



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL APPEAL NO. 22 OF 2015

(BEING AN APPEAL FROM PART OF THE JUDGMENT DELIVERED BY THE HONOURABLE GACHERU PRINCIPAL MAGISTRATE MOMBASA ON THE 12TH DAY OF FEBRUARY, 2015)

JOACAN COMPANY LIMITED.....1ST APPELLANT

JOSEPH MUNYAO.....2ND APPELLANT

VERSUS

KAHNGA MWANGUDZA.....RESPONDENT

RULING

1. On the 30/4/2015 the parties appeared by Judge Kasango and recorded a consent order as follows
 - The application dated 12/3/2015 be allowed as prayed.
 - The applicant to deposit the decretal sum of Kshs.444,800/= in a joint interest bearing account in the names of the counsels within 21 days of today
 - Costs of the Notice of Motion dated 12/3/2015 be in the cause.
 - In default, the plaintiff shall execute the decree.
 - The application dated 12/3/2015 was on its part worded as follows:
 - a. That this application be certified urgent, service be dispensed with thereof and the same be heard *ex-parte* in the first instance.
 - b. That this Honourable Court be pleased to order a stay of execution of the Judgment/Decree issued by this Honourable Court on 12th February 2015 by the Honourable Gacheru pending the hearing and determination of this application.
 - c. That this Honourable Court be pleased to order a stay of execution of the Judgment/Decree issued by this Honourable Court on 12th February 2015 by the Honourable Gacheru pending the hearing and determination of the Applicant's Appeal.
 - d. That the application be served upon the Respondent and heard inter parties on such date and time as this Honourable Court may direct.
 - e. That the costs of this Application abide the outcome of the intended Appeal.
3. Effectively therefore by the consent orders of 30/4/2015 the parties entered into a contract granting stay of execution of the lower court orders on terms that the decretal sum of

- Kshs.444,800/= be deposited into a joint interest bearing account in the names of the advocates for the parties within 21 days from 30/4/2014 and in default the stay would lapse and the Respondent as plaintiff in the decree be at liberty to execute.
4. From the content on the application dated 29/8/2015 it is clear that there was indeed a default in complying with the order of deposit and that the said deposit was not made till 6/6/2015 some 10 days out of time. The Appellant/Applicant therefore prays that time be enlarged for compliance.
 5. The application is opposed and the Respondent filed a Replying Affidavit sworn by one JOSEPH KARANJA KANYI an advocate practicing in the firm of advocates appearing for the respondent who says he is in conduct of the matter and conversant with facts of the application.
 6. The gist of the supporting affidavit and the application is that the forms having been duly signed were mislaid thus the delay in issuing the cheque for deposit.
 7. On oral submissions it was reiterated by Ms.Thiaka Advocate, for the applicant that the account opening forms were duly executed by both advocates that sent to Nairobi for the cheque to be issued. Both the affidavit in support and the oral submissions are not succinct on when and by whom the account opening terms were mislaid.
 8. Reliance was placed on the provisions of section 95 to grant the court the jurisdiction to grant the orders sought.
 9. On their side the Respondent through Mr.Atanacha advocate opposed the application while relying on the replying Affidavit and contended that the orders sought to be reviewed and varied as to extend the time within which to deposit the decretal was a consent order hence a contract which can only be upset, varied or set aside on conditions entitling a court to upset a contract.

Determination:

10. Whether or not to disturb a consent order is now a well beaten path by decisions of the court. The same must be seen in contradiction to the courts general power to extend time so as to meet the ends of justice.
11. I am of the persuasion and I have no hesitation in saying that parties have a right to enter into any agreements as they wish so long as the same is not an affront to the law. Once the parties enter into agreement over a point there ceases to be a dispute to be resolved by the court. The court thus becomes *functus officio* and must restrain itself from seeking to rewrite for the parties that understanding.
12. The pronouncement by the court's in this regard are innumerable and reference only needs to be made to **FLORA WASIKE -VS- IDESTINIO WABOKO [1980] 1 KAR 625, BROOKE BOND KEMY (T) LTD. -VS- MULLYA [1975] EA 266, HIRANI -VS- KESSANI [1952] EACA (3)** all considered in the **GATEWAY INSURANCE CO. LTD. -VS- ARIES AUTO SPRAYS [2011] eKLR** all to the effect that a court of law will always be hesitant to interfere with a consent judgment, in this case order, except in such circumstances as would afford a good ground for varying or rescinding a contract between the parties.
13. Indeed the courts has unfettered discretion under sections 95 order 50 Rule 6 to extend time, but that unfettered discretion is only available where the order is made by the court or vitiated by known vitiating factors. I am inclined to hold that a consent between the parties even if adopted by the court to be a court order remain a contract of the parties and binds both to its full effects and tenets and can only be interfered with or set aside when the established grounds are proved.
14. In the present matter for consideration, there is no allegation that there exists a vitiating factor as against the consent and therefore there would be no justification for the court to interfere with that contract in the consent order.
15. I therefore find that the application dated 29/8/2015 lacks merit and the same is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Mombasa this 18th day of December 2015.

In the presence of:-

N/A for the Applicant.

N/A for the Respondent.

P.J.O.OTIENO

JUDGE