



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

HIGH COURT CIVIL APPEAL NO. 210 OF 2018

MICHAEL OKATCH OMONDI.....APPELLANT

VERSUS

KEVIN KWENA LUNANI.....RESPONDENT

(Being an Appeal against the Ruling/Order dated 14th September 2018 in Mombasa

SRMCC No. 596 OF 2016 by Learned Principal Magistrate the Honourable F. Kyambia)

Coram: Hon. Justice Reuben Nyakundi

M. Ananda & Co. Advocates for the Appellant

Ameli Inyangu & Partners Advocates for the Respondent

JUDGEMENT

1. Through a Plaintiff dated 22nd March 2016 and filed on 24th March 2016 in Mombasa Civil Suit No. 596 of 2016, the Appellant herein filed suit against the Respondent at the trial court alleging a breach of an Agreement. Per that Agreement, the Respondent had agreed that he owed the Plaintiff/Appellant the sum of Kenya Shillings Two Million Two Hundred and Ninety-six Thousand Seven Hundred and Thirteen (Kshs. 2,296,713.00) only which was to be paid into the Plaintiff/Appellant's Account No. 0168280122 held at Barclays Bank, Nkrumah Road within a period of six (6) months which grace period expired in December 2015.

2. Per the case at trial, it is not in dispute that the Respondent owed the Appellant. It is also agreed that Judgment in default of appearance was entered as against the Defendant/Respondent. The Appellant contended that it was for a total sum of Ksh. 2,967,647.60 including costs and interest. By the by, the Respondent and the Appellant recorded a Consent dated 7th April 2017 and filed on 10th April 2017.

3. According to the terms of this Consent, the Respondent was to pay the sum of Ksh. 2,508,305.00 which was to be liquidated by instalments as follows:

a. Kshs. 500,000/= payable on execution of this Consent.

b. The balance of Kshs. 2,008,305 to be liquidated in monthly instalments of Kshs. 200,000 with effect from the 30th of April, 2017 and on the 30th of every succeeding month till payment in full.

c. The Auctioneers charges agreed at Kshs.50,000/= be paid within 14 days from the 6th April 2017.

d. In default of payment of any single instalment as stated above and the Auctioneers charges, the original judgment herein shall revert and the plaintiff be at liberty to execute the remaining amount at once without any further reference to the defendant.

e. Upon payment of all the instalments and Auctioneers charges the matter be marked as settled.

4. According to the Appellant, the Respondent defaulted on the Consent orders and as at 8th September 2017 had paid the sum of Kshs. 1,200,000. The Appellant took the view that at the point of the default, the debt owing reverted to the original decretal sum of Kshs. 2,967,647.60. Thus, for the Appellant, after deducting the already paid sum of Ksh. 1,200,000, the sum which remained owing and included the costs and interest of which Warrants were reissued and dated 2nd October 2017 was Kshs.2,245,412.60.

5. The case was then made that the Respondent's action of issuing post-dated cheques totalling to Ksh. 1,300,000.00 at his own convenience without coming back to his Advocates or the Plaintiffs/Appellant's Advocates for regularization and/or preparation of another Consent if need be to such effect could not offset the outstanding debt. It was argued that the Plaintiff/Appellant and his Advocate banked those cheques as a of due diligence on their part to mitigate the Appellants loses and not as a further consent as none had been filed nor presented in Court as at 30th January 2018. The balance due then was Ksh. 1,248,444.30 which included costs and Interest and was the amount the Appellant sought to execute for.

6. As far as the Respondent was concerned however, he paid Ksh. 500,000 on execution of the consent and a further instalment of Ksh. 200,000. It was contended that due to the political climate in 2017, the Respondent defaulted on the subsequent instalments as per the term of the Consent. It was further contended that the Plaintiff's advocate subsequently received post-dated cheques from November 2017 to February 2018 totalling to Ksh. 1,300,000. For the Defendant/Respondent, these payments, together with the initial Ksh. 1,200,000 already paid by the Respondent totalled to Ksh. 2,500,000. Therefore, the remaining balance according to the Respondent was Ksh. 8,305/-.

7. It is on the basis of the above contrasting positions that the Respondent filed the Notice of Motion Application dated 7th May 2018, the subject matter of this Appeal. The Application sought for an order of stay of execution of the Respondent/Defendant's proclaimed vehicles and household goods and an order that the proclamation and attachment of those goods be declared illegal and unlawful.

8. Having considered the Parties' positions, the learned trial magistrate drew the conclusion that the Defendant had paid a total sum of Ksh. 2,400,000/- and it was unjust for the Plaintiff to execute for Ksh. 1,248,444.30/-. He therefore allowed the Respondent's Application and declared the attachment unlawful. He also directed that the Plaintiff was at liberty to execute for the balance of Ksh. 8,305/-

9. Displeased with these findings of the lower court in **Mombasa SRMCC No. 596 of 2016** made by Learned Principal Magistrate the Honourable F. Kyambia on 14th September 2018, the Appellant Michael Okatch Omondi moves this Court on the following grounds:

a. That the Lower Court erred in Fact and Law by delivering a Ruling where he allowed the Respondent's application dated 17th May 2018 as prayed and each party to bear his own costs.

b. That the Learned Magistrate erred in Fact and in Law by making a finding that the Plaintiff is entitled to the payment of Kshs. 8,325.00 and not Kshs. 1,248,444.00 plus costs and interest as shown in the Warrants of Attachment and Sale as the Defendant had defaulted in complying with the terms of the Consent that was delivered on 7th April 2017.

c. That the Learned Magistrate erred in Fact and in Law by making a finding not in consideration of the stipulated Default Clause in the Consent recorded between the Parties on 7th April 2017. The Honourable Magistrate did not make a finding that in fact the Respondent defaulted in payment of the agreed Instalments and in the Consent there was a default clause that stated that in default of any single instalment the original judgment herein shall revert and the Plaintiff be at liberty to execute for the remaining amount.

d. That the Learned Magistrate erred in Fact and in Law in not making a finding that the Original Judgement contemplated in the Consent dated 7th April 2017 was Ksh. 2,967,647.00 as explained in paragraphs 4,5,6,7,8 and 9 of the Replying Affidavit of the Appellant filed in opposition to the Notice of Motion dated 17th May 2018.

e. That the Learned Magistrate erred in Fact and in Law when he did not consider the fact that the Defendant defaulted in payment of the instalments causing for the re-issue of warrants by the Court which were dated 2nd October 2017.

f. That the Learned Magistrate erred in Fact and in Law in not making a finding that the Respondent had used all efforts to frustrate the process of execution by filing may Applications before the trial court including the one dated 17th May 2018 which is the subject matter of this Appeal.

g. That the Learned Magistrate erred in Fact and in Law when he did not consider that the Respondent chose to flout the terms of the Consent and decided to make payments at his own convenience by issuing post dated cheques without consulting with his Advocate or approaching the Applicant's Advocate for regularization and/or preparation of another Consent if there was need nor did he file any Application to set aside the terms of the Consent dated 7th April 2017 and/or an extension of time to make payments outside the period given in the Consent.

h. That the Learned Magistrate erred in Fact and in Law in making a decision that the Appellant who had accepted post dated cheques and banked the same on a without prejudice basis had waived his rights to pursue the terms of the Consent and that the execution that was being pursued b the Appellant was wrongful.

i. That the Learned Magistrate erred in Fact and in Law in making a further deduction that the Appellant had waived his rights when he accepted the post dated cheques yet the post dated cheques were issued after the Respondent was served with warrants that were re-issued for the sum of Ksh.2,245,145.00, which if it were deducted from the total sum in the cheques of Ksh. 1,300,000.00 the balance was Ksh. 1,248,444.00 which was being claimed by the Appellant and were lawful and justified.

j. That the Learned Magistrate erred in Fact and in Law in making a deduction of sum of Kshs. 1,240,119.00 from the Plaintiff's claim which the Court had found payable at Kshs. 8,325.00 instead of the Kshs. 1,248,444.00 which was being claimed from the Warrants that were re-issued by the Court.

10. On the basis of the foregoing grounds, the Appellant seeks for the following prayers:

- a. *This Appeal be allowed and the Learned Magistrate's Ruling/Order dated 14th September 2018 be set aside and/or be reversed;*
- b. *That this Honourable Court do find that the Respondent's Application dated 17th May 2018 as an abuse of the Court Process and the same be dismissed with costs;*
- c. *That the Appellant is entitled to claim from the Respondent the sum of Kshs. 1, 248,444.00 as per the re-issued Warrants and the Appellant should proceed and execute for the same together with further costs and interest thereon;*
- d. *That costs of this Appeal and costs of the lower court be borne by the Respondent in any event.*

Appellant's Submissions

11. Counsel for the Appellant formulated four issues for determination:

- a. *Was the Plaintiff/Appellant entitled to the Original Judgment of after Defendant/Respondent defaulted in payment of the agreed instalments*
- b. *Was the Lower Court wrong in giving its Ruling against the terms of the Consent?*
- c. *Was the Defendant/Respondent to go back on the Consent amount of Ksh. 2,508,305 after defaulting on its terms?*
- d. *Is the Plaintiff entitled to the Orders sought in the Memorandum of Appeal?*

12. Embarking on his submissions, Counsel for the Appellant reminded the Court of its duty and power as the first appellate court making reference to **Mwanasokoni vs Kenya Bus Services Ltd (1985) eKLR** and **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR** which also cited **Peters v Sunday Post Ltd. (1958) EA 424**. He submits that the grounds of Appeal provided in the Memorandum of Appeal be allowed and the Ruling delivered on 14th September 2018 be set aside with costs.

13. Addressing whether the Plaintiff/Appellant is entitled to the Original Judgment after Defendant/Respondent defaulted, it is submitted that the moment the Respondent defaulted on the payment of the instalments as per the terms of the Consent dated 7th April 2017, the original judgment reverted and therefore the Plaintiff/Appellant was at liberty to execute the remaining amount. This amount was submitted to be Ksh. 1,248,444.00/- after deducting the Ksh. 1,200,000/- already paid by the Respondent and the Ksh. 1,200,000/- paid by through the post dated cheques.

14. Turning to whether the lower court was wrong in giving its Ruling against the terms of the Consent it is submitted that the Consent dated 7th April 2017 was a binding contract between the parties and the trial magistrate in making a finding without regard to the clear terms of the Consent. Reference is made to **Edward Acholla vs Sogea Satom Kenya Branch & 2 Others Cause No. 1518 of 2013 [2014] eKLR**.

15. It is further submitted that the cheques the Appellant received from the Respondent and banked was a way of due diligence on his part and mitigation of the Appellant's circumstances and not as a form of a further consent. That the Appellant never waived his rights by accepting the post dated cheques since the Respondent issued the cheques after the Respondent had been served with the warrants that were re-issued for Ksh.2,245,145.00 which reflected the costs and interest upon defaulting on the Consent dated 7th April 2017. It is submitted that if you deduct the total sum of the cheques from the amount as cited, the balance is Ksh. 1,248,444.00 which is being now claimed by the Appellant. This, it is submitted, cannot be claimed by the Respondent to be a waiver of his rights on the Consent.

16. As for the third issue, it is submitted that it was dishonest for the Defendant/Respondent to allege the outstanding debt was only Ksh, 8,305/- totally disregarding the accrued interest. Further that as the Respondent deliberately chose to flout the terms of the Consent dated 7th April 2017 and still decided to make payments at his own convenience he should not now be allowed to turn around and blame the Appellant for wanting to execute when the Respondent himself had breached the terms of the Consent. The Appellant further avers that the Respondent never filed any application to set aside the terms of the Consent dated 7th April 2017 which he breached and/or flouted.

17. Finally, it is submitted on the last issue that the Respondent misled the learned trial magistrate by misrepresenting the terms of the consent dated 7th April 2017. The Appellant further avers that the learned trial magistrate erred in law and fact by allowing the Respondent's Application dated 17th May 2018 which was in bad faith and lacked any merits.

18. In closing, it is submitted that this Court ought to re-evaluate the evidence as per the pleadings filed in the lower Court and it should set aside the Ruling delivered before the lower court and allow the Appeal with costs to the Appellant.

The Respondent's Submissions

19. Learned Counsel acting on behalf of the Respondent establishes for determination the following:

- a. *Whether the Applicant is indebted to the Respondent?*
- b. *Whether the Respondent is guilty of acquiescence or has waived his rights?*

c. Whether the lower court was right in making its ruling.

20. On the first issue, Counsel submits that all the documents produced by the Respondent confirm that the sum of Ksh. 2,500,000 out of the initial consented amount of Ksh. 2,508, 305/- has already been paid hence the contention that the amount owing is Ksh. 1,248,444/- is harsh. That should the Appeal succeed, the Appellant shall have received the Ksh. 2,500,000/- already paid in addition to the amount being claimed which would total to Ksh. 5,227,727.23/-. Inference on this limb of argument is drawn from **Civil Appeal No. 100 of 2001 Nairobi -Kenya Commercial Finance Company vs Kipng'eno Arap Ngeny & John H. William.**

21. For the second issue, it is submitted that while it is not in dispute that the Consent entered into between the parties had a default clause which directed that in default of payment, the terms of the original judgement would be referred to, the Appellant accepting and banking the post dated cheques amounted to abandoning the right to claim any default in payment. Counsel elaborates on the doctrine of waiver and the meaning of acquiescence in the instant context by relying on **Civil Appeal No. 314 of 2009-Mombasa Serah Njeri Mwobi vs John Kimani Njoroge** and the **Halsbury's Laws of England, 4th Edition, Volume 16.**

22. On the last issue it is submitted that the trial magistrate did not misapprehend the evidence in reaching his conclusions hence that verdict ought to be upheld and the appeal be dismissed with costs to the Respondent.

Analysis and Determinations

23. As is required of a Court sitting on a first appeal, my ruminations ought to be guided by the principles established in **Peters vs Sunday Post Limited [1958] EA 424.** These are reframed in **Michael Murage v Dorcas Atieno Ndwala [2019] Civil Appeal 390 of 2017 eKLR** as:

'a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.'

24. Shorn of the prolix grounds adverted to on appeal, in essence, this appeal turns on whether or not the learned trial magistrate erred in finding that the Respondent owes the Appellant Ksh. 8,305/- as opposed to the Ksh. 1,248,444/- claimed by the Respondent.

25. Looking at the arguments as framed by the parties, three things are settled. It is agreed that there was a valid Consent dated 7th April 2017 that had not been varied or set aside. It is also agreed that per the terms of this Consent, the Respondent owed Ksh. 2, 508, 305/- which ought to have been paid by instalments. It is not disputed that the Defendant/Respondent had made payments that totalled to Ksh. 2,500,000/- composed of an initial Ksh. 1,200,000/- and followed by post-dated cheques totalling Ksh. 1,300,000/-.

26. The bone of contention is whether upon breaching the explicit terms of the Consent by defaulting on the payment of the monthly instalments, the Respondent entitled the Appellant to execute for the Original judgement and if so, what amount was to be claimed. On the other end of the spectrum is the contention that by accepting the liquidation of the outstanding debt through post-dated cheques issued by the Respondent, the Appellant waived his rights to claim under the terms of the Consent.

27. Regarding consents, it was decided in **Hirani vs Kassam (1952) 19 EACA 131, at 134** 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 good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgments 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."

28. The foregoing position is reaffirmed in **Brooke Bond Liebig (T) Limited vs. Mallya [1975] E.A.** where the Court stated as follows:

"The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani v. Kassam (1952), 19 E.A.C.A. 131, where the following passage from Seton of Judgments and Orders, 7th Edn., Vol. I, p. 124 was approved:

"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 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."

29. Finally, in **Contractors Ltd vs Margaret Oparanya [2004] eKLR**, this is what the Court had to say:

"This court has qualified or conditional discretion when it comes to interfering with consent Judgments or orders. Moreover, where the consent order or Judgment is still executory, the court may refuse to enforce it if it would be inequitable to do so. 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 good ground for varying or rescinding a contract between the parties."

30. Armed with the narrative espoused in the foregoing, I turn to the findings of the trial magistrate on the matter. In making his ruling, the learned trial magistrate noted that the Defendant sought the discretion to ensure the ends of justice are met. Acknowledging that the court had the inherent jurisdiction to make such orders as to ensure the ends of justice are met, the learned trial magistrate cautioned himself to exercise this discretion judiciously. Having done so, he ruled:

"In the instant case, the dispute is whether the Defendant has paid the decretal sum as per the Court. The Plaintiff's contention is that the defendant breached the terms of the consent by failing to consistently pay the monthly instalments. The Defendant on the other hand admits default but contends he' forwarded post-dated cheques to the plaintiff which have all been cleared. He further contends that notwithstanding the default the plaintiff waived his right under the consent when he accepted the post-dated cheques.

I have considered the aforesaid submissions. I have also perused the annexures in the supporting affidavit. I note that the Defendant has paid a total sum of Kshs 2,400,000/-. In the circumstances, it is unjust for the plaintiff to execute for Kshs 1,200,000/- do hereby allow the application and I declare that the attachment herein unlawful. plaintiff is at liberty to execute for the balance which is Kshs 8,305/"

31. The trial magistrate interfered with the terms of the consent, which the Defendant admitted to having breached, on the basis that it was unjust for the Appellant/Plaintiff to claim Ksh. 1,248,444.00 /- having already admitted to having received Ksh. 2,400,000/-. Going by the authorities cited, the circumstances under which a Consent may be interfered with are limited to those that would afford good ground for varying or rescinding a contract between the parties. Such instances include where the consent has been obtained by fraud or collusion, or by an agreement contrary to the policy of the court; 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.

32. The reasoning of the trial court falls under the general ground that it would be unjust to have the Defendant/Respondent pay the amount claimed by the Plaintiff having already offset the outstanding loan to the tune of Ksh. 2,400,000/-. Respectfully, this Court agrees with the reasoning of the trial magistrate. Being of this persuasion, I harken back to the words of Sir Charles Newbold in ***Mbogo & Anor vs Shah [1968] E A 93*** for where an appeal court may interfere with the exercise of discretion by a trial court:

"A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

33. I am satisfied that the trial magistrate exercised his discretion properly and, in the circumstances, I'm reluctant to interfere with the ruling of the trial court.

34. In the upshot I find that the instant appeal is without merit and it is hereby dismissed with Costs.

35. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF MARCH, 2020

R NYAKUNDI

JUDGE

In the presence of:

1. Mr. Ochieng for the respondent.

2. Ms. Naliaka for Ananda for the appellant