



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 24 OF 2020

AMOS OCHIENG AYWA.....APPELLANT/APPLICANT

VERSUS

PAUL AKOKO OYUGI..... RESPONDENT

RULING

The application dated 18th January 2021 was for enlargement of time within which the Applicant should comply with the conditions for stay of execution.

1. Secondly, the Applicant sought a variation of the orders issued on 3rd June 2020, so that the Applicant could provide a Bank Guarantee for Kshs 510,007.50, from Diamond Trust Bank.

2. As the Appellant has stated in the grounds upon which his application was founded, the orders made on 3rd June 2020 were made with the consent of the parties. The consent was embodied in a letter dated 11th May 2020, which was signed by the advocates representing the two parties herein.

3. The following are the terms of the consent order, as adopted from the consent letter dated 11th May 2020;

“1. THAT the Appellant/Defendant pay the Respondent/Plaintiff Kshs 510,007.50 within fourteen (14) days from the date thereof.

2. THAT the Appellant/Defendant deposit the Kshs 510,007.50 in a joint interest earning account within 14 days from the date thereof.

3. THAT failure to comply, execution to proceed forthwith.”

4. The Respondent opposed the application, first because the orders which the Applicant is seeking to have varied, was entered into by consent of the parties.

5. When canvassing the application, the Applicant urged the Court to bear in mind the provisions of **Sections 1A, 1B, 1C, and 3A** of the **Civil Procedure Rules**. In his opinion, the Court has the requisite latitude to exercise its power in such manner as would enhance the overriding objectives, to facilitate a just, expeditious, proportionate and affordable resolution to disputes.

6. The Applicant further submitted that the Court is enjoined to exercise its jurisdiction by making orders that may be necessary for the ends of justice, whilst preventing the abuse of the powers of the Court.

7. And the Applicant was of the view that it would be in best interest of justice if the Court varied the earlier orders, and if the Court directed the Applicant to provide a Bank Guarantee in the sum of Kshs 510,007.50. If such an order was made, the Applicant believes that it would not prejudice the Respondent.

8. If anything, the variation orders were deemed by the Applicant, to provide a fair atmosphere within which the appeal could be canvassed.

9. I have given due consideration to the application.

10. First I note that the order which is the subject matter of the application was made with the consent of the parties.

11. I hold the view that when parties enter into a consent, each of them must be deemed to consider the terms of such consent as constituting a fair manner of resolving the issue between the parties thereto.

12. In any event, it is well settled that a consent order cannot be varied or discharged unless it was obtained by either fraud or collusion; or if the consent was contrary to the policy of the court.

13. The other instances when a consent may be varied or set aside include;

(a) when one or more parties entered into it whilst he was or they were ignorant of material facts; or

(b) when it is established that there were circumstances which could lead to the setting aside of a contract.

14. In that regard I derive guidance from the decision of the Court of Appeal in **EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED Vs SUPERIOR HOMES LIMITED CIVIL APPEAL NO. 158 OF 2014**, in which the court expressed itself thus;

“Way back in 1952, the predecessor of this Court, in Hirani Vs Kassam (1952) 19 EACA 131, at 134, stated as follows:

‘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 a good ground for varying or rescinding a contract between the parties. The position is clearly set out in Setton on Judgements and Orders (7th Edn), Vol. 1 P. 124. as follows 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.”

15. The Applicant has not demonstrated to the Court that this case falls within the scope outlined in the legal authority cited above.

16. There was no fraud nor collusion. There was nothing in the agreement, which is contrary to the court policy.

17. It has not been shown that some material particulars were unknown to the Applicant, at the time he executed the consent order.

18. Instead, what I find is as follows;

(a) Whereas the money was to be deposited in a joint interest earning account within 14 days, it was not until 26th June 2020 that the applicant’s advocates first communicated with the bank, proposing to open the joint account.

As the order in issue is dated 3rd June 2020, it was already more than 14 days by the time the applicant started taking steps to give effect to the consent order.

The delay is unexplained.

(b) It was not until 28th August 2020, that the applicant’s advocates wrote to the respondent’s advocates, forwarding the Application for opening a Business Account at the NCBA Bank.

The Applicant did not explain the delay.

(c) The respondent did agree, in principle, to the variation of the consent order, when he asked the applicant to have the joint account opened at KCB. The said “agreement” is contained in the respondent’s letter dated 10th September 2020.

However, notwithstanding the Respondent’s readiness to accommodate the Applicant, the latter did not go along with the idea of opening the joint account at KCB.

There is no explanation why the applicant did not agree to have the account opened at KCB.

(d) Instead, the applicant first suggested that the money be deposited in court. Secondly, the applicant suggested that the matter be marked as settled! And finally, the applicant suggested that he should be allowed to come up with a Bank Guarantee.

From the applicant’s conduct, the Court finds that the applicant was not keen to comply with the consent order.

19. In conclusion, I have found no sound foundation upon which I could base a decision to vary the consent order. I therefore decline to vary the said order.

20. As the stay of execution was conditional upon compliance with the consent orders, pursuant to which money was to be deposited in a joint account; and because the Applicant did not comply with the order in issue, I find that there cannot now issue an order for the extension

of the order for stay of execution.

21. The application dated 18th January 2021 is dismissed, with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU

This 27th day of **July** 2021

FRED A. OCHIENG

JUDGE