.

(i) In HCCC No. 5261 of 1988 (***Kuwinda Rurinja Co. Limited vs. Joint Liquidators of Ndumberi Farmers Co. Ltd***), the suit seeks specific performance based on the letter of offer accepted on 23rd February 1985.

(ii) In HCCC No. 5262 of 1988 (***Simon Kimani & 9 others Kuwinda Rurinja Company (the partnership and business name) vs. Joint Liquidators of Ndumberi Farmers Co. Limited (In Liquidation)***), the suit seeks adverse possession of 2.5 acres of the suit property.

(iii) In HCCC No. 3070 of 1989 (***Collin Davies/Kuwinda Holdings Limited vs. Joint Liquidators of Ndumberi Farmers Co. Limited***) the suit seeks specific performance of the sale agreement dated 31st October 1988 and removal of caveats.

(10) By letter dated 22nd October 1993 filed in court on 25th October 1993 under the letter head of Muriithi & Co. Advocates in HCCC No. 5261 of 1988, a consent order was recorded in the following terms:

“By Consent:

(1) The Joint Liquidators of the Defendant Company (Ndumberi Farmers Co. Limited) do transfer to the Plaintiff (Kuwindu Rurinja Co. Limited) or their nominee the property known as LR Nos. 11694 and 10262 less a portion of 2.5 acres popularly known as “Kijiji” and which portion is occupied by the Plaintiffs herein on LR No. 10262.

(2) The balance of the purchase price amounting to Ksh. 7,380,000/= be paid to the Defendants Advocates Me

(3) Each party to bear the costs of this suit and the matter be marked as settled.

Signed: Muriithi & Co. Advocates for Plaintiff

Signed: Kaai Mugambi & Co. Advocates for Defendants.”

(11) Another consent order was filed in HCCC No. 3070 of 1989 between the 1st and 2nd respondents in this appeal and the 3rd respondent in this appeal.

The consent was filed in the following terms:

“1. That specific performance of the Agreement for Sale be ordered and that the Transfer of LR No. 10262 and LR No. 11694 by Ndumberi Farmers Company Limited to Kuwindu Holdings Limited do proceed to registration without encumbrances.

2. That Mr. Collin Davies do pay Ndumberi Farmers Company Limited:

(i) Ks. 3,150,000/= in respect of the Agreement for Sale.

(ii) Ksh. 350,000/= belonging to Kuwindu Holdings Limited be deposited in court vide cheque no. 184780 drawn on the Kenya Commercial Bank by Ndumberi Farmers Limited.

(iii) That a further Ksh. 3,000,000/= be paid in respect of all fixtures and fittings on site as of today’s date.

3. That such sums amounting to Ksh. 6,500,000/= be paid within 30 days of settlement of cases HCCC No. 5261 of 1988 and HCCC No. 5262 of 1988 (OS) and the removal of the caveat dated 7th December 1988 placed by D.M. Kinyua Advocates on behalf of Kuwindu Rurinja Company Limited on LR No. 10262 and LR 11694 registered as IR 17163/19 and 21143/6 respectively.

4. That HCCC No. 3070 of 1989 be thereafter marked as settled with all orders vacated and withdrawn with no order as to costs.

Signed: A.F. Gross Advocate for Collin Davies and Kuwind Holdings Limited

Signed: Ogutu, Wariuki & Co. Advocates for Ndumberi Farmers Company Limited.”

IMPUGNED CONSENT ORDER

(12) A further consent was filed on 2nd October 1996 in relation to all the three suits, the subject of the instant appeal. The consent is signed by three firms of advocates namely: Messrs A. F. Gross for Collin Davies and Kuwindu Holdings who are the 1st and 2nd respondents in this appeal; Messrs Kaai Mugambi & Co. Advocates for Ndumberi Farmers Company Limited, the 3rd respondent in this appeal and Messrs Muthuri & Co. Advocates for Kuwindu Rurinja Company and Simon Kimani & 9 Others which company is the appellant in this appeal and the individuals are respondents in this appeal. At the risk of repetition, the said consent was signed by all advocates on record for all the parties in the suits then pending before the trial court.

(13) For purposes of this appeal, the relevant terms of the impugned consent order dated 2nd October 1996 are as follows:

“(1) That HCCC No. 3070 of 1989, HCCC No. 5261 and HCCC No. 5262 of 1988 (OS) be consolidated for purposes of the consent.

(2) That Specific Performance of the Agreement for Sale dated 31st October 1988 be ordered and that the Transfer of LR No. 10262 and LR No. 11694 by Ndumberi Farmers Company Limited to Kuwindu Holdings Limited duly stamped and dated 14th November 1988 do proceed to registrations.

(3) That Ndumberi Farmers Company Limited do provide the purchaser with a Rate Clearance and Land Rent Certificate and all

other requirements necessary to transfer.

(4)

(5) *That the Registrar of titles be and is hereby ordered to raise all and every encumbrance registered against the titles to date and more particularly IR No. 17163 (LR 10262) namely:*

(1) *IR 17163/19 - Caveat by Kuwinda & Co.*

(2) *IR 17163/20 - Caveat by Colin Davies.*

(3) *IR 17163/21- Court order restraining dealings.*

(4) *IR 17163/22 - Court order restraining dealings.*

(5) *IR 17163/23 - Caveat by Captain Peter Kinyanjui.*

(6) *IR 17163/24 - Caveat by Dionysisus Muturuciu Kinyua (deceased)*

(7) *IR 17163/25 - Decree of 8th December 1993 Civil Case No. 5261 of 1988.*

(8) *IR 17163/26 - Land Registrar Caveat under Section 66 (1) of RTA.*

(6)

(7)

(14) Before the trial court, the appellant company sought review and setting aside of the consent dated 2nd October 1996 on the ground that the firm of Muriithi & Co. Advocates had no authority to act for the appellant or record the consent order; that the consent had no basis and was fraudulently obtained.

(15) The learned judge in his ruling dismissing the application to review and set aside the consent order dated 2nd October 1996 expressed himself as follows:

“In my judgment, there is no reason to accept the applicant’s contention that the advocates who entered and negotiated the consent order of October 2nd 1996 had no instruction to do so. The reason for Simon Kimani’s turn around has been accounted for to my satisfaction by a number of credible witnesses. Say the evidence of Simon Kimani’s neighbour Stanley Njuguna Mwangi who has no interest in the suit land as such and who was present when Simon Kimani called for three Nissan matatus and 1.5 acres out of the total 2.5 acres. All this damaging testimony has not been repulsed and I must take it as having been accepted to be the truth.

What is more is the fact that the so called imposter advocate has not been sued for working to the detriment of Simon Kimani and his company. I venture to observe that Mr. Muthuri advocate has not been sued because these applicants do not seriously believe in what they have put forth as their case. I have also before me the evidence of Mr. Kaai advocate who acted for the defendants in both cases before the countdown to the hearing of the applications approached. I totally accept what Mr. Kaai advocate says about representation of Simon Kimani and the other applicant.” (emphasis ours)

(16) The learned judge further expressed himself thus:

“These three suits have been consolidated by consent. The suit lands have been transferred to the respective claimants. Notably, the Plaintiffs in HCCC No. 3070 of 1989 paid the purchase price of Ksh. 8.2 million while the Plaintiff in HCCC No. 5261 of 1988 received 2.5 acres on behalf of its members who were also plaintiffs in HCCC No. 5262 of 1988. By virtue of this consent order and upon fulfillment of their parts towards meeting the claims of the plaintiffs in HCCC No. 5262 of 1988 (OS) by transferring the said 2.5 acres, these plaintiffs were bound to have abandoned any claims given by the decree of 8th December 1993 stated by the applicants to be still existing. In my judgment, upon acceptance of the benefits under the consent order of 2nd October 1996, these parties are bound and have expressly provided for the vacation of the said decree. Accordingly, there is no error on the face of the record with which to invoke the jurisdiction conferred to the court by O.44 (1) of the Civil Procedure Rules.

.....

The consent order of October 2nd 1996 was not a nullity in the circumstances.....”

GROUNDS OF APPEAL

(17) Aggrieved by the ruling of the learned judge, the appellant has lodged the instant appeal citing sixty-two (62) grounds of appeal in its memorandum which can be compressed as follows:

- (i) *The judge erred in evaluating the evidence on record.*
- (ii) *The court erred in sanctioning a corrupt transaction.*
- (iii) *The judge erred in holding that the three suits were consolidated by consent of the parties.*
- (iv) *The judge erred in holding that the plaintiffs in HCCC No. 5262 of 1988 were interested only in 2.5 acres and further erred in holding that they were given their respective shares.*
- (v) *The judge misapprehended the nature of the jurisdiction to review a consent judgment and erred in applying the procedure for setting aside consent judgments.*
- (vi) *The judge erred in not requiring Mr. Muthuri advocate to confirm to court, the interested parties and the plaintiffs in HCCC No. 5262 of 1988 whom he represented when signing the impugned consent order on 2nd October 1996.*
- (vii) *The judge erred in proceeding with hearing of the application to set aside the consent in the absence of Mr. Muthuri.*
- (viii) *The judge erred in failing to find Mr. Muthuri advocate was not properly on record as he had not filed a Notice of Change of Advocate.*
- (ix) *The judge erred in not inviting the parties and counsel before him to address the court on the issue of legal representation on which the other issues turned.*
- (x) *The judge erred in treating the Notice of Motion before him as suits which had to be tried on the basis of diametrically opposed or conflicting affidavits.*
- (xi) *The judge erred in enforcing a consent that was based on an immoral or illegal act.*
- (xii) *The judge erred in failing to find that the consent was procured by bribery as per the testimony of Mr. Stanley Njuguna Mwangi that Mr. Simon Kimani was bribed to procure the consent.*
- (xiii) *The judge erred and overlooked the provisions of Section 384 (3) of the Companies Act which make prima facie evidence contents of returns of companies and the judge misunderstood the evidence of company returns and drew impermissible inferences from the said returns.*
- (xiv) *The judge misapprehended the different capacities of the plaintiffs in HCCC No. 5262 of 1988 and the shareholders of the appellant.*
- (xv) *The judge erred in acting on the affidavit of Mr. Kaai Advocate.*

(18) At the hearing of this appeal, Senior Counsel Dr. Gibson Kamau Kuria appeared for the appellant. Senior Counsel Prof. Githu Mugai led learned counsel Mr. Samuel Nderitu and Gabriel Mwangi for the 1st and 2nd respondents. The 3rd respondent was represented by learned counsel Ms V. M. Wambua.

(19) All parties filed written submissions and cited authorities in support of submissions.

APPELLANTS SUBMISSIONS

(20) Counsel for the appellant rehashed the background to the dispute between the parties culminating into the impugned consent dated 2nd October 1996 and the ruling of the court the subject of this appeal. The appellant submitted that the consent recorded on 2nd October 1996 was procured through fraud of the respondents who acted in concert with a few shareholders of the appellant company including a one **Ms Bibiana Nyawira**; that to perpetrate the fraud, the said **Ms Bibiana Nyawira**, **Mr. Mathew Mungai** and **Mr. Kingori Muraguri** purported to pass a company resolution through which they terminated the instructions of Mureithi & Co. Advocates and appointed the firm of Muthuri & Co. Advocates to act for the appellant company; that at the time the said Ms Bibiana Nyawira purported to appoint the firm of Muthuri & Co. Advocates, she was not a director of the appellant company; that **Mr. Simon Kimani** (5th respondent) filed annual returns for the company in which it was clear Ms Bibiana Nyawira was no longer a director of the company; that upon filing of the annual returns, the said Ms Bibiana Nyawira engineered arrest, prosecution and arraignment of Mr. Kimani and others before the Chief Magistrate where they were charged with forgery of company returns but were acquitted; that acquittal by the Chief Magistrate is proof that the returns as filed by Mr. Kimani were not forgeries.

(21) In this appeal, the appellant contends that the learned judge erred in holding that the returns filed at the company registry were false; the judge also erred in relying on the affidavit of Ms Bibiana Nyawira to hold that the returns were false; the judge erred in finding Ms Bibiana Nyawira was a director of the appellant company with authority to instruct the firm of Muthuri & Co. Advocates. The appellant submitted that based on the acquittal, the consent order entered into by Muthuri & Co. Advocates was null and void for want of instruction

from the duly appoint directors of the appellant company.

(22) Submitting on the validity of the consent order recorded on 2nd October 1996, the appellant cited the case of **Samson Munikah vs. Webunde Estates Limited, Civil Appeal No. 126 of 2005**. Counsel submitted that it is only the Board of Directors of a company or the majority shareholders who can appoint an advocate; that in the instant case, the appellant company had allotted 127 shares with Mr. Simon Kimani having 100 shares and Ms. Bibiana Nyawira and Mathew Mungai who purported to appoint Mr. Muthuri & Co. Advocates having one share each. It was urged that Ms. Bibiana Nyawira being minority shareholders had no capacity in law to appoint an advocate to represent the appellant company. In support thereof, the appellant cited the cases of **Marshalls Valve Gear Co. Limited Manning Wardle & Co. Limited (1909) 1 Ch 267** and **Canvas Manufacturers Limited vs. S. J. Silcock Nairobi HCCC No. 721 of 1994**.

(23) In further support of the contestation that the consent order was procured through fraud, the appellant relied on the affidavit deposed by **Mr. Simon Kimani** (deceased) that the 2nd respondent had sent emissaries with a corrupt offer to settle the matter out of court and which offer was declined; that the only inference to be drawn is that the consent order was procured by fraud.

(24) The appellant cited various authorities to support the settled legal principle that a consent obtained by fraud cannot be enforced. (See **Okoyona vs. Musi (1987) KLR 103** and **Mapis Investment (K) Limited vs. Kenya Railways Corporation, Civil Appeal No. 14 of 2005**).

(25) In conclusion, the appellant submitted that the judge erred in finding that for an application for review to succeed, there must be discovery of new important matter or evidence which was not within the knowledge of the appellant; that in the instant appeal, the judge erred because review of a consent order is governed by a different set of principles; the judge erred in relying on the affidavit of Bibiana Nyawira when the Chief Magistrate's Court made a finding after cross-examination that Ms Bibiana's testimony did not prove forgery of the appellant company annual returns.

1st and 2nd RESPONDENTS' SUBMISSIONS

(26) The 1st and 2nd respondents filed joint submissions opposing the appeal. Counsel recounted the historical background to formation and existence of the three different Kuwinda entities. It was urged that whereas the appellant submitted it had entered into an agreement to purchase the suit properties, no letter of offer, contract or sale agreement is on record to prove any sale agreement between the appellant company and the 3rd respondent; that what was in existence was a letter of offer dated 23rd February 1985 to Kuwinda Rurinja Company which was a partnership; that the partnership was not able to meet the terms of the offer and no sale agreement was signed with the 3rd respondent as the vendor; it was urged that the appellant in its plaint dated 13th December 1988 sought specific performance of the letter of offer dated 23rd February 1985; and that a letter of offer can never form the basis for specific performance of a contract.

(27) Submitting on the validity of the consent order recorded on 2nd October 1996; counsel opined that the judge made a correct finding that the returns filed by Mr. Simon Kimani were fraudulently filed; the judge correctly held that Ms Bibiana Nyawira had authority to appoint the firm of Muthuri & Co. Advocates; the findings of the Chief Magistrate's court cannot override the findings of the High Court; the Magistrate's court duty was to deal with the criminal aspects of the charges preferred and not the civil questions of the complaint; the learned judge evaluated the evidence on record from a civil perspective not a criminal angle; the judge did not err in finding the consent dated 2nd October 1996 was valid.

(28) Counsel for the respondents submitted that the principles for setting aside a consent judgment are well settled and none of the elements for setting aside a consent had been demonstrated in this appeal; that it was not for the 1st and 2nd respondents to interrogate the appointment of an advocate by another party before recording the consent; that a notice of change of advocate was filed by Muthuri & Co. Advocates and he was present in court when the consent was recorded; and that the consent order was not illegal nor was it for any unlawful purposes.

(29) Senior Counsel Prof. Githu Muigai in opposing the appeal submitted that the issue in this appeal is between the Directors of a company and shareholders, who have authority to appoint an advocate to represent the company. He further submitted that the fundamental issue is whether advocates who negotiated and made the consent had authority to do so; and finally that this Court should determine the legal effect of the judgment of the Chief Magistrate's court which acquitted Mr. Simon Kimani on the charge of false annual returns for the appellant company. It was submitted the appellants reliance on the ruling by the magistrate's court was a red herring; the trial magistrate did not make any findings on the validity of the annual returns of the appellant company; the magistrate in his ruling repeatedly stated he was not conducting an inquiry into the issue of validity of the annual returns; and the learned judge did not err in relying on the affidavit of Ms Bibiana Nyawira because the appellant never replied to the averments of fact in said affidavit.

3rd RESPONDENT'S SUBMISSIONS

(30) The 3rd respondent in its written submissions supported the appeal. Learned counsel repeated the background facts to the dispute in this matter. Counsel submitted that the 3rd respondent was invited to bid for sale of the suit properties; the 1st bidder was Kuwinda Rurinja Company (appellant) and the 2nd bidder was Mr. Collin Davies and Kuwinda Holdings Limited amongst others; that the appellant through Mr. Simon Kimani approached several banks seeking finance for purchase of the suit properties without success. Kuwinda Rurinja Co. Limited then placed a caveat on the suit properties on 8th December 1988.

(31) Being unable to complete the transaction, the 3rd respondent advertised the properties for sale for the second time on 17th and 19th December 1986. Subsequently, various factions arose within Ndumberi Farmers Co. Limited (In Liquidation). Factions also arose in Kuwinda Rurinja Co. Limited leading to quarrels and disputes over the suit properties which continue to date; one faction of the Eight (8) Liquidators of the 3rd respondent entered into a Sale Agreement dated 31st October 1988 with the 1st and 2nd respondent.

(32) In its submissions in this appeal, the 3rd respondent disowned the letter of offer made to Kuwinda Rurinja Company (the partnership) in 1985 as well as the Sale Agreement dated 31st October 1988 with the 1st and 2nd respondents. Counsel submitted that the sale agreement was not witnessed by a lawyer, it has no seal or stamp duty by the 3rd respondent; the stamp of an unnamed District Commissioner of Kiambu appears and one wonders in what capacity the District Commissioner signed the agreement; that due to this state of affairs, the sale agreement dated 31st October 1988 with the 1st and 2nd respondent was cancelled by six of the eight liquidators of the 3rd respondent.

(33) On the issue of legal representation and consent recorded on 2nd October 1996, the 3rd respondent submitted that its own lawyer on record, Ms. Kaai Mugambi advocate had no authority to negotiate and enter into the consent; that the advocate for the appellant Mr. Muthuri & Co. Advocates was also not properly appointed by the shareholders of the appellant company. Counsel submitted that due to the defect in the manner of appointment of the said two advocates, the consent they recorded on 2nd October 1996 is null and void.

(34) Counsel for the 3rd respondent concluded submissions by urging this Court to look into the myriad legal mishaps in the entire transaction that has led to the present dispute for over three decades.

REPLYING SUBMISSIONS

(35) Senior Counsel Prof. Muigai in reply to the 3rd respondents submission voiced dismay that for over 30 years in litigation, the 3rd respondent being the vendor of the suit properties had neither challenged nor questioned the legality of the Sale Agreement dated 31st October 1988 between the 1st and 2nd respondent and the 3rd respondent; that it was baffling at this eleventh and three-quarter hour for the 3rd respondent to challenge the Sale Agreement by way of written submissions. Senior Counsel urged us to find the written submissions by the 3rd respondent as nothing but evidence from the Bar. Further, counsel submitted that the 3rd respondent has never challenged the consent entered into on 2nd October 1996. No appeal against the consent has ever been filed by the 3rd respondent; that was bewildering that after 30 years of litigation for the 3rd respondent to now disown its own lawyer Messrs Kaai Mugambi who negotiated and signed the consent order on its behalf.

(36) Senior Counsel Dr. Kamau Kuria urged us to ignore submissions by Prof. Muigai who was urging his client's case rather than relying on the evidence on record; that the findings of the criminal judgment by Chief Magistrate has never been appealed against; that the Magistrate's court rejected the evidence of Ms Bibiana Nyawira upon cross-examination; that the findings by the trial magistrate on the validity of the appellant company's annual returns cannot be questioned.

ANALYSIS

(37) We have considered the grounds of appeal as well as submission by all counsel and the authorities filed in the matter. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle vs. Associated Motor Boat Co. [1968] EA 123**, it was expressed 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(“

(38) The fulcrum of this appeal is whether the learned judge erred in law and fact in declining to review and set aside the consent order recorded on 2nd October 1996. Posited in question format, is there sufficient evidence on record establishing grounds for setting aside the consent order?

(39) In this matter, the first issue we consider is the 3rd respondent's submission that its own advocate, Messrs. Kaai Mugambi & Co. Advocate, who signed the consent had no authority to enter into the consent recorded on 2nd October 1996. The 3rd respondent submitted Messrs. Kaai Mugambi Advocate had no authority to enter into the consent because he acted on the strength of a letter dated 23rd September 1996 written by only One (1) liquidator instead of a majority of the eight (8) liquidators of the 3rd respondent company. It was urged that the 3rd respondent had a total of eight liquidators who must act either unanimously or by majority; and that in the instant case, one liquidator could not lawfully appoint the firm of Messrs Kaai Mugambi & Co. Advocates.

(40) We have considered the 3rd respondent's submission on want of authorization on the part of Messrs Kaai Mugambi & Co. Advocates. For the first time in 30 years since litigation started in this matter, the 3rd respondent is questioning the legal authority of its own advocate who has been representing it, and who negotiated and signed the consent order. There is no allegation of fraud or coercion on the part of Messrs Kaai Mugambi & Co. Advocates. The 3rd respondent's contestation on lack of authority on Messrs Kaai Mugambi has been raised by way of written submissions; no affidavit evidence or application to set aside the impugned consent has ever been filed by the 3rd respondent.

(41) It is clear beyond doubt that Messrs Kai Mugambi & Co. Advocates was on record for the 3rd respondent. That is not in dispute. The suggestion that comes to our mind is whether in signing the consent, he acted on the instruction and authority of client. Clearly the letter dated 23rd September, 96 emanated from the 3rd respondent. The question of whether the said letter was signed by one or more persons is an internal mechanism, which cannot be visited or blamed upon the advocate or parties who genuinely and with good faith relied and benefited from the consequences of the consent whether the content is questioned or what part of the consent is in violation of the rights and interests

of the parties. And more importantly whether on signing the consent, the said advocates offended the relationship between Client/Advocate, whether this was a departure from the intention of the parties.

(42) The learned judge in his ruling dated 5th December 1997 expressed that he also had before him the evidence of Mr. Kaai Advocate who acted for the 3rd respondent in both cases. At no time did the 3rd respondent question the authority of its advocate to enter into the consent order made on 2nd October 1996. It is trite that submissions by counsel is not evidence. In **Geoffrey M. Asanyo & 3 others vs. Attorney General** [2018] eKLR, the Supreme Court further expressed:

“[98] In the matter before us, we thus note that neither before this Court nor any of the Superior Courts, was it argued or alleged that the Consent as filed by parties was entered into through coercion, misrepresentation and/or fraud. In essence, the elements/principles for setting aside such a consent were never alleged and/or proved. As a matter of fact, the validity of the consent has never been the issue in these proceedings.”

(43) Taking into account that the 3rd respondent has never questioned the authority of its advocate Messrs Kaai Mugambi over the years and that such challenge has been raised by way of written submission and not by evidence, it is our considered view that the contestation by the 3rd respondent that the consent recorded on 2nd October 1996 is a nullity for want of authority on the part of its own advocate has no merit. Our finding on this issue is reinforced by the fact that the 3rd respondent has never applied nor appealed against the consent order of 2nd October 1996. It does not assist the 3rd respondent to urge that since the appellant had applied to review and set aside the said consent there was no need on its part to do the same. Each party has its own separate and distinct grounds to challenge the consent by way of an appeal and failure by the 3rd respondent to challenge the consent means it is bound by the consent order recorded on 2nd October 1996.

(44) Guided by the decision of this Court in *Nguruman Limited vs. Shompole Group Ranch & Another* (supra), and bound by the Supreme Court dicta in *Mawathe Julius Musili vs. Irshadali Sumra & others* (supra), we find that the failure by the 3rd respondent to appeal against the consent order entered on 2nd October 1996 means that this Court lack jurisdiction to re-open, review and re-consider the issue of validity of the consent on any ground urged by the 3rd respondent.

(45) We now consider the pertinent legal principles on setting aside a consent order and then determine if the learned judge erred in evaluating the evidence before him in declining to review and set aside the consent of 2nd October 1996. In the seminal case of **Flora N. Wasike vs Destimo 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."

(46) 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."

(47) In the case of **Contractors Ltd vs. Margaret Oparanya** [2004] eKLR, stating thus:

"This court has qualified or conditional discretion when it comes to interfering with consent Judgments or orders. Moreover, where the consent order or Judgment is still executory, the court may refuse to enforce it if it would be inequitable to do so. The mode of paying the debt, then is part of the consent Judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

(48) With the foregoing principles in mind, it is now opportune for us to determine if the learned judge correctly evaluated the evidence on record to determine if any ground for setting aside a consent order had been established.

(49) The appellant contends that there is evidence on record to prove the consent order recorded on 2nd October 1996 was obtained fraudulently. Several items of evidence on record were referred to in support of the submission that the learned judge erred in failing to find the consent order as recorded was nullity and should be set aside. The items of evidence referred to by the appellant include:

a) *Messrs Muthuri & Co. Advocates had no authority from the majority shareholder of the appellant company (Mr. Simon Kimani) to negotiate and enter into the consent recorded on 2nd October 1996.*

b) *The annual returns filed at the Company Registry show that Ms Bibiana Nyawira who appointed the firm of Muthuri & Co. Advocates was no longer a director of the appellant company and hence the said firm of Muthuri & Co. Advocates had no legal authority to enter into the consent order recorded on 2nd October 1996.*

c) *The judgment of the trial magistrate confirmed the validity of the annual returns filed at the Company Registry.*

d) *The judge erred in failing to find that the consent order was procured by bribery as per the testimony of Mr. Stanley Njuguna Mwangi that Mr. Simon Kimani was bribed to procure the consent.*

e) *The judge erred and overlooked the provisions of Section 384 (3) of the Companies Act which make prima facie evidence contents of returns of companies and the judge misunderstood the evidence of company returns and drew impermissible inferences from the said returns.*

(50) We have examined the evidence on record and perused the judgment by the Chief Magistrate delivered in **Criminal Case No. 1193 of 1997 R vs. Simon Kimani Karanja & 2 others**. In the judgment, the learned Chief Magistrate expressed as follows:

“It is obvious the company has a dispute over the land ownership. From the evidence gathered it comes out that the company bought 2 ½ ares of land from a company known as Ndumberi. Ndumberi had 25 acres of land out of which 2 ½ acres were bought by Kuwinda. Ownership of Ndumberi of 25 acres of land changed hands but the new owners agreed to give Kuwinda 2 ½ arces. That fact is not disputed.

From the evidence the case has a lot of civil case characteristics and one needs to be careful not to get lost or carried away by the characteristics. This court will keep focused on the criminal case before it.....

In trying to put this case forward, the prosecution must have been carried away by the issues touching on civil aspects of this company and lost sight of the criminal aspect.....

It is my finding that there are some doubt reasonably raised that the removal of PW 3 (Ms Bibiana Nyawira) was not properly carried out.....”

(51) We have evaluated the evidence on record and contrasted the same with the findings in the judgment of the Chief Magistrate. It is manifest that the magistrate focused on the criminal aspects of the charge facing the accused persons. The civil dispute on ownership of the suit properties was not in issue before the trial magistrate. A critical finding by the magistrate is the doubt raised as to whether Ms Bibiana Nyawira had properly been removed as director of the appellant company. It is this doubt that lingers on and is now a ground for setting aside the consent order recorded on 2nd December 1996. In any case we are not bound by the decision of a lower court.

(52) On the issue of lack of authority on the part of Muthuri & Co. Advocates, we are persuaded by comparative dicta from other countries. The Supreme Court of South Africa in **Stand 242 Hendrik Potgieter Road Ruimsig Pty v. GÖbel (No.246/10) [2011] ZASCA105 (June 2011)** rendered itself thus:

“The rule, in essence, is that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities.”

(53) In **Mohoney v. East Holyford Mining Co [1875] L.R. 7 HL 869 Lord Hatherly** stated –

“when there are persons conducting affairs of a company in a manner which appears to be perfectly consonant with the articles of association, then those dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company.”

(54) Persuaded by the merits of the comparative dicta, we are of the view that the appellant has not demonstrated to our satisfaction that the trial judge erred in finding Ms Bibiana Nyawira had authority to appoint and instruct the firm of Muthuri & Co. Advocates.

(55) We now consider the issue of whether the firm of Muthuri & Co. Advocates had authority to represent the appellant company and the surrounding circumstances under which the consent of 2nd October 1996 was negotiated and agreed upon. It is the appellant’s contention the said firm had no authority. The learned judge in arriving at his decision on this issue relied on the affidavit deposed by Mr. Stephen Kaai Advocate dated 15th July 1997.

The said Stephen Kaai Advocate was counsel for the 3rd respondent who negotiated and signed the consent. We have examined this affidavit which in relevant excerpts it is deposed that:

“a) That on 23rd September 1996, the firm of Mugambi Kaai Advocates received written instructions from the 3rd respondent to pursue negotiations for an out of court settlement.

b) That thereafter negotiations commenced with all advocates concerned and a settlement in terms of the consent order was reached.

c) *That he believed the letter of instruction to the firm of Mugambi Kaai Advocates was written with the consent of all the Liquidators”*

(56) The learned judge in his judgment expressed himself thus:

“I have also before me the evidence of Mr. Kaai advocate who acted for the defendants in both cases before the countdown to the hearing of the applications approached. I totally accept what Mr. Kaai advocate says about representation of Simon Kimani and the other applicant.”

(57) The appellant faults the learned judge for relying on the affidavit of Stephen Kaai Advocate. In both the oral and written submissions, the appellant has not demonstrated to what extent the judge erred in placing reliance on the said affidavit. What is manifest, is the judge evaluated and weighted the evidence on record and accepted the advocate’s narration on legal representation of the appellant. On our part we see no reason for fault the learned judge’s finding.

(58) In totality, we have considered the grounds of appeal and submissions by counsel. The appellant has failed to demonstrate to our satisfaction any of the grounds for setting aside a consent judgment. The allegation that the consent was procured by fraud remains just that, mere allegations; the contestation that the advocates who signed the consent order had no instructions has not been proved to our satisfaction.

(59) We are convinced that a third party is under no obligation to ensure that the advocate of the opposite party is duly instructed. In this matter, there is evidence on record that the terms of the consent order recorded on 2nd October 1996 have been performed and executed. We see no reason to fault the findings of the learned judge.

(60) Accordingly, we find this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 22nd day of March, 2019

M. WARSAME

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR