REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 134 OF 2002

JULIUS MWIRIGI MANYARA SAMSOM.....APPELLANT

VERSUS

ALEXANDER KITHURE.....RESPONDENT

(An reference from the decision and order of Hon. E. Tsimonjero, Deputy Registrar made on 6/5/2020)

R U L I N G

1. On 03/07/2020, the appellant's advocates, **Mwenda Mwarania, Akwalu & Company Advocates ("the said advocates")**, filed the reference dated 10/06/2020 under ***Order 49 Rule 5 of the Civil Procedure Rules.*** The same was against the decision and orders of the Deputy Registrar made on 6/05/2020.

2. In the reference, they sought that the said decision be set aside, the file be re-opened, the application for execution of the decree be restored, execution to proceed and costs be as ordered in the original decree.

3. According to the said advocates, the decree in this case was issued on 30/07/2012. There were various attempts to execute the same against the respondent, through sale of property **parcel No. NTIMA/IGOKI/1579**. This resulted in the parties entering into a consent order on 6/04/2018.

4. That in his ruling of 6/05/2020, the Deputy Registrar made a finding that that there was no pending decree for execution and dismissed the application for execution and accordingly marked the matter as settled and file closed with no order as to costs.

5. It was further contended that the ruling was based on the averments by the advocate for the respondent that the parties had reached a settlement. That, that was not the case as the consent order had not been set aside. That at all material times, the parties were represented by advocates. That it was therefore not permissible for the parties to have purportedly entered into a settlement to the exclusion of their advocates which would directly contravene the principle envisaged under ***Order 9 Rule 9 of the Civil Procedure Rules***. It was concluded that the Deputy Registrar could not dismiss the application for execution when the procedure for dealing with such an application is set out under ***Order 22 of the Civil Procedure Rules***.

6. The parties filed written submissions in support of their respective positions.

7. It was submitted for the appellant that execution has been pending since 2012 but the respondent has always employed delaying tactics to frustrate the same. The Deputy Registrar ignored the purpose of the consent order of 6/04/2018 which had not been varied. That he did not have the power to overturn or vary the original decree of the judge of the High Court as stated under ***Order 49 Rule 5 of the Civil Procedure Rules***.

8. On his part, the respondent submitted that paragraphs 3 and 4 of the consent order of 6/04/2018 opened an avenue for discussion of the judgment debt. After numerous adjournments the parties reached a settlement. By which the respondent was to pay the appellant a sum of Kshs. 500,000/-. That settlement was reduced into writing. That the appellant had admitted in the presence of his counsel that he was satisfied with the arrangement he had reached with the respondent.

9. It was submitted that in view of the foregoing, the Learned Deputy Registrar did not overturn the decree but had only recorded and indicated what the parties themselves had agreed upon. That the provisions of ***Order 9*** did not preclude parties from making settlements neither does it override the provisions or ***Article 159 (d) of the Constitution of Kenya 2010***.

10. The issue is ***whether the ruling of 6/05/2020 should be set aside.***

11. By a judgment of this Court made on 5/3/2012, the respondent was ordered to pay to the appellant Kshs. 250,000/- together with interest at 15% per month from the date of filing suit in the lower court until payment in full.

12. Pursuant thereto, on 30/07/2012 a decree for Kshs. 250,000/- was issued against the respondent with interest at the rate of 15% per month from 14.6.1999 till payment in full as well as costs. After several failed executions, on 05/04/2018 the parties recorded a consent, inter alia, that: -

> "…
>
> *3. The Advocates for both parties to meanwhile discuss the settlement of the judgment debt.*
>
> *4. A mention date shall be obtained immediately upon or soon after the agreement is reached in terms of the settlement for the purpose of recording such terms of such settlement, or on 30th July, 2018, whichever is the earlier.*
>
> …"

13. Subsequent, thereto, many adjournments followed the mention date of 30/07/2018 because the parties had not arrived at any settlement. Vide an application dated 11/12/2017, the appellant sought approval for conditions of sale of the respondent's property known as **NTIMA/IGOKI/1579**.

14. Determination of the same was put on hold as parties were still negotiating. On 17/12/2019, the advocate for the respondent informed the court that the parties had reached a settlement by which the respondent was to pay the appellant a sum of Kshs. 500,000/- in full settlement of the matter. With leave, the respondent filed an Affidavit which brought on record the settlements that had been signed by the parties. Further, the Deputy Registrar confirmed from the parties themselves in court of this fact in the presence of their respective advocates.

15. It is on the basis of the foregoing that the Deputy Registrar rendered his ruling of 6/05/2020 which is the subject of this reference.

16. The consent of 6/04/2018 allowed the parties to come up with a settlement which would have the effect of varying the judgment and decree of the Court. It is clear that the matter took so long because there were ongoing consultations with a view to having a settlement on the decree.

17. This Court has considered the documents that were produced before the Deputy Registrar. The said documents are executed by the parties to this dispute and they confirmed that fact to the Learned Deputy Registrar. Can it then be said that the Learned Deputy Registrar wrongly varied the judgment of this Court? I don't think so.

18. It must be recalled that cases belong to the parties who come to Court. They do not belong to either the Court or the advocates appearing for the parties. This is why courts will willingly adopt consents and or agreements reached by the parties, provided the same are lawful.

19. In this regard, once the parties entered into the consent order of 6/5/2018, the original judgment and decree became subject to that consent. In that consent, the parties gave unto themselves the liberty to vary the judgment and decree of the Court. In this regard, if and when the parties came up with an agreement on how the judgment was to be settled, they would bound by that subsequent agreement.

20. Before the Learned Deputy Registrar, the settlement of the parties had not been challenged. Indeed the Deputy Registrar went an extra mile to confirm from the parties themselves about the settlement. The parties confirmed to him that, that was their settlement. In this regard, it cannot be argued that the Deputy Registrar was wrong in arriving at the decision he did. The decision he arrived at was not capricious but as a result of a careful and judicious exercise of discretion.

21. The Learned Deputy Registrar was criticised that he went seeking for evidence. To this Court's mind, the moment there was an allegation that the matter had been settled, it was perfectly in order for the Deputy Registrar to demand proof of the same. He is a Court of law and justice. He sought to give justice to the parties before him according to their wishes. I find no basis in that criticism.

22. It is very surprising that the appellant's advocates sought to challenge the proceedings before the Deputy Registrar. It is not clear on whose instructions they were doing so because, there is no evidence that the appellant was dissatisfied with the same. The advocates cannot purport to own the process independent of their client.

23. One thing is clear, the appellant's advocates are in breach of ***Order 1A rule 3 of the Civil Procedure Act.*** They were aware of the consent order which allowed a settlement. They were at all times aware that their client had compromised his claim with the respondent. They neither informed the Court nor did they want the Court to sanction the same. They are aggrieved by the sanctioning of that settlement on the misplaced argument that it was against the provisions of ***Order 9 Rule 9 of the Civil Procedure Rules.***

24. With due respect, the aforesaid provision cannot override the express provisions of ***Article 159 of the Constitution.*** To hang on ***Order 9 Rule 9*** aforesaid in the face of the circumstances of this case will be to slaughter justice at the altar of technicalities. ***Order 9 Rule 9*** aforesaid was meant to safeguard the interest of an advocate who has been acting for a party from being removed from record without his costs having been taken care of.

25. In the present case, no one has removed the appellant's advocates from the record. The parties went out there, negotiated a settlement of the judgment the same way they had entered into the transaction that had resulted in the dispute that landed them in Court. They did not require the presence, approval, sanction or concurrence of their respective advocates to enter into the compromise they did.

26. It is the spirit of our ***Constitution under Article 159*** that our people live in harmony. It is for that reason that alternative modes of dispute resolution mechanisms, rather than the confrontational litigation known by advocates, is encouraged. With the settlement arrived at by the parties in this case, it is expected that they will live happily and in harmony thereafter as they had been before the institution of this case.

27. The Court has noted that, the application for execution dated 25/11/2019 which the advocates for the appellant insist on pursuing is for a whooping sum of Kshs. 9,493,844/- from a judgment of merely Kshs. 250,000/-. It would seem that the parties were aware of this ungodly sum that they settled on a double sum the amount of the judgement. An advocate cannot insist on acting outside his client's position. The appellant's position is as per the documents produced in Court and as he told the Learned Deputy Registrar.

28. In view of the foregoing, I find the argument that the Deputy Registrar could not set aside the proposed execution to be without basis. This is a 2002 matter. The justice of the case demanded that it be brought to a resounding end as per the wishes of the parties.

29. Having perused the record and in particular the documents settling the matter, I find that the Deputy Registrar should have worded his orders in a manner that none of the parties is prejudiced. The documents showed that there was a balance of Kshs. 65,000/- yet to be paid.

30. Accordingly, I find the reference to be without merit and dismiss the same in its entirety. However, the final orders of the Deputy Registrar are varied to the extent that they will be effective if and when the entire agreed sum of Kshs.500,000/- has been paid as per the settlement of the parties.

I make no order as to costs.

DATED and DELIVERED at Meru this 24th day of September, 2020.

A. MABEYA

JUDGE