



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 15 OF 2012**

**HARRIET NAIGAGA ABURA .....PLAINTIFF/RESPONDENT**

**(Trading as Oasis Den Construction Engineers Limited)**

**VERSUS**

**ERIC KIMINGICHI WAPANGANA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**EUNICE MWIHAKI KARIUKI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. Through the Notice of Motion dated 6<sup>th</sup> June 2020, the applicant seeks orders that: -

*i. Spent*

*ii. That this court do grant an order of stay of execution of judgment against the plaintiff/respondent restraining them, their servants, agents and/or representatives from proceedings to execute judgment and/or decree passed issued herein on the 8<sup>th</sup> day of April 2019 by way of warrants of arrest of the applicants pending the hearing and determination of this application.*

*iii. That this court be pleased to review its orders herein issued on the 7<sup>th</sup> May 2018 in respect to the total amount owed to the plaintiff and subsequent to that order that the decretal amount as fully settled.*

*iv That costs of this application be provided for.*

2. The application is supported by the 1<sup>st</sup> applicant's affidavit and is premised on the grounds that: -

3. The plaintiff/respondent has extracted warrants of arrest with the intent of arresting the 1<sup>st</sup> applicant herein over purported existing decretal amount while its well-known to the respondent that the decretal amount has been fully liquidated.

4. The consent judgment entered herein between the parties on the 4<sup>th</sup> May 2018 herein did not factor in amounts that had been previously prior to the signing of the consent.

5. That the inadvertence on omitting this information was not deliberate but out of a mistake that had not been disclosed upon me by my previous advocates on record.

6. The applicant will suffer prejudice in the event of execution of judgment goes ahead.

7. The respondent opposed the application through her replying affidavit sworn on 29<sup>th</sup> June 2020 wherein she avers that the application is subjudice owing to the existence of two similar applications dated 26<sup>th</sup> June 2019 and 12<sup>th</sup> September 2019, which applications have not been presented by the applicants herein. She states that the applicants have not complied with the consent order of 7<sup>th</sup> May 2018 wherein they undertook to settle the debt that they owe to the respondent by monthly instalments of Kshs 160,000/=.

8. Parties canvassed the application by way of written submissions which I have carefully considered.

9. The main issue for determination is whether the applicants have made out a case for the granting of orders of review of the order issued on 7<sup>th</sup> May 2018.

10. Order 45 Rule 1 of the Civil Procedure Rules stipulates as follows:

*“Application for review of decree or order.*

*1. (1) 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.*

*(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”*

11. I have considered the reasons advanced by the applicants in seeking the review of the order of 7<sup>th</sup> May 2018. From the very outset, I note that the applicants did not attach a copy of the impugned consent order to their application so as to enable this court peruse and appreciate its contents in determining if it falls under any of the conditions for review listed under Order 45 Rule 1.

12. It was however not disputed that a consent order was recorded by the parties on the material date in which the applicants agreed to pay the debt owed to the respondent by way of monthly instalments.

13. I have perused the court file and noted that the impugned order was in the following terms:

**ORDER**

*THIS MATTER coming up for hearing on 4<sup>th</sup> May, 2018 before the Honourable Lady Justice R. Ngetich. AND UPON READING the consent dated 4<sup>th</sup> May, 2018 and signed by HARRIET NAIGAGA ABURA, PLAINTIFF and J.S. KHAKULA & COMPANY ADVOCATES for the defendants: AND UPON HEARING the counsel for the plaintiff and the counsel for the defendant:*

**IT IS HEREBY ORDERED:**

*That the suit herein be marked as REINSTATED, AND UPON re-instatement the parties herein further consent to mark this suit as fully settled and under the following terms:*

*1. That the defendants admits owing the plaintiff a total of Kshs 10,000,000/=.*

*2. That the plaintiff accepts to waive the interests accrued on the amount lent to the defendant herein and shall only expect the principal amount of Kshs 10,000,000/=.*

*3. That the defendants shall be paying Kshs 160,000/= every month as from 05<sup>th</sup> May, 2018.*

*4. That the defendant have already paid the 1<sup>st</sup> instalment of Kshs 160,000/= for the month of April 2018.*

*5. That each party to bear own costs.*

14. The applicants contention is that the consent judgment does not reflect the proper position as at the point when the same was recorded, several substantial payments had already been made to the respondent which payments were not captured in the impugned consent. It was therefore the applicants' case that the principal amount stated in the consent is erroneous as it does not properly reflect the proper amount owed.

15. On her part, the respondent maintained that there was no error in the impugned consent order as it was recorded in the presence of the applicants' advocate on record. She further contended that the payments reflected in the applicants' annexures to the supporting affidavit refer to the period prior to the entry of the impugned consent order. The respondent argued that applicants were not sincere on their application as they had repeatedly defaulted in repaying the debt.

16. In **Flora N. Wasike v Destimo Wamboko** [1982-88] 1 KAR 625, the court 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 – see the decision of this court in J.M. Mwakio vs Kenya Commercial Bank Civ. Apps 28 of 1982 and 69 of 1983. In Purcell vs. FC Trigal Ltd [1970] 3 All ER 671, Winn LJ said at 676:*

*“It seems to me that 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.”*

17. Similarly in **Hiram v Kassam** [1952] EACA 131. It was held:

*“Prima facie, any order made in the presence and with the consent of counsel is binding in all parties to 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 general for a reason which would enable the court to set aside an agreement.”*

18. Applying the principles espoused in the above cited cases to the present case, I find that the impugned consent order is binding on the parties as it was entered into in the presence of the respondent and counsel for the applicants.

19. The applicants have not demonstrated that the said consent was obtained by fraud or collusion or that it is contrary to the court’s policy. On the aspect of the general reason that would necessitate the setting aside of an agreement, I am not convinced that the applicants are candid in their prayer for review or setting aside of the consent order owing to the fact that they have filed this application more than 3 years after the said consent was recorded.

20. For the above reasons, I find that the application dated 6<sup>th</sup> June 2020 is not merited and I therefore dismiss it with costs to the respondent.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 20<sup>th</sup> day of August 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Plaintiff present in person.

No appearance for defendant

Court Assistant: Sylvia