

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 656 OF 2016

ALICO KENYA LIMITED aka CFC INSURANCE CO. (K) LIMITED.....APPLICANT

VERSUS

SALIM MOHAMED MAKASHA.....RESPONDENT

RULING

1. The application dated 6th July, 2020 seeks orders that **this honourable court be pleased to set aside the consent order entered on 27th April, 2017 and the consequential orders thereof.**

2. It is stated in the grounds and the affidavit in support that judgment was delivered by the Lower Court on 30th September, 2016. That subsequently the Respondent filed the Appeal herein. That the parties herein on 12th May, 2017 entered into a consent to stay the execution of the judgment and the Decree pending the hearing and determination of the Appeal. That to date the Record of Appeal has not been filed as the typed Lower Court proceedings have not been supplied. It is contended that the delay is unreasonable and prejudicial to the Respondent who is elderly and cannot enjoy the fruits of the judgment.

3. The application is opposed. It is stated in the replying affidavit that no reasons have been given to warrant the setting aside of the consent herein. That the Respondent complied with the conditions for stay of execution pending the hearing and determination of the Appeal and deposited the decretal sum of Ksh.2,882,987.26 in a joint account of the advocates for the parties. That the Respondent has taken steps to procure the typed proceedings but the Lower Court is yet to supply the same. It is further stated that if the application is allowed the Respondent will suffer prejudice and the Appeal rendered an academic exercise.

4. The Applicant filed a further affidavit in response. It is stated that the Respondent is not diligent enough and has taken no steps to have the Executive Officer summoned to explain the delay. That indeed it is the Applicant who has stepped up the obtaining of the typed proceedings.

5. I have considered the application, the response to the same and the written submissions filed by the respective counsel for the parties.

6. It is evident from the depositions of both parties herein that the blame for the failure to avail the typed proceedings lies squarely with the court. The delay cannot therefore be attributed to the Respondent. The Respondent has exhibited several letters herein requesting for the typed proceedings.

7. As stated by the Court of Appeal in the case of **Flora Wasike v Destimo Wamboko [1988] IKAR 625:**

“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.”

8. With the foregoing, I find no merits in the application and dismiss the same with costs in cause.

Date, signed and delivered at Nairobi this 25th day of Feb.,2021

B. THURANIRAJADEN

JUDGE