



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 98 OF 2005

MARTIN WAINAINA GATIBA

T/A ADVENTURE PETROLEUM.....PLAINTIFF/APPLICANT

VERSUS

KEMPTON INVESTMENT.....1ST DEFENDANT/RESPONDENT

TOM AYIEKO OKUNDI.....2ND DEFENDANT/RESPONDENT

TOM OTIENO ONYANGO.....SUBSTITUTED DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 5th June 2017, brought under the provisions of Order 51 Rule 1, Order 25 Rule (5)(1) & (2) of the Civil Procedure Rules 2010, Sections 1A, 3 & 3A of the Civil Procedure Act, and all other enabling provisions of the law. It is based on the grounds thereto, and an affidavit dated 5th June 2017 sworn by Martin Wainaina Gatiba, the Applicant herein.

2. The Applicant is seeking for orders that;

a) This Honourable Court be pleased to set aside the Settlement Agreement dated 19th July 2011 between the Plaintiff/Applicant and the Substituted Defendant/Respondent, and revert to the Judgment and Decree made by the Honourable Court on 9th June 2016;

b) That the costs of this Application be borne by the Substituted Defendant/Respondent.

3. In a nutshell, the Applicant avers, that, a decree was issued on 9th June 2006 in his favour against the Substituted Defendant (herein “the Respondent”) for the sum of Kshs 3,050,000, plus costs of the suit and interest thereon at Court rates. Subsequently, at the instance of the Respondent, the Plaintiff (herein “the Applicant”) and the Respondent, entered into a settlement Agreement (herein “the Agreement”) dated 19th July 2011. Pursuant to the said Agreement, the Respondent paid him a sum of Kshs 200,000 leaving a balance of Kshs 800,000 due for payment over the ensuing period of twelve (12) months.

4. However, the Respondent has not paid the said balance to date, which is a manifest breach of the settlement Agreement. That the Honourable Court in its Ruling dated 25th November 2016, stated that in case of default the Applicant to apply for setting aside of the Agreement dated 19th July 2011 and revert to the Judgment delivered and Decree made on 9th June 2006. Therefore it is in the interest of justice and fairness that the orders sought in the application filed herewith be granted.

5. However, the Respondent opposed the Application by filing a Replying Affidavit dated 7th July 2017, sworn by Tom Otieno Onyango. He deposed that upon filing of the consent letter dated 9th June 2006, the Applicant extracted the decree against him for the payment sum of Kshs.3,050,000.00 and in pursuit of settling the said decree, they held several meetings that culminated in a settlement agreement dated 19th July 2011, intended to fully compromise the decretal sum contained in the decree dated 9th June 2006.

6. In fulfilment of the Agreement, he was burdened to pay the Applicant the sum of Kenya Shillings One million (Kshs. 1,000,000.00) in full and final settlement of the aforementioned decretal sum which payment would mark the suit herein as fully settled. That it was further agreed that he should settle the agreed sum of Kshs. 1,000,000.00 in instalments of five (5) equal instalments of Kshs.200, 000.00 spread

over a period of twelve (12) months.

7. Pursuant to the Agreement, he made the initial payment in the sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000.00) only. However, the Applicant has unreasonably without any legal or factual basis rebuffed all his attempts to deliver up any of the subsequent instalments thereby frustrating fulfilment of the settlement Agreement. The Respondent argued that the Agreement between him and the Applicant is a valid binding contract, as it was executed devoid of duress, mistake, coercion, undue influence or misrepresentation which vices would otherwise vitiate the contract. Further that there is no public policy or regulation rendering the contract illegal. Neither has its legality been challenged in this or any other Court of law.

8. Therefore, it is not for the Honourable Court to re-write the terms of the Agreement and/or set-aside the valid contract which effectively compromised the decree. The parties are bound by it. That for the Applicant's frustration of his attempts to deliver up the instalment sums as per the agreement, he has always been ready and still has every intention to fully honour the Agreement. Therefore the Applicant's attempt to invoke this Honourable Court's power to set aside the settlement agreement is devoid of merit and is misconceived in law and ought to be disallowed in its entirety.

9. The parties disposed of the Application by filing submissions which I have considered. The Applicant submitted that the failure by the Respondent to offset the Kshs. 1,000,000 as expressly stipulated in the Agreement is a sufficient reason to warrant the setting aside of the Agreement. Moreover the payment was supposed to be completed within twelve (12) months from the date of the Agreement. Reliance was placed on the case of; *Kirani vs Kassan (1952) 19 EACA 131*, cited in the case of; *Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Limited (2015) eKLR*, wherein the Court held that a party who seeks the Court to set aside consent judgment must demonstrate a "reason which would enable the Court to set aside an agreement."

10. It was submitted that the objection to setting aside of the Agreement is self-serving and dishonest as the Respondent has not adduced any evidence to show any attempts on their part to settle the amount and only alleges that the Applicant has thwarted all efforts to have settlement amount paid. That at paragraph 21 of the Ruling of the Court delivered on 25th November 2016; the Court intimated that the fact that the Agreement did not contemplate breach by either party was an oversight that could only be redressed by an Application to set it aside.

11. Further, in the same Ruling at paragraph 28, that Court opined that if the Respondent violates the terms of the Agreement, then the Applicant has two options at his disposal: to enforce the terms of the Agreement; or to apply for the Agreement to be set aside and revert to the Judgment and decree. The Applicant has chosen to exercise the latter option.

12. In any case, considering the inordinate delay and the effect of currency inflation and economic fluctuations to the market value of the Agreement sum, the Applicant no longer desires fulfillment by the Agreement. That whatever benefits the Applicant anticipated from the Settlement amount are now incapable of being attained and the Respondent's indisposition to pay off the Kshs 1,000,000 as stipulated in the Agreement has unreasonably and unjustly barred the Applicant from enjoying the fruit of his judgment. It will be unjust and unfair to confine him to the Settlement Agreement six (6) years after it was violated. Therefore the Court should set aside the Agreement dated 19th July 2011 and revert to the Judgment and Decree of 9th June 2006.

13. However the Respondent submitted that the Court should consider the circumstances under which it can set aside a Settlement Agreement. That in the case of; *Industrial Court at Nairobi Cause No. 1201 of 2013 Waruinge Kamau vs Phoenix Aviation Limited*, quoting the case of; *Kenya Commercial Ltd vs Specialized Engineering Co. Ltd (1982)* it was stated:-

"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 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 agreement."

That it was further stated therein that;

"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 as order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds."

14. Further reliance was placed on the case of; *Ismail Surnderji hirani v Noorali Kassam (1952) 19 EACA 131*, where it was held that;

"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 and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside agreement."

15. That Hancox JA at page 626 said in the judgment in the case of; *Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Limited Civil Application no. 1 of 2015* citing the case of; *Flora Wasike v Destimo Wamboko (1982-1988) KAR 625*, that:-

"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."

16. The court in the case of; *Brooke Bond Liebig v Malla 1975 EA 266* it was held;

“A consent judgment may only be set aside for fraud collusion or for any reason which would enable the court to set aside an agreement”

17. Finally, in the case of; Transport Workers Union v Console base Limited Employment and Labour Relations Court at Mombasa cause no. 78 of 2013; the Court the Court held that:

“A consent judgment has the force of a contract and it can only be set aside if the threshold for setting aside a contract is met. The threshold for setting aside a contract is the existence of any or all of the vitiating factors including mistake, misrepresentation, coercion and/ or undue influence.”

18. In conclusion it was submitted that both parties willingly entered into the Agreement now having the force of contract and must not be set aside. That the application should be disallowed on the ground that it lacks merit and costs be awarded to the Respondent.

19. I have considered the Application and I find that there is no dispute that the Applicant and the Respondent herein entered into the subject Agreement. The issue is whether the Applicant frustrated the Respondent from performing his contractual obligation there-under or the Respondent defaulted in honoring the same.

20. I have looked at the subject Agreement and I note that it consists of a total of six (6) Paragraphs. Paragraphs 1 and 2 deals with the amount of the Judgment and the undertaking by the Respondent to pay the sum on behalf of the Defendants/ Judgment Debtors. Paragraphs 3 deals with the payment of the Kenya shillings one Million (Kshs 1,000,000) in five installments and as full and final payment of the debt. This Paragraph is quite important in the given circumstances as it states:-

“That in case of payment made within the duration shorter than Twelve (12) months then this agreement will terminate at that time”

21. It is noteworthy that the Agreement does not state what should happen in case of default. Be that as it were, Paragraph six (6) deals with the payment of the Kshs Two Hundred Thousand (Kshs 200,000).

22. Of great importance again is the fact that the Court takes note of the fact that, the Respondent herein filed a Notice of Motion Application dated 23rd February 2016, seeking for orders inter alia that; *the Court allow him to settle the decretal sum in monthly installments of Kshs Two Hundred Thousand (Kshs 200,000)*. It suffices to note that at that time, the Applicant had commenced execution of the decretal sum of Kenya Shillings Seven Million Seventy Nine Thousand And Four Hundred And Fifty Two Shillings Only (Kshs 7,079,452) and a decree drawn dated 9th June 2006.

23. In the ruling delivered by this Court on 25th November 2015, it dealt with the issue of the validity of the Settlement Agreement and was considered and it was held that the Agreement amounted to a valid contract between the parties. The said ruling also dealt with the legal effect of the said Agreement at paragraphs 17 to 19 and held at paragraph 19, that the Agreement compromised the Judgment and the decree herein and the parties are bound by the terms of the Settlement Agreement.

24. At paragraph 21 of the ruling the Court held that the Respondent had not honoured the terms of the Agreement. It was then held that in the absence of an express term to guide default, the Applicant herein could only seek to set the Agreement aside and then proceed to enforce the judgment debt. It is on this basis that the Court declined to set aside the Judgment and the decree of 9th June 2006.

25. Thus the Court declined to re-write the Contract between the parties and allow the Respondent renegotiate the terms of liquidating the debt. Finally at paragraph 27 of the ruling the Court observed that the Applicant was alleging that he is ready and willing to pay the sum sought and yet displayed no evidence in support thereof and concluded he did not deserve any equitable remedies.

26. It is therefore surprising that from 25th November 2016, when the ruling was delivered to date, that is about one and half years thereafter the Respondent is still ready and willing to pay the sum in question by words but not conduct. There is no evidence he paid the money within the stipulated period or even thereafter and it was rejected. He did not even offer to pay it in Court or through Court. Therefore, his purported willingness to pay has no merit. It is a mere buff.

27. When one considers the fact that the Applicant compromised his dues and drastically reduced the decretal sum to Kenya Shillings One Million (Kshs 1,000,000), in the year 2011 and the sum should have been paid within one year and over six years down the Respondent has not paid, then no words can describe the Respondent than a “cunning and shrewd person”.

28. The circumstances under which a Consent Order or/Agreement can be set aside have been alluded to by the Respondent in several authorities. Basically that it should a factor that can vitiate a contract. I wish to tap on only one of the holding in one of the authority cited by the Respondent. Being the decision in Ismail Surnderji hirani v Noorali Kassam (1952) 19 EACA 131, where it was held that;

“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 and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside agreement.” (emphasis mine).

29. It follows that the Court can set aside a consent order for any other factors that vitiate a contract “general reason” that would meet the ends of justice. Again the other authority cited by the Respondent clearly enables the Court to set aside a consent agreement for other reasons other than fraud, collusion illegality, misrepresentation, public policy and so on. The decision cited by the Respondent of; Samuel Mbugua

Ikumbu vs Barclays Bank of Kenya Limited (supra) citing the case of; *Flora Wasike v Destimo Wamboko (supra)*, the Court held that:-

“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.” (emphasis mine).

30. In the instant case the Respondent has not fulfilled its obligation to pay the balance of; Kenya Shillings Eight Hundred Thousands (Kshs 8000,000). Ironically in his Application dated 23rd February he sought for orders inter alia that, the Court hold the suit compromised in the terms of the settlement agreement. Once the Court held as such, he did not honour his obligation. In the same Application he sought that the Court set aside the Judgment and decree dated as against him. How does he expect the Applicant to find the fruit of his judgment if the Judgment/decree is set aside and he does not honour the Settlement Agreement?

31. I think I have said enough in this matter and in conclusion, I find that the Application herein has merit and in the interest of justice and of the parties, I make the following orders:-

a) As the Substituted Defendant has stated on oath that he is willing and ready to pay the sum claimed, I order that he pays the said sum within 15 days of this Order and that sum shall attract interest at Court's rates from the date this Application was filed until payment in full to compensate the Applicant;

b) In the alternative, if the said sum will not have been paid within the 15 days of the date hereof, then the consent Settlement Agreement will stand set aside and the Applicant will be at liberty to proceed against the Judgment debtors in the terms of the Judgment/Decree herein.

c) costs of this Application to the Applicant

32. It is so ordered.

Dated, delivered and signed on this 18th day of June 2018 in an open court at Nairobi.

GRACE L. NZIOKA

JUDGE

In the presence of;

Migore for the Applicant

Ms. Otendo for Orengo for the 1st Respondent

No Appearance for 2nd Respondent

FredCourt Assistant