REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 453 OF 2016

IRENE KIENDE MURIITHI.....APPELLANT

VERSUS

KENSILVER EXPRESS LIMITED.....1ST RESPONDENT

SOLOMON KIRINYA MUTHEE.....2ND RESPONDENT

RULING

1. In her Notice of Motion application dated 19th November 2019 and filed on 21st November 2019, the Appellant sought to review the consent order that was endorsed and adopted on 22nd July 2010 and that the Respondents be ordered to pay her the balance of Kshs 110,200/=. Her application was supported by the Affidavit of her advocate, Lucy Wanjiru Wang'ombe, which was sworn on 19th November 2019.

2. The deponent pointed out that the lower court delivered judgment in the Appellant's favour for the sum of Kshs 356,000/= less fifteen (15%) per cent contribution which award was set aside on appeal and replaced with an award of Kshs 876,000/= less fifteen (15%) per cent contribution. She stated that they quantified the sum due to the Appellant at Kshs 594,537.42 which was erroneous as it was based on the sum of Kshs 644,000/= after subtracting fifteen (15%) per cent contribution from the net of Kshs 876,000/= instead of the sum of Kshs 744,600/=.

3. It was her contention that the total sum ought to have been Kshs 587,736/= and that since a sum of Kshs 478,536/= had already been paid, there was a balance of Kshs 110,200/= that remained unpaid. She stated that they had requested for a sum of Kshs 100,200/= after another arithmetic error leaving out an amount of Kshs 10,000/=. She added that they also indicated party and party costs as Kshs 75,000/= as opposed to Kshs 65,000/=.

4. She pointed out that there was another figure of Kshs 23,331.40 being accrued interest that the Appellant was willing to waive as they had calculated interest based on Kshs 341,800/= instead of Kshs 442,000/=.

5. It was therefore her averment that in view of the fact that they recorded a consent based on the wrong figures and marked the matter as settled, there was an error apparent on the court record necessitating the review of the said consent. She contended that the arithmetic mistake was not intentional and was discovered when they were computing the Appellant's dues and hence the same should not be visited on the Appellant herein.

6. In opposition to the said application, on 22nd January 2020, the Respondents' advocate, Wangari Muchemi, swore a Replying Affidavit on behalf of the Respondents herein. The same was filed on 24th January 2020.

7. She asserted that the court went through the consent terms which the parties had agreed upon before adopting the same as an order of the court and marking the matter as fully settled. She averred that the orders sought were akin to the court appealing its own judgment. She was emphatic that there was no apparent error on the said consent warranting the granting of the orders that had been sought by the Appellant herein. She thus urged the court to dismiss the present application.

8. Despite the court having given directions to both parties on the filing of Written Submissions, only the Appellant filed the same. If the Respondent had filed the same on 27th February 2020, then the same had not been placed in the court file by the time the court reserved its Ruling which was based on the said Appellant's Written Submissions only.

9. The Appellant relied on the provisions of Sections 1A, 3A, 80 and 99 of the Civil Procedure Act Cap 21 (Laws of Kenya), Order 45 Rule 1

of the Civil Procedure Rules, 2010 and the case of **Morarji Manek vs Ratilal Gova Sumaria [2017] eKLR** where the court corrected the arithmetical errors that had been made by a taxing master in the computation of a taxation in support of her case.

10. Having set aside an award of the lower court on 15th November 2018, this court entered judgment in favour of the Appellant against the Respondents jointly and severally for the sum of Kshs 744,600/= made up as follows:-

General damages **Kshs 800,000/=**

Special damages **Kshs 76,000/=**

Kshs 876,000/=

Less 15% contributory negligence **Kshs 131,400/=**

Kshs 744,600/=

Plus costs and interest thereon at court rates from date of judgment until payment in full. The Respondents were also to pay the Appellant, the costs of this Appeal.

11. The Appellant submitted that she demanded an incorrect amount from the Respondents' advocates following a typographical error based on the sum of Kshs 644,400/= which was computed as follows:-

General damages **Kshs 800,000/=**

Special damages **Kshs 76,000/=**

Kshs 876,000/=

Less 15% contributory negligence **Kshs 131,400/=**

Kshs 644,400/= (sic)

12. There was no decree and certificate of costs from the lower court. This court was reluctant to compute the interest and costs as that was the responsibility of the Executive Officer of lower court and could not therefore confirm whether or not the Appellant was entitled to an additional sum of Kshs 110,200/= as she had sought.

13. Indeed, her advocates' explanation of how the aforesaid figure was arrived at was very complicated and difficult to follow. Unless there is a consent on interest and costs, it would be best to leave their computation to the relevant court officer who is an expert in assessing costs and drawing the decree to avoid the confusion that was witnessed in this case.

14. Having said so, it did, however, appear from the computation in the Appellant's Written Submissions that the Respondents had already paid her a sum of Kshs 780,536/=. This was made up of Kshs 302,000/= and an additional Kshs 478,536/=. It was apparent that the said sum was inclusive of interest and costs.

15. A basic computation showed that there was an unpaid sum of Kshs 100,200/= made up as follows:-

Computation as per Judgment of 15th November 2019 **Kshs 744,600/=**

Computation as per the advocates **Kshs 644,400/=**

Kshs 100,200/=

16. Whether or not the court could review the consent judgment was a different matter altogether. In addressing this issue, the court considered the circumstances under which the said consent was recorded.

17. Contrary to the Respondents' assertions that this court went through the consent terms, on 22nd July 2019, this court only recorded that the matter was settled and did not have the benefit of having known what the parties had agreed upon to compromise the Respondents' Notice of Motion application dated 10th December 2018 and filed on 19th December 2018 wherein they had sought a stay of execution pending the appeal of this court's decision of 15th November 2018.

18. The consent that was recorded by the parties was as follows:-

> **"BY the consent of the parties,**

THAT the matter be and is hereby marked as settled with no further order as to costs."

19. Whilst Section 3A of the Civil Procedure Act provides that, **"Nothing shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"** , the court must operate within the confines of what it can do. This court had due regard to the provisions of the Civil Procedure Act and Civil Procedure Rules that deal with the question of review of decrees and orders.

20. Section 80 of the Civil Procedure Act that stipulates as follows:-

"Any person who considers himself aggrieved:-

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

21. It is important to point out that an order for review is not granted as a matter of course. This is because Section 80 of Civil Procedure Act has to be read together with Order 45 Rule 1 of the Civil Procedure Rules which has set down the circumstances under which a decree or order can be reviewed.

22. Order 45 Rule 1 of the Civil Procedure Rules states as follows:-

"Any person considering himself aggrieved

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

23. For an applicant to succeed on an application for review therefore, he must demonstrate that:-

"1. There was discovery of new and important matter of evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order was made; or

2. There was a mistake;

3. There was an error on the face of the record; or

4. There was a sufficient reason; and

5. That the application had been made without undue delay."

24. Applying the provisions of the Order 45 Rule 1 of the Civil Procedure Rules to the facts of this case, it was evident that there was no discovery of new and important matter of evidence, which after the exercise of due diligence, was not within the Appellant's knowledge or could not have been produced by her at the time when the order was mad**e** on 22nd July 2019.The consent order emanated from the parties themselves and the court only recorded what they wanted it to record. There was no error on the face of the court and the court did not make any mistake.

25. It was therefore this court's view that it could only have reviewed the order if it was the one that made a mistake. The consent was a contract by the parties which could, however, be set aside under certain circumstances. In the case of **Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 Others [2019] eKLR**, the Court of Appeal rendered itself as follows:-

"The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig vs Mallya (1975) EA 266* where Mustafa Ag. VP stated thus;

"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 as would enable a court to set aside or rescind a contract…"

26. This court did not consider whether the said consent order could be set aside on any other ground other than the review, which it found to have been inapplicable in the circumstances of the case herein as none of the ingredients under Order 45 Rule 1 of the Civil Procedure Rules existed. The Appellant was at liberty to file an appropriate application for determination by the court.

DISPOSITION

27. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 19th November 2019 and filed on 21st November 2019 was not merited and the same is hereby dismissed with costs to the Respondents.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of July 2020

J. KAMAU

JUDGE