



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 23 OF 2011**

**ALLOY STEEL CASTING LTD.....APPLICANT**

**VERSUS**

**LUKE ONDITI ONKUNDI.....RESPONDENT**

**RULING**

1. The application dated 15<sup>th</sup> June, 2017 seeks orders that:

**“1. That the court be pleased to set aside or otherwise vary such part of the order of the Deputy Registrar made on 12<sup>th</sup> day of June 2017 as exceeds the terms of the consent letter dated 20<sup>th</sup> April 2017 and filed on 25<sup>th</sup> April, 2017.**

**2. That the costs of this application be provided for.”**

2. The application is based on the following grounds:

**“(a) the order made by the Deputy Registrar on 12<sup>th</sup> June 2017 materially alters and varies the terms of the consent letter filed by the parties;**

**(b) the order made by the Deputy Registrar on 12<sup>th</sup> June 2017 was made without jurisdiction as it exceeded the purpose for which the matter had been scheduled for mention, namely the adoption of the consent letter signed by the parties and filed in court on 25<sup>th</sup> April, 2017 as an order of the court, and was made without any application by either of the parties;**

**(c) the Respondent stands to be materially prejudiced by the order made as it effectively precludes him from claiming costs of the appeal herein as he is entitled by Section 27 of the Civil Procedure Act;**

**(d) Such further or other grounds.”**

3. The application is opposed through the grounds of opposition dated 18<sup>th</sup> July, 2017. The grounds are as follows:

**“1. That the Notice of motion dated the 15<sup>th</sup> day of June, 2017 lacks merit and is an abuse of the Court process, as there has to be an end to litigation.**

**2. That the consent Orders were voluntarily recorded by competent Advocates of the High court of Kenya, and there exists nothing to illustrate that the Honourable Court lacks jurisdiction to record the Consent Orders sought.**

**3. That the legal threshold for setting aside of Consent Orders has not been established and or met by the applicant herein.**

**4. That the Consent Order sought to be set aside and or varied has not been extracted and or exhibited, and hence the Notice of Motion is merely speculative and ought to be dismissed with costs.”**

4. The application was canvassed through written submissions. I have considered the submissions and the authorities cited.

5. The consent order dated 20<sup>th</sup> April, 2017 and filed in court on 25<sup>th</sup> April, 2017 states as follows:

**“Kindly record the following Order by consent;**

**a) That the Decretal amount in the sum of Ksh.129,753/= deposited in this Honourable Court on the 13<sup>th</sup> day of July, 2011 be released forthwith to firm of E. Oluoch Asher’s Advocate, the Advocates for the Respondent herein.”**

The consent order is duly signed by the counsels for both parties.

6. On 12<sup>th</sup> June, 2017 the counsels for both parties appeared before the Deputy Registrar. Mr. Nyabenge Advocate instructed by Oluoch advocate for the Respondent stated as follows: **“Mention is to adopt a consent dated 20<sup>th</sup> April, 2017, and filed on 25<sup>th</sup> April, 2012.”**

7. Mr. Mwangi for the Appellant stated as follows: **“I confirm”**

8. The Deputy Registrar then recorded the following order:

**“The consent dated the 20<sup>th</sup> April, 2017 and filed on the 25<sup>th</sup> April, 2017 is hereby adopted as the order of the court. That upon compliance of the consent order above the matter be marked as settled.”**

9. It is noted that there is variance between the written consent order and the order recorded by the Deputy Registrar. In the order recorded by the Deputy Registrar, there is the additional element that the matter be marked as settled upon compliance. Thus the Respondent is precluded from making a claim for costs in this Appeal. It is noted that the counsels for both parties were presented during the mention before the Deputy Registrar, thus the counsels were at liberty to make any further representations to the court. The application is not supported by any affidavit. Without any evidence of what transpired in court for the Deputy Registrar to have added the additional clause of marking the matter settled upon compliance, it is difficult for this court to tell if what the Deputy Registrar recorded was the actual consent of the parties or not, the format of the recording by the Deputy Registrar notwithstanding.

10. As stated by the Court of Appeal in the case of **Flora Wasike v Destimo Wamboko [1988] IKAR 625:**

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

11. For the above stated reasons, the application is dismissed with costs.

Date, signed and delivered at Nairobi this 30<sup>th</sup> day of January, 2018

**B. THURANIRAJADEN**

**JUDGE**