



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO 835 OF 2003**

**DAIMA BANK LIMITED.....PLAINTIFF**

**VERSUS**

**PATRICK MWEU MUSIMBA.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 8<sup>th</sup> February 2013 and filed 12<sup>th</sup> February 2013 was brought pursuant to the provisions of Sections 1A, 1B, 3A & 80 of the Civil Procedure Act Cap 21, Order 51 Rule 1, Order 45 Rules 1 & 2 and Order 22 Rules 18 & 19 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law. It had sought for the review, variation and/or setting aside of the consent order that was recorded by the parties on 6<sup>th</sup> August 2013 and that upon such review, the Defendant be put to task to show cause why he should not be committed to civil jail.
2. The Plaintiff relied on several grounds to support its application, the main ones being that its advocates signed the consent judgment by mistake, that the agreement was ambiguous and uncertain which was contrary to public policy, that the Defendant had breached the terms thereof as a result of which the terms lapsed and that there was no appeal that had been preferred. Micah L. Nabori, the Plaintiff's Liquidation Agent swore an affidavit in support of the said application in which the grounds on the face of the application were set out. He attached copies of the decree, Notice to Show Cause, Consent letter, cheques and letters exchanged between the counsels of both parties .
3. In response thereto, the Defendant swore a Replying Affidavit on 13<sup>th</sup> May 2013. It was filed on 15<sup>th</sup> May 2013. He denied that the consent that had been recorded was ambiguous and uncertain but rather that after several meetings and discussions, the *ex parte* judgment in the sum of Kshs 12,900,364.75 together with interest at the rate of 15% per annum from 1<sup>st</sup> July 2013 until payment in full was set aside and parties recorded a consent judgment in which they agreed as follows:-
  - i. **The judgment herein be and is hereby set aside.**
  - ii. **Judgment be and is hereby entered in favour of the Plaintiff against the Defendant for the sum of Kshs 10,000,000/= all inclusive.**
  - iii. **That the judgment be liquidated in 24 equal monthly instalments.**
  - iv. **That the Defendant do make an immediate lump sum deposit to the Plaintiff and commence**

**the monthly repayments in August 2008.**

**v. That there be liberty to apply.**

4. The Plaintiff filed its written submissions dated 27<sup>th</sup> February 2014 and filed on 27<sup>th</sup> February 2014. However, when the matter came up in court on 26<sup>th</sup> May 2014, its counsel requested the court to disregard the said submissions but instead consider the subsequent written submissions dated 7<sup>th</sup> March 2014 and filed on 10<sup>th</sup> March 2014. The Defendant did not file his written submissions despite having been given an opportunity to do so.

**LEGAL ANALYSIS**

5. The Honourable Ogola J was initially seized of this matter until he recused himself on 27<sup>th</sup> January 2014 upon request by the Defendant's counsel. The matter was therefore re-allocated to this court for determination of the Plaintiff's present application. In his ruling delivered on 15<sup>th</sup> May 2012, he correctly stated as follows:-

**“Being a consent and an order of the court, it remains the way it is until amended to provide for penalties and interest. The Respondent cannot take it upon itself unilaterally to amend the consent to provide for penalties and interest. Until the parties take corrective measure this court will hold both parties to the terms of the consent they filed in court.”**

6. Having said so, the court has to be satisfied that the Plaintiff demonstrated that the circumstances under which the consent was recorded would fall within the ambit of consents that could be reviewed, varied and/or set aside. A distinction must be made between an omission by a counsel which either occurs through a genuine omission or through negligence, while determining a question of whether or not should a consent warrant to be reviewed, varied or set aside.
7. The judgment that was set aside by consent of the parties indicated in the Defendant's letter dated 25<sup>th</sup> July 2008 was for the sum of Kshs 12,900,364. 75 together with interest at the rate of 15% per annum from 1<sup>st</sup> July 2003 until payment in full. It was replaced with a consent judgment recorded on 6<sup>th</sup> August 2008 against the Defendant in the sum of Kshs 10,000,000/= all inclusive. A plain reading of that consent shows that interest was included in the said sum.
8. The several correspondences exchanged between the counsels of the parties annexed to the Defendant's Replying Affidavit point to the fact that they were *ad idem* as to the terms of the consent. The Plaintiff would therefore not find solace in the doctrine on *non est factum* which would essentially have been that its counsel executed the consent on the mistaken belief that he was signing the same in respect of different terms.
9. There is no indication on the court record that counsel for the Plaintiff executed the said consent dated 25<sup>th</sup> July 2008 and recorded on 6<sup>th</sup> August 2008 by mistake, misrepresentation, duress or fraud, grounds which the court would need to consider in setting aside the said consent order.
10. Just as Ogola J had stated, this court finds that the consent recorded on 6<sup>th</sup> August 2008 was badly drafted. Whereas it was stated that “judgment” would be liquidated in twenty four (24) months, it also required the Defendant to make immediate lump sum deposit to the Plaintiff which payments were to commence in August 2008. The parties also failed to include a default clause. This was a term that would show how the Plaintiff would proceed in default of the decretal amount by the Defendant. That was an omission or a mistake but not one that this court would find to have been sufficient to vitiate or void the consent as it appeared to have been a negligent omission. Counsel for parties must bear the responsibility of negligence as they are bestowed upon a great duty of care towards their clients especially when taking action that would bind their clients or in an action that is irreversible.
11. In the case of **Kenya Tourist Development Corporation vs William K. Arap Chelashaw [2009] eKLR** that had been relied upon by the Plaintiff, it is clear that the parties therein had specifically indicated that in default of any one (1) instalment, then the agreement would come to an end and a warrant of arrest would issue against the judgment debtor therein.
12. The holding in the case of **Sandra Grimmer & Another vs Benedict Ndigirigi Gichuhi [2010] eKLR** would not be relevant in the circumstances of the case herein because in that case, the

- judgment debtor therein had attempted to rely on a consent order as a foundation for contending that the Originating Summons therein was *res judicata* which are very distinct facts from this case.
13. The court also finds the holding in the case of **Njeri Onyango vs Patrick Musembi [2005] eKLR** to have been distinguishable from the facts of this case as the court had varied the judgment therein without having been asked to do so by the parties which therefore occasioned a miscarriage of justice as it took away the applicant from a favourable decision without having been given an opportunity to make a submission in that respect.
  14. It is clear in the mind of this court that it can only review its order if it makes an error and the same is apparent from the face of the court record amongst other grounds cited in Order 45 Civil Procedure Rules, 2010. In this case, however, the Plaintiff's counsel committed the error. This is not an error that would be envisaged to fall within the circumstances that the court would find sufficient for it to exercise its powers or discretion to review an order.
  15. The court must respect the agreement that was entered into by the parties. If it was to re-open the issue of the interest, it would be a travesty and miscarriage of justice as they agreed that the sum of Kshs 10,000,000/= was all inclusive. The parties are therefore bound by the terms of their consent. This court's hands are hence tied and cannot come to the assistance of the Plaintiff to remedy the negligence of its counsel.
  16. In respect of the second issue, the consent had provided liberty to apply to both parties. Upon default of payment of the decretal sum, the Plaintiff had initially issued a Notice to Show Cause dated 31<sup>st</sup> January 2012 to the Defendant. The Defendant filed a Notice of Motion application dated 16<sup>th</sup> February 2012 wherein he had sought to set aside the said Notice to Show Cause why he should not be committed to civil jail. Honourable Ogola J found the said Notice to Show Cause, though based on a wrong decree, to have been valid.
  17. This court entirely agrees with the learned judge's conclusion and the Defendant ought to show cause why he should not be committed to jail for failure to pay the Plaintiff the decretal sum of Kshs 8,420,000/=. The Plaintiff does not require the leave of this court to proceed with the said Notice to Show Cause dated 31<sup>st</sup> January 2012. Prayer No (2) in its application is therefore spurious and without merit.
  18. Having considered the parties' pleadings herein, the affidavits and the Plaintiff's written submission, the court is not persuaded by the Plaintiff that this is not a proper case in which the court should exercise its discretion to review, vary and/ set aside the consent order recorded on 6<sup>th</sup> August 2008 to include interest on the decretal sum to be compounded from the date of the decree until payment in full or to put the Defendant to task to show cause why he should not be committed to civil jail in execution of the decree. The court should not dictate to the Plaintiff on how to proceed when there is a complete code in the Civil Procedure Rules on how to proceed with execution against a judgment debtor who has defaulted in setting the decretal sum in full.

### **DISPOSITION**

19. The upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated 8<sup>th</sup> February 2013 and filed on 12<sup>th</sup> February 2013 is unmerited and the same is hereby dismissed. There will be no order as to costs in favour of the Defendant as he was completely in default of the terms of the consent order of 6<sup>th</sup> August 2013 and cannot benefit from an order for costs.
20. It is so ordered.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of August 2014**

**J. KAMAU**

**JUDGE**