



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL MISCELLANEOUS APPLICATION NO. 55 OF 2010**

**GLORY CAR HIRE TOURS & SAFARIS  
EDEN RENT A CAR ..... APPLICANTS**

**VERSUS**

**WISE WANDUNGA KUTONDO ..... RESPONDENT**

**RULING**

Before court is the Respondent/Applicants application dated 24<sup>th</sup> August 2010 seeking the following orders

- “1. The consent orders entered on the 28<sup>th</sup> April, 2010 and all consequently orders therein be varied, reviewed and/or set aside.***
- 2. The Application dated 10<sup>th</sup> February, 2010 be dismissed with costs.***
- 3. That costs be paid by the Appellant in any event”***

The genesis of this matter is as follows. On 16<sup>th</sup> December 2009 the lower court delivered a judgement in favour of the Respondent/Applicant and against the Appellant/Applicant in the sum of Kshs.400,000/-. On 10<sup>th</sup> February 2010 the Appellant/Applicants came to the High Court under Certificate of Urgency seeking a stay of execution of this judgement pending the hearing and determination of their appeal against the same. Before this application was heard the parties entered into a consent on 28<sup>th</sup> April 2010 in the following terms

- “1. The Application dated 10<sup>th</sup> February 2010 be and is hereby allowed subject to the Applicant/Appellant depositing the decretal sum of Kshs.407,300/- in a joint interest earning account in the names of both advocates within 21 days of todays date.***
- 2. In default the application dated 10<sup>th</sup> February 2010 to stand dismissed with costs to the Respondent.”***

It is this consent order that the Respondent/Applicants have now come to court seeking to set aside. **Ms. Okata** Advocate appeared for the Respondent/Applicant whilst **Ms. Matara** acted for the Appellant/Respondent. With the consent of the court the said application was argued by way of written submissions. I have carefully perused the application dated 24<sup>th</sup> August 2010 as well as the supporting affidavit and the Replying Affidavit filed on 16<sup>th</sup> September 2010. I have also given careful consideration to the written submissions filed in this case by both counsel. The Respondent/Applicant submits that the Appellants failed to comply with the consent order in that they failed to deposit the decretal sum within the 21 day limit provided for by that consent. A consent order made voluntarily between parties to a suit amounts to a contract and is enforceable as such. Whilst the court will not participate in the formulation

of the terms of a consent, once it is adopted by the court (as this one was) it becomes binding on both parties and is enforceable by the courts. The date of consent was 28<sup>th</sup> April 2010. The terms were that the decretal sum be deposited by the Appellant within 21 days of that date which would take us to 19<sup>th</sup> May 2010. The Appellant's own annexures to their Replying Affidavit dated 15<sup>th</sup> September 2010 show that no deposit of this decretal sum was made until 16<sup>th</sup> July 2010 when a cheque for Kshs.407,300/- was deposited with Bank of Africa Limited. The deposit account was not opened until 26<sup>th</sup> July 2010. It is clear therefore that this deposit of the decretal sum was not made within the 21 days provided for in the consent order, infact the deposit was made almost two (2) months late. The Appellants submit that the delay was unintended and argue that the cheque was received by the Respondent's lawyer on 20<sup>th</sup> May 2010 only two (2) days beyond the 21 day period. The consent made no allowance for a grace period. The terms were very specific, clear and unambiguous. The period provided for was **21 days** not 24 days. This court has a duty to enforce what appears in the consent. That aside the same consent also provided for consequences of a breach of this 21 day time limit. These consequences included the automatic dismissal of the Appellant's application of 10<sup>th</sup> February 2010 with costs to the Respondent. Once again the terms used were clear and unambiguous. If the Appellant felt that the 21 day limit was too short then they ought not to have accepted the terms of the consent. In accepting the terms (and Ms. Matara Advocate did verbally confirm the consent before court on 28<sup>th</sup> April 2010) the Appellants bound themselves to fulfil the terms of the consent as they were without any variations or alterations whatsoever. In my view the question of whether or when the intended appeal was filed is neither here nor there as it was not a specific condition of the consent that the appeal be filed. I therefore find that the consent order was not fully complied with as the deposit of the decretal sum was not made within 21 days as provided. The Respondent has prayed that the consent order be set aside. Again I find that this prayer was not specifically provided for in that consent. In the circumstances I do decline to set aside the consent. However I do find that due to failure to adhere to clause 1 of the consent dated 24<sup>th</sup> April 2010 clause 2 immediately comes into effect. As such I do hereby dismiss the Appellant's application dated 10<sup>th</sup> February 2010. The stay pending appeal is set aside. The Respondents are now at liberty (not withstanding the terms of the consent) to commence proceedings for execution for payment of the decretal sum.

**Dated and Delivered in Mombasa this 18<sup>th</sup> day of October 2010.**

**M. ODERO**  
**JUDGE**

Read in open court in the presence of:-  
Ms. Okata for Respondent  
Ms. Matara for Applicant

**M. ODERO**  
**JUDGE**  
**18/10/2010**