



**Muema v OM Shree Holding Ltd (Civil Appeal E031 of 2023)
[2024] KEHC 536 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E031 OF 2023**

**FR OLEL, J
JANUARY 31, 2024**

BETWEEN

ELIZABETH MWONGELI MUEMA APPELLANT

AND

OM SHREE HOLDING LTD RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 22nd April 2023 brought pursuant to provisions of Section 79G of the *Civil Procedure Act*, Order 25 Rules 5, Order 42 Rule 13(2) and Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. The Respondent/Applicant prays for;
 - a. That this Honourable court do strike out the Appeal herein for being an abuse of the process of the court, bad in law and untenable.
 - b. That this Honorable court be pleased to find that after delivery of the judgment of the lower court which is the subject of this Appeal, the Appellant herein called for settlement of the said judgment sum, received payment of the said judgment sum and thereafter executed a consent confirming payment of the Appellants claim and confirming that the case in the lower court had been settled, an appeal from such a matter that has been compromised/adjusted and settled by consent cannot lie.
 - c. That in light of the above, this Honorable court be pleased to find that this Appeal is misplaced and abuse of the process of the court and should be struck out summarily.
 - d. That the costs of this application and this appeal be awarded to the Respondent.



2. The application is supported by a supporting affidavit of Newton M Mwangi dated 22nd April 2023, where he states that during the hearing/trial of the primary suit the parties did record a consent on liability and the suit proceeded for assessment of damages. After delivery of judgement the appellant called for payment of the decretal sum together with costs, which sums were settled by the respondent on 01.03.2023 and thereafter, the appellants counsel did execute a consent marking the case as settled.
3. The appellants advocate thereafter did serve them with the memorandum of Appeal and despite their protests that the appeal had been compromised, the appellant had insisted on proceeding with this appeal. The parties having agreed to compromise the suit and the decretal amount and costs having been paid, there was nothing left for the court to determine. This court was thus urged to strike out the appeal as it was misplaced and award costs of this application and the Appeal to the Respondent.
4. This application is opposed by the Appellant/Respondent who filed a Replying Affidavit's through her advocate one Dunstan M Wambua dated 23rd May 2023. He did depone that upon judgment being delivered on 16.01.2023, the appellant was dissatisfied and they filed their memorandum of Appeal on 12.02.2023, challenging the quantum awarded. On 03.02.2023, they did file a consent under order 9 rule 9(b) of the *civil procedure Rules* where the appellant appointed the firm of J.M Kimani & Partners Advocates LLP to come on record in place of her former advocates Kimathi Wanjoi Muli & Company Advocates and on 13.02.2023, the said consent was adopted as an order of the court, where after a notice of change of advocates was filed on the same date.
5. The appellants further averred that, they did serve the said notice of change of advocates upon the respondents advocate on 15.02.2023, and therefore the consent purported to be entered into on 01.03.2023 was illegal as it was not executed by them, as the lawful advocate's on record. In any event, the said consent did not take away the Appellants right of Appeal and no consent was executed to withdraw this appeal. The Respondents simply paid the judgment sum and did not settle the Appeal herein.
6. Finally, it was the appellants contention, that the said consent was not endorsed as an order of the court and therefore not valid. They too had informed the Respondent's by email on 29.03.2023, that they had only settled the lower court decree and not the Appeal herein. Their Appeal had merit and the Appellant should be allowed to proceed with the same and have it disposed off on merit. The respondent thus prayed that the application under consideration be dismissed.

A. Analysis & Determination

7. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and the only issue for determination is whether by paying the outstanding decretal sum and costs, it had the effect of compromising this appeal.
8. Ideally having filed a notice of change of advocates on 13.02.2023, any consent executed thereafter ought to have been signed by the firm of J.M Kimani & Partners Advocates LLP and not the firm named and styled Kimathi Wanjoi Muli & Company Advocates. To that extent, the consent dated 01.03.2023 ideally would not be legally binding especially with regards to matters pertaining to Mavoko CMCC No E0218 of 2022 Elizabeth Mwongeli Muema Vs OM Shree Holdings Limited.
9. Be that as it may, the court notes that the notice of change of advocates revolves around change of partnership status of the same law firm, which handled the trial suit. The current advocate herein acting for the Appellant does expressly admits at paragraph 11 of the replying affidavit that "by an email dated 29.03.2023 I informed the respondent's advocates that they had only settled the lower court matter



(which the respondent was under an obligation to settle, the appeal herein notwithstanding) and not the appeal herein”.

10. This is an “express admission”, confirming that the decree had been settled but not the appeal. The question that then arises is whether by their conduct, the appellant and/or her counsel are estopped from denying settlement and whether the settlement compromise the appeal.
7. The doctrine of equitable estoppel comes into play. Estoppel is defined as “a bar that prevents one from asserting a claim or right that contradicts what one has said or done before, or what has been legally established as true”. The doctrine of equitable estoppel is a defense that is raised when such conduct or representation has been relied on by another party, with the result that the other party has suffered a detriment or injury. See in this regard the decisions by Court of Appeal in *John Mburu vs Consolidated Bank of Kenya (2018)* eKLR and *Kenya National Assurance Company vs Kimani Another (1987)* eKLR.
7. From the correspondences exchanged specifically the Respondents letter dated 01.03.2023, copied to the respondent’s insurer, it is clearly indicated that the cheque issued was in the name of J.M Kimathi & Partners Advocates LLP. The said advocate on 29.03.2023 sent an email confirming receipt of the decretal sum and even correspondence exchanged show clearly that the same were addressed to the appellants advocate “D.M Wambua Advocate”, who has sworn the replying affidavit herein. The issue of turning their back to this settlement therefore does not arise. Unlike Apostle Peter who denied, his master, the appellants herein cannot run away for the fruits of their judgement, having already enjoyed the same.
7. Further while the appellants right of Appeal cannot be taken away, I do hold that they are estopped from proceeding with this appeal having consented to wholly settle the decree appealed against. They cannot desire for two mutually exclusive alternatives and enjoy the benefit of both. They chose their bed and they must hold their peace and lie on it.

Disposition

7. Taking all relevant factors into consideration, I do find that this application is merited;
 - a. The appeal herein is marked as compromised and is marked as withdrawn with no orders as to costs.
 - b. Each party, too will bear their own costs of this application.
7. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF JANUARY 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 31st day of January, 2024.

In the presence of;

No appearance for Plaintiff

Mr. Wambua for Respondents

Sam - Court Assistant

