



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 234 OF 2020

MOHAMUD AHMED MUSA.....1ST APPELLANT/APPLICANT

ABDIKADIR ABDULLAHI.....2ND APPELLANT/APPLICANT

-VERSUS-

JOAN NATALIA NAIBEI.....RESPONDENT

RULING

1. On 8th December 2020, learned counsels appearing in this appeal recorded a consent order in the following terms:

i. An order for stay of execution pending appeal is granted on the following conditions:

a. The appellants to pay the respondent a sum of ksh.2,000,000/= within 45 days from the date of the order.

b. The balance of ksh.6,688,964/= to be deposited in an interest earning account in the joint names of learned counsels appearing in this matter within 60 days from the date of the order.

c. In default of any of the above (a) and (b) the order for stay shall lapse automatically.

2. The appellants have now taken out the motion dated 14th December 2020, the subject matter of this ruling whereof they seek for *inter alia*

i. THAT this application be certified urgent, service dispensed with thereof and the same be heard ex parte in the first instance.

ii. THAT there be an order of stay of execution of the judgment and decree in Milimani CMCC No. 10791 of 2018 Joan Natalia Naibei – vs- Mohamud Ahmed Musa & Abdikadir Abdulahi pending the hearing and determination of this application.

iii. THAT this honourable court be pleased to set aside consent order made on 9th December 2020 to the extent that the appellants are to within 60 days of the order, deposit the sum of kshs.6,688,964/= in a joint interest earning account and in default of which the order for stay of execution lapse.

iv. THAT Notice of Motion application dated 11th November 2020 be reinstated and fixed for directions at the earliest date possible for purposes of determination on the balance of the decretal sum of ksh.6,688,964/=.

v. THAT costs of this application be provided for.

3. The applicants filed the affidavit jointly sworn by Terry King'ayi and Mugo Githinji in support of the motion. The respondent on her part filed the replying affidavit she swore to oppose the application. Learned counsels made brief oral submissions but they largely relied on their respective material they filed.

4. It is the submission of the appellant that the consent order was recorded by error therefore it is necessary to have it set aside.

5. The applicants aver that they nor their insurers authorized their advocates to enter into a consent. The learned advocate recorded on their behalf.

6. It is stated that the appellants did not sanction the terms of the consent in respect of kshs.6,688,964/= and that they were not aware that the aforesaid amount would be subject to proceedings on the interpartes hearing of the application dated 11th November 2020.

7. The respondent is of the submission that the appellants' application is an abuse of the court process and an afterthought. It is argued that the appellants have not demonstrated that the consent order was obtained illegally and or through fraud to warrant being set aside. It is also argued that the appellants' advocates have not established with cogent evidence the allegations of misrepresentation hence the motion is a delaying tactic.

8. In the case of **Board of Trustees, National Social Security Fund =vs= Michael Mwalo (2015) e KLR** the court stated regarding consents as follows:

“A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of court.”

9. In the instance case, the applicants have stated that the consent order was recorded by error and misrepresentation occasioned by miscommunication between the advocates appearing before court.

10. I have critically examined the averments made in the supporting affidavit jointly sworn by M/s Terry Kingayi and Mugo Githinji and it is apparent that what may have motivated the appellants to file the application is the appellants or their insurers found it a heavy burden to make a deposit of the balance of the decretal sum of ksh.6,688,964/=.

11. The record shows that M/s Terry King'ayi personally appeared and agreed to record the consent order. The particulars of misrepresentation were never given. I agree with the submission of the respondent that the application was made as an afterthought. There is no cogent evidence that there was miscommunication between the advocates. I find that the consent order was properly recorded.

12. In the end, I find no merit in the motion dated 14.12.2020. The same is dismissed with costs being awarded to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF MAY, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the Respondent