



**Mayaka v Omaera Pharmaceuticals Limited (Cause 2176 of 2016)
[2023] KEELRC 305 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 305 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2176 OF 2016
K OCHARO, J
FEBRUARY 9, 2023**

BETWEEN

RIANG'A HESBORN MAYAKA CLAIMANT

AND

OMAERA PHARMACEUTICALS LIMITED RESPONDENT

RULING

1. The application before this court by the claimant/applicant dated the December 23, 2021 expressed to be brought pursuant to the provisions of section 3 and 3 (a) and 63(e) of the *Civil Procedure Act* and order 9 rule 9 of the *Civil Procedure Rules* 2010, seeks orders:
 - a. That this Application be certified urgent and heard ex-parte in the first instance.
 - b. That the firm of Orengo & Co. Advocates be granted leave to come on record to act for the Applicant/judgment creditor in this matter in the place of Philip Henry Associates and enable them make urgent application on behalf of the Applicant in terms of setting aside consent judgment.
 - c. That this Honourable court be pleased to set aside or vary consent judgment entered on the December 15, 2021 to incorporate the entire scope of claim as pleaded and the matter to proceed to full trial.
 - d. That the Cost of this Application be in the cause.
2. The Application is anchored on the grounds obtaining on the face of the Application and those brought out in the supporting affidavit sworn by the Claimant, Rianga Hesborn Mayaka on the December 23, 2021.



The Claimant's Application.

3. The Claimant/Applicant contended that the consent judgment for a sum of Ksh 339,640 entered on the 15th December, 2021 by the firm of Philip Henry Associates was without the instruction of the Applicant herein.
4. The Claimant/Applicant avers that on the 3rd December, 2021 his advocate on record then, briefed him of the offer/proposal from the Respondent, for a compromise of the matter herein in the said sum of Ksh 339, 640. In response, he wrote an email dated the 6th December, 2021 rejecting the offer from the Respondent and instructed the Advocate to proceed with the matter to full trial.
5. The Applicant contended that on the 15th December, 2021 contrary to the agreement between him and his Advocate on record, the Advocate entered into a consent with the Respondent and the same was adopted as consent judgment of the court.
6. The Claimant/Applicant avers that on the 18th December 2021, he wrote an email to his then Advocate on record with a new offer/Proposal of Kshs. 644,666 and with instructions to allow the matter proceed to full trial if the said new proposal of Kshs. 644,666 was not appealing to the Respondent. He had been informed that the matter was to be mentioned on the 31st December 2021.
7. That on the 20th December,2021 his then Advocate on record wrote him an email informing him that on the 15th December 2021, a consent was recorded by the parties in court and that he was required to report to their offices to sign an acknowledgement of the consent, he declined.
8. The Claimant/Applicant avers that on the same day he visited his then Advocate's office, and expressed his disapproval of the consent. This didn't seat well with the Advocate. He became hostile. The Claimant has since reported the matter to the Law Society of Kenya for appropriate action.
9. The Claimant argues that his Advocate's mistakes ought not be visited on him.
10. The Respondent did not file any replying affidavit or grounds of opposition to the Applicant's application dated the 23rd December 2021. The application was canvassed by way of written submissions pursuant to the directions of this Court.

The Claimant's submissions

11. The Claimant's counsel only distilled one issue for determination, thus;

(i) Whether there are valid grounds to justify the setting aside of the consent as adopted by the court.

12. Counsel submitted that the consent herein entered by his predecessor was contrary to the Claimant's instructions. His email dated 18th December 2021, speaks to his disapproval of the consent and indication that it was without his instructions.
13. The evidence on record clearly elucidated and augments the Claimant's position that the consent on record was recorded fraudulently. That the then Advocate on record misrepresented to the Respondent and to the Honourable court that the Claimant was amenable to the terms of the consent. The Counsel further submitted that the then Advocate on record concealed the fact that he had already recorded the consent and continued to engage the Claimant while coercing him to accept the consent.



14. The Counsel for the Claimant relied on the following cases wherein the principles for setting aside consent judgment, were put forth. In the case of *James Muchori Maina vs Kenya Power & Lighting Company Ltd* (2005) eKLR the court, citing with approval the case of Flora Wasike observed as follows:

“Consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd. – Nairobi Civil Appeal No. 276 of 1997, wherein the Court of Appeal applied the reasoning in the case of Flora Wasike –vs- Destimo Wamboke (1988) 1 KAR 625 at page 626 where Hancox JA. (as he then was) 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”.

15. Similarly in *John Waruinge Kamau vs Phoenix Aviation Limited* (2015) eKLR the court considered the circumstances for setting aside the consent judgment and 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 ...”

16. Lastly the Counsel for the Claimant relied on the case of *M & E. Consulting Engineers Limited vs Lake Basin Development Authority & Another* (2015) eKLR where the court of Appeal stated as follows;

‘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.”

17. It was submitted that the consent on record was contrary to the express instructions of the claimant, there was a clear misrepresentation of material facts by the then advocate on record, attempted coercion and concealment of material fact by the advocate. The consent was vitiated by fraud, misrepresentation of material facts and the same was contrary to public policy and natural justice, and that the claimant had met the threshold of setting aside the consent judgment.

The Respondent’s submissions.

18. The Respondent’s counsel submitted that the Claimant could not absolve himself of the binding nature of the judgment, especially when the same was arrived at consensually between the parties. The Respondent in fortification of his submission relied on the case of *M & E Consulting Engineers Limited vs Lake Basin Development Authority* (2015)eKLR where the court observed;

“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.

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.”

19. Counsel submitted that there were a series of out of court discussions with the Claimant prior to the compromise of this cause on the 15th December 2021. The Respondent acceded to the Claimant’s proposal for payment and parties consensually appeared before this court on even date to record a consent judgment in the following terms;

- i. In full settlement of the Claimant’s terminal dues, the Respondent shall pay the Claimant the sum of Kshs. Two Hundred and Fifty-Seven Thousand and Six Hundred Shillings. (257,6000)
- ii. In final settlement of the costs of this cause, the Respondent shall pay the Claimant the sum of Kshs. Eight-Two Thousand and Fort. (82,040)
- iii. The settlement amount in (i) and (ii) above be paid to the claimant by the Respondent on the 31st December 2021 in the final settlement of this cause.
- iv. In default of (iii) above, the Claimant be at liberty to execute.

20. The counsel submitted that the Claimant was solely before the court seeking a second bite of the cherry despite his instructions to compromise the cause, instructions which he sought to withdraw three days after the consent judgment took contractual effect and became binding as an order of the court. In the premises, the application lacks merit and is an abuse of the Court process.



21. It was further submitted that the legal effect of a consent judgment was elaborated by the court in the case of *Wildung vs Sanderson* (1897) 2 CL 534 as cited with the approval in *SNI v. AOF* (2020) eKLR where the court expressed itself in the following terms;

“A consent Judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is of course, enforceable while it stands, and a party affected by it cannot if he concludes, he is entitled to relief, simply wait until it is sought to be enforced against him, and then raised by way of defence. The matters in respect of which he desires to be relieved. He must, when he has completed obey it, unless and until he can get it set aside in proceedings duly constituted for this purpose.”

22. It was further submitted that once acceded to, the law dictates that a party must comply with the terms therein unless he can establish grounds to have the consent judgement set aside. He placed reliance on the case of *Samuel Mbugua Ikumbu vs Barclays Bank Limited* 2015) eKLR cited with approval in *Tanjali Investment & Another vs Nancy Naliaka & Another (suing as the administrator of Estate of the late Peter Ngugi Wanjohi)*(2021)eKLR where the court of Appeal set out parameters that must be proved to set aside a consent judgment. The court observed that;

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated.

These grounds include but are not limited to fraud, collusion, illegality, mistake and agreement being contrary to the policy of the court, absence of sufficient material facts and the ignorance of the material facts.”

23. Counsel submitted that the Claimant’s allegation of fraud was not only a mere afterthought but a gross fabrication of the facts. Reliance was placed on the case of *Moses Parantai & Peris Wanjiku Mukuru (suing as the Legal Representatives of the Estate of Sospeter Mukuru Mbeere (Deceased) vs Stephen Njoroge Macharia*(2020)eKLR where the Court of Appeal held as follows;

“A party need not only plead and particularize fraud, but must also lay basis by way of credible evidence upon which a court would make a finding that indeed there was fraud in the transaction.”

24. In dismissing an application to set aside a consent judgment under similar facts, Counsel for the Respondent relied on the case of *Hirani vs Kassam* (1952),19 EACA 131 Cited with the approval in *Kiplangat Keter vs John Koech* (2021)eKLR where the court categorically observed that;

“Prima facie, any order made in the presence and with the consent of counsel is binding on all the parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court.”

25. Lastly it was submitted that an order to set aside the formal expression of the parties at this juncture will not only be prejudicial to the Respondent but shall set a perilous precedent that shall dilute the binding and legal nature of consensual judgments. He relied on the case of *Wildung vs Sanderson* (1897) 2 CL 534 [supra].



Analysis and Determination

26. Considering the material placed before me, only one broad issue presents itself for determination thus, whether the Claimant/Applicant has made a case for setting aside the consent judgement herein.
27. This matter came up before me on the 28th October, 2021, when the Claimant/Applicant testified on, and closed, his case. The matter then got slated for hearing of the Respondent's case for the 29th November, 2021, when the same didn't proceed at the instance of counsel for the parties on the account that the parties were engaged in an out of court negotiations, and were hopeful that they would reach a compromise. They requested for a mention date after 14 days from the above stated date to enable them finalise the negotiations and record a consent. The matter got fixed for the 15th December, 2021 for purposes of checking on the position of the negotiations and or recording a consent.
28. On the 15th December, 2021, counsel for the parties herein, indicated to the Court that parties had reached an agreement on the settlement of the matter, and consequently they had a consent to record. Counsel Mr. Nyanchoga dictated the terms of the consent to Court, and Counsel Mr. Mugo, the holding brief for Mr. Wambugu, confirmed the terms. The Court adopted the now assailed consent, as judgment of the court.
29. It is now settled law that a consent once recorded by the parties has a contractual effect and cannot just be set aside. A party who seeks to assail the same must be prepared to meet specific conditions if he has to succeed. Shortly hereinafter, I shall turn to the conditions and how they relate to the instant application. That a consent has a contractual effect and binds the parties thereto, I agree with the judicial holding in the case of *Wildung v Sanderson* [1897] 2 CL 534, cited with approval in the case of *SNI v -AOF* [2020] eKLR, thus

“A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is of course, enforceable while it stands, and a party affected by it cannot if he concludes, he is entitled to relief, simply wait until it is sought to be enforced against him, and then raised by way of defence. The matters in respect of which he desires to be relieved. He must, when he has completed obey it, and until he can get it set aside in proceedings duly constituted for this purpose.”

30. From the supporting affidavit filed herein by the Claimant /Applicant, it is not difficult to discern that the out of court negotiations, were carried out with his knowledge and instructions, however, he was not comfortable at all with the settlement amount that was being suggested by the Respondent. This much in my view, was expressed in his email to his former counsel, dated 6th December, 2021, with the subject indicated “Rejection of the offer from Omaera Pharmaceuticals” which read in part;

“Hello as we had shared on Friday 3/12/2021, I reject the offer from Omaera Pharmaceuticals and let the matter proceed in court to finality.

I kindly urge you to consider this advice.

Thanks.”



31. In acknowledgement of the above stated instructions by his Client, the Claimant, the former Counsel in his email dated 6th December 2021 wrote;

“Dear Hesbon

I totally agree with your assessment. We will proceed with the hearing.....”

32. There isn't any material placed before me from which it can be discerned that subsequent to the instructions that were contained in the email hereinabove stated of 6th December 2021, there were further instructions, changing the Claimant's stand as expressed therein, and allowing the former Counsel to proceed and record a consent in certain specific terms or any terms or at all. The instructions contained in the email and which the former counsel acceded to act pursuant to, were in nature express and negative.

33. It has not lost this Court's sight that a consent entered into by a duly instructed counsel, is binding on his client as he has in law an implied general authority to compromise and settle an action on behalf of the client. However, this general position of the law can be qualified in certain situations; where the compromise is contrary to negative instructions by the client; where it was arrived at through fraud or collusion; where it is contrary to policy of the court or where it was given without sufficient material facts or in misrepresentation or ignorance of material facts.

34. In the case of *M&E Consulting Engineers v – Phoenix Aviation Limited* [2015] eKLR, the Court of Appeal stated;

“We re-affirm the dicta in the High Court case of Kenya Commercial Bank Ltd v- Specialized 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 which would enable the court 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 the 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 the express negative direction. In the absence of 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 understood 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.”

35. Having found as I have hereinabove that the email dated 6th December 2021 contained a negative express direction, and that there is no material placed before this court to demonstrate that the Claimant changed the instructions subsequently, I am not persuaded that the principle of ‘general authority of counsel to compromise a suit on behalf of his client’, can be invoked to act against the Claimant’s application herein.
36. I find no difficulty in concluding that the Claimant’s former Counsel didn’t act *bona fide*. I have found considerable difficulties in understanding how Counsel with such express instructions as stated hereinabove would still go ahead and record a consent compromising his client’s claim as did the claimant’s former counsel herein.
37. By reason of the foregoing premises, I find that the Claimant/Applicant has established that the consent herein entered into by his former counsel, is one fit for setting aside. Consequently, the consent judgement that was entered herein on the 15th December 2015, is hereby set aside, with a consequential order that the matter shall proceed to be heard on merit. The hearing of the matter to start from where left.

READ SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2023.

OCHARO KEBIRA

JUDGE

In the presence of

Ms. Omwega holding brief for Orange for the Claimant.

No appearance for the Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

