



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND COURT CASE NO. 65 OF 2013**

**PHILIP ACHUKI NDUBI.....1<sup>ST</sup> PLAINTIFF**

**ELIJAH MONDA NYANCHOKA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DR. ANIL TAYLOR.....DEFENDANT**

**RULING**

1. The suit by the plaintiffs brought vide a plaint dated 5<sup>th</sup> December 2012 but filed on 19<sup>th</sup> February 2013 was founded on wrongful eviction and repossession of tools of trade of the plaintiffs by the defendant. The 1<sup>st</sup> plaintiff by the plaint sought damages for breach of contract relating to an agreement for lease that the plaintiffs had entered with the defendant for the operation of a school.
2. Although the defendant entered appearance in the suit on 25<sup>th</sup> February 2013 no defence was filed by the defendant. Instead the 1<sup>st</sup> plaintiff and the defendant appear to have compromised the suit on the terms of a consent entered into between the parties and which consent was filed in court on 18<sup>th</sup> March 2013. The signed consent between the parties was in the following terms:-

**“I Philip Achiki Ndubi being the plaintiff in case No. HCC No. 65 of 2013 have agreed with Dr. Anil R. Taylor to settle the matter out of court on terms:**

1. **That he Dr. Taylor pays kshs. 80,000/= to me.**
2. **That I forego the court action.**
3. **I take whatever my property in school namely:-**
  - a. **2 tables**
  - b. **1 chair**
  - c. **Any other property that is mine.**

**I have today received kshs. 5,000/= as part payment pending payment by the defence counsel Mr. Soire.”**

3. The 1<sup>st</sup> plaintiff vide an application dated 6<sup>th</sup> May 2013 sought to have the above consent set aside for what he termed disobedience of the order. Hon. Justice Okong’o dismissed the 1<sup>st</sup> plaintiff’s said application. In his ruling the judge observed at page 9 thus:-

**“In any event, the consent provided that the defendant was to pay to the 1<sup>st</sup> plaintiff a sum of kshs. 80,000/00 and that the 1<sup>st</sup> plaintiff was to discontinue the suit and also**

**collect his properties from the school. The 1<sup>st</sup> plaintiff admitted the defendant paid him kshs. 80,000.00 that was provided for under the consent. In my view, this was the only thing that the defendant was obliged to do under the consent. The other terms of the consent were to be complied with by the 1<sup>st</sup> plaintiff. The consent letter did not provide that the defendant was to hand over the 1<sup>st</sup> plaintiff's properties to him or that the defendant would give him access to take delivery.”**

4. The record shows that on 7<sup>th</sup> April 2014 the matter was fixed for formal proof hearing when Mr. Soire Advocate for the defendant raised the issue of the suit having been compromised on the terms of the consent and hence there was nothing that remained to go to hearing. The 1<sup>st</sup> plaintiff for his part stated he would like to enforce the consent as the same was only partially fulfilled. It was then that the court made the following order:-

**“This matter is stood over generally. The plaintiff is at liberty to move the court to enforce the consent filed on 18<sup>th</sup> March 2013 if he is of the view that the same has been breached.”**

5. The record further shows the 1<sup>st</sup> plaintiff took out a Notice to Show Cause (NTSC) dated 4<sup>th</sup> May 2015 which was fixed for hearing on 14<sup>th</sup> May 2015 before the deputy registrar. The NTSC advised the defendant that his presence would be dispensed with if the sum of kshs. 387,110/= being the balance or amount owing on the decree was deposited in court. On 14<sup>th</sup> May 2015 the NTSC was not heard as scheduled as the same was adjourned and a new date for hearing was to be taken at the court registry. The record does not show that the NTSC was eventually heard. The record further does not show when judgment in the suit was given and in what terms.
6. The 1<sup>st</sup> plaintiff by an application for execution of decree filed in court on 13<sup>th</sup> July 2015 seeks execution by means of attachment and sale of the defendant's (J/D's) movable property. The decree extracted in this suit indicates judgment in this case was entered on 7<sup>th</sup> April 2014. I have earlier in this ruling referred to the proceedings in court on 7<sup>th</sup> April 2014 and quite clearly no judgment was entered by Hon. Justice Okong'o as the judge merely ordered the matter to be marked stood over generally.
7. I have made extensive reference to the record of the court to contextualize the defendant's application dated 17<sup>th</sup> August 2015 which application is the subject of this ruling. The application seeks inter alia the following orders:-
- i. That the court be pleased to stay illegal proclamation of attachment issued on 11<sup>th</sup> August, 2015 pending the hearing of this application inter partes.**
  - ii. That a temporary stay of execution of the alleged decree herein pending the hearing and determination of the suit.**
  - iii. That the court be pleased to set aside the alleged judgment and decree herein pending the hearing and determination of the suit.**
  - iv. That the respondent be condemned to meet the costs of the application.**
8. In my preliminary review of the file record it has become patently clear and evident that there was no relevant judgment entered in favour of the 1<sup>st</sup> plaintiff in this matter that was capable of being executed. Indeed there was no liquidated demand/claim by the plaintiff which would have enabled a judgment for the liquidated sum to be entered in favour of the 1<sup>st</sup> plaintiff. A formal proof would have been required for any judgment to be entered having regard to the nature of the claim made under the plaintiff.
9. The alleged consent which the 1<sup>st</sup> plaintiff claims to have been breached or partially fulfilled only provided the defendant was to pay to the 1<sup>st</sup> plaintiff a sum of kshs. 80,000/= which the 1<sup>st</sup> plaintiff was paid and that the 1<sup>st</sup> plaintiff was to collect his properties from the school. The consent did not attach any value to the properties that the 1<sup>st</sup> plaintiff was to collect from the school. Thus even if it was to be held that the consent was not fully performed, then it would have

been necessary to have a formal proof hearing to establish what properties of the 1<sup>st</sup> plaintiff were not released and their respective values. It is not clear where the 1<sup>st</sup> plaintiff plucked the sum of kshs. 387,110/= indicated in the NTSC form. The extracted decree cites the date of judgment as 7<sup>th</sup> April 2014 yet no judgment was entered by the court on that day.

10. The 1<sup>st</sup> plaintiff has opposed the application by the defendant and has filed submissions. I have considered the submissions filed by the 1<sup>st</sup> plaintiff and I do not consider that the apparent irregularities as relates to the entry of judgment, extraction of the decree and processing of the NTSC have been satisfactorily addressed. This is a court of justice and it will not allow a party to short circuit the procedural processes where that prejudices the other party. The defendant in the present suit was of the view that the consent entered into with the plaintiff fully compromised the suit. If the 1<sup>st</sup> plaintiff felt that the same did not, he was entitled as advised by Hon. Justice Okong'o to move the court to have the same fully complied with.
11. The option the 1<sup>st</sup> plaintiff had was to set out the aspects of the consent that were not complied with and to seek to prove that the compliance was partial. The 1<sup>st</sup> plaintiff omitted to do that and instead sought to obtain an ex parte judgment yet by the consent the 1<sup>st</sup> plaintiff had stated that he had foregone the suit. Technically there was no suit before the court following the consent which compromised the suit. The court would only have become seized of the matter if the 1<sup>st</sup> plaintiff proved that the terms of the consent had not been met and it was necessary therefore for the court to hear the case.
12. As I am satisfied there was no valid judgment or decree in this suit entered in favour of the 1<sup>st</sup> plaintiff. I will accordingly set aside the purported judgment entered on 7<sup>th</sup> April 2014 and the decree issued herein and all the consequential orders. I grant the defendant's application in terms of prayers 4 and 5 and I award the defendant the costs of the application dated 17<sup>th</sup> August 2015.
13. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 29<sup>th</sup> day of April, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the defendant

..... Court assistant

**J. M. MUTUNGI**

**JUDGE**