



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NO. 13 OF 2017

MOHAZO EPZ LTD.....PLAINTIFF

VERSUS

NEW WIDE GARMENTS EPZ LIMITED.....1ST DEFENDANT

EXPORT PROCESSING

ZONES AUTHORITY (EPZA).....2ND DEFENDANT

AND

CROSS-CLAIM

EXPORT PROCESSING

ZONES AUTHORITY (EPZA).....2ND DEFENDANT/CLAIMANT

VERSUS

NEW WIDE GARMENTS EPZ LIMITED.....1ST DEFENDANT

AND

COUNTER-CLAIM

EXPORT PROCESSING ZONES

AUTHORITY (EPZA).....2ND DEFENDANT/CLAIMANT

VERSUS

MOHAZO EPZ LTD.....DEFENDANT

RULING

1. On 6th February, 2020, I delivered judgement in this case in which I granted the following orders:

1) I enter judgement for the plaintiff against the 1st Defendant in the sum of Kshs 9,442,488.87 with interests at court rates from the date of filing suit till payment in full and costs.

2) I however dismiss the Plaintiff's suit against the 2nd Defendant with costs and enter judgement for the 2nd Defendant against the Plaintiff in the sum of US \$ 26,605.38 with interest at court rates from the date of filing the counterclaim till payment in full with costs.

3) I enter judgement for the 2nd Defendant against the 1st Defendant in the sum of USD 3,648.37 and Kshs. 120,125/= with interest at court rates from the date of the cross-claim till payment in full together with costs.

2. By an application dated 10th December, 2020, the Plaintiff herein seeks an order that the entire judgement sum of Kshs 12,680,941.87 together with interest now amounting to well over Kshs 17,000,000.00 currently held in the joint account of the advocates for the Plaintiff and the 1st Defendant or reasonable part thereof be released to the Applicant to alleviate its suffering due to the delayed execution of the 1st Defendant's intended appeal.
3. The said application was based on the fact that though the 1st Defendant filed a Notice of Appeal in February, 2020, to date it has not proceeded with the same hence causing the Applicant a lot of financial stress. It was deposed that the agreement to deposit the decretal sum in the said joint account was on the understanding that the said intended appeal would be expeditiously prosecuted.
4. It was deposed that the Plaintiff lost its entire investment due to the wrongful acts of the 1st Defendant who is now desperate to delay the filing and prosecution of the intended appeal hence the Plaintiff has been caused untold suffering at the hands of the 1st Defendant.
5. In response to the application, it was deposed on behalf of the 1st Defendant that following the compromise of the 1st Defendant's application for stay by consent filed herein on 24th July, 2020, a joint account was opened in which the decretal sum plus interest amounting to Kshs 17,205,959.00 was deposited. It was therefore averred that there is no reason why the said consent should be set aside or varied.
6. The 1st Defendant averred that vide a letter dated 10th February, 2020 filed in court on 17th February, 2020, it requested for typed proceedings and made follow ups with the court thereon from time to time. On 11th December, 2020, the court furnished it with the typed proceedings and a certificate of delay to enable it file the appeal to the Court of Appeal and on 21st December, 2020, it filed its appeal registered as Civil Appeal No. E518 of 2020.
7. It was therefore deposed that the delay in filing the appeal was caused by the Court and as the appeal is yet to be heard and in light of the consent filed herein, the orders sought by the Plaintiff are not capable of being granted.
8. It was disclosed that the 2nd Defendant has also laid claim to the decretal sum on the ground that it is unable to secure any attachable assets from the Plaintiff in order to satisfy its judgement against the plaintiff. Consequently, it was the 1st Defendant's position that the decretal sum ought to be preserved together with interest pending the hearing and determination of the aid appeal.
9. The 2nd Defendant's claim referred to in paragraph 8 above is the subject of the application dated 19th March, 2020 in which the 2nd Defendant seeks an order that this Court attaches the decree obtained herein by the Plaintiff against the 1st Defendant for Kshs 9,442,488.87 with costs and interests thereon to pay and settle the decree obtained by the 2nd Defendant against the Plaintiff herein.
10. The said application was based on the fact that the Plaintiff has not appealed against the said judgement and has not settled the same. According to the 2nd Defendant, it has not been able to trace any assets belonging to the Plaintiff capable of settling the decretal sum. It was the 2nd Defendant's position that should the entire sum due to the Plaintiff from the 1st Defendant be paid, the same may not be recovered to settle its decree owed to the 2nd Defendant.
11. The said application was opposed by the 1st Defendant herein on the ground that in light of the consent entered into between the Plaintiff and the 1st Defendant, the orders sought in the 2nd Defendant's Application are not capable of being granted in view of the pending appeal.

Determination

12. I have considered the two applications, the affidavits in support thereof and in opposition thereto as well as the submissions filed. By a consent letter dated 20th July, 2020, the advocates for the Plaintiff and the 1st Defendant agreed to have the application dated 17th February, 2020 allowed, on condition that the 1st Defendant deposits within forty five days of filing of the said consent the judgement sum of Kshs 12,680,941.87 plus interest in a joint interest earning bank account to be opened at the Kenya Commercial Bank Ltd in the joint names of the firm of A. E. Kiprono & Associates and Nancy Baraza & Co. Advocates and in default the Plaintiff was at liberty to execute. That consent was adopted as an order of this court.
13. The application that gave rise to the said consent was seeking a stay of execution of the judgement in this matter pending the hearing and determination of the intended appeal by the 1st Defendant.
14. The effect of the said consent is that a stay of execution was granted pending the hearing and determination of the said appeal which the 1st Defendant has shown is now in existence.
15. The Plaintiff's application in effect seeks to have the consent order varied and/or set aside. The consent order that is sought to be set aside in these proceedings was, no doubt, entered into by counsel who were duly instructed to act in the matter generally for their respective clients. In such circumstances the general rule was laid down by the Court of Appeal **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997** in where it was held that:

“A solicitor has a general authority to compromise on behalf of a client, if *bona fide* and not contrary to express negative direction; and it would seem that a solicitor acting as an agent for the principal solicitor has the same power. No limitation of

the implied authority avails the client as against the other side unless such limitation has been brought to their notice...A consent order can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be settled which are not carried out.”

16. The locus classicus in applications for setting aside consent orders or judgements is the Court of Appeal decision in **Flora N. Wasike vs. Destimo Wamboko [1988] KLR 429; [1982-88] 1 KAR 625**. In that case the Court expressed itself as hereunder:

“It is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons...Prima facie a consent 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement...A court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties...In the instant case, while the Judge did not in terms record the parties’ ‘or their advocates’ consent to the consent judgement he entered, nevertheless the original record shows that both parties were represented by advocates and that the consent judgement was recorded in their presence. The universal practice is to record that a judgement or order is by consent, if that be the case, and it is difficult to believe unless demonstrably shown otherwise that the court would so head the judgement if it were not the case, at least so far as the Judge was aware. Furthermore, a solicitor or counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned...But it would be no mean task for a party to a decree by consent to prove that the decree is invalid on the grounds referred. It is abundantly clear that the appellant was a ready and willing party to the material judgement by consent and that the terms and consequences of the judgement were explained to her.”

17. The East African Court of Appeal on its part in **Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266** noted that:

“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 have been no mistake or misunderstanding. None of the factors which give rise to the setting aside of a consent agreement existed.”

18. The main reason why the Plaintiff seeks to have the said consent set aside, is because of the delay by the 1st Defendant in fast tracking the prosecution of the appeal. The 1st Defendant has however satisfactorily explained the circumstances giving rise to the delay. It, in fact, has exhibited a certificate of delay from this Court explaining the reason why the proceedings were not supplied in time. In my view, a party ought not to be penalised in situations where the delay is placed squarely at the doorsteps of the court. I am not satisfied that the 1st Defendant is to blame for the situation it finds itself in as it could not be expected to file the appeal before obtaining the proceedings. Rule 82 of the Court of Appeal is clear that the time required in preparation and supply of the proceedings is to be discounted in computation of time. In other words, once a party requests for proceedings, the time, in so far as the filing of the appeal is concerned is frozen.

19. As regards the financial position of the Plaintiff it has not been stated that the said position was unknown to the Plaintiff at the time the consent was being entered into and could not have been discovered despite the exercise of due diligence.

20. I am therefore not satisfied that the orders sought in the application dated 10th December, 2020 ought to be granted. The same is hereby disallowed. The 1st Defendant ought to expeditiously set down the appeal for hearing and determination.

21. As regards the application dated 19th March, 2020, it is clear that what the 2nd Defendant seeks to attach is decree of this Court which is in favour of the Plaintiff. That decree, however, is the subject of a stay order. In my view, whereas there is an order staying the execution of the decree issued in favour of the Plaintiff, nothing stops the 2nd Defendant from attaching the decree. However, so long as the stay stays extant, the money the subject of the stay cannot be released to the 2nd Defendant. What Order 22 rule 47(6) prohibits is the release of the sum under attachment as long as the attachment remains in force. Consequently, I hereby direct that the sum due to the Plaintiff pursuant to this judgement shall not be released to the 2nd Defendant during the pendency of the appeal by the 1st Defendant. It shall however remain under attachment during the pendency of the appeal and the 2nd Defendant will have to await the said decision. Once the appeal is determined, and depending on its outcome, the 2nd Defendant would be at liberty to apply for release of such sums as will be due to it.

22. In the circumstances of this case, there will be no order as to the costs of both applications.

23. Orders accordingly.

Ruling read, signed and delivered in open Court at Machakos this 25th day of February, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

Dr Baraza for the Plaintiff

Mr Kiprono for the 1st Defendant

Mr Omondi for Mr Ojiambo for the 2nd Defendant

CA Geoffrey