



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 73 OF 2015

WEST KENYA SUGAR CO. LTD APPELLANT

VERSUS

HARUN NAMBALE INZERA.....RESPONDENT

RULING

1. Parties to this Appeal entered into a consent dated 15th October, 2015 which was filed in court on the same day. The same was validated into a consent order by the Deputy Registrar on 16th October, 2015. The terms of the consent were as follows:-
 - i. *A stay of execution is granted in respect of the decree in Butali PMCC No. 116 of 2013, Harun Nambale Inzale Vs West Kenya Sugar Co. Ltd pending (sic) hearing and determination of this appeal;*
 - ii. *The entire decretal amount of Kshs.131,500/= together with party and party costs of Kshs.85,000/= all totaling to Kshs.216,500/= be deposited in a joint interest earning account in the name of both Advocates within 30 days from the date of filing the consent;*
 - iii. *In default execution to issue; and*
 - iv. *Proceedings be typed for parties to proceed with the appeal.*

2. The appellant/applicant found itself edged between a rock and a hard place when it did not comply with order No.2 hereinabove, within the 30 days agreed upon. It filed an application by way of Notice of Motion on 23rd November, 2015. The application was brought under certificate of urgency.

3. The applicant sought the following orders-
 - i. *Spent;*
 - ii. *spent;*
 - iii. *This Honourable court be pleased to extend time for the Appellant/Applicant to comply with the terms of the consent order contained in the consent letter dated 15th October, 2015 and in particular clause No.2 of the consent; and*
 - iv. *Costs of this application be in the cause.*

4. The application was anchored on the following grounds-
 - i. *That the respondent has proclaimed the appellant's tools of trade and if allowed to proceed with the execution proceedings, the appeal will be rendered nugatory;*
 - ii. *That the parties had since (sic) filed a written consent on stay of execution of the decree pending appeal on condition that entire (sic) decretal amount and costs be deposited in a joint interest*

earning account;

- iii. *That the period of 30 days requiring the entire decretal amount in Butali PMCC No.116/13 be deposited in a joint interest earning account has since lapsed;*
- iv. *That the appellant/applicant is in possession of the said decretal amount together with costs in the name of both Advocates and is ready and willing to deposit the same in a joint interest earning account but the respondent has refused to execute the joint account opening forms thereby rendering the appeal nugatory hence the appellant/applicant stands to suffer irreparable loss and damage in any event the appeal succeeds (sic) as the respondent is not a person of known means;*
- v. *That the application has been made without delay; and*
- vi. *That the respondent stands to suffer no prejudice if the application is allowed.*

Applicant's submissions

5. At the hearing of the application, the applicant relied on a supporting affidavit dated 23rd day of November, 2015 and a supplementary affidavit dated 3rd December, 2015, sworn by Raymond Olendo an Advocate in the law firm of Ogenjo, Olendo and Company Advocates. The applicant also relied on its written submissions filed on 9th December, 2015 and list of authorities filed on 4th December, 2015.
6. Ms Odek, learned counsel for the applicant beseeched the court to grant the prayer sought in paragraph 3 of the application for time to be extended for the applicant to comply with the consent order dated 15th October, 2015. She submitted that the parties herein agreed that there be a stay of execution pending the hearing and determination of the appeal herein. It was also agreed that the decretal amount and costs amounting to Kshs.216,500/= be deposited in a joint interest earning account opened in the names of the Advocates for both parties within 30 days from the date of filing of the consent letter.
7. Learned counsel for the applicant further submitted that their law firm informed the applicant's insurer about the consent and they issued a cheque on 6th November, 2015. The cheque was received in the evening hours of 11th November, 2015. A copy thereof was attached to the applicant's supporting affidavit. Ms Odek submitted that they were unable to deposit the cheque as the joint bank account had not been opened as it was not clear who between the parties was to open the account. She submitted that the respondent's Advocates were required to avail copies of various documents to facilitate in opening the said account but they failed to do so. As at the time the application was being heard, the joint bank account had not been opened.
8. It was the applicant's submission that the respondent had no objection to the stay pending appeal being granted as long as the decretal amount was deposited in a joint bank account.
9. It was submitted for the applicant that although the respondent's replying affidavit had indicated that this court has no jurisdiction to interfere with a consent order of the parties herein, Order 50 of the Civil Procedure Rules and Section 95 of the Civil Procedure Act gives the Honourable court discretion to enlarge time where limited time has been fixed for doing certain acts and where such time has expired. In addition, it was submitted that once a court has endorsed a consent order, parties become subject to the law governing consent orders. Substantive law allows courts to review orders and enlarge time. This court was urged to exercise its discretion and enlarge time so that the appeal herein is not rendered nugatory.
10. Ms Odek submitted that the appeal that has been filed is an arguable one and that it is just and fair for the court to enlarge time for the applicant to deposit the decretal sum in a joint interest earning bank account as the appellant drew the cheque in time. Bank account opening forms were attached to the applicant's supporting affidavit.
11. Ms Odek relied on the decisions of **Invesco Assurance Co. Ltd Vs Charles Kaburu** [2007] eKLR, **Geminia Insurance Company Ltd Vs Susan Nduta Mwangi and 2 others** [2009] eKLR and **Geology Investment Ltd and 40 others Vs Consolidated Bank of Kenya** [2008] eKLR,

where courts of concurrent jurisdiction exercised their discretion in enlarging time that had been stipulated for carrying out various activities by consent orders.

Respondent's submissions

12. Mr. Yego, learned counsel for the respondent opposed the application dated 23rd November, 2015 and relied on the replying affidavit filed on 1st December, 2015 sworn by Harun Nambale Inzera, the respondent.
13. Mr. Yego submitted that the application was incompetent and had been made in absolute bad faith as the affidavit on record was sworn by the applicant's Advocate and not the applicant. He also submitted that the supporting and supplementary affidavits were commissioned by Advocate Peter M. Samba who works for the law firm of Ogejo, Olendo and Company Advocates and could therefore not commission affidavits stating how the said law firm handled this matter. He submitted that a different Advocate should have commissioned the affidavits. Mr. Yego urged this court to strike out the supporting and the supplementary affidavits for being incompetent.
14. It was submitted for the respondent that this court lacks jurisdiction to extend time in respect of the consent order dated 15th October, 2015. Mr. Yego relied on the Court of Appeal decision in **Gateway Insurance Co. Ltd Vs Aries Auto Sprays** [2011] eKLR where a majority of the Judges held that a consent order cannot be altered or varied by the court. The Court of Appeal held that it lacked jurisdiction to extend time, where the time sought to be extended had already lapsed. Mr. Yego submitted that in the instant case, the time lapsed on 15th November, 2015, yet the application before the court was filed on 23rd November, 2015. He submitted that such an application can only be brought during the time prescribed by law. He submitted that in the case of **Gateway Insurance Co. Ltd (supra)**, the court was categorical that a consent assumes the form of a contract and cannot be varied unless there has been some form of fraud, collusion or misrepresentation. The applicant had not shown that was the case in this matter.
15. It was submitted that the consent was voluntarily executed on 15th October, 2015. The parties herein agreed that in default of non-compliance with paragraph 3 of the consent order, execution would issue. Mr. Yego submitted that execution had been partially done before interim orders were granted by the Court. He submitted that the consent order did not grant any party liberty to apply and therefore the consent order was binding on the parties.
16. He further submitted that the applicant was indolent after being accommodated by the respondent by entering into a consent and was not deserving of the orders sought having failed to take action to deposit the decretal sum in a joint bank account. It was submitted that it was incumbent upon the applicant to enjoy the olive branch extended to them but they slept on their laurels and forgot about the consent. He submitted that the letter from the applicant dated 19th November, 2015 forwarding the account opening forms was forwarded to the respondent after expiry of the 30 days agreed upon and that they did not receive the said letter.
17. It was submitted that the applicant will suffer no prejudice as the appeal is yet to be heard. Mr. Yego prayed that the application be dismissed.

Applicant's response

18. Ms Odek responded by stating that Peter M. Samba Advocate is not an employee of the law firm of Ogejo, Olendo and Company Advocates. She submitted that the respondent applied for the consent orders because he had not paid further court fees as required. She submitted further that the respondent did nothing to facilitate the opening of a joint bank account and that the applicant will be highly prejudiced if the orders prayed for are not granted.

Analysis and determination of the application

19. This court lists the following issues that call for determination-

(i) Should this court strike out the applicant's replying and supplementary affidavits for being incompetent?

(ii) Does this court have jurisdiction to extend the time stipulated in paragraph 2 of the consent letter filed in court on 15th October 2015 and validated by the Court on 16th October, 2015?

Striking out of the applicant's affidavits

20. The respondent in a surprise move not anticipated by the applicant, prayed for the applicant's supporting and supplementary affidavits to be struck out for having been commissioned by Peter M. Samba Advocate whom the respondent said was an employee of the law firm instructed by the applicant. This Court notes that the name Peter M. Samba appears on the left hand margin of the letter addressed from the law firm of Ogejo, Olendo and Company Advocates to Z. K. Yego Law offices. Whereas the respondent had the opportunity to raise that issue in his replying affidavit, he did not do so. He therefore denied the applicant the opportunity to either controvert or admit the said allegation. It is not the work of the court to make suppositions or to investigate allegations of this nature. The court is expected to make decisions based on facts and evidence presented before it. This court would have expected the respondent's counsel to undertake due diligence and present before the court concrete evidence from the Law Society of Kenya to show that Mr. Peter M. Samba is an employee of the law firm of Ogejo, Olendo Company Advocates. Ms Odek for the applicant denied the allegation from the bar as she was not given the opportunity to respond to the same by way of an affidavit.

21. He who alleges must prove and I am not persuaded that I should strike out the applicant's affidavits for incompetence. If what is alleged is true, counsel are put on notice to desist from such unethical practice which is likely to lead to conflict of interest and striking out of affidavits.

Does this court have jurisdiction to extend the time stipulated in paragraph 2 of the consent letter filed in court on 15th October 2015 and validated by the Court on 16th October, 2015?

22. Although the application before me seeks for orders of enlargement of time within which to deposit the decretal amount in a joint bank account, the said application was brought under the provisions of Sections 3A and 3 of the Civil Procedure Act, Order 42, rule 6 and Order 51, rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. This being an application which was filed by a law firm, this court would have expected the application to be anchored on the provisions of Order 50 of the Civil Procedure Rules and Section 95 of the Civil Procedure Act that address the prayers being sought and not to be brought under omnibus provisions of the law.

23. It is apparent from the replying affidavit deposed by the respondent and from submissions of his counsel that the applicant failed to deposit the decretal amount in a joint bank account in the names of both the applicant's and respondent's Advocates within the 30 days agreed upon by the parties herein in their consent letter filed in court on 15th October, 2015.

24. A reading of the affidavit deposed on behalf of the applicant shows that the applicant's Advocates were not proactive in taking measures to open a joint bank account after filing of the consent letter on 15th October, 2015. No explanation was given as to why bank account opening forms were not filled in advance by the applicant's lawyers and sent to the respondent's lawyers for their execution as the applicant's Advocates awaited the cheque from the applicant's insurer.

25. After the cheque was received on 11th November, 2015 by the law firm of Ogejo, Olendo and Company Advocates, no action was taken until the 19th November, 2015 when a letter was written to the law firm instructed by the respondent to which copies of the bank account opening forms were attached. Although Ms Odek for the applicant submitted that it was not clear who was

to initiate the process, this court notes that the consent order was in favour of the applicant thus in the natural flow of things, the applicant's firm of Advocates would have been expected to take advantage of the kind gesture from the respondent by taking the first step to open a joint bank account with the respondents' Advocates. It did not. The delay between the time when the cheque was received on 11th November, 2015 and the 19th November, 2015 when the account opening forms were sent to the respondent is not explained.

26. In her submissions, Ms Odek cited the provisions of Section 95 of the Civil Procedure Act Cap 21 of the laws of Kenya which give courts the power to enlarge time. The said section reads as follows-

"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may in its discretion, from time to time, enlarge shall period, even though originally fixed or granted may have expired".

She also cited the provisions of Order 50 of the Civil Procedure Rules which makes provisions for enlargement of time.

27. Order 50 rule 6 of the Civil Procedure Rules provides as follows -

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise".

28. In the case of **Hirani V Kassam [1952] 19 EACA 131**, the following position on consent orders as set out in **Setton on Judgments and Orders** 7th Edition, Vol. 1 page 124, was cited with approval-

"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 to 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 the agreement".

29. In the Court of Appeal decision of **M & E Consulting Engineers Limited V Lake Basin Development Authority & Another [2015] eKLR**, the Court held that -

"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside and varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to 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 the agreement....."

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

30. I am bound by the Court of Appeal decisions cited in this ruling and it is this Court's finding that the consent letter assumed the form of a contract after being filed in Court on 15th October, 2015

and being validated by the Deputy Registrar on 16th October, 2015. The consent was therefore binding on the parties and this court lacks jurisdiction to enlarge time unless by the mutual consent of the parties. This court finds that the applicant slept on its rights and equity cannot come to its aid.

31.I therefore find that the application herein lacks merit. I hereby dismiss it with costs to the respondent.

DELIVERED, DATED and SIGNED in open court at Kakamega on this 21ST day of JANUARY, 2016

NJOKI MWANGI

JUDGE

In the presence of:-

..... for the applicant

.....for the respondent

.....Court Assistant