



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL APPEAL NO. 9 OF 2007

FESTUS KINYUA KANGANGI.....
.....APPELLANT

VERSUS

ISAAC W. MUCHIRI.....
.....RESPONDENT

R U L I N G

The Appellant/Applicant herein was committed to civil jail by the Senior Resident Magistrate Kerugoya for non payment of money owed to the Respondent herein. He kept being recommitted for a period 30 days for non payment.

One such re-committal was done on 5.1.2007. That prompted his counsel to file the memorandum of appeal before this court on 30th January 2007. That Appeal has not been admitted to date. Contemporaneously with the filing of the appeal, the Appellant through his counsel filed the application for stay of execution pending the determination of the said appeal. He also prayed for the release of the Appellant from civil jail. The applicant was ordered released from civil jail the very following day i.e. on 31/01/07. There is no evidence that he was recommitted to civil jail thereafter. This bit of information is very important as counsel for the applicant submitted in court that the Applicant was in prison when the consent they are challenging was entered into. That clearly is a lie.

Pending the appeal to be processed and heard, counsel for both parties came to court on 24.6.08 which is the date clearly indicated on the record and entered a consent. The consent was to the effect that the balance of the decretal amount plus interest should be deposited in the office of the Respondents counsel on or before 31.7.08 failing which the Appeal shall stand dismissed.

The Appellant instructed his present counsel to file the Application dated 11.6.09 which is now the subject of this ruling. I have considered the same carefully along with all the rival affidavits and authorities tendered to the court. I have also considered the oral submissions by both counsel. This Application must nonetheless fail for the following reasons.

- 1. As rightly stated by counsel for The Respondent, there is no competent Appeal before this court reason being that no leave to file the same was obtained from the subordinate court as required by the Civil Procedure Rules. This is not one of the Appeals that attract an automatic right of Appeal.**
- 2. Even assuming (for the sake of argument) that there is a competent appeal before this court, following the said consent, the same stood dismissed by 1.9.07. There has never been any Application to extend that time.**

3. ***It is noted that the consent was in respect of the application dated 19.11.07 seeking the dismissal of the Appeal. Had the consent not been recorded that application would definitely have succeeded and I believe that is why the counsel for the appellants conceded to the consent.***

There is even no need for me to delve into the reasons as to why the said consent cannot be vitiated. I would nonetheless wish to state that as at the time counsel on record entered into the consent, he had the authority to do so on behalf of the Appellant. As held by the Court of Appeal in **HIRANI VS KASSAM (1952) 19 EA CA 131:-**

“Prima facie, any order made in the presence and with the consent of counsel is binding to all parties to the proceedings or action, and on those claiming order them....and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court.....or if consent was given without sufficient material facts.....or in general for a reason which would enable the court to set aside an agreement”.

There was no fraud or collusion even remotely proved in this matter and as stated earlier on, with or without the consent, the application for the dismissal of the Appeal was bound to succeed.

The Application dated 11.6.09 which I must say was also grossly defective in form substantively lacks merit.

The same is therefore dismissed with costs to the Respondent. **High Court Civil Appeal No. 9 of 2007** therefore stands dismissed. Any issues of execution should therefore continue before the trial court.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 8th day of December 2010

In presence of:- Mr. Gachugi for Munene Muriuki for Respondent. N/A for Appellant.