



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 714 OF 2010**

**FRANCOIS NGIRABATWARE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NDIKUMANA CONSTANTIN..... DEFENDANT/APPLICANT**

**RULING**

1. The outcome of the two Applications before Court rests on what this Court makes of the Letter dated 11<sup>th</sup> November 2011.

2. The Application of 4<sup>th</sup> February 2016 is by the Defendant who seeks the following substantive Orders:-

**2. THAT the Judgment entered herein pursuant to the Consent Letter dated 11<sup>th</sup> November 2011 and filed in Court on 7<sup>th</sup> May 2012 together with the Decree and all Consequential Orders given herein be Reviewed, vacated and Set Aside and this Suit be heard on its full merits with the participation of the Defendant.**

**3. THAT the Defendant be granted unconditional Leave to file a Defence and defend this Suit on its merits.**

3. The second Application is dated 23<sup>rd</sup> October 2015 by Dalbit Petroleum Ltd (the Chargee) for the following prayers:-

**2. THAT this Honourable Court do order a Stay of Execution of the Ruling and Orders made by this Honourable Court on the 5<sup>th</sup> day of October 2015 pending the hearing and final determination of the Applicant's appeal.**

4. This suit commenced by a Plaintiff dated 27<sup>th</sup> October 2010 and presented to Court on the same day. In a nutshell the claim by the Plaintiff against the Defendant was for breach of contract alleged entered between the two on 1<sup>st</sup> July 2000 for the sale of various Tracks and Trailers. The reliefs sought by the Plaintiff are :-

**a) Kshs. 9,800,000/- being the balance due on the agreed purchase price and interest thereon.**

**b) Kshs.7,092, 800/- special damages being expenses incurred by reason of the breach of contract.**

**c) In addition and/or in the alternative to the reliefs (a) and (b), specific performance of the contract by way of delivery and surrender of all the trucks and trailers the subject matter of the contract and/or payment of the current market value of the said vehicles.**

**d) General damages for loss of use and loss of business for the said vehicle for a period of 8 years or such other reasonable period that the Court may determine.**

**e) General damages for breach of contract.**

**f) Costs of this suit.**

5. By a Notice of Appointment dated 9<sup>th</sup> November 2010 and filed in Court a day after, the firm of S.M Keyonzo was appointed to act for the Defendant. It would however seem that the Defendant did not file a Defence and has not done so to date.

6. The Court record shows that on 8<sup>th</sup> March 2012 Mutava J. dismissed the suit for want of prosecution.

7. The suit was in that state until 26<sup>th</sup> February 2013 when Mabeya J. allowed its reinstatement having been moved by the Plaintiff vide a Notice of Motion dated 20<sup>th</sup> July 2012.

8. What happened between 8<sup>th</sup> March 2012 when the suit was dismissed and 26<sup>th</sup> February 2013 when it was reinstated is of great concern to the Plaintiff. It was between this period that a consent dated 11th November 2011 was received by Court. On the consent is a Court stamp dated 7<sup>th</sup> May 2012 and a receipt No.4720103 of the same day showing that Kshs.375 was paid for its filing. I will certainly return to this.

9. The consent letter reads:-

The Registrar

High Court of Kenya

**NAIROBI**

Dear Sir,

**RE: NAIROBI (MILIMANI) HCCC NO.714 OF 2010**

**FRANCOIS NGIRABATWARE – VS- NDIKUMANA CONSTATIN**

Kindly enter a consent in the above matter in the following terms:

1) By Consent Judgement be entered in favour of the Plaintiff against the Defendant in the sum of Kshs. 10,000,000/- (Ten million Kenya Shillings all inclusive.

2) There be a stay of execution for ninety (90) days.

Dated at NAIROBI this 11<sup>th</sup> day of November 2011.

*Signed*

**OGETTO OTACHI AND COMPANY, ADVOCATES**

**ADVOCATES FOR THE PLAINTIFF**

*Signed*

**KEYONZO AND COMPANY**

**ADVOCATES FOR THE DEFENDANT**

10. Having reinstated the suit and, ostensibly, on the strength of a Consent Judgment the Plaintiff was now able to prosecute its Application of 18<sup>th</sup> July 2012 for the following prayers:-

**2. THAT the Respondent be prohibited from transferring or charging the property Registration number L.R 7785/1086 (original No.7785/10/823.(IR 81475).**

**3. THAT Ms. Dalbit Petroleum Limited, who have caused a charge to be registered against the property Registration number L.R 7785/1086 (original No.7785/10/823), do furnish the Court with information on the amount, if any, owing under the Charge registered on 19<sup>th</sup> January 2006.**

**4. THAT directions do issue as to the manner in which the amount owing under the terms of the charge, if any, shall be satisfied.**

**5. THAT upon discharge of the Charge the property known as L.R 7785/1086 (original No.7785/10/823) be sold to satisfy the Judgement debt.**

11. Enter Dalbit Petroleum Ltd (the Chargee) into the proceedings. The Chargee resisted the Application of 18<sup>th</sup> July, 2012 by the Plaintiff.

12. Gikonyo J. heard the said Application and in a Ruling of 1<sup>st</sup> October 2015 ultimately made the following Orders:-

**“Going by the evidence presented and failure by the Chargee to provide account as ordered, the only order that commends itself to the court is, and I hereby order that the attached property shall be sold in execution of the decree and satisfaction the judgment debt herein, and any surplus shall be utilized as by law provided. The Chargee may utilize Order 22 rule 51 of the Civil Procedure Rules or any other available law to stake claim for the surplus of the proceeds. But the property shall not be sold without a proper valuation and upon settlement of terms by the Deputy Registrar, High Court. It is ordered”.**

13. It is the above Ruling that has aggrieved the Charge who has preferred an Appeal against it and in the meantime its sought Stay vide the Application of 23<sup>rd</sup> October, 2015.

14. With this brief background the Court is now in a position to deal with the matters before it.

15. One of the Grounds upon which the Defendant seeks the Review, Vacation or setting aside of the “Judgement” entered pursuant to the consent letter dated 11<sup>th</sup> November 2011 and filed on 7<sup>th</sup> May 2012 is that :-

**“It is further curious and strange from the records in Court that at the time of filing the Consent letter on 7.5.2012, the Suit had been dismissed for want of Prosecution on 8.3.2012 as evidenced from the Plaintiff’s own application on record dated 20.7.2012 and therefore no judgment could have been entered thereon and the Application of 18.7. 2012 was a Nulity. There is nowhere on record where the Consent letter is finally endorsed and Judgment entered in terms thereof as by Law required save only for filing of the Consent letter on 7.5.2012 and the two(2) Applications which followed on 18.7.2012 and 20.7.2012”.**

16. How did the Plaintiff confront this ground? In a Replying Affidavit filed on 1<sup>st</sup> March 2016 Mr.

Gershon Otachi Bw'Omanwa Counsel for the Plaintiff avers:-

**6. THAT soon thereafter Mr. Keyonzo intimated that the Defendant had taken cognizance of the contents of the proposal as forwarded and after due consideration for the same had agree to pay the Plaintiff Kshs.10,000,000/- in full and final settlement of the matter.**

**7. THAT I was then tasked with drafting of the consent which I did and forwarded to Mr. Keyonzo for execution on behalf of the Defendant. After he signed, I endeavored to have the same filed in court for adoption as an Order of the Court.**

**8. THAT in my efforts to have the Consent filed in court, I discovered with the help of my clerk that the file could not be traced in court and was not in its slot at the registry. We embarked on a search of the file and even wrote to the Registrar of the High Court expressing our frustration and requesting his assistance in tracing the court file for purposes of filing a consent that would settle the suit. The said letter is attached to annexure "GOO 1" below.**

In his arguments before Court, Counsel urged the Court to consider that the validity of the Consent has not been challenged and that it was filed when the proceedings were alive.

17. But is this latter assertion true? There can be no argument that from 8<sup>th</sup> March 2012 when the suit was dismissed up to 26<sup>th</sup> February 2013 when it was reinstated the proceedings herein were 'dead'. There is also clear evidence that the Consent Order of 11<sup>th</sup> November 2011 was paid for and received by Court on 7<sup>th</sup> May 2012, about two (2) months after the suit had been dismissed and long before it had been resuscitated by the order for reinstatement.

18. Even if it is accepted that the consent was paid for and received by Court when the Court file was missing, there is no evidence that upon the tracing of the file the consent was endorsed or adopted as an order of the Court. Further no Decree has ever been extracted in respect thereof.

19. For this reason, the Plaintiff should not have enjoined the chargee to assist in the execution of a Decree that never was. In the Application of 18<sup>th</sup> July, 2012 in which the Plaintiff, inter alia, sought that the chargee furnishes the Court with information on the amount, if any, owing under the charge the Plaintiff asserted,

***'The Plaintiff seeks execution of the Decree and sale of Immovable property'.***

This was not true. There was no Judgement of Court and certainly no Decree!

20. When Justice Gikonyo made his ruling of 1<sup>st</sup> October 2015, the Judge had been made to believe that the Plaintiff was possessed of a judgment and/or Decree. That said, I cast no aspersions on the Plaintiff as he too may have been laboring under a mistaken belief that the Consent dated 11<sup>th</sup> November 2011 had been translated into a Court Order.

21. Without hesitation, I would hold and as I now do, that all orders made on the strength of the purported Judgement and/or Decree are a nullity and of no consequence. One result of my holding is that the Orders of 1<sup>st</sup> October 2015 made against the chargee are a nullity.

22. As the request by the Defendant to file a Defence, I would say this. The Consent letter dated 11<sup>th</sup> November 2011 has not been adopted as an Order of the Court. There is no Judgment as yet in favour of the Plaintiff. There is no request for Judgement made by the Plaintiff. For this reason the Court grants the Defendant unconditional leave to file a Defence.

23. Whether or not the Consent letter of 11<sup>th</sup> November 2011 can be successfully applied by the Plaintiff to mount a request for Summary Judgement or Judgement on Admission is left for another day.

24. These are my Orders:-

- (i) The Ruling and Orders of Court of 1<sup>st</sup> October 2015 are hereby vacated and set aside.**
- (ii) The Defendant is granted Leave of 14 days to file and serve a Statement of Defence.**
- (iii) The Defendant shall have costs of the Notice of Motion of 4<sup>th</sup> February 2016.**
- (iv) As the Notice of Motion of 23<sup>rd</sup> October, 2015, it has been rendered unnecessary by the Court's Order in (1) above and I make no Orders in respect thereof. The Chargee may move Court to withdraw it.**

**Dated, Signed and Delivered in Court at Nairobi this 13<sup>th</sup> day of October ,2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Nyambati for Plaintiffs

K'opere for Defendant/Respondent

Ngunju for Chargee

Alex - Court Clerk