



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. 442 OF 2019

MUSA GABIRAARI HAMZA.....1ST APPLICANT

THOMAS MBERA ACHEI.....2ND APPLICANT

VERSUS

PHILIP OTIENO OLWARO.....RESPONDENT

RULING

1. The parties herein recorded a consent before **Kamau J**, on 24.07.2019 to allow the motion by **Musa Gabiraari Hamza** and **Thomas Mbera Achei** (the Applicants) dated 15.07.19 seeking leave to appeal out of time and stay of execution. On terms including the payment of half the decretal sum in the sum of Sh. 723,534/- to **Philip Otieno Olwaro** (the Respondent) through his advocate and the deposit of a further similar amount into a joint interest earning account in the names of their respective advocates within 21 days. It appears that the condition for deposit was not complied with and the Applicants filed the motion dated 9th June, 2020.

2. The motion was seeking inter alia that the firm of **Kimondo Gachoka & Company Advocates** be granted leave to come on record in place of **Kairu McCourt Advocates** for the Applicants (spent- prayer allowed on 14.08.2020); that the court be pleased to vary the consent order issued on 24th July, 2019 so that the Applicants are allowed to deposit the sum of Kshs. 723,534/= into court instead of a joint interest earning account; that the period within which the Applicants were to comply with the consent order of 24th July 2019 be enlarged and/or extended to enable the comply and prosecute and finalize the Appeal; and that there be stay of execution of the judgment delivered on 5th April, 2019 pending hearing and determination of the appeal. The motion is expressed to be brought under Section 95 of the Civil Procedure Act, Order 9 Rule 6(b), Order 50 Rule 6 of the Civil Procedure Rules among other provisions. On grounds, *inter alia*, that the Applicants had partially complied with the terms of the consent order of 24th July, 2019 but have been unable to comply with the order for deposit of half the decretal sum amounting to Kshs. 723,534/= in a joint interest earning account in the stipulated period because the Respondent herein has failed and or refused to complete the necessary account opening forms.

3. The motion is supported by an affidavit sworn by **Sharon Laboso** which amplifies the grounds on the face of the motion. The deponent states that the Applicants have been unable to comply with the order requiring them to deposit part of the decretal sum in a joint interest earning account because the Respondent has rejected the bank proposed by the Applicants and has failed and or refused to avail alternate bank account opening forms.

4. The motion was opposed by way of a replying affidavit sworn by the Respondent. The Respondent asserts that on 30th July, 2019 his counsel forwarded to the Applicants counsel the account opening forms, as such the allegation that Respondent's counsel declined to supply the necessary account opening forms is false. Finally, the Respondent opposed the balance of the decretal sum to be deposited in court.

5. The motion was canvassed by way of written submissions. For the Applicant, it was submitted the principles upon which a court may interfere with a consent order or judgment were outlined in **S M N v Z M S & 3 Others [2017] eKLR** and **Flora N. Wasike v Destimo Wamboko [1988] eKLR**. Counsel reiterated material in the supporting affidavit to the effect that non-compliance was due to the Respondent counsel's rejection of the Applicants' choice of bank and failure to avail account opening forms from their preferred bank. Finally, it was submitted the Applicants have demonstrated good faith through partial compliance by releasing half of the decretal sum to the Respondent and that he will not suffer any if the balance of the decretal sum is deposited in court.

6. The Respondent's argument was that no proper grounds for variation of the consent have been demonstrated. That on two occasions, the Respondent's advocate forwarded account opening forms to Applicants' counsel, but they did not complete the forms. Nor have they filed the memorandum of appeal in accordance with the consent. It was asserted that the Applicants have approached the court with unclean hands as they are in breach of the terms of the consent order and have no plausible grounds to justify the variation of the terms of the consent.

7. The court has considered rival affidavits and submissions. It is trite that a consent judgment/order may be set aside only in certain circumstances, for instance, of fraud or collusion, misrepresentation of the facts, lack of consensus, public policy or for such reasons as would normally lead to the setting aside or rescinding of a contract. See **Flora N. Wasike v Destimo Wamboko [1988] eKLR**.

8. The Court of Appeal in **Samson Munikah Practising as Munikah & Company Advocates v Wedube Estates Limited [2007] eKLR** cited the decision of the Court of Appeal for Eastern Africa in **Brooke Bond Liebig (T) Ltd v. Mallya [1975] E.A. 266** where it was stated that:

“The circumstances in which a consent judgment may be interfered with were considered by this Court in Hirani v. Kassam [1952] 19 EACA 131 where the following passage from Seton on Judgments and Orders, 7th Edn., Vol 1, P. 124 was approved:

Prima facie, any order made in the presence and with the consent of the 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 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.

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion.

All material facts were known to the party who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham, J. said in the introduction to the passage quoted above from Hirani's case, a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding it. ...”

9. **Ag. Vice President Mustafa** stated in his judgment that:

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. 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 could give rise to the setting aside of a consent agreement existed.” (Emphasis added).

10. Prayers 4 and 5 of the motion are declined. The matters disclosed in this case do not bring it within the principles above. Mere differences between the parties' respective advocates on the preferred bank, as appears to be the case here is not enough ground for varying a consent order. For all that, however, the parties appear willing to carry out the terms of the consent order. In the circumstances, the prayer for extension of time appears more appropriate than that seeking the varying of the consent.

11. The Applicants must be faulted for not moving the court with dispatch as soon as it became apparent that they could not comply on time due to differences on the parties' preferred bank. Nevertheless, there is uncontroverted evidence that the Applicants have released payments to the Respondent pursuant to the consent. The Respondent will not be unduly prejudiced and can be compensated through costs. The court will grant prayer 6 by enlarging time for compliance by a further 45 (forty-five) days from today's date.

12. Prayer 8 is superfluous. The original consent terms allowed conditional stay of execution pending appeal. The enlargement of time revives the terms of the consent and there is no need for a separate order to stay execution as prayed in the instant motion.

13. Noting the causes of delay in compliance, this court directs that deposit of the sum of Kshs. 723,534/= can be made into any of the following banks: -the Co-operative Bank, Standard Chartered Bank or Diamond Trust Bank and directs the parties' advocates as officers of the Court to co-operate in facilitating the opening of the bank account by completing the necessary forms without delay. The Court's limited time resource should be applied in the determination of the core dispute between parties rather than being dissipated in administrative matters arising from its orders, which advocates for parties can easily resolve without resorting to the court. The Respondent is awarded the costs of the application in any event.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 21ST DAY OF OCTOBER 2021

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Waikwa h/b for Ms. Sagini

For the Respondent: Mr. Ongeri

C/A: Carol