



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2041 of 1999

PETER M KUNGU & 11 OTHERS.....PLAINTIFF

VERSUS

MAKENAGIRA FARMERS TRADING

COMPANY LIMITED.....DEFENDANT

RULING

Vide their notice of motion dated 8/8/2014, the defendant herein, **Makenagira Farmers Trading Company Limited** seek for the release of the sum of Ksh 100,000 deposited in court by the plaintiff in compliance with the consent order of 16th October 2002 to their advocates on record, M/s Wanjama & Company Advocates. The defendant is also asking for cost of the application.

The application is supported by the affidavit of Ezekiel N.K.Wanjama, an advocate of the High court. He avers that the firm of M/s Wanjama & Company Advocates was instructed by the defendant on 21/11/2002 to take over from Ms Munoru Kagira & Wamae Advocates. They filed their Notice of change of advocates on 26/11/2002. On the same day they perused the court file and noted that the previous advocates has requested the deputy registrar to release Ksh 100,000 deposited by the plaintiff on account of rent. He objected to the release of money to his former advocates through his letter dated 10/12/2002. On 14/1/2003 he made an application for an order that the money be released to the firm of M/s Wanjama & Company Advocates. The same was opposed by their former Advocates through the affidavit of Edward Kiiru Kagiri sworn on 17/2/2003. They later recorded a consent order on 27/3/2003 to the effect that the funds being held by the court be invested in an interest earning bank account in both names of the law firm. Mr. Kagiri never availed his personal details to facilitate the opening of the account in bank of his choice. On 5/6/2012 Mr. Kagiri died before the money was deposited in the joint account. Their client is now demanding the release of the said money to M/s Wanjama & Company Advocates.

The plaintiff did not file any response as required by the law.

The application was heard on 3/3/2015 by way of oral submissions. Mr Wanjama informed the court that the money was deposited as a consideration for the stay of execution for distress for rent in 2002. He also stated that the plaintiff has not communicated to the them. Further, that the defendant's, former advocate Mr. Kagiri passed on before the money was released. Mr. Wanjama further submitted that the issue that brought the plaintiff to court had been overtaken by events and the defendant instructed him to apply for the release of the money.

Mr. Moriasi advocate submitting on behalf of the plaintiff on the other hand informed the court that there was consent on record between Mr. Kagiri advocate and the defendant's advocates that the money be deposited in their joint account and that therefore the money can only be paid out if that consent is set

aside by the court. Counsel for the plaintiff also told the court that the defendants should have first sought to have the consent order set aside before applying for release of the funds deposited in court.

In a brief rejoinder, Mr. Wanjama for the defendant submitted that the court has a wide discretion under section 3A to set aside the consent order and allow this application.

I have considered the application together with the supporting affidavit and the brief oral submissions by counsels. In my view the following are the issues for determination.

1. ***Whether the court should set aside the consent order of 16th October 2002?***
2. ***Whether money deposited in court as condition for stay should be released while the case is still pending in court***

On the first issue, both parties have conceded that there exist consent between the current defendant's advocate and the former defendant's advocate, the late Mr. Kagiri to the effect that Ksh 100,000 deposited in court be transferred to joint interest earning interest account held by the two advocates. The plaintiff's contention is that the order herein sought cannot be granted since the defendants are not seeking to set aside the consent order.

Although the defendant has not expressly sought for the setting aside by asking this court to release the said deposit, the defendant is in essence seeking for the consent order to be set aside. In my view, and as stated by Mr. Wanjama, the court has inherent power under section 3A of the Civil Procedure Act to do all that is necessary for ends of justice to be met and to prevent abuse of its processes. It is also in the discretion of the court to set aside an order but such discretion must be exercised judiciously and not capriciously, and with the sole intention of avoiding injustice or hardship resulting from accidents, inadvertence or excusable mistake or error.

The Court of Appeal in the case of **Samuel Wambugu Mwangi v Othaya Boys' High School Civil Appeal No. 7 OF 2014 [2014] eKLR** set out the circumstances under which a consent order can be set aside. The court observed that:

“Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited – vs- Maliya (1975) E.A. 266. It was stated that 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 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 ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.”

Also the Court of Appeal in **Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another Civil Appeal NO. 276 OF 1997 [1998] eKLR** cited with authority the judgment in the case of Flora Wasike vs Destimo Wamboko (1988)1 KAR 625, Hancox JA (as he then was) said in his judgment at page 626 -

“It is now 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.”

Applying the principles of law cited above in facts of this case, the defendant's case is that consent was entered between Ezekiel N. K. Wanjama and Mr. Edward Kiiru Kagiri who has since passed on before the money could be transferred from the court to a joint account.

In my view the consent in this case can be set aside. Once a consent order has been adopted by a court it becomes a judgment or an order which can be set aside if the conditions stipulated were not met. In saying so am persuaded by the case of **Edward Acholla v Sogea Satom Kenya Branch & 2 others**

[2014] eKLR where the court held that:

“Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with 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.”

In my view the consent order was rescinded since the deceased was a party to the consent and he died before the consent could be effected.

On the second issue, whether money deposited in court as condition for stay of distress for rent should be released to the defendant while the case is still pending hearing and determination, this court notes that the money was deposited as security for performance of the order. By allowing security for performance to be released before the claim is determined, the court is putting the Plaintiff in a position in which should the suit succeed, it would be difficult for the plaintiff to realize the fruits of his litigation.

As was stated by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

Although the defendant alleges that the plaintiff’s claim has been overtaken by events the allegation has not been substantiated. I note that the matter has been lying in court unattended since 2003 and no application for its dismissal under Order 17 of the Civil Procedure Rules has been made.

In the end, I decline to grant the prayers sought in the notice of motion dated 8/8/2014 seeking release of the deposit held in court since the matter has not been concluded or terminated by any means. The application is accordingly dismissed with no order as to costs.

Dated, signed and delivered at NAIROBI this 28th day of May, 2015.

R.E.ABURILI

JUDGE