



No. 2743

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 201 OF 2008

**SANGANYI TEA FACTORY CO. LTD
APPELLANT**

-VERSUS-

**EVANS ONDIEKI
NYOKWOYO.....RESPONDENT**

JUDGMENT

(Being an appeal from the Ruling of the Hon. Mrs. L. Koming'oi Senior Resident Magistrate at Nyamira, in CMCC No. 153 of 2007

delivered on 18th November, 2008)

Evans Ondieki Nyokwoyo hereinafter "***the respondent***" was the plaintiff in a suit he commenced against Sanganyi Tea Factory Company Limited hereinafter "***the appellant***" in the Senior Resident Magistrate's Court at Nyamira being SRMCCC No. 153 of 2007. In the said suit, he claimed damages both general and special, costs of the suit and interest. The suit was informed by the fact that he had sustained injuries in the course of his employment with the appellant on 8th January, 2004. Prior to the accident he had been an employee of the appellant as a leaf collection clerk. On the material day he was however, assigned different duties by the supervisor. He was instructed to arrange firewood in the factory. As he did so he slipped and injured his left knee. The wood also pricked him on the right knee. He blamed the appellant for the accident as he was assigned duties that he was not familiar with and he was also not supplied with protective gear like gloves and gumboots. On that basis he sued the appellant for compensatory damages as aforesaid.

The appellant was duly served with summons to enter appearance on 19th November, 2007. However, it neither entered appearance nor filed a defence to the claim. By a request for judgment dated 14th December, 2007 and filed in court on the even date, the respondent sought albeit successful for entry of interlocutory judgment against the appellant. On 20th December, 2007, the court duly acted on the request and entered interlocutory judgment against the appellant.

The suit was thereafter set down for assessment of damages. The hearing on the assessment of damages was slated for 18th June, 2008. In a reserved judgment delivered on 14th August, 2008, the trial court assessed the general damages payable to the respondent at kshs. 80,000/= less 50% contribution and special damages of kshs. 6,500/=. The following day, the respondent served on the appellant with the Notice of entry of judgment.

On or about 3rd October, 2008, **Messrs Nyachiro Nyagaka & Co. Advocates** entered the fray on behalf of the appellant. They managed to persuade **Messrs S. N Nyachae & Co. Advocates** for the respondent to enter into a consent order setting aside the interlocutory judgment aforesaid on terms that; the appellant would pay the respondent's counsel 6,000/= being thrown away costs within ten (10) days from the date of the consent. Further the appellant was to file and serve statement of defence within seven (7) days from the same date and pay the auctioneers costs. There was finally, a default clause in the consent order to the effect that *"... in default of any of the above terms, interlocutory judgment reverts and execution do issue forthwith..."*. That consent was adopted as a court order on 3rd October, 2008.

The contention of the appellant is that it complied fully with the terms of the consent order aforesaid. On the other hand it is the contention of the respondent that the appellant violated the consent and pursuant to the default clause he commenced the execution of the decree. It was then that the appellant was constrained to file an application dated 7th November, 2008 seeking to consolidate SRMCCC No. 153 of 2009 with SRMCCC No. 152 of 2007, an order of stay of further execution of the decree against the appellant's motor vehicle KAT 976Y and extension of time within which to file its defence. Finally, it also sought to have the attachment so far levied to be declared illegal, null and void.

In support of the application, **Rebecca Mbithi**, the then Head of Legal and Regulatory Affairs of Kenya Tea Development Agency, which was an agent of the appellant claimed that the interlocutory judgment was compromised vide the consent order dated 2nd October, 2008, whose terms the appellant had fully complied with by 9th October, 2008 and that the execution levied thereafter was thus in bad faith. Otherwise the instant application had been brought in good faith. According to her though the cheque for thrown away costs was prepared and paid to the respondent's counsel the same for unknown reasons was not banked. The appellant's counsel then liaised with the respondent's counsel and established that the said cheque had infact not been received. The cheque was subsequently traced on 4th November, 2008 and it was agreed between counsels that attachment of the appellant's goods could be waived as the cheque could still be banked. However in total negation of the agreement counsel for the respondent proceeded to execute the decree hence the application.

In response to the application, the respondent swore an affidavit in which he deponed where pertinent that the application was an abuse of the court process, not made in good faith, lacked merit and was totally misconceived. The appellant had not exercised due diligence nor had he placed all the true facts before the court. It was therefore undeserving of the exercise of the court's discretion in its favor. The consent order was specific in nature on the requirements expected of the appellant. The appellant did not meet those requirements in time as the appellant's cheque dated 9th October, 2008 was received in the respondent's advocates chambers on 4th November, 2008 and when the advocate's secretary declined to receive the same, the appellant's advocate's clerk threw the envelope containing the same on the table and went away. The respondent then returned the said cheque to the appellant's advocates by Nation Courier Services.

In response to the respondent's replying affidavit, the appellant's counsel filed a further affidavit in which he merely reiterated what has already been set out elsewhere in this judgment. Suffice to add that he confirmed that the cheque was allegedly delivered on 9th October, 2008 within time. Reacting to this disclosure, counsel for the respondent also swore further replying affidavit in which he reiterated that on

4th November, 2008, a process server called **Justus Orondo** brought a sealed envelope containing a cheque but his secretary upon being informed that it was a cheque declined to receive it whereupon the said process server threw the said envelope on the table and left. He later returned the cheque to **Messrs Nyachiro Nyagaka & Co. Advocates**.

The learned magistrate heard the parties on the application on 14th November, 2008 and in a reserved ruling delivered on 18th November, 2008, she dismissed the application with costs essentially holding that the appellant did not comply with the terms of the consent order. Neither the cheque for the thrown away costs nor defence was delivered, filed and served in time as contemplated by the consent order. Indeed the court delivered itself thus

“... the defendant having not fulfilled the above conditions the plaintiff had no choice but to go ahead with execution. I find that this court had no jurisdiction to vary the consent order dated 2nd October, 2008 this consent can only be set aside by another consent ... I find that the defendant deserves no mercy from this court. They chose not to comply with the consent order. I find no merit in this application and the same is dismissed with costs...”

That dismissal triggered this appeal. Six grounds were advanced by the appellant in support of the appeal. These were:

“1. The learned magistrate erred both in fact and law by failing to find that she had no (sic) jurisdiction to vary the consent order filed by parties.

2. The learned magistrate erred both in law and fact by holding that the proclamation over the defendant’s property was in order and proper in law.

3. The learned magistrate erred both in law and fact by failing to find that the consent order compromised the interlocutory judgment and thus no execution could be lawfully undertaken unless and until the judgment is entered afresh.

4. The learned magistrate erred both in law and fact in failing to consider the defendant’s/appellant’s evidence and submissions tendered in court.

5. The learned magistrate erred both in law and fact by failing to hold that the appellant is in the circumstances entitled to orders sought.

6. The learned magistrate erred in law in making a ruling that was in the circumstances unfair and unjust”.

On 30th November, 2010, **Mr. Nyachae** and **Mr. Nyagwencha**, learned counsels for the respondent and appellant respectively recorded a consent to the effect that the appeal be canvassed by way of written submissions. Subsequently those submissions were filed and exchanged. I have carefully read and considered them alongside cited authorities.

The issue for determination in this appeal is fairly simple and straightforward; it is whether the learned magistrate was right in holding that the consent order entered into on 2nd October, 2008 was not complied with by the appellant. From what I can discern from the record, the learned magistrate cannot be faulted

in her conclusion. The cheque for thrown away costs though dated 9th October, 2008 was not delivered to the respondent's counsel until about 4th November, 2008. In the terms of the consent order, that cheque ought to have been delivered to the respondent's counsel within 10 (ten) days from 2nd October, 2008. That means that the cheque should have been received by respondent's counsel latest by 12th October, 2008. So that when it was received on 4th November, 2008, it was way out of the time line set by the consent order. There is no reason to discount what the respondent's counsel deponed to with regard to the cheque being delivered into his chambers as aforesaid. There would have been no basis for the respondent's counsel to sent the cheque back to the appellant's counsel by Nation Courier Services, if indeed it had been remitted in time.

In any event, according to the appellant's own counsel's further affidavit, the cheque was delivered on 19th October, 2008 which was still way out of time. I have seen the letter dated 9th October, 2009 addressed to **Messrs S. N. Nyachae** forwarding the cheque. That letter to my mind was generated and backdated deliberately for the application. That letter was received by **Nyachae & Co. advocates** on 4th November, 2008 at 10.15a.m going by the reception stamp thereon and which in any event was received under protest. I do not think that an official letter can take a whole month to be delivered in Kisii from Eldoret, Nakuru or even within Kisii itself if the said letter was forwarded within the agreed time lines in mind. The appellant's lawyers have offices scattered in these towns going by their letterheads. There is in any event no evidence that the said letter was posted. If anything it was hand delivered. As further evidence that the letter was concocted, a copy thereof was only filed in the Senior Resident Magistrate's court, Nyamira on 11th November, 2008 going again by the court's official stamp endorsed thereon. How come it took a whole month plus for a letter to be filed in court. Since the letter was hand delivered and the respondent's counsel disputes having received it earlier than 4th November, 2008 and since whoever delivered it was a well known process server, why could he as pointed out by the learned magistrate swear an affidavit to put the matter to rest? I do not think that the respondent's counsel would have made those endorsements on the letter merely to set up the appellant.

Again the appellant was required to file and serve his defence within seven days. However the same though dated 30th September, 2008 it was not until 10th November, 2008 that it was filed. There is no evidence that the said defence was ever served on the respondent's counsel. Indeed by the appellant seeking in the application extension of time within which to file the defence confirms that fact. Clearly therefore the appellant breached the terms of the consent through and through.

A consent order is like a contract. It binds the parties to it and can only be varied or set aside by another consent between the same parties or by court upon application and proof of same grounds as would justify the setting aside of a contract; like fraud, mistake, misrepresentation or if it is against public policy. What the appellant did after it was caught up by the time lines in the consent order amounted to a variation of the initial consent order. It delivered the cheque outside the agreed period. Similarly it filed the defence out of time. As stated in the case of **Munyiri –vs- Ndungunya** “... *The remedy that was open to the parties was to set aside the consent order either by review or by the bringing of a fresh suit as a court can only interfere with a consent judgment in such circumstances as would afford a good ground for varying a contract between parties...*”. If there was subsequent mutual agreement between the parties as claimed, that mutual understanding cannot replace a consent duly adopted as an order of the court. Parties should have sought the variation or setting aside of the said consent order before they could be bound by the subsequent arrangement whether oral or written. It is not the duty of the court to re-write the consent orders for the parties. The duty of the court is limited to enforcing such consent orders unless and until they are reviewed, varied, altered and or set aside. As stated by the court of appeal in **Nation Media Group Limited –vs- Busia Teachers Co-operative Credit and Savings Society Limited and Another (2010) eKLR**, the terms of a consent order cannot be altered by court and it is prejudicial upon the parties to a consent order for it not to be followed to the letter.

In the upshot, I find this appeal unmerited and is accordingly dismissed with costs to the respondent.

Judgment dated, signed and delivered at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE