Case Number:	Civil Appeal 21 of 2019
Date Delivered:	28 Nov 2019
Case Class:	Civil
Court:	Court of Appeal at Mombasa
Case Action:	Judgment
Judge:	Daniel Kiio Musinga, Kathurima M'inoti
Citation:	Kenya Revenue Authority v Mohamed Saleh & Company Limited [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	H.C. Civil Suit 221 of 2004
Case Outcome:	Appeal dismissed with costs to the respondent
History County:	Mombasa
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, MUSINGA & M'INOTI, JJ.A.)

CIVIL APPEAL NO.21 OF 2019

BETWEEN

KENYA REVENUE AUTHORITY.....APPELLANT

AND

MOHAMED SALEH & COMPANY LIMITED.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (P.J.O. Otieno, J.) dated 31st *January, 2018* ***in H.C. Civil Suit No. 221 of 2004.)***

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JUDGMENT OF THE COURT

1. In October 2003, the respondent commenced Judicial Review Proceedings against the appellant vide ***Mombasa High Court Miscellaneous Application No. 643 of 2003***, challenging the decision of the appellant to impose customs duty retrospectively on sugar that it had imported under the COMESA safe guard arrangements that allowed importation of sugar duty free. The High Court issued an order of *mandamus* compelling the appellant to process the respondent's import documents and release the subject sugar imports under the COMESA zero (0%) duty tariff which was applicable before 12th September, 2003. The appellant was also ordered to waive custom warehouse rent, bear warehouse storage charges and container demurrage charges. No appeal was preferred by the appellant against the aforesaid orders.

2. In compliance with the ruling, the appellant waived the custom duties it had levied but failed to bear the other charges as ordered. Consequently, the respondent filed a suit, ***HCCC No. 221 of 2004,*** seeking a sum of ***Kshs.5,936,880.00*** as warehouse (Godown) storage charges and demurrage charges at ***US Dollars 208,320***. The respondent had settled those sums in order to mitigate its losses. The respondent also sought costs of the suit and interest on the sums claimed at 12% per annum from 1st January, 2004 until payment in full.

3. Later on, the respondent reduced its claim for demurrage charges by half, that is US Dollars 104,160.00 on the ground that it had received a discount on the same from the shipping line.

4. The appellant filed a statement of defence stating, *inter alia*, that it complied with the *mandamus* order in full and nothing remained outstanding.

5. When the hearing commenced, the appellant successfully made several applications for adjournment to enable parties negotiate and record a settlement. On 8th March, 2017, ***Ms Lumadi***, learned counsel then appearing for the appellant and ***Mr. Mogaka***, learned counsel for the respondent, recorded a consent in the following terms:-

"By consent partial judgment is entered for the plaintiff against the defendant in the sum of USD 104,160 being 50% of the demurrage charges."

The parties did not agree on the issues of costs and interest on the admitted sum and therefore, the learned judge was to exercise his discretion in the final judgment.

6. At the close of the case, one witness, ***Abdul Aziz Mohamed Saleh Bawazir***, (PW1), had testified on behalf of the respondent and produced several documents in support of the respondent's claim. The appellant also called one witness, ***Peter Macharia Maina***, who also testified and produced various documents.

7. In his judgment, ***P.J.O. Otieno, J.*** held that the respondent had proved that it paid a sum of Kshs.5,523,731 as storage charges, leaving a balance of Kshs.413,149 and therefore entered judgment for the proved sum. The court further awarded interest on that sum as well as on the admitted sum of USD 104,160 at 14% per annum from 1st March, 2004 and 1st May, 2004 respectively till payment in full.

8. Being dissatisfied with that decision, the appellant preferred an appeal to this Court, stating that the learned judge erred in law and fact in entering judgment for USD 104,160 despite the record showing that the appellant had raised the issue of capacity of its counsel to enter the consent judgment; that the amount of Kshs.5,523,731 was not payable as demurrage or storage charges; that evidence on record showed that the said sum was clearance/handling charges which was amount payable to the Shipping Lines and Customs Clearing Agents; that the learned judge ignored the evidence tendered by the appellant's witness; that any actions legitimately taken by the appellant under the Customs and Excise Act Cap 472 (now repealed) would not lead to an award of damages to the respondent; and that the learned judge erred in awarding costs of the suit to the respondent.

9. The appellant filed submissions and its learned counsel, ***Mr. Ontweka***, made brief oral highlights of the same. The appellant submitted that its counsel who was in court on 7th March, 2017 had no instructions to enter into a consent judgment regarding demurrage charges; adding that such charges are incurred by an importer in the ordinary business of importation and the respondent could not extend them to the appellant.

10. Further, the appellant's counsel submitted, the court erred in treating the amount of Kshs.5,523,731.10 as storage charges. It was contended that the Kenya Ports Authority tariff defines "storage" charge to mean a charge levied on cargo remaining in the port area after expiry of the allowed free period. The respondent had nominated Habo Agencies as its customs agent and the respondent was supposed to pay for the services rendered as handling charges, not storage charges. The appellant therefore argued that the evidence of Debit Notes from Habo Agencies could not support the claim for storage charges.

11. Lastly, the appellant submitted that the learned judge erred in awarding interest at 14% per annum when the respondent's claim in the plaint was for interest at court rates of 12% per annum.

12. In response, the respondent's counsel submitted that the consent judgment in respect of demurrage charges was unassailable,

citing this Court's decision in ***Kenya Commercial Bank Limited v Specialized Engineering Company Limited [1982] KLR 485***.

13. As to whether the respondent was entitled to the sum of Kshs.5,523,731 on account of storage charges, counsel submitted that the respondent's witness statement that was adopted as his evidence in chief stated as follows:-

"The storage charges incurred were Kshs.5,936,880/- for 193 days from 22.08.2003 to 29.02.2004. A Debit Note No.KD-8860 dated 15*th June, 2004 is at page 8 of the Plaintiff's List of Documents."* (See Debit Note at Page 77 of the Record of Appeal on storage charges.)

On the other hand, the appellant's witness was not able to demonstrate that the money that was paid to Habo Agencies was not on account of storage charges.

14. Regarding costs, counsel submitted that costs follow the event unless the court for good reason orders otherwise. He cited ***section 27*** of the **Civil Procedure *Act***.

15. On the issue of interest, Mr. Mogaka submitted that the appellant's memorandum of appeal does not contain any ground challenging the trial court's award of interest at 14% per annum; that under ***rule 104(a)*** of this ***Court's Rules*** a party cannot raise a ground of appeal outside the memorandum of appeal, except with the leave of the court; and that courts exercise discretion in awarding interest and it had not been demonstrated that the learned judge exercised his discretion arbitrarily.

16. We have considered the record of appeal and counsel's submissions. There are three issues that arise for our determination in this appeal. The first one is whether the learned judge erred in law in entering judgment for the sum of USD 104,160 on account of demurrage charges; two, whether the learned judge erred in law in entering judgment in favour of the respondent in the sum of Kshs.5,523,731 on account of storage charges; and lastly, whether this Court can consider a ground of appeal that was not raised by the respondent in the memorandum of appeal.

17. Before we make a determination on each of the above issues, we must reiterate that the foundation of the respondent's claims in the suit that gave rise to the impugned judgment, the subject of this appeal, is the order of *mandamus* issued by the High Court in the Judicial Review matter, Misc. Civil Application No.643 of 2003. The Court compelled the appellant to not only release the respondent's sugar consignment but also to bear storage charges and container demurrage charges. That order was not appealed against. The respondent filed H.C.C.C. No. 221 of 2004 after the appellant failed to act on its demands for reimbursement of the storage and demurrage charges.

18. Regarding the demurrage charges, we have already pointed out that on 8th March, 2017 counsel for the parties entered into a consent judgment in the sum of USD 104,160. No formal application was ever made to set aside the consent judgment; the issue was only raised by the appellant in the course of submissions before the High Court, alleging that Ms. Lumadi, who was then on record for the appellant, had no authority to enter into such a consent.

19. We do not agree with the appellant that the learned judge, in the circumstances as stated above, erred in failing to set aside the consent judgment. The appellant did not satisfy the trial court that the consent judgment was obtained by fraud or collusion. The

principles for setting aside a consent judgment are well settled. In ***Kenya Commercial Bank Limited v Specialized Engineering Company Limited*** (supra) this Court, in an unprecedented move, adopted as its judgment the High Court decision of ***Harris, J***. in ***Civil Suit No. 1728 of 1979*** between the same parties, where the principles crystalized from that judgment are as follows:-

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.

3. An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide **and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.**

4. The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes that he would not have given his consent had he known these facts.

5. The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and, when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds."

20. Similarly, in ***Brooke Bond Liebig (T) Ltd v Mallya [1975] EA 266***, the predecessor of this Court held that a consent judgment may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement. The appellant did not satisfy the above principles. In the circumstances, therefore, we find no merit in the first ground of appeal and dismiss it.

21. We now turn to the second ground challenging the award of Kshs.5,523,731 on account of storage charges. Initially, the pleaded sum was Kshs.5,936,880 but the trial court awarded the sum that was proved. Evidence was tendered by the respondent's witness that the amount claimed was on account of storage charges for 193 days from 22nd August, 2003 to 29th February, 2004. The appellant's refusal to release the respondent's sugar meant that the sugar had to be stored at Awanad Freight Station (CFS) Logistics until the High Court ordered its release.

22. Evidence of payment of Kshs.5,523,731 as storage charges was tendered. Although the appellant's witness argued that the aforesaid sum was handling charges and not container freight station charges, his averment to that effect was purely hearsay. In cross examination, the witness said he was relying on information that had been given to him by some undisclosed persons. He stated: "*I am not aware if the goods were detained or stored in any CFS Godown. I am aware that the goods were handled by Habo Agencies. The information I have was given to me in 2009*." In re-examination by Mr. Ontweka, the witness stated:-

"I did not handle the case in 2003. I only came to know about Misc. Civil Application No. 643 of 2003 recently. I was unable to ascertain the demurrage or storage charges incurred. KRA cannot know the quantum of storage charges. The goods were not released meaning they were detained."

23. We are satisfied that the claim of Kshs.5,523,731 was proved to have been paid as storage charges and the learned judge did not err in awarding the same.

24. Lastly, on the issue of interest, ***rule 104(a)*** of this ***Court's Rules*** states as follows:-

"104. At the hearing of an appeal-

a. No party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 93 or rule 94."

This ground is not contained in the memorandum of appeal and no leave was sought to argue it. We must therefore reject it summarily. We can only add that in 2004 when the respondent filed the suit, court rates of interest were 12% per annum but in 2018 when the impugned judgment was delivered, court rates on interest had been reviewed upwards to 14% per annum.

25. All in all, we find this appeal devoid of merit and dismiss it with costs to the respondent.

Dated and delivered at Malindi this 28th day of November, 2019.

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR