



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 3 OF 2016

IN THE MATTER OF THE ARBITRATION ACT 1995

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

YASMIN MOHAMEDALI ABDULLA.....CLAIMANT/APPLICANT

-VERSUS-

RBS LIMITED.....RESPONDENT

RULING

1. *Yasmin Mohammedali Abdalla* (the applicant) has brought a notice of motion dated **12th May 2017** brought under Order 45 of the Civil Procedure Rules and Section 1A and 3A of Civil Procedure Act Cap 21. The applicant seeks the following prayer:

“the court be pleased to review an correct an error on the face of the record to wit the sum of Ksh 12,315,000.00 in the consent filed and adopted by the court on 16th February 2017 to be amended to read Ksh 13, 590,000.00.”

BACKGROUND

2. By a chamber summons dated **11th January 2016**, the applicant sought an order of this court to recognise the arbitration award between the applicant and RBS Limited, the respondent.
3. This court on **31st May 2016**, recorded a consent of the parties that the arbitration award dated **10th September 2015** be recognised as binding and enforceable as against the respondent.
4. The award provided for payment by the respondent to the applicant of the specific sums and interest. What was not determined with specification was the exact amount of party/party and arbitrators costs the respondent was to pay to the applicant. Consequently the applicant filed a bill of costs before this court for taxation.
5. When the bill of costs came up for taxation, on 14th **February 2017** before the taxing master, the parties requested to be given time to discuss and agree on the costs.
6. When the matter appeared before the Deputy Registrar, the taxing master on **16th February 2017**, the applicant’s advocate informed the Deputy Registrar the following:

“we have filed our comprehensive consent which settles the bill of costs and mode of payment.”

7. The consent the learned advocate for the applicant referred to before the Deputy Registrar is dated **14th February 2017** and filed in court on **16th February 2017**. It is that consent which is the subject of the application before me. The following is the applicant’s deposition, in the affidavit, on what preceded the signing of the consent:

“ - That on the same date (14 February 2017) the Respondent’s Counsel (Mr. Kago) and I sat down over coffee and discussed the Bill of Costs at length and eventually agreed to have the same taxed at Ksh 500,000.00.

- That during the same sitting, the claimant’s counsel made a proposal for the payment of both the agreed costs and the principal sum plus accrued interest by installments. The proposal was discussed and it was finally agreed that the Respondent would pay the Principal Sum plus Costs and accrued interest calculated upto and including 14th February 2017 by five (5) installments with effect from 16th February, 2017.

- That according to the decree issued herein, whose contents the Respondent was fully aware, interest on the Principal amount awarded was at 17% p.a. calculated from 5th February 2014 until full payment.

- As at 14th February 2017 there were 36 complete months between 5th February 2014 and the said date. However, instead of using the said number of 36 months in calculating the interest then due, the Respondent’s counsel and myself inadvertently used the figure of 26 months hence arriving at a wrong figure of Ksh 3,315,000.00 instead of Ksh. 4, 590,000 as accrued interest.”

8. The application is opposed by the respondent through its director by affidavit. By that affidavit, the respondent deposed that there is no error in the consent arrived upon by the advocate and that the claim of the additional Ksh 1, 275,000 is unfounded. That the respondent has fully complied with the consent. The respondent therefore sought dismissal of the application.

ANALYSIS AND DETERMINATION

9. A consent either recorded before court and adopted by the court is akin to a contract. It therefore has a binding force and it can only be set aside on grounds which would justify setting aside a contract. In **Board of Trustees National Social Security Fund vs Micheal Mwalo [2015] eKLR** the court of appeal had occasion to discuss the effects of a consent as follows:

“The position is clearly set out in **Setton on Judgments and Orders (7th 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.”

.....

“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.”

.....

“In **Wasike v Wamboko the High Court in Kakamega (Gicheru J, as he then was)** held –

“1. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.

2.The Civil procedure Act (Cap 21) Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid *ab initio* and should be rescinded or that there exist circumstances to warrant varying the decree.”

10. In the case of **Peter M. Kungu & 11 Others v Makenagira Farmers Trading Company Limited [2015] eKLR** it was stated as follows:

“ The Court of Appeal in the case of **Samuel Wambugu Mwangi vs Othaya Boys High School Civil Appeal No. 7 of 2014 [2014] eKLR** set out the circumstances under which a consent order can be set aside. The court observed that:

“***circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited –vs- Maliya (1975) E.A 266. It was stated 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 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 the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.”***

11. As stated before, the applicant had judgment for specific sum against the respondent. That sum was **Ksh 9 million plus interest** from **5th February 2014** until payment in full. There was no reason given why the applicant should consent to receive an amount less than that stated amount. It is also correct as stated by the applicant's advocate that there are 36 months between **5th February 2014** and **16th February 2017** when the consent was entered into. The consent, it needs to be borne in mind, was not consented to or negotiated in a vacuum. It was considered when the applicant had a judgment for a specific sum that is **Ksh 9 million plus interest**. There is no reason shown, even by the respondent, why an applicant with that judgment would accept payment of a lesser sum than the judgment amount, as it turned out. It is clear that when the advocate appeared before the Deputy Registrar, on **14th February 2017**, it was for taxation of the applicant's costs. The applicant's learned advocate addressed the taxing master and informed her that although the matter was coming for taxation, of costs, there was an offer made by the respondent. For that reason, he sought for another date. The taxing master adjourned the matter to **16th February 2017** for mention. Since the applicant had already on record a judgment for the principal sum plus interest, it follows that the offer only related to the costs, and probably to settlement of the amount by instalment. A consent that would alter the amount of the judgment would need to be explained. If not explained, it would follow that both the advocate operated under mistaken belief when they calculated the months from **5th February 2014** to **16th February 2017** to be 26 months when in fact they are 36 months.

12. It is for the above reason that on a balance of probability I find the advocates, both of them, entertained a mistake in calculating the interest amount on the basis of 26 months and not 36 months.

13. The consent recorded before court on **16th February 2017** is for the reasons set above liable to be set aside on the ground that the advocates by mistake calculated the interest due on the judgment amount on the basis of 26 months rather than 36 months.

14. Accordingly, I order as follows:

a. The consent entered before court on **16th February 2017** is hereby set aside in respect to the sum of **Ksh 12,315,000** and is **substituted** with judgment for Yasmin Mohamedali Abdulla the applicant for **Ksh 13,590,000**.

b. The rest of the consent entered into before court on **16th February 2017** remains as drawn.

c. There shall be no order as to costs in regards to the notice of motion dated **12th May 2017**.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of October, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

.....for the Applicant

.....for the Respondent

MARY KASANGO

JUDGE