



**Kamadep Guest House Ltd v Pelings Security Ltd; Armok Auctioneers (Interested Party)  
(Civil Appeal 106 of 2022) [2023] KEHC 22978 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22978 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL 106 OF 2022  
SC CHIRCHIR, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**KAMADEP GUEST HOUSE LTD ..... APPELLANT**

**AND**

**PELINGS SECURITY LTD ..... RESPONDENT**

**AND**

**ARMOK AUCTIONEERS ..... INTERESTED PARTY**

**JUDGMENT**

1. The Respondent filed suit at the Small Claims Court at Kakamega seeking for damages for ksh. 197,000 on account of breach of contract . In a judgement delivered on 12<sup>th</sup> September 2022, the trial court awarded the Respondent the above stated sum plus interest from the date of filing suit and the costs of the suit.
2. By a consent 31<sup>st</sup> October 2022 and filed in court on 21/2/2023 the parties entered into a consent on the mode of settlement of the decretal sum.
3. The Appellant then allegedly defaulted on payment, and execution proceedings began. This prompted the Appellant to go back to the court through the Notice of motion dated 14<sup>th</sup> November 2022.
4. He sought an order that “The Respondent/Applicant be granted leave to settle the decretal sum as agreed in the adopted consent herein while the Auctioneer’s charges be quashed as being illegal and exorbitant.”
5. The trial court dismissed the motion. This Appeal is against the said dismissal.



## Grounds of Appeal

6. In the memorandum of Appeal dated 30/11/2022, the Appellant has set out the following grounds:
  - a. That the trial magistrate erred in fact and in law to take into account the fact that the Appellant had paid the 1<sup>st</sup> instalment in full and not Ksh.15, 000 only ( sic)
  - b. That the learned trial magistrate erred in law by allowing the Auctioneers charges without considering the parameters between the decretal sums and the auctioneers charges as enumerated in the copy of the Auctioneers fees.
  - c. That the learned trial magistrate erred in facts and law by rendering a ruling whose effect would be an unlawful attachment of the Appellant's property while the Appellant demonstrated willingness to abide by the recorded consent.
7. The Appeal proceeded by way of written submissions:

## Appellant's submissions

8. It is the Appellant's submission that the Appellant has demonstrated its willingness to abide by the consent. And that the trial erred in misconstruing the Appellant's intention when it approached it.
9. The Appellant further submits that the trial court erred in allowing the auctioneers fees without considering the parameters between the decretal sum and Auctioneer's charges. The Appellant then went ahead to calculate what he considers to be the fees due to the Auctioneer and prays that the Auctioneers fees be expunged from record or be subjected to taxation.

## Respondent's submissions

10. It is the Respondent's submissions that the consent which forms the subject matter of this Appeal was entered into by the parties after delivery of the judgement; that the consent set out the terms of settlement of the decretal sum; that the consent was dated 31<sup>st</sup> October 2022 and filed in court on 14<sup>th</sup> November 2022. The respondent then went ahead to reproduced the terms of the consent.
11. The Respondent submits that the Appellant is misusing the court process by making small payments and which payments are only done when the matter is due to come up in court. The Respondent further accuses the Appellant of misinformation and lies in the handling of this case.
12. The Respondent contends that allowing this Appeal will defeat the whole purpose of why the Respondent approached court in the first place. It is further submitted that the Appellant's hands are unclean and that the Respondent too is deserving of justice.

## Determination

13. The role of this court was set out in interalia the case of *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates* (2013)eKLR where the court held as follows: "This being a first appeal we are reminded of our primary role as the first appellate court , namely to re-evaluate, re-assess and re-analyze the extracts on record and then determine whether the conclusions reached by the Trial Judge are to stand or not, and give reasons either way"
14. I have considered the Application and documents in support, the Replying Affidavit as well as the respective submissions by the contestants.



15. The consent which forms the subject matter of this Appeal was entered into by the parties after delivery of the judgment. It is dated 31<sup>st</sup> October 2022. The consent sets out the terms of the settlement of the decretal sum. The term of the consent made were as follows:
  1. ---
  2. ---
  3. The Respondent shall pay monthly installments of Ksh.40, 000 until payment in full.
  4. The first installment of Ksh.40, 000 shall be made on 1<sup>st</sup> November 2022 and the subsequent instalments shall fall due on the 1<sup>st</sup> of every subsequent month till payment in full.
  5. In the event of default in any one instalment the entire balance shall become due and payable and the claimant shall be at liberty to take out execution proceedings.
16. It is important to remember that the Appellant herein is not contesting the terms of the consent. The only which this court is being called upon to determine is:
  - a). whether the terms of the consent have been complied with or not.
  - b). The other issue for consideration is whether this court should make a determination on the Auctioneer's fees.

Whether the terms of the consent have been complied with.
17. I will start by restating the cardinal principle of the Law of Evidence which loosely put is : “ He who alleges must prove”. It is the Appellant's case that the trial court erred by holding that the Appellant had paid only Ksh.15, 000 when in fact he had paid the Ksh.40, 000 in full.
18. The Appellant however did not submit any evidence that it had indeed paid the Ksh.40, 000 when it appeared in the trial court. He has neither made any effort to seek leave of this court to submit the same by way of additional evidence. Indeed, the Appellant has not made any effort to demonstrate any compliance, whether partially or fully with the consent. In short, he has failed to prove that he has fully complied with the terms of the consent in question.
19. In terms of the said consent, the first instalment of Ksh, 40, 000 was due on 1<sup>st</sup> November 2022. The Appellant defaulted, and the Respondent through its counsel's letter dated 4/11/2022 alerted the Appellant about the default and the intended execution.
20. The first payment was made on 5/11/2022 and the amount paid was Ksh.15, 000 not Ksh.40, 000 . This is evident from Annexure “VW2” to the Respondent's Replying Affidavit sworn on 15/11/2022.
21. On 7/11/2022, a proclamation notice was served on the Appellant. It is quite clear therefore that the Appellant was in default when the proclamation of its goods was carried out. As correctly pointed out by the trial court, the consent order had been breached and therefore the respondent had the right to carry out execution proceedings.
22. By seeking that the court allows the Appellant to continue paying the instalment as initially agreed, when it had already defaulted would be in breach of paragraph 3, 4 and 5 of the consent order. In effect, the Appellant is asking the court to look the other way and ignore the fact that there was an order binding on the parties.
23. If the court was to do this this would also mean rewriting the consent of the parties. Further, as correctly pointed out by the trial court, the terms of a consent are contractual in nature and can only be varied



either by consent of the parties or other grounds upon which a contract would normally be varied. (see *Flora wasike vs Desmond Wambeolla*( 1980)1 KAR)

24. It is rather contradictory of the Appellant to allege that, the consent order is not an issue, and indeed goes ahead to fault the trial court for making it an issue in its Ruling, and at the same time, seek to vary the terms of the very same consent. The Appellant's prayer was essentially seeking to vary the consent, necessitating the trial court to address itself to the essence of a consent order.
25. In a nutshell, the Appellant was in default of the consent order and the execution proceedings undertaken were valid. The Appellant's complain in this regard is without any merit and the same is hereby dismissed.

**Should this court make a determination on the Auctioneer's fees.**

26. On the Auctioneer's costs, either party to the disputed costs is at liberty to apply for Assessment such costs by the court. There is no indication that the same has been done. The Appellant's prayer that the costs be expunged for being exorbitant is a wrong approach, and is therefore misconceived. The court could not also tax a bill whose particulars have not been presented to court for taxation. The prayer is incapable of being granted. I regard this, I regard this as an abuse of the court process.
27. In conclusion the entire Appeal fails and the same is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED IN AN OPEN COURT AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**S. CHIRCHIR**

**JUDGE.**

**In the presence of :**

E. Zalo- Court Assistant

No appearance by the parties.

