



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

**CIVIL CASE NO 180 OF 2014**

**GEORGE NGABO WASIKE.....1<sup>ST</sup> PLAINTIFF**

**FRANCIS NDEGWA WAINAINA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMUEL NDUNG'U GITAU.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Defendant's Notice of Motion dated and filed on 9<sup>th</sup> October 2014 was brought under the provisions of Order 9 Rule 9, Order 22 Rules (sic) 22, Order 45 Rule 1 (1) (b) of the Civil Procedure Rules as well as Sections 4A and 63(e) of the Civil Procedure Act. Prayers Nos (1), (2) and (4) were spent. It sought for the following remaining orders:-

1. Spent

2. Spent

3. **THAT this Honourable Court be pleased to review and vary the Consent Order issued on the 5<sup>th</sup> September, 2014 in respect to Order 2 thereof limited to reduction of the monthly instalments to Kenya Shillings Five Hundred Thousand Only (Kshs. 500,000) only.**

4. Spent

5. **That costs be in the cause.**

**THE DEFENDANT'S CASE**

2. The application was supported by the Defendant's Affidavit that was sworn on 9<sup>th</sup> October 2014. His submissions were dated and filed on 1<sup>st</sup> December 2014.

3. The Defendant's case was that the Consent Order recorded on 5<sup>th</sup> September 2014 was entered into in good faith in anticipation of booming business which unfortunately turned out to be the opposite. He said that his transport business had been extensively affected by the current financial instability and in view of the hard times he could not pay the monthly instalment of Kshs. 1,500,000/= as had been agreed in the said consent.

4. He contended that there was sufficient reason to review and vary the consent and urged the court to allow his application.

**THE PLAINTIFFS' CASE**

5. In response to the said Application, the 1<sup>st</sup> Plaintiff swore a Replying affidavit on 17<sup>th</sup> October 2014 on his own behalf and

that of the 2<sup>nd</sup> Plaintiff. It was filed on 21<sup>st</sup> October 2014. Their written submissions were dated 3<sup>rd</sup> December 2014 and filed on 5<sup>th</sup> December 2014.

6. The Plaintiffs' averred that the consent herein was entered into without duress, undue influence or pressure. They averred that the Defendant willingly agreed that in the event he defaulted, the Plaintiffs would be well within their rights to execute. It was also their case that there was no error or mistake on the face of the record.

7. Therefore it was their case that the Defendant had not fulfilled the grounds for review set out under Order 45 Rule 1 of the Civil Procedure Rules.

### **LEGAL ANALYSIS**

8. This was an application for review which is governed by Order 45 Rule 1 of the Civil Procedure Rules, 2010. Review by the court under this Order is restricted to the grounds set out hereunder:-

- a. **there has been a discovery of new and important matter of 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 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.**

9. It was the view of the court that the case of **Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR** and the cases of the Court of Appeal referred to therein would not assist the Defendant as they were distinguishable from the facts of this case. Indeed, the Defendant did not provide any evidence that he was under disability or that there was unequal bargaining power at the time he recorded the consent herein. In any event, the case of **Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited** (Supra) was in respect of unconscionable interest that had been charged by the defendant therein.

10. On the other hand, the court was in agreement with the holdings in cases of **Salama Mahmoud Saad vs Kikas Investments Limited & Another [2014] eKLR**, **National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR** and **Paviwa Limited vs Co-operative Bank of Kenya [2014] eKLR** that were relied upon by the Plaintiff that an applicant must demonstrate either of the grounds under Order 45 Rule 1 of Civil Procedure Rules exist so as to enjoy the benefit of a review by the court.

11. In the current application, it was evident that there had been no discovery of new and important matter that was not within the knowledge of the Defendant at the time of entering into the consent. Further, there was no mistake or error apparent on the face of the record. It therefore means this court could only review the consent for any other sufficient reasons.

12. It was not disputed that the consent was duly executed by the parties herein on 1<sup>st</sup> July 2014. The same was entered into willingly and therefore there was no undue influence or duress.

13. The Defendant's argument was that he was unable to pay the instalment as per the consent due to harsh economic times. This allegation was not substantiated and there was no proof to show that the Defendant's business was negatively affected. Even if that was so, the Defendant did not demonstrate that he explored other avenues to enable him settle the debt. In any case, it would be unfair to assume that the Plaintiffs were not suffering from the said harsh economic times by being kept away from the fruits of their judgment.

14. In light of the foregoing, having considered the pleadings, the affidavit evidence, written submissions and the case law that was relied upon by the parties herein, this court was not satisfied that there was sufficient cause to review the consent order entered into by the parties.

### **DISPOSITION**

15. In the circumstances foregoing, the upshot of this court's ruling was that the Defendant's Notice of Motion dated and filed on 9<sup>th</sup> October 2014 was not merited and the same is dismissed with costs to the Plaintiff.

16. It is so ordered.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of April 2015**

**J. KAMAU**

**JUDGE**

