Rugi Farmers Co-operative Society Ltd v Rumukia Farmers Co-operative Society Ltd (Civil Appeal 239 of 2016) [2024] KEHC 1961 (KLR) (Civ) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1961 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 239 OF 2016

CW MEOLI, J

FEBRUARY 29, 2024

BETWEEN

RUGI FARMERS CO-OPERATIVE SOCIETY LTD ..... APPELLANT

AND

RUMUKIA FARMERS CO-OPERATIVE SOCIETY LTD ..... RESPONDENT

(Being an appeal from the ruling of the Co-operative Tribunal at Nairobi delivered on 8th April 2016 in CTC No. 1 of 2004)

JUDGMENT

1. This appeal emanates from the ruling delivered by the Co-operative Tribunal (hereafter the Tribunal) on April 8, 2016 in CTC No. 1 of 2004. The proceedings before the Tribunal were commenced by way of a statement of claim filed on August 10, 2004 and amended on July 31, 2013 by Rugi Farmers' Co-operative Society Ltd, the claimant before the Tribunal (hereafter the Appellant) against Rumukia Farmers' Co-operative Society Ltd, the respondent before the Tribunal (hereafter the Respondent).The amended pleadings filed several years after the motion which was the subject matter of the ruling of the Tribunal are as follows.

2. The Appellant's claim arose from allocation of shares in the property christened "One House" – Former Mukurwe-ini Head Office (hereafter the property) by the liquidator of Mukurwe-ini Co-operative Society Ltd , allegedly based on the recommendation of the liquidation committee on the February 13, 2002. It was averred that the liquidation committee headed by Mburu Mungai & Associates had after the liquidation exercise of Mukurwe-ini Co-operative Society allocated Kiawaimiri Farmers 79.6% share (Kshs. 4,930,276) equivalent of assets while Muhito Farmers got 20.4% share (Kshs. 1,263,365) equivalent of assets. And that the Respondent despite granting

approval, participating in liquidation meetings and having signed the agreement regarding the sharing ratio of 79.6% : 20.4% in favour of the Appellant, had refused to vacate the Appellant's allocated space.

3. It was further averred that on or about July 2004, in disregard of the sharing ratio, the Respondent purported to allocate itself approximately a half share of the property. That subsequently and without the Appellant's knowledge and or in absence of further liquidation exercise, the Appellant's erstwhile counsel Messrs. M.K. Kiminda colluded with the Respondent's advocate by recording a consent on August 11, 2005 which consent was fraudulent, and of no legal effect. That the actions of the Respondent were unlawful and an affront to the Appellant's rightful share as allocated by the liquidation committee.

4. The Respondent filed a statement of defence on August 31, 2004 which was also amended on January 22, 2014, denying the key averments in the plaint. It was averred that although there was an attempt by the liquidator to allocate shares to the property, the effort was abandoned after it proved impossible to implement, upon the discovery that the property comprised two separate buildings erected on two separate parcels of land. That the Liquidator, District Co-operative Officer, and the parties concluded that the two buildings could not be divided in the manner proposed in the suit. And that the alternative method adopted was to sub- divide the two shops on the two properties and assign one shop to each party. Hence, pursuant to a consent dated August 11, 2005 the Appellant got a front shop as it was entitled to a higher ratio of the assets, while Respondent was assigned a back shop which was of a lesser value.

5. It was further averred that the erstwhile counsel for the Appellant had full and proper instructions to conduct the matter on behalf of the Appellant and duly executed the consent with due authority of the Appellant.

6. On July 19, 2011 the Appellant filed a motion expressed to be brought under Rule 3, 4 and 17 of the *Co-operative Tribunal Rules*, Section 100 of the *Civil Procedure Act* (CPA) and Order 12 Rule 7 of the *Civil Procedure Rules* (CPR) seeking inter alia that the consent order dated August 11, 2005 executed by counsel for the Appellant and Respondent respectively and filed in the Tribunal on August 17, 2005 be set aside; that a declaration be issued that the counsel for the Appellant, Messrs. M.K Kiminda Advocate, did not have authority and or instructions from his instructing client to record the consent dated August 11, 2005; and that the consent dated August 11, 2005 was therefore fraudulently negotiated, entered into and filed, all with a view to defeat the interest of the Appellant.

7. The grounds on the face of the motion were amplified in the supporting affidavit sworn by the David Gichuki Muthumbi, who described himself as the chairperson of the Appellant, duly conversant with the matter hence competent to depose. He stated that following the approval and adoption of the scheme of distribution by the liquidation committee, the Respondent refused to vacate the Appellant's portion of the property thus provoking the claim before the Tribunal, and counsel on record instructed to pursue the enforcement of the sharing ratio approved by the Appellant. That erstwhile counsel had given regular updates on the cause, and the Appellant was shocked to learn that no hearing in respect of the claim had taken place. Furthermore, the Appellant's counsel had, without the authority of the Appellant negotiated a consent with the Respondent's counsel which was subsequently adopted as judgment of the Tribunal on August 26, 2005. He asserted that the erstwhile counsel did not inform the Appellant that the matter had been concluded and the information only came to the Appellant's knowledge when some of its members perused the court file.

8. He stated that erstwhile counsel ought to have advised the Appellant in writing about the negotiations regarding the consent but had instead proceeded to act on his own behalf , without the authority of the Appellant by recording the consent leading to great losses to the Appellant.

9. The Respondent opposed the motion through a replying affidavit dated September 28, 2011. Thereafter, parties canvassed the Appellant's motion by way of written submissions. The Tribunal's ruling dismissing the Appellant's motion provoked the instant appeal, which is based on the following grounds: -

> " 1. The learned chairman erred in law and in fact by failing to consider that the consent order recorded on 11th August, 2005 by M.K. Kiminda Advocate was negotiated, entered and recorded fraudulently on behalf of Kiawaimiri Farmers Co-operative Society Ltd which had been deregistered and its registration under CS No. 9441 had been cancelled on 21st April 2004 by the Commissioner of Co-operatives and it was no longer a legal entity, hence Advocate M.K. Kiminda did not have a legal client as at 11th August, 2005.
>
> 2. The learned chairman erred in law and in fact by failing to consider that the consent order recorded on 11th August, 2005 by Mr. Muteithia Advocate was negotiated, entered and recorded fraudulently on behalf of Muhito Farmers Co-operative Society Limited which had been de-registered on October, 2004 by the Commissioner for Co-operatives and could no longer have capacity to operate as a legal entity, hence Advocate Mutheithia did not have a legal client as at 11th August, 2005.
>
> 3. The learned chairman erred in law and in fact in failing to consider that the liquidation report, the transfer of investment resolution to the new splinter societies, and the approval & adoption of the scheme of distribution agreed and signed by the liquidator, district co-operative officer Nyeri and representatives of all the societies dated 6th September, 2001 and communicated to the parties vide letter dated 13th February, 2002 was full and final and should be implemented to the letter.
>
> 4. The learned chairman erred in law and in fact by failing to address, disregard and expunge the recommendations vide dated 9th February, 2005 which involved Kiawaimiri Farmers Co-operative Society Ltd and Muhito Farmers Co-operative Society Ltd which two entities had already been de-registered and ceased to be legal entities in October, 2004.
>
> 5. That the learned chairman erred in law by not enforcing Section 69 of the Co-operative Society Act which clearly stipulates that any party aggrieved by the liquidation report or order could only appeal to the Tribunal or the High Court and not otherwise as was done letter dated 9th February, 2005.
>
> 6. The learned chairman erred in law and in fact by not considering the application dated 9th July, 2011 on its merits but only considered technicalities of delay which Section 159 of *the Constitution* has allowed a wide discretion to the court to use oxygen rules to overlook technicalities and address the real issues in dispute.
>
> 7. The learned chairman completely misdirected himself on the issues before him and also failed to appreciate and consider all the evidence, documents and facts that had been filed in the Tribunal file.

8. The learned chairman failed to appreciate that there were no legal parties before the Tribunal when the consent was recorded on 11th August, 2005.

9. The learned chairman erred in dismissing the application dated 19th July, 2011, the chairman failed to appreciate its contents and purpose.

10. The said decision of the learned chairman was arbitrary, capricious and biased." (sic)

10. The appeal was canvassed by way of written submissions. Counsel for the Appellant opened his submissions by restating the pertinent events. Relying on the principles in *Brooke Bond Liebig (T) Ltd v Mallya* (1975) E.A 266 and *Flora Wasike v Destimo Wamboko* (1982-88) 1 KAR 266 it was the Appellant's case that the motion had met the threshold for setting aside of the consent order. Reiterating that the firm of Messrs. M.K. Kiminda did not have the capacity to represent the Appellant in August 2005 as the registration of Kawaimiri Farmers had been cancelled, as such it was a non-existent entity; secondly, erstwhile counsel did not have a legal client at the time the consent was recorded; and thirdly, erstwhile counsel did not demonstrate that he had advised his "clients" and or received corresponding instructions to record the impugned consent.

11. Counsel therefore argued that the Tribunal erred especially by disregarding the fact the Kiawaimiri Farmers' Co-operative Society as an entity had been de-registered, and therefore erstwhile counsel did not have a legal client when the impugned consent was recorded. Addressing the substratum of the claim before the Tribunal, counsel urged the court to allow the appeal to enable the liquidation report of 2001-2002 to be adopted and enforced by the court. He accused the Tribunal of failing to consider the merits of the Appellant's motion and basing its decision on technicalities regarding delay. The court was therefore urged to allow the appeal.

12. The Respondent in defended the tribunal's findings, by equally restating the Respondent's version of pertinent events, and cited the cases of *Diamond Trust Bank of Kenya Ltd v Plyland Panels Limited & Others* as quoted in the case of *Skyview Properties Limited v Attorney General & 2 Others* [2009] eKLR and *Flora N. Wasike* (*supra*). To contend that the Appellant had not satisfied the governing principles to warrant setting aside the impugned consent order. Emphasizing that the fact of an advocate recording a consent without instructions cannot justify such setting aside. It was further submitted that the Appellant has not demonstrated that erstwhile counsel acted ultra vires and as such has not established that the consent was invalid.

13. In addition, that the Appellant did not satisfactorily explain the delay of five (5) years in bringing the motion to seek setting aside of the consent order despite knowledge of the same. In conclusion, while calling to aid the decision in *Brooke Bonde Liebig (T) Ltd* (*supra*) as cited in *Skyview Properties Limited* (*supra*) counsel urged the court to uphold the Tribunal's decision in keeping with the equitable maxim that equity aids the vigilant and not the indolent. The court was urged to dismiss the appeal with costs.

14. The court has considered the record of appeal, the pleadings before the Tribunal as well as the submissions by the respective parties. The duty of the first appellate court was spelt out in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

See also *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2 EA 212; *Peters v Sunday Post Ltd* (1958) EA 424; *William Diamonds Ltd v Brown* [1970] EA 11

15. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

16. The Appellant's motion before the Tribunal essentially sought "that the consent order dated August 11, 2005 signed by counsel for the Appellant and Respondent respectively and filed in the Tribunal on August 17, 2005 be set aside; that a declaration be issued that the counsel for the Appellant, Messrs. M.K Kiminda Advocate, did not have the authority and or instructions from his instructing client to record the consent dated August 11, 2005; and that the consent dated August 11, 2005 was therefore negotiated, entered into and filed fraudulently and or in collusion to defeat the wider interest of the Appellant."

17. The Tribunal in its decision, dismissed the Appellant's motion by stating inter alia that; -

> " I have looked at the application, affidavits in support and reply, I have also read and considered the written submissions and cited authorities. I have had a chance to go through the consent complained about.....
>
> ....The main ground for reviewing the consent herein is that the counsel who recorded it on its behalf did not have instructions to do so.
>
> I have gone through the record the advocate was not holding brief for that day. He is the advocate formally on record for the Applicants. No complaint had been raised about the advocate filing pleadings including this suit. If there were any disagreements between M.K Kiminda, advocate the same were not at the material time brought to the attention of the tribunal or the opposing side. The Respondents were entitled under the principle in the English Case of *Royal British Bank v Thughand* (1856) 6E & B 327 to assume that the claimant and his advocate had complied with these formalities and procedures. The submission therefore, that the advocate had no instructions to enter into a consent is unsubstantial. Counsel, generally has power to compromise suit.

> The next question is whether the Applicant have established grounds which would warrant interference with a consent order. The grounds as stated above are the ones that would afford good reasons to vary and rescind a contract between the parties. As noted in the passage Setton (*supra*) the consent binds all parties to the proceedings and on those claiming under them. It is therefore no excuse that Rugi Farmers Co-operative Society Ltd succeeded the initial claimants, the claim has not changed. They are bound by the consent orders. No evidence has been placed before the tribunal to show that there was fraud, mistake or misrepresentation on the part of the Respondent. It was the Applicant's obligation to bring on the grounds for variation. They have failed.
>
> There was the issue of delay raised by the Respondent. The consent in question was recorded on August 17, 2005. The consent application was filed on July 19, 2011. This is six years later. No explanation is given for such delay. In the replying affidavit the Respondent states that some of the terms of the consent have been complied with. This assertion has not been refuted. It is my finding that the application while unmerited, has been brought after inordinate and unexplained delay. It appears like an afterthought. The upshot of what I stated is that the application is without merit. The same is dismissed with costs to the Respondent." (sic)

18. First, upon perusing the entire record of proceedings before the Tribunal, the court observed that the Appellant's grounds of appeal included new matters in grounds 1, 2, 4 & 8 that were not explicitly canvassed in the motion before the Tribunal. It appears that the issues in grounds 1, 2 & 8 therein came up during the Tribunal proceedings on November 1, 2011, November 15, 2011, September 13, 2012 and November 26, 2014.

19. In that period, the Appellant filed a motion dated January 9, 2012 seeking joinder of the parties in their present names, in place of their respective former names, on grounds that Kiawaimiri Farmers' Co-operative Society Ltd (now Rugi Farmers Co-op Soc. Ltd) and Muhito Farmers' Co-operative Society Ltd (now Rumukia Farmers Co-op Soc. Ltd) were dissolved in 2005 by the Commissioner of Co-operatives. The proceedings before the tribunal on September 13, 2012 indicate that a ruling in respect of the latter motion was reserved for November 8, 2012. However, the record does not capture the delivery thereof, and subsequently, the parties were preoccupied with the Appellant's motion dated July 19, 2011. In the ruling which is the subject of this appeal, the Tribunal adverted to the matter by stating that the successors to the dissolved societies claiming under their predecessors were bound by the consent.

20. That said, it is settled that issues for determination before a court generally flow from pleadings and a presiding court can only pronounce itself on the issues arising from the said pleadings. See the Court of Appeal decision in *North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others* [2014] eKLR. As earlier stated, the motion dated July 19, 2011 specifically challenged the consent order dated August 11, 2005, not on the basis of the legal status of Kiawaimiri Farmers' Co-operative Society Ltd (now Rugi Farmers Co-op Soc. Ltd) as a client, at the date of recording the impugned consent, but on the basis of want of authority and or fraud by its erstwhile advocate. The ruling reserved for November 8, 2012 on the former question is yet to be delivered.

21. The court therefore declines the Appellant's covert invitation to interrogate matters raised in grounds 1, 2, 4 & 8 of the memorandum of appeal dated May 6, 2016 which belong to the pending ruling on the joinder motion dated January 9, 2012.

22. Moving on to the remaining grounds of appeal, the key question for determination is whether the Tribunal's findings on the issues for before it were well founded. The grounds upon which a consent

order may be set aside are settled. Hancox JA in the celebrated case of *Flora N. Wasike* (*supra*) stated that: -

> " 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: see the decision of this Court in *JM Mwakio v Kenya Commercial Bank Ltd*. Civil Appeals 28 of 1982 and 69 of 1983. In *Purcell v F. C. Trigell Ltd* [1970] 2 ACCER 671, Winn LJ said at 676:
>
> > "It seems to me that, if a consent order is to be set aside on grounds which justify the setting aside of a contract entered into with 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 of rectification of this order looked at as a contract..."

23. The learned Judge continued to state that: -

> " It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in *Hirani v Kassam* [1952] 19 EACA 131 at 134 as follows:
>
> "The mode of paying the debt, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in *Setton on Judgments and Orders (7th Edn) Vol. 1 p. 124* as follows: -
>
> > "*Prima facie*, any order made in the presence and with the consent of counsel is binding on all 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 an agreement contrary to the policy of the court ..., or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."
>
> See also:- *Brook Bond Liebig (T) Ltd v Mallya* (1975) EA 266.

24. The latter passage was also followed by the High Court in *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1980] eKLR where the court stated that: -

> " ....Both counsel relied, for different purposes, upon the decision of the former Court of Appeal for East African in *Brook Bond Liebig (T) Ltd v Mallya* [1975] EA 266, where, in declining to set aside a consent judgment, the court cited with approval a passage from *volume 1 of the 7th Edition of Seton on Judgments and Orders page 124* to the effect that, *prima facie* any order made in the presence and with the consent of counsel is binding on all parties to the proceedings and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement.
>
> The *7th Edition of Seton* was published in the year 1912, that is, more than sixty-five years ago. It does not take into account the decision of *McCardie J in Welsh v Roe* (1918), 87 LJ KB 520, where the earlier authorities were carefully considered and it was held that after

> the commencement of an action, the solicitor for a party has an implied general authority to compromise and settle the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the notice of the other side. This decision is accepted as authoritative by the editors of the Supreme Court Practice (1979), vol 2 para 2013, where it is stated that a solicitor has a general authority to compromise on behalf of his client, if he acts *bona fide* and not contrary to express negative direction."

25. Both the courts in the *Brook Bond Liebig* (supra) and the above case refused to set aside the disputed consent orders. On an appeal in respect of the *Kenya Commercial Bank Ltd case*, the Court of Appeal held that the advocate had both the implied and ostensible general authority to bind the appellant client "in effecting the compromise". The court affirmed the judgment of the High Court and dismissed the appeal. In a more recent decision in *Intercountries Importers and Exporters Limited v. Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR, the Court of Appeal pronounced itself as follows:-

> " Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside..."

26. The gist of the Appellant's argument before the Tribunal was that Messrs. M.K. Kiminda Advocate did not have the Appellant's authority to compromise the matter by way of consent. That erstwhile counsel acted on his own behalf at the peril of the Appellant when he recorded the consent without authority, , fraudulently and in collusion with the Respondent's advocate. In rebuttal, the Respondent asserted that the Appellant's motion did not rise to the requisite threshold for the setting aside of a consent order properly entered into by the Appellant's advocate, and therefore binding. The Respondent citing prior correspondence between both counsel in the matter and protesting delay by the Appellant.

27. Concerning alleged fraudulent collusion and want of authority, it is not disputed that at the date of the adoption of the consent, Messrs. M.K. Kiminda Advocate and Messrs. Muteithia & Co. Advocates were both duly on record for the respective parties in the matter. A perusal of the actual consent (annexure DGM 5 as exhibited by the Appellant) reveals that it was duly executed by the respective counsel in the matter. Further from annexure Exh.1 & Exh.2 exhibited in Respondent's replying to affidavit, it appears that prior to the recording of the consent, there was an exchange of correspondence between the advocates.

28. Therefore, it would appear that at all material times, Messrs. M.K. Kiminda Advocate had express and or implied authority to compromise the matter on behalf of the Appellant, there being no indication from the latter that instructions had been withdrawn. Nor limited in any way, and communication of such limitation made by the Appellant to the parties in the suit. The advocates representing the Appellant must therefore be deemed to have possessed the requisite authority to compromise the suit by recording the impugned consent on behalf of their clients. Besides, the legal status of Kiawaimiri Farmers' Co-operative Society Ltd (now Rugi Farmers Co-op Soc. Ltd) and Muhito Farmers' Co-operative Society Ltd (now Rumukia Farmers Co-op Soc. Ltd) was not a live question at the time of recording of the impugned consent.

29. The Appellant's affidavit material before the Tribunal did not particularize the alleged fraud on the part of its advocate. Seemingly, the Appellant based its claims on want of authority and supposed

misinformation by its advocate regarding the progress of its case. Tunoi JA (as he then was), in *Vijay Morjaria v Nan Singh Madhu Singh Darbar & Another* [2000] eKLR stated that; -

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

30. Allegations of fraud in civil matters call for a higher threshold in proof. The Court of Appeal in *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows; -

> " ...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that:
>
> > "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

31. In *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR, the same court held that: -

> " Fraud is a serious quasi-criminal imputation, and it requires more than proof on a balance of probability though not beyond reasonable doubt".

32. Recently, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR stated regarding the question of legal and evidential burden that:

> " The person who makes an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".

33. The onus was on the Appellant to demonstrate with particularity the acts of fraud on the part of its advocate in collusion with the Respondent's counsel. Other than making a blanket accusation, the Appellant did not tender material to demonstrate the claims. The Tribunal's finding that no evidence has been placed before it to show fraud, mistake, or misrepresentation on the part of the Respondent cannot therefore be faulted.

34. Lastly, the Tribunal addressed the Appellant's delay in bringing the motion to set aside the consent. The impugned consent was recorded on 26.08.2005 and it was not until July 2011 that the Appellant filed the motion to set aside. No explanation was given for the delayed action since 02.07.2009 when the Appellant's representatives learned of the consent. Section 1B of the *Civil Procedure Act* imposes a duty on every court to further the overriding objective in Section 1 A of the *Civil Procedure Act*, namely, to "facilitate the just, expeditious, proportionate and affordable resolution of civil disputes ".

The Tribunal was therefore entitled to consider the aspect of the delay, and correctly found that given the unexplained extended period of delay, the Appellant's motion was probably an afterthought.

35. In the result, the court is of the considered view that the Tribunal properly considered pertinent issues of law and fact before it, against established legal principles, and arrived at correct decision. This appeal is therefore without merit, and the court hereby dismisses it with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the Respondent: Mr. Odhiambo

C/A: Carol