



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**MISC.CIVIL APPLICATION NO.70 OF 2014**

**PETER KARUIRU GACHIRA**

**T/A KARUNJE ENTERPRISES LTD.....APPLICANT**

**VERSUS**

**NGANGA MUNENE & CO. ADVOCATES.....RESPONDENT**

**RULING**

1. The Notice of Motion dated the 26<sup>th</sup> February, 2018 was brought under a Certificate of Urgency and is premised under the provisions of Sections 3, 3A and 63e of the Civil Procedure Act, Cap 21 and Orders 22 Rule 22(1), Order 45 Rules 1 & 2 of and Order 51(1) the Civil Procedure Rules, 2010 and all other enabling provisions of the law; the Applicant seeks the following orders;

- (i) The consent judgment entered by the parties hereto on 23/01/2018 be varied and/or set aside together with any subsequent orders;
- (ii) There be a stay of execution of judgment and any subsequent decree or orders thereto pending the hearing and determination of this application;
- (iii) The court reviews its orders of 23/01/2018 and holds that the applicant has paid the respondent all his monies; in the alternative the court orders that the respondent to write off any debt with the money the respondent owes the applicant;
- (iv) The costs of the application be paid by the respondent.

2. The application is supported by the supporting affidavit of Peter Karuiru Gachira sworn on the 26<sup>th</sup> February, 2018.

3. In response to the application, the respondent, filed its Grounds of Opposition on the 27<sup>th</sup> February, 2018.

4. The counsels for the applicant and respondent made oral submissions and hereunder is a brief summary of the rival submissions;

**THE APPLICANT'S CASE**

- (i) The applicant is seeking to set aside or to review the “**consent judgment**” entered on the 23/01/2018 because he contends that the consent was obtained under duress and intimidation as the respondent had extracted warrants of arrest; that he did not know the reasons for the warrants as no Notice to Show Cause was ever served upon him;
- (ii) He is also seeking for an order of stay of execution pending the hearing and determination of the application;
- (iii) That his application was merited as he had annexed a bundle of receipts to prove payment and that nothing was owed at that time; the respondent acted in bad faith as it obtained the warrants of arrest knowing full well that the monies had been paid up in full; and that the amount paid was in excess;
- (iv) The applicant prayed that the application be allowed and that the orders made herein also be applicable in Misc.Civil Case No.4 of 2015.

**THE RESPONDENT'S CASE**

(v) The application was opposed and the respondent relied on the grounds filed in opposition; and it submitted that the application was bad in law, frivolous and a gross abuse of the court process;

(vi) The warrants were issued by the court and the consent made in court on the 23/01/2018; it was on record that the applicant paid the sum of Kshs.20,000/- into court for this instant application and also paid the sum of Kshs.20,000/- for Misc. Civil case No.4/2015;

(vii) That the applicant appeared in court to show cause why he should not be committed to civil jail and did not produce any receipts; the consent was entered on the 23/01/2018 and the application was made on the 26/02/2018 which was the day before the date when the matter was due to confirm compliance; the application was therefore an afterthought to avoid adherence to the consent order which was an order of this court;

(viii) Case-law referred to **Ishmael Irangi vs Nowrojee CA.11/1952; Brookebond Leighburg Vs Malleya CA.120/1975**; the principle set out in **Irangi(supra)** is that even though there was a compromise of the case the court cannot interfere with the agreement made between the parties; that a consent judgment can only be set aside due to collusion; but this was not shown;

(ix) The application was not merited at all and was an abuse of the court process and should be dismissed with costs.

## **REJOINDER**

5. A consent judgment is a form of contract and there are factors which make a contract invalid; one of them being duress; the consent recorded on 23/01/2017 was made under duress; the applicant appeared before court under a warrant of arrest and did not know about the Notice to Show Cause leading to the making of a contract under duress; the applicant prayed that the consent order be set aside;

## **ISSUES FOR DETERMINATION**

6. After taking into consideration the presentations of Counsel for both parties this court finds the following only one issue for determination;

(i) Whether to set aside or review the 'consent order' of 23/01/2018;

## **ANALYSIS**

7. The applicant herein has requested that the orders made herein be applicable to Misc. Civil Case No.4 of 2014 and this court file is annexed to this instant file;

8. Both files relate to an Advocate/Client Bill of Costs as between the respondent who is a firm of advocates and the applicant who was its client; the chronology of events in the files is as follows;

(i) **Misc.4 of 2015** – the events are as follows; an Advocate/Client Bill of Costs was filed on the 14/01/2015 by the respondent; the Bill was taxed at Kshs.89,475/- and a Certificate of Taxation issued; the respondent obtained judgment on the 5/12/2016;

(ii) The record demonstrates that the applicant had partially paid up the decretal sum leaving a balance which the respondent proceeded to recover by way of NTSC that sought for the applicants arrest and committal to civil jail; on the 23/01/2018 the applicant appeared in court upon the execution of the warrant of arrest and the impugned consent order was entered into between the two parties on the terms of payment and the 27/02/2018 was the date set for mention to confirm compliance;

(iii) **Misc.70 of 2014** – on the 29/10/2014 the parties herein filed a consent order that the Advocate/Client Bill of Costs be taxed at Kshs.52,450/- and that there be a stay of execution for 30 days; the applicant partially paid this agreed amount leaving a balance of Kshs.46,915/- upon his failure to pay this balance the respondent proceeded to recover by way of NTSC seeking for the applicants arrest and committal to civil jail; as in Misc.4/2016 on the 23/01/2018 the applicant appeared in court upon the execution of the warrant of arrest and another consent order was entered into between the two parties on the terms of payment of this outstanding amount; and again 27/02/2018 was the date set for mention to confirm compliance; and on the date set for confirming compliance it is noted that the applicant filed the instant application under a Certificate of Urgency;

9. It is the applicant's contention that the consent judgment of 23/01/2018 was a form of contract and that it was invalid as it was made under duress; that when he had appeared before court he was under a warrant of arrest and did not know about the Notice to Show Cause this then led him into the making of a contract under duress;

10. It is trite law that the consent order entered into by the respective counsel herein was binding on the parties hereto and that the same can only be varied if it is demonstrated that there was fraud or collusion or misrepresentation; it can also be varied if it is against the court's policy or if it is shown that it was given without sufficient material facts;

11. In this instance the applicant was brought to court under a warrant of arrest the same was meant to compel him to pay the outstanding costs arising from a taxation in default to suffer the consequences of committal to civil jail; it is a well established factor that all execution applications operate on the element of duress so as to get the desired outcome which is payment; be it attachment of moveables or immoveables; be it attachment of salary or committal to civil jail the idea is to use duress to compel the judgment debtor to pay;

12. This court reiterates that the applicant must demonstrate that the consent was either obtained fraudulently or that there was collusion or

misrepresentation which he has failed to do; therefore this court finds no reason to set aside the consent order of 23/01/2018;

13. As for review; the provisions for review of an order or decree of the court are spelt out in Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules; the rules provide that there must be discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the knowledge or could not be obtained and produced at the time the order was made; or that there must be a mistake or error apparent on the face of the record; or for any other sufficient reason.

14. What comes out clearly is that what the respondent was seeking to recover was the outstanding balances; and this court opines that the applicant at all material times was in possession of the receipts demonstrating payment therefore the annexed receipts cannot be deemed to be discovery of evidence that was not within the applicants knowledge; nor has the applicant pointed out any error on the face of the record;

15. This court finds that the applicant has not satisfied the aforementioned settled principles for an order for review and therefore this court finds that there are no sufficient reasons tendered and that this not a suitable case for the granting of such orders;

#### **FINDINGS AND DETERMINATION**

16. This court finds that from the material placed before it the applicant has failed to satisfy the settled principles for setting aside or for review of a consent order;

17. The application is found lacking in merit and it is hereby dismissed;

18. The respondent shall have costs;

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 25<sup>th</sup> day of October, 2018.**

**HON.A. MSHILA**

**JUDGE**