REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 22 OF 2014

Moses Mwangi.....Appellant

Versus

Francis Wahome Ngahu.....Respondent

RULING

The background information relevant to the application now the subject of this ruling is that on 29th April 2014, the appellant appealed against the judgement rendered in CMCC NO 232 of 2011. The record shows that on 2nd September 2015, the lower court forwarded to the High Court the original record of the lower court's file, certified copies of the proceedings and judgement of the lower court and exhibits produced in the lower court.

On 3rd February 2016 the Respondents applied to have this appeal dismissed for want of prosecution. While the said application was still pending, the appeal was admitted on 24th February 2016. When the application seeking to dismiss this suit for want of prosecution came up for hearing before me on 25th July 2016, the advocates for both parties recorded a consent order as follows:-

> *"By consent the appellant to file and serve the record of appeal within 30 days from today and list the appeal for directions within 30 days thereafter in default the appeal shall stand dismissed with costs to the Respondent."*

The appellant did not file the record of appeal within the period of 30 days stipulated in the consent. On 29th August 2016, the appellants moved this court under certificate of urgency seeking orders *inter alia* that this court orders the lower courts file to be returned to the lower court for the purposes of extracting the decree. There was an alternative prayer that the court directs the Deputy Registrar to issue or facilitate issuance of the decree. The appellant also sought an order to stay execution of the lower courts decree and a further order seeking to *review or vary* the consent order referred to above.

The said application is premised on the grounds *inter alia* that that the appellants advocates were unable to extract the lower courts decree since the file had already been transferred to the high court and the registry informed them that it was necessary to return the file to the lower court so as to extract the decree. The applicant also states that they applied for extension of time on 25th August 2016 but there was no available judge to hear the application and that the applicants advocates have prepared the necessary documents but cannot file the appeal without the decree, that the applicant has been diligent in prosecuting this appeal and that no prejudice will be occasioned to the Respondent if extension of time is granted.

The Respondents counsel vehemently opposed the application and averred *inter alia* that **(a)** the orders in

question were made by consent after the Respondent applied to dismiss this appeal for want of prosecution, **(b)** the appellant now seeks to modify the said consent order, **(c)** as per the said consent there is no appeal now, **(d)** the applicant is guilty of larches and inexcusable indolence, **(e)** the efforts to file the record were being made barely 2 days before the expiry of the 30 days stipulated in the consent, **(f)** a decree cannot prevent the applicant from filing the record since the law allows for filing of a supplementary record, **(f)** no evidence was tendered as to when the proceedings were applied for or paid. **(g)** It took the appellant close to nine months to deposit the decretal sum in a bank account as decreed by the lower court, and **(h)** no grounds for review have been demonstrated.

I find it necessary to recall that when the appellants application came before me *ex-parte*, in addition to certifying the application as urgent, I granted an order directing the Deputy Registrar to facilitate the issuance and or extraction of the decree.The court record shows that the said order was not extracted and there is nothing to show that it was brought to the attention of the Deputy Registrar. Had the applicants advocates taken the necessary steps pursuant to the said order, the results would have been different. In fact, the decree was paid for on 25th August 2016, one month after the consent order was recorded.

On 4th October 2016, I granted both parties 14 days to file and exchange their submission. The record shows that as at close of business on 18th October 2014, no submissions had been filed by either parties. I proceeded to write this ruling without the benefit of the said submissions.

I have considered the affidavit evidence tendered by both parties and in my view the following issue falls for determination, namely, **(a)** whether the applicant has demonstrated grounds to set aside review or vary the consent order.

A consent order or judgement is strictly a judgment or order based on mutual agreement between the parties without coercion, inducement, fraud, or collusion, and it is presumed that the parties to the suit are in a better position to know the material facts of the case, between themselves, and thus once the consent is endorsed by court, it cannot be varied or set aside with ease. An applicant must to prove that the consent was obtained illegally or irregularly or that he/she did not apprehend the facts or terms well.

In *Wasike v Wamboko* Gicheru J, (as he then was) held that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out. This position is clearly set out in *Setton on Judgments and Order* 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... 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 an agreement."*

This passage was followed by the court of appeal in *Brooke Bond Liebig Ltd V Mallya* in which Law Ag P said:-

> *"A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."*

In *Kenya Commercial Bank Ltd Vs. Benjoh Amalgamated Ltd,* **Githinji J**, (*as he then was*) considered the circumstances under which a consent Judgment can be set aside and referred to and relied on the decision in *Hirani vs. Kassam i*n which the above passage from *Setton on Judgments and Orders* was approved and stated that:-

> *"It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell*

Ltd [1970] 3 All ER 671, Winn LJ said at 676:-

> *"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."(Emphasis added)*

In *Kenya Commercial Bank Ltd Vs. Specialised Engineering Co. Ltd*. Harris J correctly held *inter alia*, that –

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

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

The applicant seeks to review the consent order made on 25th July 2016. I find that no material has been presented before me to warrant or justify setting aside the consent order as clearly illustrated in the above cited authorities.

Even assuming that the order in question was not made by consent, it is trite law that an application for review must meet the substantive requirements set out in Order **45** of the Civil Procedure Rules. Thus, the crucial issue that falls for determination is whether or not the application meets the threshold laid down under Order **45** of the Civil Procedure Rules, 2010 to warrant this court to allow it.

Review, like an appeal is a creation of statute; a court has no inherent power to review or alter its own judgments except for the limited purpose of correcting clerical or mathematical errors.

Order **45** Rule **1** of the Civil Procedure Rules, 2010 restricts the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds; **(a)** discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; **(b)** on account of some mistake or error apparent on the face of the record, or **(c)** for any other *sufficient reason* and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reasons.

It is settled law that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

Authorities are in agreement that the power to review can only be exercised on the application of a person on 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 order was made. The

power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 45 Rule 1 means a reason sufficiently analogous to those specified in the rule.

I find nothing in the material presented before me to show that there has been discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicants at the time the orders in question were made. Further, there is nothing to show that there is an error on the face on the record of the court which warrants to be corrected by this court. I am not persuaded that the reasons offered amount to *'sufficient reason'* within the meaning of the rules cited above.

Considering the 30 days allowed in the consent, and the history of this case as enumerated above, I think the applicants did not utilize the period in question properly and there is no explanation as to why they started pursuing the decree the last few days. The said conduct points to some unacceptable degree of laxity.

Regarding the evident laxity on the part of the Appellant alluded to above, I find it fit to recall the words expressed by the court in *Utalii Transporters Co. Ltd & Others vs NIC Bank & Another* where it was stated *inter alia* that:-

> *"the first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court from such impulsive inclination, and requires it to make further inquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgement seat.*
>
> *It is, therefore, a matter of discretion by the court.....Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of suit for want of prosecution.*
>
> *These principles are:-*
>
> *a. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;*
>
> *b. Whether the delay is intentional, contumelious and, therefore, inexcusable;*
>
> *c. whether the delay is an abuse of the court process;*
>
> *d. whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;*
>
> *e. what prejudice will the dismissal occasion the plaintiff?;*
>
> *f. whether the plaintiff has offered a reasonable explanation for the delay;*
>
> *g. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?*

I am persuaded that there has been inordinate delay on the part of the applicant in pursuing the decree. The said delay has not been explained. The record shows that certified proceedings were ready as early as 2nd September 2015. In fact further court fees and the decree was paid as late as 25th August 2016. To me the delay is inordinate therefore inexcusable. Such an unexplained delay leads one to conclude or impute abuse of court process or improper motive on the part of the applicant. I also find that by allowing

the application the Respondent will be prejudiced as the successful litigant in the lower court because he has not been able to enjoy the fruits of the judgement. I strongly hold the view that after evaluating all the reasons offered for and against the application, the interests of justice do not dictate a lenient exercise of the discretion in favour of the applicant.

In conclusion, I find that this is **not** a proper case for this court to exercise its discretion in favour of the applicant. Accordingly, I refuse the application dated 29th August 2016 and dismiss the same with costs to the Respondent.

Orders accordingly. Right of appeal **30** days

Signed, Delivered and Dated at Nyeri this **27th** day of **October** 2016

John M. Mativo

Judge