



IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 1673 OF 2000

NATIONAL INDUSTRIAL CREDIT BANK LIMITED ::::::::::::::: PLAINTIFF

VERSUS

ISAAC KINYANJUI NJOROGE ::::::::::::::: DEFENDANT

R U L I N G

1. Before the Court is a **Notice of Motion** Application dated **18th April 2013**. It is expressed to be brought under Order 45 and 51 of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act. The application seeks the following orders:-
 1. *That this honourable court be pleased to review the orders made on 3rd October 2012.*
 2. *That this honourable court be pleased to set aside the order that “this matter is marked “settled” made on 3rd October 2012.*
 3. *That this honourable court be pleased to set aside the consent judgement recorded on 3rd October 2012.*
 4. *That this honourable court be pleased to grant leave to the Defendant to amend his defence to include a counterclaim for his costs.*
 5. *That costs of this application be provided for.*
2. The Application is premised on the several grounds set out therein and is supported by the affidavit of the Defendant **ISAAC KINYANJUI NJOROGE** dated 18th April 2013.
3. The brief history of the application is as follows. On or about June 1994 the Plaintiff entered into a Hire Purchase Agreement with the Defendant pursuant to which the Plaintiff financed the purchase of motor vehicle registration number KAD 402S Isuzu Lorry for a sum of Kshs.4,400,000. The Hire Purchase charges payable were Kshs.2,464,000 making a total of Kshs.6,864,000 which was to be repaid in 29 monthly instalments of Kshs.228,806/= commencing 3rd July 1994 with a final instalment of Kshs.229,800 payable on or before 3rd December 1996. As normally happens the Defendant fell into arrears and was unable to comply with the terms of the Hire Purchase. The Plaintiff repossessed the said lorry, sold it at Kshs.450,000/= in an auction and applied the proceeds of the sale to the debtors account which still remained in debt of Kshs.5,449,436/= which the Plaintiff sought to recover from the Defendants as per the amended Plaint dated 26th April 2001.
4. On 19th March 2003 the Defendant filed his amended defence which merely denied the claim. That amended defence was filed by M/s Onesmus Githinji & Company Advocates who has since ceased acting for the Defendant. The matter was then listed for hearing and parties filed their documents in preparation for the hearing of the suit.

5. In the course of time the court record shows that the parties started negotiating a settlement out of court. On 20th September 2006, the hearing of the matter was adjourned when the parties informed the court that they were negotiating a settlement. After that there were a few mentions to record settlement which did not materialise. On 1st December 2010, the firm of Onesmus Githinji for the Defendant was granted leave to cease acting for the Defendant. On 7th June 2012 when the matter first came before my court, M/s Ngugi & Company Advocates appeared for the Defendants in the matter and informed the court that she had come on record for the Defendant. On 3rd July 2012 M/s Ngugi filed in court the Witness Statements for the Defendant. That Statement, like the Defendant's defence, merely denied the Plaintiffs claim but did not make any counter-claim.
6. On 24th July 2012 when the matter was scheduled for hearing, the court could not reach the matter and a hearing date for 3rd October 2012 was given. However, on that day, 3rd October 2012 M/s Ngugi for the Defendant was the first to address the court in the following terms.

“We have agreed that this matter be marked as settled and the matter be mentioned on 13th November to determine the issue of costs.”

M/s Mburu for the Plaintiff then replied,

“that is correct”.

The court then ordered,

“this matter is marked “settled”. It will be mentioned on 13th November to determine the issue of costs.”

7. The subsequent record shows that the parties were not able to agree on the issue of costs. In fact on 11th February 2013, the Defendant appeared in this matter in person as the Defendant's advocate was not in court. On 12th March 2013 a new advocate, Professor Wangae, appeared for the Defendant when parties agreed to mention the matter on 11th April 2013. On 11th April 2013, the matter had stalled, and it was stood over generally by the court. From that point the next

proceedings in the matter is this application which now seeks to set aside the aforesaid consent, and also leave for the Defendant to amend his defence and introduce a counter-claim.

8. The application is opposed vide a replying affidavit of M/s Lilian Sogo dated 30th May 2013. M/s Sogo describes herself as a legal officer with the Plaintiff herein. She provides the background of the claim leading to the Plaintiff in which she stated the alleged indebtedness of the Defendant. However, it is also noted that the deponent at paragraph 11 of her affidavit states that,

“THAT notwithstanding the Defendant's indebtedness to the Plaintiff, the Plaintiff offered to write off the aforesaid sum owing from the Defendant in view of the length that had elapsed in recovering the same from the Defendant.

THAT by a consent recorded in court on 3rd October 2012 in the presence of the Defendant, the instant suit was marked as settled save as to costs which were to be the subject of negotiations between the Plaintiff and the Defendant's advocate.”

She further states that the parties had negotiated a settlement on costs but the Defendant rejected the same and brought in a new advocate in this matter.

9. Parties made oral submissions before me on 24th March 2014. Professor Wangae for the Defendant/Applicant submitted that the said consent recorded in court on 3rd October 2012 did not amount to a consent as there was still the issue of costs which was to be determined, and so the consent recorded was a conditional consent which can be set aside if the parties are not able to

- reach the agreement on costs. The counsel pointed out to paragraph 7 of the replying affidavit of Lillian Sogo where the deponent admits that owing to an inadvertent error, the sum owing from the Defendant had been miscalculated leading to the filing of the suit to recover Kshs.4,718,241/- instead of Kshs.607,207/= which was the sum then owing to the Plaintiff from the Defendant at the time of filing the suit. In that regard Professor Wangae submitted that the sale of the Defendant's lorry caused the Defendant to suffer huge damages which cannot be considered by costs in a taxation. The counsel submitted that the said consent cannot stand if the parties cannot agree on costs. On the issue of leave to amend the defence the counsel submitted that it is only if the defence is amended and a counterclaim made that the Defendant can recover the true costs and damages he has suffered.
10. Ms. Irene Mburu for the Plaintiff/Respondent submitted that the grounds upon which a consent can be set aside were stated in the case of **FLORENCE WASIKE – VS – DESTIMO WAMBOKO**, and these include cases of fraud, mistake or misrepresentation, and that the present application does not disclose any of the above grounds.
11. On the issue of leave to amend the defence the counsel submitted that there is no basis for the same, there is inordinate delay of more than 12 years, the amendment would be prejudicial to the Plaintiff, and in any event the same is time barred, and would not allow the Plaintiff the benefit of a fair trial. Further, there is no draft of the proposed amendment and the court cannot give leave for amendments without beginning or end. Finally the counsel submitted that what the Defendant seeks are in the nature of damages and not costs.
12. I have carefully considered the application and the opposing submissions of the parties. In my view, the issues for determination are as follows:-
- i. ***Whether the consent recorded in court on 3rd October 2012 was conditional, and if so, whether failure on one part negates the entire consent. If not, can the consent still be set aside.***
 - ii. ***Whether the 'costs' referred to in the consent are costs of the suit or damages.***
- iii. ***Whether this court can at this stage of proceedings allow amendment of the Defence to provide for a counter-claim.***
13. When the court recorded that “**This matter is marked ‘settled’**”, what did the court have in mind, or rather what did the parties have in mind? In my mind, the said “**settled**” immediately informed me that the suit herein, referring to the pleadings in the Plaintiff and in the Defence, and any pending applications in the matter were settled and there was no longer any dispute for this court to consider. That part of the consent was self-contained, so to speak, or severable and able to stand alone. Indeed, it is because parties understood it to be capable of standing alone that it was made alone and separable. The parties had yet to agree on costs, and this did not stop them from stating categorically that the dispute was over. Any failure in the agreement on costs cannot be allowed to interfere with or impact, the settlement of the suit. I therefore do not agree with the Defendant's/Applicant's submission that since one part of the consent had collapsed, the entire consent must also collapse. Clearly, there was a consent only on one aspect, which did not affect the other. So, I rule that the consent recorded in court on 3rd October 2012 was not a conditional consent. It was a consent which finally disposed of the dispute, leaving the parties to settle the issue of costs. The understanding was that should parties fail to settle the issue of costs, parties would still have to fall back on the legal principles which help in the settlement of costs.
14. This brings me to the issue whether the said consent can still nevertheless be set aside. To answer this I go back to the background record of the suit. I noted earlier that the desire to settle the suit is demonstrated throughout the suit and as early as the year 2006. This shows that the parties have completely discussed the issues, and probably agreed upon broad principles to guide the agreement. It is therefore not true to think or to propose that the said consent was arrived at arbitrarily or capriciously without much thought. I have stated earlier in this Ruling those dates when the parties indicated to Court that they intended to settle the matter amicably.
15. It was therefore not surprising to the court when on 3rd October 2012 the parties recorded the above consent in the presence of the Defendant. That having been done, any application to set

aside the consent must be based on known principles of law. In the case of **FLORA N. WASIKE - V - DESTIMO WAMBOKO (1982 -88) I KAR 625**, the Court of Appeal stated three important principles upon which a consent judgment can be set aside.

- *It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a consent, for example fraud, mistake or misrepresentation.*
- *An advocate would have ostensible authority to compromise a suit or consent to judgment, so far as the opponent is concerned.*

16. In the instant case, there is no element of fraud, mistake or misrepresentation. The Defendant was in court when the consent was recorded, and he has not stated that the consent was not validly recorded. Neither has the Defendant alleged that the said M/s Ngugi who was his advocate did not act with his authority. It seems to me that the Defendant upon reflection on the proceedings, which transpired on 3rd October, 2012, realized that he could have gotten a better deal. However, that reflection is now irrelevant. There is no legal ground upon which to set aside that consent. Professor Wangae for the Applicant had submitted that the Plaintiff has admitted filing a suit for a sum of over Kshs.5.0 million while the genuine claim was over Kshs.600,000/= and that on that ground the consent should be set aside to enable the Defendant proceed with the suit through a counter-claim. That submission makes some sense. Be that as it may, it must be noted that at the time of filing the Plaint the Defendant still owed the Plaintiff over Kshs.600,000/=. In addition, the figures claimed, and the sums realized from the sale were always known to the Defendant. In fact the Plaintiff's claim that the suit lorry was sold at an auction for Kshs.450,000/= has not been challenged. But more importantly, this court notes that when the Plaintiff realized that its claim was exaggerated, the Plaintiff involved the Defendant in the negotiations which led to the settlement. All these factors were or must have been considered before the parties entered into the consent whose impact was to withdraw the entire claim against the Defendant, despite the acknowledgement that the Defendant still owed the Plaintiff over Kshs.600,000/= which attracted interests as from 1994. In my view, there is no new evidence, or any mistake on the face of the record, or generally any ground upon which the consent dated 3rd October, 2012 may be set aside by this court.

17. The second issue is, whether the costs referred to in the said consent were costs of the suit or damages. To my understanding those costs were costs of the suit. I need not overstretch my mind to make this conclusion. Damages are clearly different species from costs of the suit. It is a normal practice for parties to settle a suit pending the determination of costs of the suit. This is normally possible because the legal practice has a special way of determining costs due to parties when parties are unable to agree. The consent did not address which party was entitled to costs. But it was assumed that those un-agreed costs were due to the Defendant. This is borne out by paragraphs 13 of the Replying Affidavit of Lilian Sogo, and by the submissions of M/s Mburu, that the Defendant has rejected the costs offered to him by the Plaintiff. Since in my mind those costs were the costs for the suit, they can be determined by the legal mechanism provided by law where parties fail to agree on costs. This is the process of taxation. Prof. Wangae for the Defendant has submitted that the costs referred to herein are not the costs of the suit but are damages. I disagree. Damages are specifically pleaded while the costs follow the event. Since the Defendant had no counter-claim or indeed since before the parties made the said consent there was no reference to damages, parties must have referred to the ordinary costs of the suit. If the parties cannot agree on costs, the same can be referred for taxation. The taxation process also has in-build mechanism to consider even difficult cases for settlement on a higher scale.

18. The last issue I raised is whether the court can at this stage of the proceedings allow the amendment of the defence to introduce a counter-claim. I need not address this issue since I have already denied the prayer to set aside the consent. However, this issue raises important aspects of law, which I will briefly comment on. The law is that pleadings can be amended at any time even after judgment has been pronounced. It is upon every litigant to impress the court with his burden which necessitates amendments of pleadings. The Defendant seeks to amend the defence to introduce a counter-claim to enable him claim damages which he alleges to have suffered as a result of the suit, which he probably now believes he could have won. It appears to me that with

the Plaintiff admitting that the claim was inadvertently exaggerated, the Defendant now thinks that he did not owe the Plaintiff any money. The Defendant needs reminding that his lorry was sold at a public auction for Kshs.450,000/= and when the net of that sum was applied to the loan account, the Defendant still owed the Plaintiff Kshs.607,207/=. The Plaintiff must be lauded for withdrawing that claim which together with interests since 1994 would amount to a sum far greater than Kshs.607,207/=. This notwithstanding I have noted that allowing amendments to the defence to introduce a counter-claim, will severely prejudice the Plaintiff. The suit is over 12 years old, and the Plaintiff has pleaded that the intended amendments have suffered limitation since any suit based on contract must be filed within 6 years. However, of far more relevance to me is the fact that the Defendant has not found it prudent to annex a draft of the proposed amendment of defence and counter-claim. This court is not in a position to determine the extent of those amendments, and the Plaintiff is left in the darkness as to what to expect in the amendment. Further, the Plaintiff cannot respond to the amendment. This aspect of the application, if granted, would amount to unfair practice and trial against the Plaintiff. I deny this prayer.

19. There is a further element. The Defendant is seeking costs in CMCC No.935 of 2011. The Defendant wants the court to allow the amendments to the defence and counterclaim to enable him include costs of the said CMCC No. 935 of 2011. In my view, the above suit is a separate suit and cost arising from it can be determined within that suit.

20. For the foregoing reasons, I herewith dismiss the Defendant/applicant's Notice of Motion application dated 18th April, 2013.

21. Costs shall be for the plaintiff/Respondent

DATED, READ AND DELIVERED AT NAIROBI

THIS 16TH DAY OF MAY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Mburu for Plaintiff

Mr. Wange for Defendant

Teresia – Court Clerk