



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 237 OF 2018

GIDEON KITAVI MBUUKO.....1ST PLAINTIFF

KAVITA KYONDO aka PHILIP KAVITA KYONDO.....2ND PLAINTIFF

VERSUS

COSMAS MROMBO MOKA T/A MADALTEX ENTERPRISES.....DEFENDANT

JUDGEMENT

1. When a court of law could review an order made by consent is the concern of this determination. The records availed show that on the 9.11.2017 the parties before the trial court recorded a consent in the following terms:

- i. THAT the plaintiffs do and hereby give the defendant/judgment debtor a period of Ninety (90) Days to source for a buyer in respect of his unsurveyed property situate in Shanzu.**
- ii. THAT the amount of Kenya Shillings One Hundred Thousand (Kshs. 100,00) paid as security by the defendant on 10th July, 2014 be released to the plaintiffs as part payment of the debt.**
- iii. THAT the rental income for the property situate next to Plot No. 2895/I/MN comprising of two (2) medium shops, two (2) small shops and two (2) one bedroom units being Kshs. 41,000/- per month be paid directly to the plaintiff's Advocate by Nairobi Homes who are the property agents with effect 15th November, 2017**
- iv. THAT both advocates be in the process of sale of the property.**
- v. THAT this matter be mentioned on 19th February, 2018.**

2. It is that order the Appellant sought to review by the notice of motion dated 1.8.2018 and premised on the fact that the consent was entered into in the absence sufficient material facts and mis-representation of material facts by the Respondent.

3. The lack of sufficient facts and mis-representation are said to be with regard to the covenanted sum of Kshs. 41,151.50 which was the monthly rent expected from some property merely described as un-surveyed plot situate in Shanzu. The appellant contended before the trial court in the application for review that once the consent was recorded in court, it dawned on them that the net income from the

property was indeed not the represented sum but Kshs. 27,433 and that even that sum had not been paid consistently by the person obligated by the consent to pay, M/s Nairobi Homes (Mbs) Ltd.

4. The respondent opposed the application on the basis of the grounds of opposition dated 20/8/2018 in which it was contended that the application was bad for seeking review and committal to Civil jail in the same breath; that it was propelled by bad faith and mis-representation as the applicant was already collecting the rent and was thus estopped from challenging the consent in a belated manner.

5. In his determination, the trial court after giving regard on the materials placed before him found that indeed the respondent had mis-represented facts as to the effective date the rent would be due for payment but still disallowed the payer for review on the basis that even after discovery of the true facts the plaintiff proceeded and received the sum of Kshs. 100,000 deposited in court. The court took the view that the Appellants conduct was akin to an election to proceed with the terms of the consent the misrepresentation notwithstanding.

6. This being a first appeal I am expected to reevaluate, reappraise and reexamine the entire record at trial and to come to own conclusions, while noting that on matters of discretion, I should be hesitant to intervene unless there be shown to have occurred an improper exercise of the discretion by considering irrelevant matter and ignoring relevant matters[1].

7. While I am reminded of those parameters, the court must also take into account that what was sought to be set aside by review was indeed a consent and thus a contract which can only be set aside and vacated on proof and establishment of a vitiating factor[2].

8. The reading of the consent order reveals that the duty and obligation to pay the sum of Kshs. 41, 151.50 was placed upon Nairobi Homes (Mbs) Ltd. That was a party who was never a party to the suit, and never participated in crafting and recording the consent. He was thus a stranger to the consent and no rights nor obligations could be vested or imposed upon it by the consent and ensuing court order. It is a cardinal principle of law under the doctrine of privity of contract that only parties to a contract can derive benefits and be burdened with obligations under the contract[3].

9. The effect of imposing an obligation upon that third party is that it was denied the chance to be heard on whether it would be possible to comply with the court order. In fact that failure made the consent unenforceable against the said Nairobi Homes (Mbs) Ltd from the very word go. The consent to me thus went against the law on privity of contract and the general principles of natural justice besides the fact that it was tainted with lack of clarity in case of default. One of the vitiating factors upon a contract is that a contract contrary to the law or public policy is unenforceable.

10. In the decision of FLORA WASIKA VS DESTOMO COHOKO [1988] eKLR the court set the law as follows:-

“it is now settled law that a consent judgement or order has contractual effect and can only be set aside, on grounds which would justify setting a contract aside, or it certain conditions review to be fulfilled which are not carried out”

11. In this matter the third term of the consent was worded to the effect that

“both advocates be in the process of sale of the property”

In submissions rendered it is said that the property is yet to be sold and therefore this is a condition that was due for fulfillment but is yet to be carried out.

12. I do find that there was in fact a misrepresentation as to the rental income and failure to disclose that the same income had been committed up to January 2018 which facts vitiated the consent. I also find that the consent was lacking in clarity and timelines together with what to happen in the event of default as expected of court order to make the same executable and final.

13. The third reasons for setting aside is that there was an intended sale which has not materialized and may not have materialized once again on account by failure to set timelines. For those three reasons, I do allow the appeal the consent Order of 9.11.2017 in its entirety.

14. I however note that some money has been received by the Appellant pursuant to the consent and towards the decretal sum. Such sums shall be taken into account when time comes for the decretal sum to be ascertained for payment.

15. I am however note able to order the committal of the respondent of Civil Jail because that duty is primarily vested upon the Deputy Registrar to listen to parties and make a discretionary order.

16. The result is that I do set aside the order by the trial court dismissing the application dated 1/8/2017, and in its place I substitute an order allowing same with costs. Accordingly the orders of 7/9/2017 is set aside in its entirety. I award the costs of the appeal to the appellant.

17. There is a matter that was not argued and could not have been argued before me but I consider necessary for my comment and observation. It relates to the compilation for a record of appeal and its contents. I take the view that the entrenched practice of preparing a record of Application in the High Court is indeed a good and desirable practice which needs to be encouraged even though it is not anchored on any rule. This is because it is intended to ease the work of the court by obviating ramage on the records at trial which are at times jumbled and messy. A Record of Appeal therefore, in my view, should be limited to only material that are appropriate to the dispute and necessary for courts consideration in its determination. Going by the provisions of order 42 Rule 13 (4), the record should be limited to the memorandum of appeal, the pleadings filed notes taken at trial or the proceedings, taken, the decision appealed from and any other document filed but relevant for the determination of the appeal. Like in this case, the appeal being hinged on the decision made pursuant to the Notice of Motion dated 1.8.2017, the motion itself including the affidavit in support and any responses filed and submissions, if filed, were relevant to be part of the record.

18. Despite guide provided by the law, I was presented with a Record of Appeal and a Supplementary Record of Appeal which sought to put everything in the court file including applications which had no bearing at all on the matter at hand. There were also letters between the parties and court payment receipts. That approach has made the record unnecessarily bulky and incoherent. Infact even the order the documents have been arranged is most confusing as no sequence is adopted at all.

19. My view is that a counsel preparing a record of appeal should, as part of obligation to court to assist achieving the overriding objectives, purpose to arrange the documents sequentially to make the perusal flow and not confusing or just incoherent.

20. I encourage counsel, to consider that the flow and ease of reading the documents filed should be seen as a facilitator of expeditious disposal of court disputes and that each should strive to achieve ease in reading the record of appeals when filed by arranging the documents sequentially even by the order of dates. In this matter for example a lot of unnecessarily paper work has been employed and I get the impression that it has done no good but has increased the costs of litigation.

21. Accordingly, I direct that when costs of the appeal are taxed, the sheer volume of the record should be disregarded and the entire costs of compiling that record shall not be payable to the appellant.

22.. It is so ordered.

Dated and signed at Mombasa this 18th day of December 2019.

P.J.O. OTIENO

JUDGE

Dated and delivered at Mombasa this 20th day of December 2019.

LADY JUSTICE D. CHEPKWONY

JUDGE

[\[1\]](#) Kenya Ports Authority vs Kuston (K)Ltd [2009] 2 E.A 212

[\[2\]](#) East African Portland Cement Co. Ltd vs Superior Homes Ltd [2017] eKLR

[\[3\]](#) Agricultural Finance Corporation vs Lengetia Limited [1985] eKLR