



REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 62 of 2010

STEPHEN MARANI SHIBWECHE (Suing as

Adm & Personsl Rep. of SAMUEL SIMIYU.....APPELLANT

VERSUS

SHAJANNAND INDUSTRIES LTD.RESPONDENT

**(An Appeal from the Judgment and decree of Hon. H. Ong’udi, CM delivered on 10th March, 2010
in Kakamega CMCC No. 366 of 2008)**

JUDGMENT

On 23.12.09, the Lower Court entered Judgment for the sum of Kshs.516,000/= plus interest and costs in favour of the plaintiff/appellant against the defendant/respondent.

The respondent subsequently filed an application for stay of execution of the judiciary decree made on 23.12.09 pending the hearing and determination of an appeal in Kakamega HCCA No. 17 of 2010 on 10.3.10. The application dated 23.12.09 was by consent “allowed on condition that the decretal amount be deposited in a joint bank account in the names of both advocates of the parties within 30 days from today. Costs to the respondent”.

The respondent did not deposit the decretal sum in time and on 14.4.10 filed an application for the enlargement of time within which to deposit the decretal sum. The application was opposed. After hearing the parties, the trial magistrate in a ruling dated 12.5.10 allowed the application and enlarged the time up to 19.6.10. The appellant was aggrieved by the said enlargement of time and appealed to this court on the following grounds:-

- “1. That the learned magistrate erred in law and in fact in findingand holding that the Court had owned a consent order recorded by the parties and hence the Court had the discretion to interfere with it by extending the time limited by the parties.
2. That the learned magistrate erred in law and fact in granting prayer two (2) of the said application dated 13th April 2010 when it was obvious that the said prayer had previously been heard and determined.
3. That the learned magistrate erred in law and infact in holding that the court had jurisdiction under Order XLIX Rule 5 of the Civil Procedure Rules to hear and determine the merits of the Application before the court.

4. That the learned magistrate erred in law and in fact by citing and relying on section 1A (i) of the Civil Procedure Rules as the basis of her determination without bearing in mind that the said section was not meant to cover consent orders or to assist a litigant who is bent to abuse the court process.

5. That in arriving at her decision, the learned magistrate did so in a partisan manner and failed to exercise her discretion within the precedent Law and applicable principles and as a result arrived at a wrong decision which has occasioned a serious miscarriage of justice and ought to be reversed.”

The appellant was represented by the firm of Muma Nyagaka & Co. advocates while the respondents were represented by E. K. Owinyi & Co. Advocates.

The parties took directions on 2.6.11 for the appeal to proceed by way of written submissions. Submissions were filed on behalf of the appellant but none were filed by the respondent’s side. The main issue herein is whether a court had any powers to extend the time limited by the consent of the parties.

As stated in the case of **FLORA WASIKE VS DESTINO WAMBOKO [1982-88] I KAR 625**, a Consent is binding on the parties like a contract and like a contract it can only be set aside on grounds of fraud or mistake.

Order 50 rule 6 or Section 1A (i) CPA do not give the court any such jurisdiction to alter the Consent entered into by the parties.

Although the appellants counsel asked the court to dismiss appeal No. 17 of 2010 with costs, the said appeal is not part of these proceedings. On 2.6.11, the directions given were that HCCA No. 39 of 2007 be consolidated with this Appeal No. 62/2010, it appears there is an error on the record as No. 39/02 is the lower court record. HCCA. No. 17 therefore remains pending.

The appeal herein (HCCA. No. 62/10) is allowed and the ruling and orders of the Chief Magistrate’s Court in Kakamega dated 12.10.10 in CMCC No. 39 of 2007 set aside. The respondent’s application before the lower court dated 13.10.10 in CMCC No. 30 of 2007 is dismissed with costs to the appellant.

Delivered, dated and signed at Kakamega this 18th day of December, 2012

**B. THURANIRA JADEN
J U D G E**