



REPUBLIC OF KENYA



**Ahmed & 2 others v Kazungu (Commercial Suit E002 of 2023)  
[2024] KEHC 10288 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 10288 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL SUIT E002 OF 2023  
F WANGARI, J  
APRIL 26, 2024**

**BETWEEN**

**MATANO AHMED ..... 1<sup>ST</sup> PLAINTIFF**

**JOSHUA BAYA ..... 2<sup>ND</sup> PLAINTIFF**

**CHRISTOPHER KARISA KAZUNGU ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**CHRISTOPHER KARISA KAZUNGU ..... DEFENDANT**

**RULING**

1. The Plaintiffs and the defendant had entered into a sale of land agreement dated 5/2/2021 for sale of land title no. CR. 62116 LR. No. 9129 and CR. 62118 LR. No. 9132 for a total purchase price of Kshs. 110,000,000. The Plaintiffs were the vendors while the Defendant was the purchaser. The Defendant was in breach of the contract and the Plaintiffs filed this suit claiming the balance of the purchase price.
2. The parties entered into a consent dated 3/7/2023 which was adopted as the judgment of the court on 5/7/2023, and a subsequent decree issued on 7/8/2023. The terms of the consent judgment were for the Defendant to pay to the Plaintiffs Kshs 17,800,000 all inclusive and thereafter take vacant possession of the properties in issue.
3. The Defendants later discovered that there was an adverse claim on the properties and that fact had not been disclosed by the Plaintiffs as at the time of entering into the sale agreement and filing of the consent. It is pursuant to that discovery that the Defendant seeks the following orders inter alia;
  - i. That the consent judgment be set aside, reviewed or varied.
  - ii. That these proceedings be stayed pending hearing and determination of Mombasa ELC Case No. 31 of 2021.



4. The application was not opposed. Both parties were directed to file their submissions and both parties complied. However, submissions by the Plaintiff/ Respondent have no probative value, and it is also well settled that submissions cannot take the place of evidence.

### **Analysis and Determination**

5. I have considered the parties' pleadings, the written submissions together with the authorities relied upon, as well as the law and in my view, the following issues are for determination;

- a. Whether the consent judgment ought to be set aside
- b. Who bears the costs?

6. On the first issue, it has been held under what circumstances a consent judgment is interfered with. In the Court of Appeal in the case of *Brooke Bond Liebig Ltd V Mallya* [1975] EA 266 at 269 Law Ag P said:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

7. In *Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd* [1982] KLR 485, Harris J correctly held inter alia, that –

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 the 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.

8. In *Hirani V. Kassam* [1952] 19 EACA 131 the Court of Appeal held;

“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: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“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. The Plaintiff at the execution of the sale agreement, and entering into a consent, withheld material facts relating to the suit properties. They did not disclose the fact that there was an adverse claim that had been lodged against them in the Environment and Land court. If that fact had not been withheld from the defendant, the Defendant would not have entered into a sale agreement and subsequent recording of a consent.



10. I find that the non-disclosure by the Plaintiffs is material to warrant the consent judgment be set aside and these proceedings be stayed.
11. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. Due to the nature of the proceedings, each party is to bear its own costs.
12. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The applications dated 22/11/2023 is allowed on the following terms
    - i. That the consent dated 3/7/2023, recorded as a judgment of the court on 5/8/2023 and which Decree was issued on 7/8/2023 is hereby set aside.
    - ii. That these proceedings are hereby stayed pending hearing and determination of Mombasa ELC Case No. 31 of 2021.
  - b. Matter be mentioned on 16/9/2024 for status update
  - c. Either party is at liberty to move the court accordingly
  - d. No orders as to costs

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF APRIL, 2024.**

**F. WANGARI**

**JUDGE**

In the presence of;

Ibrahim Advocate for the Applicant

M/S Ondieki Advocate h/b for Omwenga Advocate for Respondent

Barile, Court Assistant

