



REPUBLIC OF KENYA



KENYA LAW
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Michael & 3 others v Mastermind Tobacco Kenya Limited (Insolvency Cause 2A of 2022) [2023] KEHC 26497 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
INSOLVENCY CAUSE 2A OF 2022
RPV WENDOH, J
DECEMBER 18, 2023**

BETWEEN

**CHRISTINA GATI MICHAEL 1ST PETITIONER
MARIA MAHANDO WANDWI 2ND PETITIONER
MICHAEL MWITA 3RD PETITIONER
ESTHER WANKURU MWITA 4TH PETITIONER**

AND

MASTERMIND TOBACCO KENYA LIMITED RESPONDENT

RULING

1. The application for determination is the one dated 17/7/2023. It was filed by Christina Gati Michael, Maria Mahando Wandwi, Michael Mwita and Esther Wankuru Mwita (the applicants). They seek the following orders:-
 - a. Spent;
 - b. This court do issue an order setting aside the consent orders dated 15/6/2022 and filed on 17/10/2022 before this court;
 - c. That the respondent be ordered to pay the outstanding debt owed as per the consent failure to which execution do ensue for the outstanding amount and the statutory demand be allowed;
 - d. That this court do issue further orders it deems fit to penalize the directors of the respondent company for the false representation that the company was in a position to meet its debt obligations.
 - e. Cost of this application be provided for.



2. The application is based on the grounds appearing on its face and is supported by the affidavit of Athanas Mwita Kerario, Counsel for the applicants sworn on 17/7/2023.
3. Counsel deposed that on or about 22/3/2022, the applicant filed a statutory demand for Kshs. 18,190,891.11; that through dialogue and goodwill, the respondent admitted to owing the applicants and parties entered into a consent on repayment terms; that based on the consent, the respondent made payments between June 2022 until January 2023; that the respondent has since negated on the consent and failed to show cause why the balance of the debt remains unpaid to date; that despite demand, the respondent has never responded to the said demand; that the only way for the applicants to recover the outstanding debt is to have the consent set aside and an order of execution do issue.
4. The application was opposed. George Wachira the Legal Counsel for the respondent swore a replying affidavit dated 30/7/2023. He deposed that this court on 17/10/2022, adopted a consent dated 15/6/2022 where the respondent was to pay the applicants a cumulative sum of Kshs. 44,153,469.66 from 30/6/2022 to 30/4/2024; that as of 20/7/2023, the debt paid was a total of Kshs. 20,295,671.36; that it is therefore misleading for the applicants to contend that since February 2023 the respondent have deliberately failed to remit any payment in line with the consent; that the applicants through their Counsel have been paid Kshs. 695,544/= and 1,341,132,36/= in February and March 2023 respectively.
5. The respondent further deposed that between 3/1/2023 and 27/1/2023, the applicant suffered agency notices issued by Kenya Revenue Authority which restrained it from accessing its funds in its bank Accounts; that despite the cashflow challenges, the respondent has paid a substantial sum of Kshs. 20,295,671.36. The respondent urged this court to dismiss the application with costs and allow the respondent to pay the applicants the balance of the consent sum of Kshs. 23,857,798.30 in 30 months effective January 2024.
6. Both parties filed their respective submissions. The applicants filed their submissions dated 18/9/2023. On whether the respondent breached the consent order to warrant its setting aside, the applicant relied on the Court of Appeal case of Board of Trustees National Security Fund vs Michael Mwalo (2015) eKLR where the court stated that it will interfere with consent orders if it is shown that it was obtained by fraud, collusion or by an agreement that is contrary to public policy. The applicants submitted that in the instant case, when Counsel for the respondent was entering into the consent, he knew of the tax obligations; that it was not the duty of the applicants to ensure the respondent is tax compliant; that the tax notice issued to the respondent should not have affected the consent order; that the agency notice was issued before the consent was signed, and the respondent ought to have notified the applicant of any condition that would lead to the change of any clause in the consent.
7. The applicants further submitted that the suggestion by the respondent to vary the time for payment of the balance, is an indication that the respondent is already in breach of the terms. The applicants prayed that the application be allowed and execution do issue on the admitted outstanding sum of Kshs. 23,857,798.30.
8. The respondent filed its submissions dated 18/10/2023. The respondent submitted that the issue is whether the applicants who have received part payment can have the consent set aside when they have derived a benefit. The respondent relied on the Court of Appeal findings in the case of CA No. 243 of 2002 *Diamond Trust Bank of Kenya vs Ply & Panels Ltd & Others (Unreported)* where it was held that courts will not set aside a consent judgement which has been executed.
9. The respondent submitted that the Kenya Revenue Authority issued it with a letter dated 27/1/2023 disrupting its activities; that since the letter was unforeseen on its part, this court should exercise its



discretion and in the best interest of justice, review the terms of the consent as per paragraph 13 of its replying affidavit.

10. I have considered the application, the response thereto and the submissions by both parties. The issue for consideration is whether this court can set aside and/or vary the consent terms of 15/6/2022.
11. The principles of setting aside consent orders entered between parties is now well settled. A court will be slow in interfering with the consent orders agreed upon by parties unless it is shown that the terms were obtained by fraud, collusion or any agreement contrary to public policy. The East Africa Court of Appeal in the decision of *Hirani vs Kassam* (1952) EACA 131 held: -

“Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, and on those claiming under themand 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”
12. Both parties acknowledge that there are consent terms entered into on 15/6/2022. In the two consents, the respondent acknowledged outstanding debts of Kshs. 25, 962, 578.55/= and Kshs. 18, 190,891.11 making it a total of Kshs. 44,153,469.70/=. In both consents, the parties agreed that the first instalment will be paid on 30/6/2022 and the last instalment to be paid on 30/4/2024. The complaint by the applicants is that the respondent has regened on its duty to pay the monthly instalments as per the consent terms since February 2023.
13. The applicants stated in their grounds that they entered into a consent for payment of a debt amounting to Kshs. 14,473,610/= while in their supporting affidavit Counsel deposed that the outstanding debt is Kshs. 18, 190,891.11/=. The respondent deposed that out of the Kshs. 44,153,469.66, a sum of Kshs. 20, 295,671.36/= has been paid, which assertion has not been challenged by the applicants.
14. This court is unable to decipher how the respondent is in breach, if the outstanding debt being claimed by the applicants in their application is Kshs. 18, 190,891.11/= and a sum of Kshs. 20, 295,671.36/= has already been paid. The applicants did not succinctly tell this court the outstanding amount of the Kshs. 18,190,891.11/= has not been paid since January 2023 as alleged. The consent terms are subsisting until 30/4/2024. The respondent is still within time to comply with the terms of the consent orders. In my view, the applicants have failed to establish that the consent terms dated 15/6/2022 should be set aside.
15. On the prayer of the respondent to vary consent terms that the outstanding debt be settled in 30 months, effective January 2024, this court is of the view that consent terms are contractual in nature. The court cannot rewrite an/or vary the terms of the consent terms suo moto. The variation of the terms has to be discussed or renegotiated by the parties themselves.
16. In the premise, I find that the application dated 17/7/2023 is devoid of merit. It is hereby dismissed with no orders as to costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 18TH DAY OF DECEMBER, 2023.

R. WENDOH

JUDGE

Ruling delivered in the presence of;



No appearance for the Applicants.

Mr. Okoth for the Respondent.

Emma & Phelix Court Assistants.

