



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI CIVIL DIVISION
CIVIL APPEAL NO. 516 OF 2014

NGOORO TIMOTHY.....1ST APPELLANT

JAMES WAHOME2ND APPELLANT

VERSUS

GRACE WAIRIMU NJOROGE.....RESPONDENT

RULING

(a) This ruling seeks to determine an application dated 18th January, 2017 filed by the Appellants and seeking a review of consent orders recorded on 20/5/2015. The application is brought under sections 1A, 1B, 3A, 80 and 100 of the Civil Procedure Act, Orders 20 Rule 2, Order 45 Rule 1 (1) of the Civil Procedure Rules and all other enabling provisions of the law.

(b) The application seeks for orders;

(i) ...spent

(ii) ...spent

(iii) THAT the Honourable Court be pleased to review, vacate and/or set aside paragraph 2 of the consent order of 20th May, 2015 requiring that; ***“the appeal be prosecuted within 12 months from the date herein. In default the appeal stands dismissed.”*** and the same be reviewed, vacated and/or set aside to state that;

“this sum shall be held until the appeal herein is heard and determined and an application made to the Court for an appropriate order as to its disposal.”

(c) THAT the costs of this application be costs in the cause.

(2) This application is based on the grounds on the face of the application and the Supporting Affidavit of **ALFRED DEYA**, the Appellants’ Advocate in conduct of the matter. Among the grounds advanced in support of the application are that there is a mistake/error apparent on the face of the record of the consent order recorded, the consent was recorded without a meeting of the minds of the advocates hence occasioning the mistake and that the present appeal is substantially similar to **civil appeal number 517 of 2014 – Ngooro timothy & Another V. Danies Mutunga**.

(3) The Respondent filed Grounds of Opposition and a Replying Affidavit of **ROSE OBAGA** an Advocate of the Respondent both dated 28th April, 2017 opposing the Application. The Respondent states that the Appellants have not been candid and truthful to this court and they are deliberately misleading the court by being economical with the truth. The Respondent avers that the consent order was recorded on dictation from the bar by the Counsel for the Appellants, Mr. Alfred Deya and herself. That the Court did read the consent back to them and they both confirmed its contents and appended their signatures on the same. The Respondent further avers that it is the Appellant who extracted the said Orders on 25th May, 2015 for purposes of opening the joint interest earning account. Further that there has never been any consolidation with any other file and that Civil Appeal No. 517 of 2014 and the one herein were being handled by different judges of this Honourable Court.

(4) The circumstances under which an order of review can be granted are provided for in Order 45 Rule 1 of the Civil Procedure Rules. Order 20 Rule 2 as quoted in the application does not apply here as it deals with accounts in counter-claims... Order 45 Rule 1 of the CPR provides that

“1. (1) any person considering himself aggrieved—

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby Allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

(5) The effect of this rule is to provide for an avenue for a party to seek review from the Court that passed an order or decree. A close reading of the law will show that there are specific conditions which should be considered to warrant a review. Also, the application for review has to be filed without unreasonable delay. In this matter, the consent orders were drafted and read out to the presiding judge by the Appellant’s Counsel together with Respondent’s Counsel. It is not in dispute that the orders were confirmed by the Counsels who appended their signatures. It is also not in dispute that the Appellant’s Counsel extracted the said consent orders on 25th May, 2015. I will have difficulties in reasoning with the Appellant that there is a mistake/error apparent on the face of the record of the consent order recorded which alleged mistake the Appellant has not pointed out. The fact that the Consent did not represent what the Appellant’s counsel thought he had agreed to as he avers in his affidavit, does not amount to there being a mistake on the face of the consent order.

(6) I have looked at the Order issued on 20th May, 2015 and the paragraph in contention clearly states, ***“THAT the appeal be prosecuted within 12 months from the date hereof in default the appeal stands dismissed.”*** The Appellants aver that they were under a mistaken state of mind and that is what the Counsel communicated to the instructing client what he thought was the position of the matter as per the annexed letter dated 26th May, 2016 that ***“the appeal be fixed for hearing in a year’s time failure to which the stay order will lapse.”*** Even if that was the case, I find that the Appellants were indolent enough not to act on the mistaken belief to set the appeal for hearing within a year’s time. I would also like to bring the attention of the parties to the provisions of Order 42, Civil Procedure Rules which provides that the Court on its own motion can dismiss appeals which have not been prosecuted within a year of service of the memorandum of appeal.

(7) A consent order is normally treated as a binding contract between the parties and courts will interfere only if circumstances which would have vitiated or rescinded a contract influenced the consent order. In the case of **Board of Trustees of National Social Security Fund Vs. Michael Mwalo (2015) eKLR**

which case has also been referred to by the Counsel during submissions, the Court of Appeal held that, *“To impeach a consent order or judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the law.”*

(8) The Applicant has not established that there existed any of the three conditions at the time the order was being recorded to warrant a review of the consent orders. Order 45 requires that applications for review of orders and decree be filed without unreasonable delay. These orders were issued on 20th May, 2015 whereas that instant application for review of the orders was filed on 18th January, 2017. This is unreasonable delay which the Court will be reluctant to entertain.

(9) Having been of the said view, I find and hold that the application dated 18/1/2017 has no merits and its hereby dismissed with costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **22nd** Day of **September, 2017**.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... for the Appellant

..... for the Respondent