REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 35 OF 2000

NICOMA CONSTRUCTION CO. LTD.............PLAINTIFF/RESPONDENT

-VERSUS-

KEN SOUTH PLASTIC CO. LTD.............1ST DEFENDANT/RESPONDENT

ANNE KILELE...2ND DEFENDANT/APPLICANT

THE ESTATE OF THE LATE

WALTER KILELE......................................3RD DEFENDANT/RESPONDENT

RULING

1. Kenya Commercial Bank Limited is the 2nd Garnishee herein and the applicant in the **application before me, dated 2nd October 2018**. It is brought under provisions of **Section 1A(1) (2) (3) and 3A of the Civil Procedure Act and Orders 23 Rule 5 and Order 45 rule 1 (b) 23 of the Civil Procedure Rules**.

2. The applicant seeks Orders of Review and/or setting aside of the consent order recorded in court on the 26th September 2018, and stay of execution of the ruling delivered on the 31st July 2018 in this court, as well as costs of the application.

3. The application is based on grounds that there is an appeal filed against the ruling delivered on the 31st July 2018 that allowed execution of the judgment and decree in the suit. It is averred that if a stay order is not granted, the appeal will be rendered nugatory, and the applicant will suffer substantial loss. It is further averred that the consent order recorded on the 26th September 2018 was without the authority and or consent of the application and was obtained by misrepresentation of facts.

4. The application is opposed. The 1st Defendant filed its replying affidavit on the 24th January 2019, by its advocates Ashitiva Advocates LLP. The plaintiff's replying affidavit was sworn on the 25th January 2019 by Francis Mwangi Njuguna Advocate who had the conduct of the suit on behalf of the plaintiff.

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

5. I have considered the affidavit evidence on record and the submissions.

6. The court order dated 29th August 2018 directed the 1st Garnishee Barclays Bank, Nakuru Branch, and Kenya Commercial Bank Limited the 2nd Garnishee (applicant) City Hall Way Nairobi, in respect to Account No. xxxxxxxxx and xxxxxx respectively to pay out, all money deposited lying or being held as deposit by the Banks to the credit of **Ann Naanyu Kilele,** the 2nd defendant, to satisfy the decree for Kshs.9,112,920/90 with interest and costs which it is stated has accrued to Kshs.128,479,792/=.

7. By the said court order, the managers of the Garnishee banks were ordered to appear in court on the 26th September 2018 to show cause why they should not pay the sum stated above plus costs and interest.

8. **Court Proceedings for the 26th September 2018 show that:**

- Mwangi advocate appeared for the Decree holder/plaintiff
- Biko Advocate held brief for Wambugu for the 2nd Defendant/2nd Garnishee

- Ms Matu appeared for the 1st Garnishee

The court record further shows that the above advocates appeared on behalf of their respective clients to answer to the Notice to Show Cause issued on the 29th August 2018 upon application of even date.

9. The court was informed that the 2nd Garnishees advocate B.G Wambugu was bereaved and needed time to file a response to the application. No objection was raised. However the 2nd Garnishee's advocate, Mr. Biko and Mr. Mwangi for the plaintiff informed the court that they had a consent to record. **The consent order was recorded, extracted and issued on the 26th September 2018.**

It is this consent order that the applicant/2nd Garnishee seeks to set aside.

10. In its submissions, the applicant argues that no instructions had been given to the Advocate holding brief, and buttresses this submission by an email communication of the same date, in which the only instructions given were to seek for an adjournment and extension of time to file a response to the application. I have seen the email and confirm the contents therein. It was directed to Mr. Karanja advocate of M/S Mirugi Kariuki & Company Advocates, Nakuru. It was sent by Mrs. Wambgu Advocate.

11. The 1st Garnishee in its replying affidavit agrees that all parties were duly represented by counsel.

I however note that Mr. Karanja advocate, to whom the email was sent, did not attend court for W.G. Wambugu advocate, but that Mr. Biko held brief for Mrs. G. Wambugu advocate, and no objection to the adjournment was raised by any of the other advocates. To that extent, I agree that the consent was procedurally and regularly recorded by the advocates stated above.

12. I am satisfied that the plaintiffs reply to the application represents the true positon as to what transpired in court on the 26 th September 2018.

13. However, the plaintiff submits that there is no competent appeal on record as the Notice of Appeal filed on the 17th August 2018 was filed out of time, having been filed seventeen days thereafter.

Section 75(2) of the Civil Procedure Act provides for 14 days upon which a Notice of appeal may be filed from the date of the decision, ruling, order or judgment. There is no doubt that the Notice of Appeal was filed out of time, by three days, not seventeen days as alluded to.

14. The applicant has stereed away from this issue in its submissions. The court has not been informed whether or not the period for lodging the appeal (Notice of Appeal) was enlarged by an order of the court.

See-**Charles Karanja Kiiru -vs- Charles Githinji Muigwa (2017) e KLR**, and **Order 50 rule 6 of the Civil Procedure Act.**

In the premises, I agree with the plaintiff that there is no competent appeal on record from the ruling of this court delivered on the 31 st July 2018.

15. **Issues for Determination**

(1) Whether or not to set aside the consent order recorded on the 26th August 2018.

(2) Whether or not to grant or deny on order of stay of execution of the decree pending hearing and determination of a purported appeal from the court ruling delivered on the 31st July 2018.

16. I have taken the liberty to state the salient and material facts leading to the present application as they form the basis of any orders that this court will ultimately issue.

I have re-examined the court record for the 26th August 2018. Mr. Biko advocate holding brief for Wambugu did not object to the consent being recorded. Mr. Mwangi for the plaintiff clearly told the court that the matter (then in court) was between the plaintiff (his client) and the 2nd Garnishee (2nd Defendant), and proceeded to read out the consent to the court for it to record.

17. A scrutiny of the consent indicates that it was to bind the 1st Garnishee - (Barclays Bank) represented by Ms. Matu Advocate, and whose client was not party to the application then in court as submitted before the court by Mr. Mwangi Advocate, yet, the consent squarely bound the 1st Ganishee to release certain money to the plaintiff. Further, it stated that upon the money being paid, the Garnishee proceedings between the two banks would be marked as settled.

18. I note that only two advocates countersigned against the consent to confirm their acceptance and agreement to the recorded consent.

Unfortunately, the advocates appended their signatures thereto, without stating their names. The court is not clear as to which of the three advocates signed, and more so whether Biko advocate for the applicant did sign the consent, as to bind the applicant.

19. It was argued by the applicant that the consent was obtained through misrepresentation of facts, that the said advocate had no instructions

to record the consent as there was a Notice of Appeal against the 31st July 2018 ruling, that authorised execution proceedings against the applicant. I have already rendered that the Notice of Appeal having been filed out of time, and without leave of court is incompetent, unless as I stated, time for filing was enlarged which information has not been brought to the court's attention.

20. I have read and considered authorities cited by the applicant, **Pastor Antony Makena Chege –vs- Nancy Wamaitha Magak and Another (2015) e KLR and Grace Njoki Kibagi –vs- john Kibagi Kangangi & Another (2017) e KLR.**

The thread running across the said decisions is that, for a consent to be valid and binding, all parties thereto ought to be enjoined and represented for it to be effective and enforceable.

21. A consent decree as defined in BLACK'S LAW Dictionary 9th Edition is

"*A court decree that all parties agree to*"

I agree with the plaintiff's submission that a consent judgment is a contract in which parties make reciprocal concessions in order to resolve their disputes to bring to an end litigation, and when complied with, becomes a valid agreement with force of law.

22. Citing the cases **John Waruinge Kamau –vs-Phoenix Aviation Ltd (2015) e KLR** and **Kenya Commercial Bank Ltd –vs- specialised Engineering Co. Ltd (1982)KLR** where the court rendered

> "*The making by the Court of a 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 recognised grounds, the applicant submitted that the Advocate holding brief for G.W. Wambugu & Co. was acting under instructions from the firm, and therefore there could have been no misrepresentation of the facts*."

23. The threshold and principles for setting aside consent orders are well established in numerous court decisions, among them **Brooke Bond Liebig –vs- Mallya (1975) EA 266, flora N. Wasike –vs- Destimo Wamboko (1988) e KLR,** and **Inter Countries Importers** and **Exporters –vs- Teleposta Pension Scheme Registered Trustees & 5 Others (2019) e KLR**.

These include, if the consent was obtained through

a) fraud

b) collusion

c) no consensus between the parties

d) against public policy

e) misrepresentation or knowingly concealment of material acts or

f) An error, misconception, misunderstanding or mistake.

24. I am minded that any order made in the presence, and with consent of counsel is binding on all the parties to the proceedings or action, and those claiming under them, and may not be readily varied or set aside except under the circumstances I have cited above, among others.

In the present application it does seem that the applicant advocates, G.W. Wambugu & Co Advocates, did not give express instructions to the advocate instructed to hold its brief, Mr. Karanja, who in turn instructed Mr. Biko Advocate to hold his brief. I alluded to the email directed to Mr. Karanja advocate above.

It does not mention anything to do with a compromise or consent. Its contents were very clear, that the advocate holding brief would only request for adjournment and extension of time to file a replying affidavit to the application as the advocate G.W. Wambugu was bereaved.

25. Mr. Biko Advocate, complied with the express instructions, and there was no objection from the other counsel. However, before the court could grant and record both the adjournment and the time extension, the advocates, in particular Mr. Mwangi advocate for the plaintiff, indicated that they had a consent to record.

That being the scenario displayed before the court, and being aware of the principles of setting aside consent orders as set out above, I come to the finding that the consent orders as recorded, and signed by only two of the three advocates representing the parties to the application, was obtained without sufficient material facts and express consent of the applicant, despite its advocates having been present in court - See **Flora N. Wasike (Supra)**

26. **I therefore proceed to allow prayer No. 2 of the application and set aside the consent order recorded on the 26th September 2018**.

27. There is agreement by all counsel, save the applicant, that there is no competent appeal on record from the ruling of this court dated the

31st July 2018.

Provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** presupposes that there is on record a competent appeal.

I have already rendered above that the Notice of Appeal filed on the 17th August 2018 was filed out of time and without leave of court. That makes the Notice of Appeal incompetent. In essence, there is no appeal against the court's ruling dated the 31 st July 2018, and therefore there can be no order of stay of execution pending an appeal that is non-existent.

28. I decline to grant an order of stay of execution as prayed at prayer No. 3 of the application. The interim stay order dated 22nd October 2018 is thus vacated.

29. Circumstances pertaining to the application hereto, and upon my discretion and powers donated to me under **Section 27 of the Civil Procedure Act,** I am persuaded to make no order of costs to, or by, any of the parties hereof.

It is so ordered.

Delivered, Signed and dated at Nakuru this 31st day of October 2019.

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J.N. MULWA

JUDGE