



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL APPEAL NO. 17 OF 2018**

**FAULU KENYA LTD.....APPELLANT**

**VERSUS**

**REBECCA WANDIGI.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This matter comes for ruling for a notice to show cause why the case should not be dismissed for want of prosecution.
2. It is the appellants case that they had been waiting for proceedings of the lower court so that they could file their record of appeal which they filed on the 22/07/2018.
3. Mr. Momanyi for the respondent stated that the record was not complete as there was a consent filed between the parties in the lower court to the effect that the appellant was to deposit Kshs. 1,171,260/= in court within 45 days in default of which execution of the decree was to take place. Further Mr. Momanyi stated that the appeal had been filed out of time and in the absence of the agreed deposit, there was no appeal. He thus prayed that the record be struck out.
4. In rejoinder, Mr. Mwanzia admitted that indeed there was a consent, which he sought leave to file as part of a supplementary record. He further stated that the consent terms were clear on the extension of time to file the appeal. He further stated that the failure to deposit the decretal amount could not defeat his client's right of appeal and that it was in the interest of justice that the appellant be given a chance to prosecute the appeal.

**B. Analysis & Determination**

5. I have perused the record herein as well as the consent entered herein dated 11/04/2018 and filed in court on the 23/05/2018. The consent was entered on the following conditions:

*a) That the applicant do deposit the decretal amount plus costs and interest amounting to Kshs. 1,171,260/= in a joint interest earning account in the names of MOMANYI GICHUKI & CO. ADVOCATES and MITHEGA & KARIUKI ADVOCATES within 45 days from today.*

*b) Failure by the applicant to comply with conditions (a) above, the consent order be deemed vacated and the respondent to proceed with execution process.*

*c) The intended appeal be filed within 30 days from the date of the consent.*

6. Regarding consent orders, the position is clearly set out in **Setton on Judgments and Orders** (7<sup>th</sup> Edn), Vol.1 pg 124 as follows-

*“Prima Facie, 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...*

*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.”*

7. This passage was followed by the Court of Appeal in **Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269** in which Law Ag P said:

***“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”***

8. In **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485**, Harris J correctly held inter alia, that –

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

***A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.***

9. The appellant has not placed any evidence to show illegality in the consent. In fact, the appellant’s advocate concedes that the consent terms as alleged by the respondent’s advocate are as stated. He however states that it is in the interest of justice that he be given an opportunity to prosecute his appeal.

10. It is not disputed that the appellant has failed to deposit the decretal amount as agreed. The failure to comply, the appellant is in breach of the consent order. It is noted that the consent was entered into to settle the appellant’s application dated 12/03/2018 that sought stay of execution of the judgement delivered on 4/07/2017.

11. The purpose of security under Order 42 in an application for stay of execution, is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. Having failed to comply with the requirement to deposit the decretal amount within the agreed time, it is my considered opinion that the respondent is free to initiate execution proceedings.

12. It is important to note that there is no other order for stay save that of the consent as is framed. The appellant has a duty to comply with the order in which he is one of the authors.

13. Regarding the dismissal of the appeal as raised by the respondent’s advocate, I do note that the decision in **MOHAMMED SALIM t/a CHOICE BUTCHERY –VS- NASSERPURIA MEMON JAMAT (2013) eKLR**, where the court upheld the decision of **M/S PORTREITZ MATERNITY –VS- JAMES KARANGA KABIA CIVIL APPEAL NO.3 OF 1997** and stated that: -

***“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right .....”***

14. The judgment in CMCC No. 162 of 2019 was delivered on 4/07/2017. Under the relevant law, the appellant had 30 days within which to file his appeal. The time allowed by the law expired on 3/08/2017. The appellant filed the memorandum of appeal on 7/05/2019 which was about ten months after the delivery of judgment.

15. The appellant said he obtained orders for extension of time to file the appeal in Embu HC Civil Miscellaneous Application No. 9 of 2018 but did not avail a copy of the said order to support his claim that his appeal was properly before the court.

16. The appellant further argued that he has a right to pursue his appeal. I agree that this right ought to be upheld. However, it can only be upheld if the appellant also respects the right of the opposite party and complies with orders of the court. It is not in dispute that the appellant failed to honour the consent order on his part after the respondent accommodated him that his application be allowed.

17. The consent order had a defaulters’ clause which provided that the stay orders were to be vacated if the decretal amount was not deposited within 45 days. The orders were then automatically vacated at the end of 45 days for the deposit was not made within that period. This means that the respondent was at liberty to execute against the appellant since it was one year before the appeal was filed.

18. The main issue here is the notice to show cause why the appeal should not be dismissed for want of prosecution. This appeal was admitted on 16/01/2019 and the record of appeal was to be filed and served within 21 days. From the court record, the record was filed on 22/07/2019.

19. Rule 35 (2) of Order 42 of the Civil Procedure Rules provides that the Deputy Registrar do list the appeal before the judge for dismissal if no action has been taken for one year since the service of the memorandum of appeal. The appellant does not deny that he has failed to comply with the rules. In fact, it apologized for the delay. It is more than one year since the memorandum was filed and served since the notice to show cause was issued on 4/07/2019. Rules are made to maintain order and good conduct among citizens and to avoid injustice.

20. The appellant has not given sufficient cause why he failed to comply with the rules. For over two years since the judgment was delivered, the respondent has been denied the fruits of her judgment.

21. For the foregoing reasons, I dismiss this appeal with costs.

22. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mutegi for Momanyi for Respondent**

**Respondent present**