



Mbaka & another v PS Ministry of Interior and Coordination of National Government & 5 others; Law Society of Kenya & 4 others (Interested Parties) (Constitutional Petition 6 of 2020) [2023] KEHC 455 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION 6 OF 2020
EM MURIITHI, J
JANUARY 26, 2023**

BETWEEN

DOROTHY KANYUA MBAKA 1ST PETITIONER

MARY SYINTHI MUSYOKA 2ND PETITIONER

AND

PS MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT & 5 OTHERS RESPONDENT

AND

LAW SOCIETY OF KENYA & 4 OTHERS INTERESTED PARTY

RULING

1. By a notice of motion dated September 27, 2022, the applicant seeks orders as follows: -
 - ' 1. That this honourable court be pleased to set aside the conservative order dated April 19, 2021 executed between the petitioners and the respondent and adopted as an order of the court.
 2. That the petition be set down for hearing and disposal on merit.
 3. That costs of the application be borne by the respondent'
2. The grounds of the notice of motion are set out as follows:
 - ' Grounds for the application



1. That the consent order was filed in the wrong file and/or proceedings in that the same ought to have been filed in the High Court civil suit No 15 and 16 of 2004 and/or High Court Miscellaneous Application (JR) 11 OF 2005.
 2. That the consent order was an agreement for payment of sum of Kenya shillings twenty four million and eighty thousand (Ksh 24,080,000.00), which is twelve million and forty thousand (12,040,000.00) each in full and final settlement of the decree and not by instalments thereby.
 3. That by signing the consent orders, the counsel for the beneficiaries of the order understood and expecting the payment would be by one payment and not by instalments whatsoever.
 4. That failure by the defendant to pay the agreed sum in lumpsum as agreed has caused the plaintiff's untold suffering and prejudice by the fact that they are people living with disabilities and confined to wheelchairs for over 25 years.
 5. That it is now more than a year since the said consent order was filed in court and the defendants have warranty and with impunity failed, ignored and/or refused to honour the said consent orders making the same to be meaningless.
 6. That failure to respect the consent order by the respondent and in extension the judgment of the court delivered on May 21, 2014 which particularized the heads of the award, is a contravention of article 54 (10 (a) of the Constitution by the respondents that requires persons with disabilities to be treated with dignity and respect.'
4. The issue about mis-filing is a technical matter which does not affect the substance, and the applicant who was a party to the consent cannot take benefit of any wrong doing in which he took part in the filing of the consent in the petition rather than in the service suit in which the award of damages was made.
 5. The principles for setting aside a consent judgement or order are settled. It has to be demonstrated that circumstances exist to justify the setting side of a contract between the parties. See Flora N Wasike v Destimo Wamboko (1988) eKLR, (Hancox JA as he then was) held:

' 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.'
 6. The consent dated April 19, 2021 and signed by Ms AG Riungu Advocates for the petitioners and Felix M Kioko, special state counsel for the Attorney General, which was adopted as an order of this court provided specifically as follows: -
 1. By consent of the petitioner and the judgement debtor herein the Ministry of Defence being the judgmental debtor has agreed with the judgement creditors herein to wit Dorothy Mbaka and Mercy Syonhi Musyoka to pay them a sum of Kenya Shilling twenty four million and eighty thousand (Kshs 24,080,000.00), which is twelve million and forty thousand (Kshs 12,040,000.00) each in full and final settlement of the decree.



2. The petition shall be marked stood over generally and shall be withdrawn by the petitioners upon receipt of the payment as herein stated in paragraph (1) above'
7. It has not been demonstrated that any grounds as which vitiate a contract exist and the court is on the authority unable to set aside the consent order.
8. If the plaintiff contends that the payment has not been done in accordance with the consent order, she should seek the aid of the execution process of the court.

Orders

9. Accordingly, for the reasons set out above the notice of motion dated September 27, 2022 is declined.
10. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THE 26TH JANUARY, 2023.

EDWARD M MURIITHI

JUDGE

Appearances

Ms AG Riungu & Co. Advocates for the Plaintiff./Petitioners.

Hon Attorney General for the Respondents.

