



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA.

CIVIL APPEAL NO. 45 OF 2018.

FRANCIS KAMAU.....APPELLANT

VERSUS

LEONARD KURU.....RESPONDENT

[An Appeal from the Ruling in Original Bungoma CMCC No. 542

delivered on 1.8.2018 by G.P. Omondi (SRM)].

J U D G M E N T

Leonard Kuru (the Respondent) filed a suit against the appellant in Magistrate's Court seeking;

(a) The plaintiff's claim against the defendant is for a declaration that the latter do pay him the amount due and owing to K.I.E. immediately to avoid the unnecessary hardship on his part, so that the plaintiff at once pay off the loan and that the defendant is obliged to pay him the loss incurred.

(b) General damages

(c) Costs of this suit

(d) Interest on (a), (b) and (c) above

The defendant/appellant filed statement of defence denying any claim and prayed that the suit against him be dismissed. The suit went for full hearing and by Judgment delivered on 16.7.2012 the trial court K. Ngomo (SPM) entered Judgment for the plaintiff against the defendant as prayed. The Plaintiff/Respondent then later extracted the decree and in order to enforce the same a Notice to Show Cause on was served on the appellant. He was subsequently arrested and committed to Civil Jail for 30 days on 21.2.2018. Upon such committal Counsel for the appellant and Onkangi Holding brief for the Judgment Creditor informed the court.

Onkangi Holding brief for Ocharo for Creditor. Milimo for Milimo Migosi Ogamba for the Judgment Debtor.

Milimo: We have a consent to record. By Consent of both the Counsel for the Judgment Debtor and the Judgment Creditor warrants be lifted and the Judgment Debtor to liquidate the decretal sum in the following terms;

1. Kshs.550,000/= be paid on or before 22/3/2028 and a postdated cheque No.000518 is hereby issued.

2. The remaining balance be liquidated by monthly payments on or before 22nd of every month of Kshs.100,000/= each until payment in full.

3. In default of any monthly payment execution to issue for the remaining balance.

4. The matter be mentioned on 28.03.2018 when the Judgment Debtor must attend.

The appellant then filed application dated 2.3.2018 where the applicant was seeking to set aside the consent Judgment on 21.1.2018. By ruling delivered on 1.8.2018 the learned trial magistrate G.P. Omondi (SRM) dismissed the appellants application with costs.

Aggrieved by the ruling, the appellant preferred this appeal on the following grounds;

- i. **THAT** the Learned Magistrate erred in Law and in Fact by holding that the Appellant was under obligation to pay Respondent the sum of Kshs.1,036,188/= as the decretal sum.
- ii. **THAT** the Learned Magistrate erred in Law and in Fact by failure to consider that the consent recorded on 21st February, 2018 was recorded under duress and non-disclosure of material facts.
- iii. **THAT** the learned Magistrate erred in Law and in Fact by not exercising his discretion judicially.
- iv. **THAT** the Learned Magistrate erred in Law and in Fact by making 2 different rulings on 21st February 2018 before consent under duress would be resorted to.
- v. **THAT** the Learned Magistrate erred in law and fact by misconstruing the Appellant's Notice of Motion dated 2nd March 2018 and hence arrived at a wrong decision.
- vi. **THAT** the Learned Honourable Magistrate erred in law and fact by not considering the Appellant's Submissions, authorities relied upon by the appellant.
- vii. **THAT** the Learned Honourable Magistrate erred in Law and fact by showing open bias against the Appellant.
- viii. **THAT** the Learned Honourable Magistrate erred in Law and fact by allowing in irregular mode of execution in the matter where no decree has been extracted and Respondent's bill of costs has never been taxed.
- ix. **THAT** the Learned Honourable Magistrate erred in Law and fact by Failure to set aside the consent dated 21st February 2018.
- x. **THAT** the Learned Honourable Magistrate erred in Law and fact by declaring that there was consent Judgment as opposed to consent to the mode of payment.

By Consent of the Counsel for both parties this appeal was canvassed by way of written submissions. Counsel for the appellant submitted that the consent order recorded and entered in court was as a result of warrants of arrest issued on 21.1.2018. He submitted that the Appellant was under duress because he had been prosecuted in court, and threatened with committal to Civil Jail. And that he did not have an option. Mr. Ocharo for the Respondent submits that there was a consent recorded by both parties and a party who seeks to set aside the consent must satisfy the conditions for setting aside a contract.

Upon considering the appeal and submissions, the issue for determination in this appeal is whether the trial Court in exercising its discretion in the ruling dated 1.8.2018 erred or exercised discretion wrongly. It is now settled that an appellate court should not interfere with the exercise of discretion of the trial court unless it is shown that he misdirected himself in some material particulars and arrived at a wrong decision or it is apparent that the exercise of his discretion has led to an injustice.

Madan, JA (as he then was) in **United India Insurance Co. Ltd. & 2 Others Vs. East African Underwriters (Kenya) Ltd [1985] eKLR** rephrased it as follows:-

“The court of Appeal will not interfere with a discretionary decision of the Judge appealed from. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should have not taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong”.

It is not in contention that there was a consent recorded in court on 21st January, 2018. This is the Consent the appellant sought to set aside in the application dated 2nd March, 2018 and which by ruling dated 1st August, 2018 was dismissed.

The grounds upon which a Consent order can be set aside by a Court are settled; they must be such as would rescind a contract. It must be shown that it was obtained by fraud, mistaken, coercion, undue influence collusion or by agreement that is contrary to the policy of the court.

These principals have been reiterated in several decisions of the court. In **Brooke bond Liebig Vs Mallya (1975) EA 266** – Mustafa Ag. UP stated:

“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 grounds of fraud or collusion that there was no consensus between the parties, public policy or for such reasons s 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 not have been any mistake or misunderstanding One of these factors which would give rise to the setting aside of a consent agreement existed.”

In **Flora N. Wasike v Destimo Wamboko [1988] eKLR**, Hancox J.A cited Section on Judgment and Orders 7th Edition Vol. 1 page 124 and reiterated that: -

“.....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.”

The Appellant in this appeal is not alleging fraud, collusion or that there was no consensus between the particulars. He is not alleging mistake or breach of public policy.

In the present appeal, the grounds upon which he sought the trial court to set aside the consent was that, there was duress exerted on the applicant. He shows as an element of duress that the applicant had been convicted to Civil Jail which he interprets as a form of coercion.

Was the Appellant under duress or coercion to negotiate?

In **Jayantilala Lalji Gandhi & another v Mavji Ruda [1986] eKLR** the court held: -

‘Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or bodily harm.The rule here is that the threat must be illegal in the sense that it must be threat to commit a crime or a tort.’

The Court of Appeal in **John Mburu Vs Consolidated Bank of Kenya (2018) eKLR**, stated: -

‘But there is also economic duress which was discussed by this court in Kenya Commercial Bank Ltd & another Vs Samuel Kamau Macharia & 2 Others (2008) eKLR. The court cited with approval the decision of the privy council in PAO and Others Vs Lau Yiu & another 1979 3 ALL ER 65 stating thus: -

‘Duress whatever form it takes is coercion of the will so as to vitiate consent. Their Lordships agree that in a contractual situation commercial pressure is not enough. There must be present some facts on which called in law be regarded as coercion of his will, so as to vitalize his consent..... In determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did not protest whether at the time he was allegedly coerced into making the contract he did or he did not have an intensive course open to him. Such as an adequate legal remedy, whether he was independently advised and whether after entering the contract he took steps to avoid it.’

In this appeal the application represented by Counsel so was the Respondents. The applicant did not protest. The consent was made in the presence of the applicant and his Advocate; Even if I were to accept that he had been threatened to Civil Jail, his Advocate was not and will give the best legal advice to his client and that is what they consented to.

Upon considering the appeal. I am satisfied that the applicant did not satisfy the conditions for setting aside the consent order before the trial magistrate. I find that the trial magistrate rightly dismissed his application. I find that this appeal lacks merit and is dismissed with costs.

Dated and Delivered at BUNGOMA this 29th day of May, 2020.

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S.N.RIECHI

JUDGE