Republic v Hussein Halake Roba Speaker Isiolo County Assembly & another; Tom Ojienda & Associates (Exparte) (Miscellaneous Application 216 of 2017) [2022] KEHC 13520 (KLR) (Judicial Review) (29 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13520 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION 216 OF 2017

AK NDUNG'U, J

SEPTEMBER 29, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

ISIOLO COUNTY ASSEMBLY ..... 1ST RESPONDENT

HUSSEIN HALAKE ROBA SPEAKER ISIOLO COUNTY ASSEMBLY ..... 2ND RESPONDENT

AND

TOM OJIENDA & ASSOCIATES ..... EXPARTE

RULING

1. Before the court is the *ex parte* applicant's chamber summons application dated July 30, 2020 filed pursuant to sections 5 of the *Judicature Act* and section 1A,1B,3A & 63 of the *Civil Procedure Act*. The application seeks orders as follows;

    1. That this honourable court be pleased to certify the matter herein as urgent.

    2. That this honourable court be pleased to cite the Speaker Isiolo County Assembly Hon Hussein Halake Roba and the Clerk/ Chief Finance Officer, Isiolo County Assembly Hon Salad Boru Guracha for being in contempt of the Certificate of Order issued on November 29, 2019 and punish them as per section 5 of the *Judicature Act* for having deliberately disobeyed the Order of this honourable court.

3. That summons be issued against the said Speaker Isiolo County Assembly Hon Hussein Halake Roba and the Clerk/ Chief Finance Officer, Isiolo County Assembly Hon Salad Boru Guracha to appear before this court and show cause why they should not be committed to civil jail for such term as the court may deem just.

4. That the cost of this application be provided for.

2. The application is supported by the grounds on its face and a Supporting Affidavit dated July 30, 2020, sworn by Prof Tom Odhiambo Ojienda, the Managing Partner of the applicant.

3. It is the *ex parte* applicant's case that on April 28, 2017 the court in its order directed the respondent to pay the sum of Kenya Shillings Five Million, Five Hundred and Fifty-One Thousand Eight Hundred and thirty-nine and one cent (Kshs 5,551,839.01) with interest from the said date until payment in full. The *ex parte* applicant subsequently filed JR No 216 of 2017 seeking for the order of *mandamus* to compel the respondent to pay the decretal sums.

4. It is contended that on February 5, 2019 the parties recorded a consent order in the following terms;

1. The applicant confirms that out of the taxed sum of Kshs 5,551,839.31 he has received a sum of Kshs 1,050,000.00 (leaving a balance of Kshs 4,501,839.31.

2. The respondents to pay the aforesaid balance of Kshs 4,501,839.31 by way of monthly instalments of Kshs 500,000.00 each commencing March 5, 2019 and thereafter on the 5th day of each subsequent month until payment in full.

5. Only the first two installments have since been paid and the respondent herein is faulted for failing to respect the sanctity of the court despite having even been served with a Certificate of Order issued by the honourable court directing the respondents to pay the sum of Kenya Shillings Seven Million Two Hundred twenty-six thousand two hundred and twenty eight and ninety nine cents only (Kshs 7,226,228.00/=) with interest at the rate of 9% per annum from October 2, 2017 to October 22, 2019 until payment in full.

6. In response the respondents filed a Replying Affidavit sworn by Salad Boru Guracha, the 2nd respondent herein on June 3, 2022. In the affidavit Mr Guracha confirms that indeed judgment was entered against Isiolo County Assembly Service Board and the Clerk of the County Assembly of Isiolo and a consent recorded in place of the application filed in JR No 216 of 2017.

7. It is argued that in addition to paying the two instalments covering the months of March and April 2019 and totaling to Kshs 1,000,000.00 a sum of Kshs 500000 was paid on May 8, 2019. It is the respondents' case that the outstanding amount at June 2019 was Kshs 3,001,839.31. The difficulties in servicing the subsequent instalments were due to the delayed release of funds from the national government.

8. The *ex parte* applicant is accused of failing to inform the court that the respondents had paid a total sum of Kshs 2,550,000.00 as at the date of the Certificate of Order and as such the 9% interest was to be compounded based on the said amount and not the principal decretal amount. It is also the 2nd respondent's case that the Certificate of Costs was served upon him and that he only became aware of it when the present application was filed and served a fact the respondents opted not to contest as according to them their resolve has always been to settle the amounts owed.

9. The 2nd respondent contends that on November 29, 2021 the parties appeared before court and although both parties were in agreement that the amount that had already been paid was Kshs

5,000,000.00/= they differed on what was outstanding as according to the *ex parte*applicant it was Kshs 2,226,228.99 representing accrued interest.

10. The respondents are said to have continued paying the agreed instalments and that as at July 2021 a total sum of Kshs 3,000,000.00/= had been paid and only a balance of Kshs 1,839.31/= was outstanding.

11. The *ex parte* applicant is said to have declined the respondents' efforts of finally settling the issue of interest by paying the sum Kshs 500,000.00/=.It is contended that according to the *ex parte* applicant the sum owing is Kshs 2,226,228.99/=. The respondents' case is that the parties having submitted to an alternative dispute resolution mechanism and reduced the same to a consent the court's role should only be to ascertain whether the obligations resulting from the consent have been fulfilled.

12. It is also the respondents' case that in the event that interest was to be charged the same would be based on unpaid or outstanding balances and not the principal decretal sum.

13. In conclusion the respondents contend that the order sought for committal in the instant application cannot be issued as no order of *mandamus* was issued and further that it would be unjust to cite them for contempt when they have fully discharged their obligations under the judgement.

Determination

14. I have had occasion to consider the Chamber Summons application, and the affidavit in support. I have also considered the replying affidavit and had due regard to the learned submissions by counsel. At this stage of the proceedings and arising from the material before me, three (3) issues crystalize for determination:

    i. What is the effect of the consent order dated February 5, 2019?

    ii. Whether the applicant can unilaterally rescind a consent order entered into willfully by parties and adopted as an order of the court.

    iii. Should the respondents be cited for contempt?

15. The consent order recorded in court before Hon Justice Nyamweya (as she then was) is dated February 5, 2019 and its terms are as follows;

    1. The respondent shall pay the outstanding balance of taxed costs of Kshs 4,501,839.31 by way of monthly instalments of Kshs 500,000 commencing on March 5th, 2019 and thereafter on the 5th of each subsequent month until payment in full.

    2. Each party to bear its own costs.

16. The Court in the case of *Superior Homes (Kenya) Ltd v East Africa Portland Cement Company Ltd* [2014] eKLR held as follows on the effect of parties recording a consent;

> "Order 25 Rule 5 of the *Civil Procedure Rules* provides for the compromise of a suit, and states that where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement or compromise, it shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith. In this suit the parties herein in their consent order which was recorded by the court agreed to settle the suit with finality. I am in this regard in agreement with the finding in Agrafin Management Services Limited V Agricultural Finance Corporation & 5 Others

[2012] eKLR that the effect of this action was that the consent order becomes an order of the court upon being endorsed by the Court, and that is why a decree was subsequently issued.

Once such a consent order as the one herein was recorded by the court and a decree issued, it consequently became subject to the law governing the discharge of court orders and decrees. Under the *Civil Procedure Act* such discharge can only be by way of appeal from the order, or review and setting aside of the order. It is in this respect to be noted that under section 67(2) of the *Civil Procedure Act*, that no appeal shall lie from a decree passed by the court with the consent of parties. The only allowed legal procedure therefore through which a consent order and a decree issue thereof can be discharged is by way of review and setting aside. In Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd (1982) KLR 485. It was held *inter alia* in this regard as follows:

"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."

17. The firm of PS Kisaka in its letter dated February 4, 2019 and executed by both the clerk of the Isiolo County Assembly and the firm of Pro Tom Ojienda & Associates addressed to the Deputy Registrar of the High Court, Judicial Review Division requested for the DR to enter consent in the following terms;

    1. The applicant confirms that out of the taxed sum of Kshs 5,551,839.31 he has been received a sum Kshs 1,050,000 leaving a balance of Kshs 4,501,839.31.

    2. The respondents to pay the aforesaid balance of Kshs 4,501,839.31 by way of monthly installments of Kshs 500,000 each commencing March 5, 2019 and thereafter on the 5th day of each subsequent month until payment in full.

    3. Each party to bear its own costs.

18. These are the terms adopted by Nyamweya J when the parties appeared before her on the on February 11, 2019. The court subsequently upon confirmation by counsel for both parties adopted the said consent as an order of the Court. The consent ordinarily became an order of the court upon being endorsed by the court.

19. This ultimately meant that the amount that was outstanding in light of what had been clearly stated in the consent was the sum of Kshs 4,501,839.31/= as it was confirmed that the respondents had already paid the sum of Kshs 1,050,000.00/=.The outstanding sum was to be paid in monthly installments of Kshs 500,000.00/= commencing March 5, 2019 and thereafter on the 5th of each subsequent month until payment in full.

20. It is the respondent's argument that the moment the consent was recorded before the honourable court as to the amount owing and the mode of repayment, the applicant could not legally vary the same by unilaterally extracting a purported Certificate of Order reviving the original decretal sum that had effectively been compromised. I am in agreement with this position. Once the consent was recorded, both parties were bound by it just like in a contract and no party would be at liberty to introduce new terms to it or vary the same. A party desirous of varying or setting aside the terms ought to approach the court and the threshold applicable is the one applicable in varying or setting aside a contract.

21. The pertinent question therefore becomes, can a party unilaterally rescind a consent order entered into willfully by parties and adopted as an order of the court? The answer to this lies in the Court of Appeal

decision in *East African Portland Cement Company Limited v Superior Homes Limited* [2017] eKLR where the court stated as follows;

> " As for the final ground 3, we need not belabour the principle, properly conceded by counsel, that the trial court was entitled to consider and if found appropriate vary, set aside or review the consent judgment. The only issue is whether there were compelling grounds for varying or reviewing the consent decree. Way back in 1952, the predecessor of this Court in Hirani vs Kassam (1952) 19 EACA 131, at 134, stated as follows:
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> "The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Setton on *Judgments and Orders* (7th Edn), Vol 1, p 124, as follows:
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> "*Prima facie*, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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 the court to set aside an agreement."

33. That decision has been followed in many other decisions and we only sample two more:

    The Brooke Bond Liebig Ltd case (*supra*) where the court stated that:

    "a consent order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if 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."

    And the Flora Wasike case (*supra*) stating:

    "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.... In Purcell vs F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;

    "It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."

34. In this case, the trial court was certainly aware of those principles as it cited and applied the Brooke Bond Liebig Ltd case which was followed in the case of Contractors Ltd vs Margaret Oparanya [2004] eKLR, stating thus:

    "This court has qualified or conditional discretion when it comes to interfering with consent judgments or orders. Moreover, where the consent order or judgment is still executory, the court may refuse to enforce it if it would be inequitable to do so. The mode of paying the debt, then is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

22. The court in *Superior Homes (Kenya) Ltd v East Africa Portland Cement Company Ltd* [2014] eKLR held as follows;

> " The Court of Appeal in Munyiri vs Ndunguya (1985) KLR 370 also held that the only remedy available to parties who want to get out of a consent order is to set aside the consent order by way of review or by bringing a fresh suit in court. A review can only be by way of judicial process. There was no such review sought by the defendant in the present case to set aside the consent order, and neither was there any consent by the parties herein that the defendant be discharged from the consent order. In the circumstances this court finds that the said discharge by the defendant of the consent order to be of no legal effect and that the said consent order and decree are consequently still subsisting and in force."

23. In the case before this court no evidence has been adduced by the *ex parte* applicant that it sought for and obtained a review of the consent order or that it filed a fresh suit in court. Neither is there evidence that there was any consent between the parties herein that the terms of the consent were no longer applicable. Consequently, the consent order is still subsisting and in force.

24. The final question would be; can the respondents herein be cited for civil contempt. The elements of civil contempt were elucidated by Mativo J (as he then was) in the case of *Republic v Kenyatta University Ex parte Losem Naomi Chepkemoi* [2019] eKLR where the court held as follows;

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.

> 23. It is the last test in paragraph (d) above that warrants detailed consideration. Unfortunately, the *ex parte* applicant never addressed it at all. On the face our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt of court is quasi-criminal in nature.
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> 24. Two principals emerge. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. The second reason is coherence: - it is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted: in the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person."

25. Strangely, the consent entered into by the parties did not have a default clause. Whether by design or inadvertence, this omission leaves the applicant with little or no option other than to move the court for the setting aside of the consent. The chamber summons application seeking the citing of the respondents for contempt cannot lie at this stage not until the consent order is legally set aside.

26. This is more so for reason that even the sums cited in this application as owing are not applicable as they go against what the parties consented to as the amount to be paid.

27. The upshot is that the application dated July 30, 2020 fails. The same is dismissed. In the circumstances of this case, each party is to bear its own costs.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 29TH DAY OF SEPTEMBER 2022

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A K NDUNG'U

JUDGE