



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 116 OF 2018

EQUITY BANK (K) LTD.....APPELLANT

-VERSUS-

MATILDA MUTETI KILILI.....1ST RESPONDENT

SUSAN MUENI.....2ND RESPONDENT

MUNYAO JOSEPH.....3RD RESPONDENT

MBOLONZI STEPHEN.....4TH RESPONDENT

RULING

Introduction

1. The 1st respondent filed Makueni SPMCC No. 64 of 2016 against the 2nd, 3rd and 4th respondents and judgment was entered in her favour. In order to satisfy the decree, she commenced execution proceedings and instructed a firm of auctioneers which proceeded to proclaim and attach motor vehicle registration No. KCD 786Y. The said vehicle is jointly registered in the name of the 4th respondent and the appellant as a financier. The appellant filed objection proceedings which were dismissed by the lower Court in a ruling dated 02/08/2018.

2. The appellant appealed against the ruling and also applied for stay of execution *via* the application dated 24/08/2018. This Court granted temporary stay orders and directed that the application be canvassed by way of written submissions. On 17/10/2018, the matter came up for highlighting of the said submissions and a consent was recorded in the following terms;

a) That the appellant to deposit in Court the decretal sum of kshs 1,680,616/= within 30 days and in default, execution to issue.

b) That record be prepared.

c) That mention on 21/11/2018

3. It is that consent that prompted the current application dated 26/10/2018 in which the appellant seeks the following orders;

a) Spent.

b) Spent.

c) That this Court be pleased to review, set aside and/or vary the consent order made on 17/10/2018.

d) That further to prayer number 3 above, this honorable Court be pleased to reinstate the appellant's Notice of Motion dated 24/08/2018 to be heard and determined on it's merits.

4. The application is premised on the grounds on the face thereof and supporting affidavits sworn on the same day by Counsel Peter. C. Onyango and Kariuki King'ori, the Legal Manager of the appellant bank. The gist of the application is that the consent order was entered into without authority and instructions from the appellant and appellant's advocate respectively and as such, it is void *ab initio*.

5. The application is opposed through the replying affidavit of S.M Makau, an Advocate practicing in the firm of M/S Annie Thoronjo & Co. Advocates. He deposes that Counsel Peter. C. Onyango has not demonstrated that he had not given instructions to the Advocate holding his brief to record the consent. He contends that the application is only meant to delay the finalization of this matter and deny the plaintiff the enjoyment of her lawfully obtained judgment.

6. He also deposes that the compromised application was for stay under Order 42 Rule 6 of the Civil Procedure Rules and that one of the conditions of granting stay pending appeal is that an applicant must furnish security.

7. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

The submissions

8. The appellant submits that the Advocate who held brief was instructed to proceed with the application but not to record the consent. In contending that neither the appellant nor its advocates were involved in the negotiations that led to the consent order, the appellant relies on the case of **Kenya Commercial Bank Ltd –vs- Specialized Engineering Co. Ltd (1982) KLR 485** where the Court held that;

“The making by the Court of the consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their Advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.”

9. The appellant also submits that the consent order does not fulfill the legal and legitimate threshold of an order as it lacks express authority from the person on whose behalf it was made. It relies on **Kafuma –vs- Kimbowa Contractors 1974 EA(UO 91** where the Court held that;

“In a situation where the Advocate has no authority at all to enter a consent judgment, the consent judgment will be a nullity”

10. It is also the appellant’s submission that the application has conformed to the rules of stay and should be allowed.

11. On her part, the 1st respondent submits that a party seeking to set aside a consent must show that the consent is illegal. She relies on **Civil Appeal No 293 of 2014, Board of Trutees NSSF –vs- Michael Mwalo**.

12. She also relies on **HCCA No. 205/2015; SMN –vs-ZMS & 2 others** where the Court of Appeal noted that;

“A consent order entered into by Counsel is binding on all parties to the proceedings and cannot be varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of Court or where the consent was given without sufficient material or misrepresentation or ignorance or such facts in general for a reason which would enable the Court to set aside the agreement.”

“If a transaction was on the face manifestly illegal, the Court would refuse to enforce it

13. Having considered the application, the replying affidavit together with the annexures, the parties’ submissions and authorities cited therein it is my considered view that the following issues arise for determination.

a) Whether to consent order entered on 17/10/2018 is valid.

b) Depending on the outcome of (a) above, what is the way forward?

Whether the consent order entered on 17/10/2018 is valid.

14. The appellant has exhibited a letter dated 12/10/2018 addressed to Kasyoka & Associates Advocates. I believe it is imperative to reproduce the contents of the said letter;

Kasyoka & Associates

Advocates

P.o Box 240-90138

Makindu

Re: Makueni Civil Appeal No. 116 of 2018

Equity Bank (K) Ltd –vs- Matilda Mtete Kitili & 3 others

“Kindly hold our brief in the above matter coming up for mention for highlighting of submissions on 17th October 2018. The

position is that while we have filed and served our submissions, we are yet to receive submissions from any other party.

That being so please inform the Learned Judge that it is our request to the Court to either adopt our submissions and direct a ruling date or should it feel inclined, the Court may give the other parties time to file and serve their submissions when we can thereafter attend before the learned Judge on a new date.

Yours faithfully

Oregu & Odhiambo Advocates

Signed

Peter .C. Onyango

15. I note from the record that indeed, no directions were given to canvass the application dated 24/08/2018 by way of written submissions. The matter had been fixed for inter parties hearing on 17/10/2018. However on the said date, Mr. Muthiani held brief for the appellant and indicated that the matter was in Court to confirm filing of submissions just as indicated in the above letter.

16. This shows that despite not being the addressee of the letter, he somehow had instructions as indicated therein. It was actually the other Counsel who indicated that there was consent. Mr. Muthiani confirmed the position and proceeded to state the terms of the consent.

17. From a plain reading of the letter, it is clear that there were no instructions to record the consent. The respondent contended that the letter did not have a 'received' stamp from Kasyoka & Associates but from experience, it is hardly the practice especially where the correspondence is a request to hold brief.

18. In my view, a better approach would have been an affidavit from the firm of Kasyoka & Associates disowning the said letter. Accordingly, I am satisfied that Mr. Muthiani acted without instructions.

Way forward

19. The appellant has also sought the reinstatement of the application dated 24/08/2018 to be heard and determined on its merits. As observed by the respondent, the said application was for stay of execution and often times, the Court requires an applicant to furnish security before granting such stay. Therefore, as much as Mr. Muthiani acted without instructions, the consent was not illegal. I dare say that he should be lauded for trying to save the Court's time.

20. In line with prayer (c) of this application, the impugned consent should be varied and the appellant be ordered to deposit half of the decretal amount as security. This effectively means that the application dated 24/08/2018 has been compromised to that extent and there is no need of reinstating it. In my view, this will expedite the suit and ensure that the Court does not go round in circles.

21. Thus the court makes the following orders;

i. -The consent entered herein be and is hereby set aside.

ii. -The court grants conditional stay of execution in that the applicant shall deposit in court or in interest earning account in joint names of parties' advocates' ksh 800,000 within 30 days from dates herein.

iii. -In default of the above condition, the application shall stand dismissed with costs to the respondent.

iv. -Costs in the main appeal

SIGNED, DATED AND DELIVERED THIS 31ST DAY OF MAY, 2019 IN OPEN COURT.

HON. C. KARIUKI

JUDGE