No. 2935

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 125 OF 2010

JOSEPH KIPKIRUI CHERUIYOT...APPELLANT

VERSUS

SOTIK TEA CO. LTD...RESPONDENT

JUDGMENT

This appeal arises from the ruling and order of the **Honourable P. L. Shinyada** delivered on 17th May, 1996 in **KISII CMCC.NO. 359 of 1996; Joseph Kipkurui Cheruiyot** vs **Sotik Tea Co. Ltd**. The ruling was triggered by an application filed by **Sotik Tea Co. Ltd**, hereinafter, ***"the respondent"***. That application by way of Notice of Motion was dated 23rd February, 2010. Amongst main prayers sought in the application were:-

§ ***That the court reviews, varies, discharges and or sets aside the consent order of 18th November, 2009 and in particular the provisions of the interest accruable.***

§ ***That the court reviews, varies, discharges and sets aside the decree dated 19th January, 2010.***

§ ***That upon such review and setting aside, the court be pleased to find that the execution process started by the decree holder, has no basis at all in law, therefore null and void ex-debito Justititae.***

From both the supporting as well as replying affidavits, the dispute herein relates to the interpretation of the judgment dated 18th November, 1998, the subsequent consent letter dated 18th November, 2009 and adopted as an order of the court on 19th January, 2010.

Initially, the appellant had sued the respondent claiming general and special damages, costs and interest. The suit was triggered by an industrial accident in which the appellant was involved in on 22nd November, 1995 whilst working as a night watchman for the respondent. He fell in a ditch as he went about his duties. The suit was eventually heard and by judgment dated and delivered on 18th November, 1998, **Mrs Owino**, the then Senior Resident Magistrate at Kisii found for the appellant thus ***"… None of the defendants did witness the accident. They have all admitted that the hole was not fenced. It was allegedly covered by pieces of timber which could move. The hole they admitted was 20 feet deep. In the circumstances of this case, I do find that the defendant acted negligently in covering the hole or ditch inprotected (sic). They explained (sic) by not providing sufficient lighting to the area. They did not provide him with a torch… I note that the injuries of the plaintiff have healed well. I would in the circumstances of this case and evidence considered sum of kshs.80,000/- general damages. The plaintiff will also get costs of this suit…"*** It is instructive that the learned magistrate makes no mention of the issue of interest in the above judgment, yet it has become the bone of contention right from the trial court upto this appeal

That judgment elicited an appeal on the part of the respondent being ***KISII HCCA.NO. 212 OF 1998*** which was subsequently dismissed for want of prosecution on 16th February, 2009. Months later, the appellant triggered a consent letter dated 18th November, 2009 in these terms:-

"a. Costs herein be allowed at kshs.23,000/-.

b. It be certified that the defendant has paid the decretal sum of kshs.80,000/- and costs of kshs.23,000/- as at 7th September, 2009 and what remains unsettled to date is the interest accruable on the decree from 18th September, 1998 till the 7th September, 1998 till the 7th September, 2009, to be calculated and shown in the decree…"

That consent letter was duly signed by both parties and filed in court on 20th November, 2009. On 19th January, 2010, the court adopted the same as an order of court. It would appear that the respondent failed to pay the element of interest aforesaid. The appellant then took out execution proceedings for the sum of kshs.125,063/50 being the accrued interest. It is that attachment that prompted the application. The respondent's argument before the subordinate court and before this court is that since in the judgment, the learned magistrate did not award interest the same was not payable and for the appellant to have included that claim in the consent letter amounted to misrepresentation of facts. That the said consent letter was signed without sufficient material facts involving the judgment and in particular, an order involving an award of interest. Finally, that the respondent executed the consent letter on the mistaken belief that the trial court had awarded interest in the suit.

On the other hand, the appellant had always maintained that the consent order was voluntarily entered into, it was unambiguous, not fraudulent nor was it entered into under duress or coercion. That the respondent had not met the conditions for setting aside a consent order and that the application had been made in bad faith.

The learned magistrate having considered everything that had been urged before her in a well thought out and written ruling held thus:-

"…Counsel for the applicant in his affidavit deponed to the fact, that he was misrepresented (sic) into believing that interest had been awarded in the judgment and further that he signed the consent letter for the 18th November, 2009 be (sic) mistake. Counsel for the respondent on the other hand alleges that in as much as interest was not awarded both parties varied the judgment by consent on 18th November, 2009 when they decided to include the interest. In as much as it is not this court's duty to interpret a contract or consent, in this case, I still do believe that if at all, the parties intended to vary the judgment as alleged then there would have been a clear clause expressly indicating that the parties have agreed by consent to vary the judgment but this was not so. So clearly the defendant's counsel

had no intention to vary the judgment and had the issue of interest been within his knowledge, then I doubt if the consent would have been entered into. Clearly the said consent was drafted by counsel for the plaintiff and sent to the defendant's counsel for his signature and still the plaintiff's counsel applied for a decree and certificate of costs to be drawn vide his letter dated 10th November, 2009 and filed in court on 4th February, 2010. It therefore emerges then even before the consent had been entered into, the respondents had already done a letter addressed to the Executive Officer requesting for interest, when the same had not been awarded by the court.

Due to the foregoing, I hereby review this court's consent order of 19th January, 2010 and hereby set it aside. Since the execution already commenced was for recovery of the interest the same is also declined as being null and void ab initio. I will not make any other (sic) as to costs…".

That ruling did not go down well with the appellant, hence this appeal. He advanced 7 grounds of appeal to wit:-

"1. The learned trial magistrate grossly misdirected herself in coming to conclusion that she had inherent powers when parties had consented and thereby compromised the judgment of the court of 18th day of November, 1998.

2. The learned trial magistrate erred in law in failing to find that the court cannot vary or discharge a consent letter but only a court order.

3. The learned trial magistrate erred in failing to appreciate the effect and import of plaintiff's authorities and so the defendant's where none of the orders of review were allowed.

4. The learned trial magistrate failed to appreciate that a party cannot consider itself to be aggrieved by an order it requested the court to make by consent.

5. The learned trial magistrate erred in law and in fact in failing to appreciate that the execution process commenced on the 18th day of February, 2010, was regular in that there is a decree which has not been set aside.

6. The learned trial magistrate erred in law and fact when she appreciates that, "For avoidance of doubt the only decree in the subordinate court file is dated 18th November 1998 and extracted on 4th February, 2010 with a certificate of costs dated 19th January, 2010" yet she proceeds later in her ruling to state that it is unjust to condemn the defendant to pay an amount that is not awarded by the court in its judgment.

7. The trial magistrate erred in law and in fact in trying to interpret the consent between parties and to offer her option (sic) on how the consent should have been drawn…"

When the appeal came up for directions, parties filed a consent letter in terms that the appeal be canvassed by way of written submissions. Subsequently and acting on that consent, parties filed and exchanged written submissions which I have carefully read and considered.
I do not think that the learned magistrate can be faulted in any way in her conclusions in the ruling. Of course a consent order is like a contract. It binds the parties to it and can only be varied, reviewed and or set aside by another consent between the parties or by court upon application and proof of same grounds

as would justify the setting aside of a contract such as fraud, mistake, misrepresentation or if it is against public policy. In the judgment of the subordinate court, there is no mention of interest. In legal parlance, what is not granted is deemed to be denied. Much as the appellant had claimed interest in his plaint, that the learned magistrate made no mention of it in her judgment is deemed that she denied him the interest. However, the appellant in his wisdom or lack of it attempted to insert the element of interest in the judgment by way of a consent letter.

Unaware that the interest had not been given, counsel for the respondent without the benefit of having read, the judgment of the court, duly and routinely signed the consent letter. It was much letter and under the pain of execution that the respondent took time to peruse the judgment and **"voila"**, the appellant had not been awarded the interest he was now craving for.

Apparently, the judgment was delivered in the absence of the respondent but in the presence of the appellant. The appellant knew that he had not been awarded interest, yet without as much as alerting counsel for the respondent of that fact, proceeded to make it a clause in the consent letter. Further and as properly observed by the learned magistrate, before even counsel for the respondent could act on the consent letter, counsel for the appellant had already applied for the decree and certificate of costs vide a letter dated 16th November, 2009 and filed in court on 1st Mach, 2010. In that letter again, he had inserted a claim for interest knowing very well that the same had not been awarded.

In my view and just as the learned magistrate held, the conduct of the appellant in this whole episode was not above board. If indeed the appellant felt strongly, that he was entitled to interest as indeed he was since there is nothing on record to suggest that he was not entitled to, nothing stopped him from moving the court as appropriate to review the judgment so as to include the element of interest.

The part of the consent that has brought a disagreement between the parties is the portion to the effect that ***"…and what remains unsettled to date is the interest accruable on the decree as from 18th September, 1998 till 7th September, 2009 to be calculated as shown in the decree…"*** The foregoing in my judgment does not in itself amount to compromising the judgment of the court. Those words are mere statements made on what parties thought would have remained unsatisfied. The words in their ordinary construction mean that the respondent was now to pay interest to the appellant though the same had not been awarded in the judgment.

All said and done, I am satisfied that the consent was obtained by mistake and or misrepresentation by the appellant, just like the learned magistrate held. The appeal lacks merit and is accordingly dismissed with costs to the respondent.

Judgment dated, signed and delivered at **Kisii** on this 23rd day of September, 2011.

ASIKE – MAKHANDIA
JUDGE