



**Bevaj Furniture Limited v Gulf African Bank Limited (Commercial Case E899 of 2023)
[2025] KEHC 1406 (KLR) (Commercial and Tax) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E899 OF 2023
JWW MONG'ARE, J
FEBRUARY 28, 2025**

BETWEEN

BEVAJ FURNITURE LIMITED PLAINTIFF

AND

GULF AFRICAN BANK LIMITED DEFENDANT

RULING

1. On 4th July 2024 the parties herein after a prolonged period of negotiations appeared before this Honourable Court and applied to have the Court adopt as a judgment and order of this Court the consent order dated 15/5/2023 and have the matter marked as settled by their own agreement. Subsequently, the Court recorded the said consent order and proceeded to mark the file as closed.
2. On 4th October 2024, the Defendant moved this Honourable Court by an application filed under Sections 1A, 1B, 3, 3A and 63 of the Civil Procedure Act and Orders 13 Rule 2 and order 51 of the Civil Procedure Rules seeking the following orders:-
 1. Spent
 2. That the Consent order dated 15th May 2023 and endorsed as the Judgment of the Court on 4th July 2023 be set aside.
 3. Upon such setting aside, judgment be entered for the Defendant against the Plaintiff for the sum of Kshs. 62,074,123.44 together with contractual profits at 14% per annum and default damages at 20% per annum from 4th October 2024 until payment in full.
 4. That costs of this Application be awarded to the Defendant.



3. The Application is supported by the grounds set on its face and the supporting affidavit of LAWI SATO, Senior legal officer of the Defendant, sworn on 4th October 2024. The Application is opposed and the Plaintiff has filed a replying affidavit sworn by ROSELINE WAMBUI MBUGI, a director of the Plaintiff. Both parties have filed written submissions which I have carefully considered.

Analysis And Determination

4. It is the Applicants case that parties entered into the consent of 15/5/20023 pursuant to an agreement that the Plaintiff being indebted to the Defendant and having charged the property on LR Nairobi/Block196/921(Title umber 12672 on LR 7785/951) was to be allowed to sell the property an agreed sum of Kshs. 145,000,000/= and thereafter fully discharge the loan due and owing to the Defendant upon payment of the said funds to the Defendant. The Applicant argues that the Plaintiff misled it to believe that the property was sold at Kshs.145,000,000/= but instead sold the same at a sum of Kshs.215,000,000/= and therefore depriving its of the sum of Kshs.15,311,739/= which it had agreed to waive pursuant to the negotiations therein.
5. The Applicant now urges that the Court to set aside the consent judgment and proceed to enter judgment in its favour for the sum of Kshs. 62,074,123.44/= which it claims it is due and owing to it as a result of the waived profit and default damages. It accuses the Plaintiff of obtaining the said consent through fraud.
6. In its response the Plaintiff denies having acted fraudulently to deceive the Defendant. The Plaintiff maintains that indeed the property was sold for Kshs.145,000,000/= which sum was paid in full to the Defendant and therefore discharging the loan thereafter. It is the position taken by the Plaintiff that it did not act fraudulently as the extra 70,000,000 realized was from the sale of the extra fittings and furnishings which were removable and was sold separately. The Plaintiff argues that the present application is an attempt by the Defendant to cripple it financially. The Plaintiff has exhibited as part of its replying affidavit the sale agreement for the suit property for the sum of Kshs.145,000,000/=. The same is marked as RWM1 and an addendum agreement for the sale of the fittings and furnishings marked RWM 2.
7. Order 49 Rule 2(b) allows the Court to enter judgment by consent of the parties. The said provision provides as follows; “ 2. When Judgment may be entered by Registrar [Order 49, rule 2]
Judgment may, on application in writing, be entered by the registrar or, in a subordinate Court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, in the following cases:
(a).....
(b)in all other cases in which the parties consent to judgment being entered in agreed terms; or
8. Courts have held that a consent judgment can only be set aside if it is established that the same was procured through fraud, mistake or misrepresentation. This was reinforced in the case of Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd [1980] KEHC 11 (KLR) Githinji J, (as he then was) considered the circumstances under which a consent Judgment can be set aside and



referred to and relied on the decision in *Hirani v Kassam* [1952] 19 EACA 131 in which the above passage from *Seton on Judgments and Orders* was approved.

“It is now well 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:

“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 the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

9. I have considered carefully the parties’ arguments in the present case and the explanation offered by the Plaintiff on the price variation between the agreement and the addendum to the agreement for the sale of the extra furnishings and fittings. I find that no evidence has been put forward to demonstrate that the Plaintiff acted fraudulently with intend to defraud the Defendant in the consent agreement. Instead, I find that the Plaintiff has been candid in its explanation and has put forward documents to support the same. I am therefore satisfied that the consent judgment herein was not procured through fraud as alleged and I find no good reason to interfere with it. In any event, the allegations of fraud require a higher standard of proof as they, if established, carry penal consequences as they are criminal in nature. The consent judgment will therefore be maintained and shall remain as a judgment of this Court, having been properly entered with the consent of the parties.
10. In conclusion therefore I find no merit in the Defendant ’s application dated 4th October 2024. The same is dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

Ms.Kithure holding for Mr. Kirimi for the Plaintiff/Respondent.

Ms. Cheruiyot holding brief for Mr. Kongele for the Defendant/Applicant.

Amos - Court Assistant

