IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, MWILU & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 263 of 2009

BETWEEN

M & E. CONSULTING ENGINEERS LIMITED.....APPELLANT

AND

LAKE BASIN

DEVELOPMENT AUTHORITY.....1st RESPONDENT

THE COOPERATIVE BANK.....2nd RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (H.P. G. Waweru J.) dated 17th October 2008

in

HCCC NO. 2098 OF 1993)

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JUDGMENT OF THE COURT

1. This appeal relates to the nature and extent of the authority of an advocate to compromise a suit by way of consent and bind the client. By an amended Plaint dated 19th October, 1993, the appellant lodged a liquated claim for a sum of Kshs. 12,414,675.30 in respect of professional services and reimbursable expenses arising from mechanical and electrical services rendered by the appellant to the 1st respondent. The 1st respondent in its defence denied liability.

2. On 6th March, 1998, the 1st respondent's defence was struck out and judgment entered on the liquidated claim and interest thereon totalling to Kshs.57,507,575/55. A decree was issued. In executing the decree, the appellant took out garnishee proceedings against the 2nd respondent, **The Cooperative Bank of Kenya Limited**. A garnishee order *nisi* was issued on 7th March, 2005 ordering that all debts due, owing or accruing from the Garnishee to the Judgment Debtor be attached in answer to the decree.

3. The 1st and 2nd respondents objected to the garnishee order stating that the claim and suit between the parties had been marked as settled on 2nd April, 2003 by consent of and in the presence of the advocates

for the parties; that by order dated 17th September, 2004, the Deputy Registrar recorded that the judgment debt had been paid in full and nothing was outstanding.

4. The appellant's contention in this appeal is that there was no valid consent entered and recorded by the parties on 2nd April, 2003 marking the suit as settled.

5. Two consents giving rise to the present appeal were recorded in this matter. The first consent was recorded in court on 2nd April, 2003 by counsel for the appellant (decree holder) and counsel for 1st respondent (judgment debtor) in the following terms:

> "*By consent the matter be marked as fully settled. The party and party costs be and are hereby agreed at Ksh. 2 million against the judgment debtor. The same to be liquidated by monthly instalments of Ksh. 50,000/= payable on the 10th day of every month for three months with effect from 10th April 2003. The instalments payable to be reviewed upwards thereafter."*

6. When the first consent was recorded in court on 2nd April, 2003, learned counsel Mr. Nyamogo appeared for the decree holder while learned counsel Mr. Owalla appeared for the judgment debtor. The appearance of both counsel is decisive in this appeal as it is alleged that the consent recorded and entered on 2nd April, 2003 was done fraudulently and without the knowledge and authority of the decree holder and or judgment debtor.

7. The second consent on record is in writing and is dated 13 September, 2006 and was filed on 14th September, 2006; it was executed between the decree holder's advocate and the judgment debtor's advocates requiring payment by the judgment debtor of a sum of Kshs.80 million in satisfaction of the decree. The 2nd respondent being the Garnishee did not negotiate and was not party to this second consent. The appellant attempted to execute the second consent against the 1st and 2nd respondents. The validity of the first and second consents came up for consideration and determination before the High Court; the court (H.P.G. Waweru, J.) delivered a ruling dated 17th October, 2008 which is the subject of this appeal.

8. In his ruling, the learned judge ordered that the 2nd consent dated 13th September, 2006 and entered as an order of the court on 14th September, 2006 be set aside; that the 1st consent order recorded on 2nd April, 2003 be restored; that the garnishee proceedings including the garnishee order issued on 18th April, 2005 and the garnishee order absolute granted by consent entered on 14th September, 2006 be struck out and set aside.

9. In restoring the consent order of 2nd April, 2003 and striking out the consent dated 13th September, 2006, the learned judge expressed himself as hereunder:

> ***"I therefore find, in light of the clear record of the court, that indeed the decretal sum was compromised and settled as recorded by consent on 2nd April 2003 save for costs which were settled subsequently....What is without doubt, however, is that long after the compromise, which had been negotiated in the year 1999, the consent order of 2nd April 2003 was recorded marking the matter as fully settled except for costs of the suit agreed at Kshs.2 million. All available evidence points to the fact that the compromise between the decree holder and the judgment debtor was acted upon by the latter; it paid the compromised decretal sum way back in 1999. The decree holder cannot claim it rescinded a contract that had already been performed by one party."***

10. As regards the validity of the 2nd consent dated 13th and filed on 14th September, 2006, the learned judge held that this 2nd consent could not lawfully be entered because the decretal sum had been compromised and settled; that the 2nd consent was fraudulent and entered without the authority of the judgment debtor. The court expressed itself as follows:

"The effect of the consent order of 13th September, 2006 was to revive a debt that had been extinguished by compromise...The compromised decretal sum having been settled in 1999, some six years before, the decree was long settled and that fact was recorded in the consent order of 2nd April 2003. It matters not that some officer or officers of the Judgment Debtor acknowledged the alleged further indebtedness upon the decree. It matters not that at some point the Board of directors of the Judgment Debtor may have acknowledged the alleged further indebtedness. The officers of the Judgment Debtor were clearly acting either in ignorance or in collusion with the decree holder....or in furtherance of a fraud."

11. Aggrieved by the ruling of the High Court, the appellant has lodged the present appeal citing several grounds which can be compressed as follows:

"(i) That the learned judge erred by failing to deal with and dispose of the controversial and valid issue whether the judgment debtor was lawfully and competently represented by M/s Ombonya & Co. Advocates or by Mr. Owalla Advocate and thereby prejudiced himself on the question as to the validity or otherwise of the consent recorded on 2nd April 2003.

ii. *The learned judge erred by concluding that the decree had been settled and extinguished by the consent recorded on 2nd April, 2003 notwithstanding pendency before the court of a notice of motion dated 28th September 2005 seeking to set aside or vary the consent.*

iii. *The learned judge erred when he failed to require parties to avail the precise terms of the contested compromise for purposes of assisting the court to arrive at a just, fair and fully informed decision.*

iv. *The learned judge erred and misdirected himself in his finding that the Honourable Deputy Registrar's order of 10th December, 2004 was that the decree had been fully paid notwithstanding the absence of such an order on record.*

v. *The learned judge erred and prejudiced the appellant by attaching premium to the letter dated 16th August 2005 by Nyamogo & Nyamogo Advocates to Wangalwa Oundo & Co. Advocates by treating the letter as communication of decree holder's instruction to it's advocates notwithstanding that the letter was not in evidence before the trial court by affidavit or otherwise."*

12. At the hearing of this appeal, learned counsel Mr. Wangalwa Oundo appeared for the appellant while learned counsel Mr. Kiche holding brief for Mr. Ohaga appeared for the respondents.

13. Counsel for the appellant submitted that the core issue in this appeal is whether the first consent recorded on 2nd April, 2003 was a valid consent or whether it is the second consent that was valid; the other interrelated issue is whether the judgment and decretal sum had been compromised and marked as settled by the first consent recorded on 2nd April, 2003.

14. The appellant submitted that the consent recorded on 2nd April, 2003 was not valid because it was entered into by learned counsel Mr. Owalla who was not the advocate on record for the decree holder; that an advocate who is not on record cannot purport to act for and bind a party; that the said Mr. Owalla had no express authority to enter into the consent on behalf of the decree holder; that the judge erred in holding that a consent order made by an advocate who is not on record can bind a party; the judge erred in not making a specific finding on fraud when fraud had been raised; the judge erred in failing to find that the 1st consent had properly been set aside by the 2nd consent. Counsel submitted that the valid consent was the 2nd consent dated 13th September, 2006 and filed on 14th September, 2006; that the first consent having been entered into by an advocate not on record, the said consent could not bind the decree holder and it had properly been set aside by the second consent.

15. Counsel for the respondents in opposing the appeal urged this Court to find that the first consent recorded on 2nd April, 2003 was valid and it compromised the judgment and decretal sum; that the consent was properly recorded not only in the presence of the advocates of the parties but it was done in court; that Mr. Owalla Advocate was properly on record appearing for the judgment debtor; that the compromised sum was duly paid to the decree holder and the negotiations for compromise were concluded by the parties way back in 1999. Counsel referred this Court to two letters on record dated 25th June, 1999 and 29th June, 1999 from the appellant addressed to the Permanent Secretary of the Ministry of Rural Development relating to the indebtedness of the 1st respondent indicating that the judgment/decretal sum had been compromised and settled in full. The relevant excerpts of the letter dated 25th June, 1999 indicate that the appellant accepted the reduced figure of Kshs.23,929,039/= as the final amount of claim for the work done; in the letter dated 29th June, 1999, the appellant acknowledges receipt of the sum of Kshs.23,929,039/= and re-affirmed that it has no further claim and that it had instructed its lawyers to register the agreement in court. The two letters are copied to the 1st respondent. It is useful to indicate that this compromised sum was paid directly by the Ministry to the appellant in 1999 and this fact is not disputed.

16. We have considered the grounds of appeal and submissions by both counsel. This is a first appeal and we are obliged to re-evaluate the evidence on record and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123);** see also **(Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270)**.

17. At the centre of this appeal is validity of the first and second consents recorded in the matter. It is the appellant's contention that the first consent recorded on 2nd April, 2003 was not valid as it was recorded by Mr. Owalla advocate who was not the advocate on record for the judgment debtor and had no authority to bind the 1st respondent.

18. The 1st respondent as the judgment debtor is not questioning the legal authority of Mr. Owalla Advocate who represented it in court on 2nd April, 2003 when the consent was recorded; it is astounding and probing that it is the appellant decree holder questioning the legal authority of Mr. Owalla Advocate to represent the judgment debtor. Drawing analogy from principal agent relationship, Mr. Owalla Advocate was the agent of the 1st respondent who was and is a disclosed principal. If a disclosed principal does not question the express or ostensible authority of the agent, and the disclosed principal accepts or ratifies the acts of the agent, can a third party question the agent's authority? The answer is in the negative. Guided by this analogy, we are satisfied that Mr. Owalla had express and ostensible authority to act for and bind the 1st respondent on 2nd April, 2003 when he appeared in court and recorded the consent order marking the matter settled. It is also interesting to note that the appellant is not challenging the authority of its then advocate Mr. Nyamogo who was present in court when the consent was recorded on 2nd April, 2003. Our re-evaluation of the record of the proceedings in court on 2nd April, 2003 leads us to conclude that both parties were represented by advocates who had authority to act for and on behalf of their respective clients.

19. We re-affirm the *dicta* in the High Court case of **Kenya Commercial Bank Ltd. -v-Specialised Engineering Company Ltd., 1982 KLR 485** as was upheld by this Court in **Civil Appeal No. 43 of 1980** thereof where it was stated as follows:

> *"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 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.*

3. *An advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.*

4. *The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes he would not have given his consent had he known these facts.*

5. *The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds."*

20. Bearing in mind the decision in ***Kenya Commercial Bank Ltd. (supra)*** have examined and re-evaluated the evidence on record in light of the grounds of appeal as stated in the memorandum. The record is explicit that on 2nd April, 2003, the judgment debtor and decree holder were represented by advocates; learned counsel Mr. Nyamogo for the appellant decree holder and learned counsel Mr. Owalla for the 1st respondent judgment debtor were present in court; there is no evidence on record that the advocates did not understand what they were doing particularly the fact that they were recording consent marking the matter as settled. On this day, the two advocates recorded a consent that the matter be marked as fully settled save for costs for counsel for the appellant which costs were agreed at Kshs.2 million to be paid by instalments. There is nothing on record to show that there was any limitation on the authority of the two advocates or that they had no authority to compromise the judgment sum and mark the matter settled. In addition, the record shows that Mr. Owalla advocate appeared in court more than once representing the 1st respondent; for instance on 4th February, 2003; 13th February, 2003; 13th March, 2003 and 2nd April, 2003. In all these dates, learned counsel Mr. Nyamogo was present for the appellant and there was no objection to Mr. Owalla's representation of the 1st respondent. We affirm the dicta that a duly instructed advocate has an implied general authority to compromise and settle a suit 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.

21. The appellant further submitted that the consent recorded on 2nd April, 2003 was obtained by fraud; it is not indicated who was fraudulent - was the appellant's advocate Mr. Nyamogo fraudulent or was Mr. Owalla Advocate for the judgment debtor fraudulent? If the alleged frauds were to be true, how come the parties had directly been in communication vide the two letters dated 25th June, 1999 and 29th June, 1999 indicating that the judgment/decretal sum had been compromised and settled in full? We are convinced that the two aforementioned letters by the appellant are corroborative and confirm that indeed there were negotiations and compromise of the judgment/decretal sum by the parties themselves; all that the advocates were required to do was to record in court that the matter had been settled; our view is fortified by the fact that the compromise sum was paid to the appellant after the negotiations in 1999.

22. A pertinent legal issue considered by the learned judge is whether the judgment sum had been lawfully compromised by the consent recorded on 2nd April, 2003 and whether the appellant could lawfully enter into the second consent on13th September, 2006 to set aside the consent of 2nd April, 2003 and revive the original judgment/decretal sum. We concur with the finding of the learned judge that the consent entered into on 2nd April, 2003 was lawful and binding on the parties. It is our concurring view that the judgment sum having been compromised and the compromised decretal sum having been paid, there was nothing to revive or set aside. In this regard, we are reminded of the principle of estoppel by record or estoppel by judgment. The appellant is estopped by the consent recorded on 2nd April, 2003 from claiming the original judgment sum which was compromised. We concur with the learned judge's finding that the second consent dated 13th September, 2006 was a nullity and could not revive a judgment/decretal sum that had been marked as settled.

23. The appellant further contends that the learned judge erred in not making a specific finding on fraud. We disagree. The learned judge was specific that if there was any fraud, it was on the part of an officer or officers of the 1st respondent and or it's Board of Directors. We believe it is not the appellant's contention that it required the trial judge to make a specific finding whether the two advocates who recorded the first and second consents were fraudulent. If this were so, then it is our finding that the advocates' who recorded the first consent on 2nd April, 2003 were not fraudulent. On the issue of fraud, the trial judge expressed himself as follows:

> ***"The officers of the Judgment Debtor were clearly acting either in ignorance or in collusion with the decree holder. They must have advised the Board of Directors to acknowledge the alleged further indebtedness either in ignorance or in furtherance of a fraud. The intention here appears to be all too clear; it was to illegally obtain funds from a public body that had now come into substantial funds from the Government. Upon the affidavit evidence placed before the court, I find that the judgment debtor never gave its authority for the consent order of 13th September 2006 to be entered. And even if it had given such authority, the same would have been unlawful as in fact in law, there was no longer any decretal sum due and payable by itself. I therefore find that the consent order dated 13th September 2006 was not lawfully entered as the decretal sum had long been compromised and settled. The consent order was fraudulent and unlawful."***

24. The appellant in challenging the validity of the consent recorded on 2nd April, 2003 submitted that the consent relates to settlement of fees and costs of the appellant's advocate and not settlement of the judgment and decretal amount. At risk of repetition, the recorded consent is that "*By consent the matter be marked as fully settled. The party and party costs be and are hereby agreed at Kshs.2 million against the judgment debtor.*

The same to be liquidated by monthly instalments....." We have pondered and asked ourselves the questions how do you consent on costs when a matter has not been fully finalized and concluded? Why should the 1st respondent consent to pay party and party costs and pay the advocate of the appellant if the dispute between the parties has not been fully settled? There is only one irresistible inference to be drawn from this and that is that the dispute between the parties had been fully settled as per the consent. If the consent were to relate to the appellant's advocate's fees and costs, this would have been an issue between the appellant and its advocate as advocate client costs, the 1st respondent would not have been party to such consent and it would not have been required to pay the same. This inference reinforces our view that the judgment and decretal sum and the suit between the parties had been compromised.

25. Finally, the appellant urged us to find that the learned judge erred when he failed to require parties to avail the precise terms of the contested compromise for purposes of assisting the court to arrive at a just, fair and fully informed decision. We beg to differ. The learned judge did not err. The issue before the trial court was the validity of the consent recorded on 2nd April, 2003. The record of proceedings before court on 2nd April, 2003 is explicit and in writing; a judge cannot receive additional evidence to add to, explain, vary or subtract the contents of the record of proceedings of the court.

26. In conclusion, we have considered all the other grounds of appeal raised by the appellant and find they have no merit. We affirm the Ruling of the High Court dated 17th October, 2008. This appeal has no merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 16th day of October, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR