



**Kamau v Kinyua (Civil Appeal 49A of 2018) [2022] KEHC 12647 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12647 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 49A OF 2018  
MM KASANGO, J  
JULY 27, 2022**

**BETWEEN**

**GEORGE KAMAU ..... APPELLANT**

**AND**

**ALBERT NYAGA KINYUA ..... RESPONDENT**

**RULING**

1. The judgment of Limuru Magistrate’s Court, for which this appeal refers to, was delivered on March 16, 2018. It is a concern to this Court that instead of this appeal proceeding for full hearing this Court is engaged by the parties with interlocutory applications. I will refer to this later in this Ruling.
2. The appellant filed an application dated April 17, 2018 seeking stay of execution pending the determination of the appeal. That application was before court on May 22, 2018 when the parties entered into a consent. By that consent, it was agreed by the parties that the application be allowed by consent subject to the provision of a security bond for the value of the entire decretal sum by the applicant. The security bond was to be provided within 21 days after the decree was extracted. In default, parties consented to execution of the Limuru Magistrate’s court judgment to proceed.
3. The appellant filed a notice of motion application dated October 8, 2020 which is the subject of this Ruling. Appellant seeks by that application there be an enlargement of time for stay of execution of the judgment and decree; and the consent order of May 22, 2018 be reviewed by allowing the appellant to deposit the decretal sum in court or in joint interest earning account in the names of the parties advocates.
4. The application is supported by the affidavit of Hope Wambugu, an employee of Britam General Insurance Company Limited. The deponent stated that on the appellant’s advocate receiving a copy



of the extracted decree on November 21, 2019, the said advocate informed an employee of Britam Insurance. This is what the deponent stated in his affidavit.

“That our Advocates immediately informed my superior or, M/s Caroline Kimeto vide an email dated 21<sup>st</sup> November, 2019 attaching a draft Insurance Bond for her execution notifying her of the urgency in the matter.

That my said superior is no longer an employee of Britam General Insurance Company Limited and unfortunately left employee without finalizing the Insurance Bond and thus we have complied with the Ruling of this Honourable Court.

That due to the challenges we are facing as the insurance, we pray for a review of the terms to allow the appellant/applicant to deposit the decretal sum in court or in a joint interest earning account in the names of the parties advocates.”

5. The application is opposed by the respondent. The respondent in his replying affidavit deponed that although the extracted decree was forwarded to the appellant on November 21, 2019 to date the appellant has failed to file the bond as per the parties consent.

### **Analysis**

6. I have considered the parties affidavits and their written submissions. Although both parties have labored in their submissions, on whether the court is empowered to enlarge time, the gravamen of the application is indeed whether or not a consent can be set aside. To recap, parties recorded a consent before court on May 22, 2018 to the effect that the judgment of Limuru Magistrate’s court be stayed pending the determination of this appeal on condition that the appellant would within 21 days after decree was extracted, provide security bond.
7. The Court of Appeal in the case *Inercounties Improters and Exporters Limited vs. Telepostal Pension Scheme Trustees & 5 others* (2019) eKLR delivered a ruling where it considered the very issue before this Court: that is under what circumstances a consent order may be set aside. The Court of Appeal in that case stated:-

“We have considered the application and the submissions of parties, and consider that the central issue for our consideration is whether the threshold requirements for setting aside the consent have been met. To do so, it will be necessary to consider whether the tests to be fulfilled have been satisfied.

The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig Vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”



And in the case of *flora n. wasike vs destimo wamboko* [1988] eKLR Hancox JA cited Setton on Judgments and orders (7<sup>th</sup> edition) vol 1 page 124, and reiterated that;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and 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 general for a reason which would enable a court set aside an agreement.”

Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court [to]set it aside.”

8. The threshold of setting aside consent order is clearly re-stated in above case. The appellant seeks the setting aside of the consent on the grounds that the Britam Insurance personnel is no longer in its employment and because the said Insurance is facing challenges. There is absolutely no hint in the application that there was fraud collusion or that the consent was against public policy nor has the appellant shown there exists circumstances in that consent, which would give rise to setting aside a contract.
9. The appellant argued for extension of time as though such enlargement is not tantamount to setting aside a consent order. Such enlargement of time clearly would amount to setting aside the consent order to the effect that the appellant was required to provide Security Bond within 21 days of extraction of the trial court’s decree. This Court therefore in the absence of the conditions for setting aside consent order being presented by the appellant, the application must and does fail.
10. As stated before, the appellant is engaging the court in interlocutory applications at the expense of hearing and determining this appeal. I will order that this appeal be heard on priority basis. I have noted that the record of appeal was filed as far back as January 27, 2020. That record of appeal contains the trial court’s proceedings. For some unexplained reason, the trial court’s file, despite the trial court’s proceedings having been typed, has not been availed. I will require the Deputy Registrar of this Court to urgently follow up and request the trial court’s file be produced to this Court.

### **Disposition**

11. For those reasons set out above, I determine the application dated October 8, 2020 as follows:-
  - a. Directions on hearing the appeal shall be issued.
  - b. A date for hearing this appeal shall be fixed at the reading of this ruling.
  - c. A mention shall be fixed before Deputy Registrar for purpose of ensuring the trial court’s file is availed to this Court.
  - d. This appeal shall be heard on priority basis to that end.
12. The application is without merit and is dismissed with costs.

**RULING DATED AND DELIVERED AT KIAMBU THIS 27<sup>TH</sup> JULY, 2022.**

**MARY KASANGO**

**JUDGE**



**In the presence of:-**

**Coram:**

Court Assistant:- Mourice

For Appellant:- Luchemo HB Kirui

For Respondent:-Mr. Kariuki

Court

Ruling delivered virtually,

**MARY KASANGO**

**JUDGE**

