



Lets Koroga v Sufra Garden Restaurant Limited (Environment and Land Appeal E104 of 2022) [2024] KEELC 7254 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7254 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E104 OF 2022
AA OMOLLO, J
OCTOBER 17, 2024**

BETWEEN

LETS KOROGA APPELLANT

AND

SUFRA GARDEN RESTAURANT LIMITED RESPONDENT

(Being an appeal from the ruling and order of Hon. Gakubi Chege Business Premises Rent Tribunal involving Tribunal Case No. e437 of 2022)

RULING

1. For determination is the notice of motion application dated 27th March 2024 taken out by the Appellant/Applicant under the provisions of Section 1A, 1B and 3B of the Civil Procedure Act and Order 45(1) & (2) of the Civil Procedure Rules. The Applicant is praying for orders;
 - i. Spent
 - ii. That this court does review its orders dated 12th March, 2024 and allow the appeal to proceed on trial.
 - iii. Costs be provided for.
2. The application is premised on the grounds inter alia;
 - a. That on 12th March, 2024, the matter was coming for directions regarding the court's ruling dated 23rd November, 2023 to confirm release of the Applicant's goods and payment its costs.
 - b. The appeal is still pending and raises serious points of law inter alia loss of business damages.
 - c. The Applicant is incurring a loss of Kshs.131,000 per day since the closure of the business and a commercial loan of Kshs.2.8 million at 12% p.a which must be mitigated on appeal.



3. The application is also supported by the affidavit of Kamal Singh Bhullar sworn on 27th March, 2024. The deponent reiterated the facts states on the grounds listed on the face of the motion. He deposes that they shall suffer irreparable loss and special general damages if the appeal is not allowed to proceed.
4. The application is opposed via the replying affidavit of Abdulwahid Qassim Abdo sworn on 11th June, 2024. He deposed that the Appellant is estopped by conduct and the law from bringing this application as on 12th March, 2024, it chose to have the appeal marked settled with no order as to costs. That the Applicant cannot retract from the consent it willingly elected.
5. The Respondent avers that a consent has a contractual effect and can only be set aside on such grounds as would obtain in a contract. A claim for error by the court is not such a ground. That a duly instructed advocate has an implied general authority to consent and settle an action/case. Therefore, stating that counsel that was holding brief was misled is preposterous. Mr. Abdo reiterated that the Applicant has not satisfied the grounds for review and urged this court to dismiss the present application with costs.
6. The Application was prosecuted by way of written submissions. The Appellants'/Applicant's submissions is dated 30th August, 2024. The submissions repealed the facts contained in the application. He highlighted the error that what was coming up on 12th March, 2024 was confirmation that the directions of this court dated 29th November, 2023 had been complied with. That those directions never mentioned withdrawing or settling of the appeal. In support of the application, it cited the case of Hosea Nyandika Mosagwe & 2 Others vs County Government of Nyamira (2022) eKLR.
7. The Respondent filed list of authorities inter alia Paul Kiplangat Keter vs. John Koech (2021) eKLR for the proposition that grounds for variation of a consent judgment are fraud, collusion, illegality, mistake or an agreement which is contrary to public policy. They cited the of Odhiambo Owit & Co. Advocates Vs. Equator Bottlers Ltd (2022) eKLR for the proposition that the obligation of an advocate holding brief is not limited to adjourning a case. Such an advocate should be ready to argue the case. The Respondent also cited the case of Hosea Nyandika Mosagwe and 2 Others Vs County Government of Nyamira (2022) eKLR.
8. The proceedings of 12th March, 2024 which culminate to the present application was as follows;

Akello: Our application is overtaken by events as the appellant visited the premises and removed the items.

Wakasha Were: I confirm the Appellant took away his items from the suit premises. The matter can be marked as settled.

Order:

The application dated 22/11/2023 is marked as compromised with no order as to costs as the Appellant took away his goods. The appeal is also marked as settled with no order as to costs. The court file is marked as closed.
9. The Applicant was represented by Counsel on the said date and it is the Appellant's Counsel who intimated to court that the matter can be marked as settled. This court would have recorded the matter is marked as settled without adding the word "Appeal" and which in my mind makes no difference as to what was settled. Otherwise, the Appellant's counsel would have asked a date for next action of their case.
10. Once an order is recorded, I read it back to the parties. The Appellant has not deposed that the Counsel who represented it that day (12/3/2024) was not aware of the order as recorded marking the appeal as settled. Mr. Wakasha Were advocate who then was holding brief has not sworn an affidavit to explain



what he meant when he stated, “the matter can be marked as settled” to bring out the error on the part of the court.

11. Was there an error marking the matter as settled because the appeal was not fixed for hearing on 12th March, 2024? The law allows parties to withdraw or settle a claim at any stage. For instance, Order 25 of the Civil Procedure Rules allows for withdrawal at any stage which includes moving the court by way of filing a notice of withdrawal or consent even where a case has no count date. The consent/ notice of withdrawal can also be endorsed administratively. In this instance the Appellant’s counsel moved the court to have the matter deemed as settled. There can be no error on the court for merely endorsing such a request.
12. In the case of Hosea Nyandika Mosagwe & 2 Others Supra, Mugo Kamau J. Cited Tokesi Mambili & Others Vs Simon Litsanga which held that;
 - i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
 - ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”
13. I am not persuaded that there is error on the court as alluded to by the Appellant as the appeal was settled by consent of the parties’ advocates present in court on 12th March, 2024. As correctly submitted by counsel for the Respondent, that consent can only be varied on grounds as obtaining setting aside a contract. The application is not brought on those grounds (fraud, illegality et al) and did not submit on them. I will therefore not delve into analysing if the application meets the threshold of setting aside the consent order.
14. In conclusion, I find the application dated 27th March, 2024 to be without merit and dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

A. OMOLLO

JUDGE

