



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC.CIVIL APPLICATION NO. 25 OF 2014.**

**B.M.MUSYOKI & CO. ADVOCATES.....APPLICANT**

**-VERSUS-**

**HORTICULTURAL CROPS DEVELOPMENT AUTHORITY.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This ruling arises from two applications filed by the ex parte applicant and the Respondent respectively. The application by the Respondent herein, **Horticultural Crops Development Authority**, is dated 28<sup>th</sup> April, 2016 and seeks the following orders:

1. **That the application herein be certified urgent and be heard exparte in the first instance.**
2. **That the Honourable Court be pleased to enlarge time to allow the applicant to file reference against the ruling of Hon. R.A Aganyo Deputy Registrar done on 21<sup>st</sup> January 2016 out of time.**
3. **That the Honourable Court do make a temporary order for stay of execution pending hearing and determination of this application for leave to file reference out time.**
4. **That costs of this application be provided for.**

2. The other application filed by the ex parte applicant herein, **B.M.Musyoki & Co. Advocates**, is by a Notice of Motion dated 18<sup>th</sup> April, 2016, in which the applicant seeks the following orders:

- 1) **That judgment be entered for the applicant against the respondent for a sum of Kshs 37,851,504.22 as appears in certificate of taxation dated 26<sup>th</sup> January 2016 with interest at 18% per annum from the date of filing this application until payment in full.**
- 2) **That the applicant be allowed to execute the judgment herein against Agriculture, Fisheries and Food Authority who is the successor of the respondent.**
- 3) **That the respondents do pay costs of this application.**

3. For good order and convenience, I will first determine the application by the Respondent as the outcome of the ex parte applicant's application may well depend on the outcome of the respondent's application.

4. According to the respondent, the Horticultural Crops Development Directorate was formerly the Horticultural Crops Development Authority. By the **Agricultural Fisheries Food Act 2012** the parastatals were reconstituted into directorates under one Authority the Agricultural Fisheries Authority (AFFA) who took over the functions of the current directorate and currently Agricultural Fisheries and Food Authority is under the Acting director general but the board of management is yet to be constituted as per the Act.

5. It was averred that the directorate the applicant herein was served with the certificate of taxation dated 26<sup>th</sup> January 2016 by their advocates on record relating to taxation of costs by their previous advocate's on record, the applicants herein and they then wrote to the acting Director General AFFA for authority and advise to pay the said sum of Kshs.37,851,504.22 to the advocate.

6. Subsequently on 29<sup>th</sup> February 2016 a meeting was convened with the representatives of AFFA, the Directorate and the Advocates in this case wherein a tentative agreement was arrived at to pay the taxed costs by installments since the respondent had no ready funds. However upon informing the director general AFFA of the said decision decision to pay the amount of taxation by installment, he director advised that since he had no functional Board of Management he had to seek approval or concurrence from the Principal Secretary of the parent Ministry of Agriculture Livestock Fisheries at Kilimo House. The said Principal Secretary upon consultation with the legal officers in the Ministry gave instructions through AFFA that the respondent should object against the ruling on taxation for being excessive and AFFA instructed its advocates on record M/s Ombachi Moriasi & Co. Advocates by letter of 20<sup>th</sup> April 2016 to appeal against the ruling on taxation by way of reference to the Judge.

7. The Respondent was however advised by the said firm of advocates that the objection to the taxation ought to be filed in court within fourteen (14) days from the dated of ruling. It was therefore the respondent's case that the delay to file the appeal/reference was caused by the bureaucracy and channel of communication between the Directorate to AFFA and Principal Secretary Ministry of Agriculture Livestock and Fisheries since AFFA did not have a functional Board of Management.

8. According to the Respondent, this Court has wide discretion to enlarge time as provided for under the **Civil Procedure Rules** and the **Advocates Remuneration Order 1962 Rules**. To the Respondent, the delay was not deliberate but is excusable since it was spent while trying to seek the necessary approval to pay in line with good governance.

9. The application was opposed by the ex parte applicant.

10. According to the applicant, the costs in this matter were taxed on 21<sup>st</sup> January 2016 and he served the respondent's advocates with certificate of taxation on 27<sup>th</sup> January, 2016 though the respondent's advocate was present when the ruling was delivered on 21<sup>st</sup> January 2016. Upon service the respondent convened a meeting on 29<sup>th</sup> February 2016 where it was agreed on how the taxed costs would be paid. The said meeting, according to the applicant was held in the respondent's offices and was attended by:

- a. The applicant
- b. Mr. Zakayo Magara- the respondent's Managing Director
- c. Mrs. Frankie Walikhe- the head of legal affairs of AFFA
- d. A Mr. Wamweya- representing AFFA
- e. Mr. Antony Mutua- Internal Auditor of the respondent
- f. Mr. Francis A. Moriasi Advocate- Advocate for the respondent.

11. It was averred by the applicant that following the meeting, the parties recorded a consent which was filed in this court on 4<sup>th</sup> March 2016 and adopted as an order of the court on 3<sup>rd</sup> May 2016. The applicant

further disclosed that the respondent had been promising to pay the amount and that the parties were in constant communication hence the Respondent could not claim to have delayed due to lack of communication. In the applicant's view, the delay has not been sufficiently explained.

12. Since the respondent had already consented to the taxed costs, the applicant averred that and it is trite law that there cannot be an appeal against a consent order or judgment and having approved the consent the respondent cannot roll back the clock and seek approval from the Principal Secretary. In the applicant's view, going by the averments in the supporting affidavit, approval by the Principal Secretary was for payment and not the amount of costs. To him, the respondent is a parastatal with capacity of suing and being sued and the Principal Secretary has no business dictating who should and should not be paid. He asserted that the intended reference is hinged on the personal opinion of the Principal Secretary but not on any legal basis since the Principal Secretary has no business deciding on matters before the court where the Ministry is not a party.

13. It was contended that the respondent was represented in this matter by an advocate of several years standing but not legal officers at the Ministry. In any event the head of legal department was in the meeting held on 29<sup>th</sup> February 2016. To the applicant, the application is a delaying tactic which was jerked by his application dated 18<sup>th</sup> April 2016. It was the applicant's position that due to antecedents and conduct of the respondent, if this court is inclined to grant this application the same ought to be on condition that it deposits the entire taxed amount in an interest earning account in the name of the parties' advocates within fourteen days.

14. I have considered the material on record.

15. In this matter there is a consent letter dated 3<sup>rd</sup> March, 2016 which was executed by the advocates for the parties herein. According to the said consent the applicant's costs taxed on 21<sup>st</sup> January, 2016 was agreed to be liquidated by way of Kshs 10,000,000.00 on or before 20<sup>th</sup> March, 2016 and the balance was to be paid in 5 equal monthly instalments of Kshs 5,570,300.00 with effect from 20<sup>th</sup> April, 2016 and in default thereof execution was to issue. There is no allegation that the said consent was improperly arrived at. On 4<sup>th</sup> May, 2016, the said consent was recorded as an order of the Court.

16. The circumstances under which a consent order can be set aside are now well known. It is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons. In other words *Prima facie* a consent 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 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 in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. The East African Court of Appeal on its part in **Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266** expressed itself 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...and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement... It is well settled that a consent judgement can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.”***

17. In **Ismail Sunderji Hirani vs. Noorali Esmail Kassam [1952] 19(1) EACA 131** the same Court held

that where a suit has been settled by a compromise the decree is passed upon the new contract between the parties which supersedes the original cause of action and in that case the contract of the parties is not the less a contract, and subject to the incidents of a contract because there is superadded the command of a Judge.

18. In this case a consent having been entered into which was translated into an order of the Court, the respondent cannot turn round and seek to object to the order which arose from the said consent without challenging the consent itself since even if the Court were to allow the objection the consent order would still remain on record as an order of this Court. In other words what the respondent seek from this Court would amount to the Court granting an absurd order and turn these proceedings into a circus. This Court cannot exercise its discretion in a manner that would embarrass its proceedings.

19. In the result I decline to allow the application dated 28<sup>th</sup> April, 2016 which I hereby dismiss with costs.

20. With respect to the ex parte applicant's application dated 18<sup>th</sup> April, 2016, it is my view that where an advocate's costs have been taxed and a certificate issued, the only bar to the entry of judgement is if there is a dispute as to the retainer. Such dispute does not exist in these proceedings. Accordingly, there is no legal basis upon which this Court can decline to grant the orders sought in the said application.

21. The applicant has not only sought the amount taxed but interests thereon as well. However the certificate of costs exhibited does not mention any interest. Section 51(2) of the *Advocates Act* under which the application was based provides:

***The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.***

22. It is therefore my view that in proceedings falling under section 51 of the said Act the Court is only empowered to make an order that judgment be entered for the sum certified to be due with costs. In premises judgment is hereby entered for the applicant against the respondent for a sum of Kshs 37,851,504.22 as appears in certificate of taxation dated 26<sup>th</sup> January 2016 with costs. As it is not in doubt that Agriculture, Fisheries and Food Authority is the successor of the Respondent, the said Agriculture, Fisheries and Food Authority is under an obligation to satisfy the judgement herein. This position was made clear in Nairobi HCMisc.Appli. No. 442 of 2011 – **Kilimanjaro Safari Club Limited vs. The Governor – Kajiado County & Others** – where **Ogola, J** expressed himself as follows:

**“It is evident that the County Council of Ol Kejuado has a successor and assign that has taken over its functions after the repeal of the Local Government Act and subsequently the elections. This is the County Government of Kajiado. Therefore, the proceedings herein are sustainable against the said County Government.”**

23. Accordingly I direct that the applicant be allowed to execute the judgment herein against Agriculture, Fisheries and Food Authority as the successor to the respondent.

24. Orders accordingly.

**Dated at Nairobi this 22<sup>nd</sup> day of July, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr B M Musyoki for the applicant**

**Mr Moriasi for the Respondent**

**Cc Mwangi**