



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 319 OF 2013

WATER RESOURCES MANAGEMENT

AUTHORITYPLAINTIFF/RESPONDENT

VERSUS

NAIROBI CITY WATER AND

SEWARAGE COMPANY LTD.....DEFENDANT/APPLICANT

RULING

1. Through the application dated 22nd February 2017, the defendant/applicant seeks orders to vary Order No. 4 of the consent order recorded on 21st November 2016 on grounds that the order contains material alterations from the consent terms recorded by the parties on 17th November 2016. It is the applicant's case that the said material alterations vitiate an integral component of the agreement reached by both parties.
2. The application is supported by the affidavit of the defendants Legal Officer, **Judy Gitari**, who avers that on 17th November 2016, the parties herein drafted a hand written consent that was signed by their advocates but that the presiding judge did not endorse it and instead directed the parties to appear before her on 21st November 2016 when a typed draft consent was presented to the court which draft differed materially from what had initially been agreed upon.
3. It is the applicant's case that the typed consent at paragraph 4 indicates that interest rates would be **"reviewed"** instead of waiver of interest as was indicated in the original handwritten consent.
4. The respondent opposed the application through grounds of opposition dated 22nd April 2019 wherein it states that the application is baseless, premature and lacks both legal and factual foundation as the subject consent order, as recorded by the court reflects the intention of the parties and their agreement. It is the respondent's case that the consent recorded by the parties in court reflects their true intention and agreement.
5. The respondent maintains that the instant application is a time buying gimmick employed by the applicant to evade settling the debt owed to the respondent.
6. I have carefully considered the application dated 22nd February 2017 and the plaintiff/respondent's Grounds of Opposition. I find that the main issue for determination is whether the applicant has made out a case for the granting of orders of variation of the consent order recorded on 21st November 2016.
7. Courts have taken the position that they will not interfere with the consent recorded by the parties except in certain exceptional circumstances. In the present case, the applicant argues that there are material alterations in the handwritten consent recorded by the parties on 17th November 2016 when compared to the typed copy especially at paragraph 4 thereof wherein instead of stipulating that there shall be **"waiver of interest"** the typed consent states, **"the rate of interest will be reviewed"**.
8. I have perused both the handwritten consent and the typed copy at the affected paragraph 4 and I note that while it is true that the initial intention of the parties, as shown in the handwritten draft, was to state that there will be a gradual waiver of the interest, the said provision was clearly altered in the same handwritten draft to show that **"the rate of interest will be reviewed."** I note that the alteration done on the original handwritten draft was counter signed by both parties and it is therefore incorrect for the applicant to suggest that the alteration was done on the typed draft and not the handwritten one.

9. The general principle of law that a consent judgment or order has the effect of a contract and can only be set aside on grounds which would justify setting aside of a contract. This is the position that was adopted in **Brooke Bond Liebig Ltd v Mallya** [1975] EA 266 wherein it was held:

"a consent order 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."

10. Similarly, in **Flora Wasike v Destimo Wamboka** (1988) 1 KAR 625 it was held:

"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...."

11. In **Purcell v F C Trigell Ltd** [1970] 2 All ER 671, Winn LJ said at 676;

"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."

12. In the present case, I find that the typed consent is the exact replica of the handwritten draft consent word for word, and that the application does not meet the threshold set for the granting of consent orders as discussed in the above cited cases. I therefore find that the application is not merited and I therefore dismiss it with costs to the respondent.

Dated, signed and delivered in open court at Nairobi this 12th day of March 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Muoma for Macharia for defendant/applicant

Mr. Obok for Mumma for respondent.

Court Assistant - Sylvia