



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 288 of 2002**

**JACOB JUMA.....1<sup>ST</sup> APPELLANT**

**MIRIAM JUMA.....2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**ROSALINE WANJIRU.....RESPONDENT**

**R U L I N G**

1. Jacob Juma and Miriam Juma hereinafter referred to as the Applicants, were dissatisfied with the decision and ruling of a Principal Magistrate delivered on 25<sup>th</sup> April, 2005 in CMCC No. 9972 of 2005 in the Magistrate's Court at Nairobi. They lodged their appeal in this Court on 5<sup>th</sup> May, 2005. The appeal was admitted to hearing on the 18<sup>th</sup> April, 2008. On 30<sup>th</sup> May, 2008 directions were given under Order XLI Rule 8B for the appeal to proceed to hearing.

2. On 29<sup>th</sup> August 2008 pursuant to a consent letter dated 26<sup>th</sup> August 2008 signed by both parties, an order was recorded by the Deputy Registrar as follows:

*"It is hereby ordered by consent:*

*(i) That the appeal be and is hereby withdrawn with costs to the Respondent.*

*(ii) That the Appellant do pay the decretal sum entered in the lower Court together with costs and interest as awarded.*

*(iii) That costs of this appeal be agreed upon and or in absence of an agreement the same be taxed.*

*(iv) That the money deposited in Court as security for the Appeal be released to the Respondent's Advocates M/s. Odero Olonde & Co. Advocates.*

*(v) That the balance of the decretal sum together with costs of the appeal and interest be paid by monthly installments of Kshs.50,000/= commencing the 5<sup>th</sup> day of October, 2008 and thereafter on or before the 5<sup>th</sup> day of each of the subsequent months until payment in full.*

*(vi) That in default of payment of any installment when it becomes due and payable, the entire outstanding becomes due and payable and execution do forthwith issue against the appellants."*

*Dated this 29<sup>th</sup> day of August, 2008.”*

A copy of this order was extracted and issued on 11<sup>th</sup> November, 2008.

3. On 17<sup>th</sup> November, 2008 pursuant to another consent letter dated 12<sup>th</sup> November, 2008 signed by both parties, an order was recorded by the Deputy Registrar as follows:

*“Order by consent:*

- (i) *That the costs of this appeal be and is hereby assessed in the sum of Kshs.82,714.00.*
- (ii) *That the interest so far accrued assessed at Kshs.237,300.00.*

*Dated this 17<sup>th</sup> day of November, 2008.”*

A copy of this order was extracted and issued on 11<sup>th</sup> December, 2008.

4. By a Notice of Motion dated 6<sup>th</sup> March 2009, the applicants have now moved the Court under Order XLIV Rule 1(1)(b) of the Civil Procedure Rules, section 3A & 80 of the Civil Procedure Act for orders as follows:

- (i) That the application be certified as urgent and service thereof be dispensed with in the 1<sup>st</sup> instance.
- (ii) That this Honourable Court be pleased to order a temporary stay of its orders issued on 11<sup>th</sup> November, 2008 and 11<sup>th</sup> December, 2008 pending the hearing and determination of this application.
- (iii) That this Honourable Court be pleased to review and set aside its orders issued on 11<sup>th</sup> November, 2008 and 11<sup>th</sup> December, 2008.
- (iv) That the appeal herein dated 3<sup>rd</sup> May, 2005 and lodged in Court on 5<sup>th</sup> May, 2005 be reinstated and heard on merit.
- (v) That there be a stay of execution of Nairobi PMCC No. 9972 of 2002 pending the hearing of this application.
- (vi) That there be a stay of execution of Nairobi PMCC No. 9972 of 2002 pending hearing and determination of this appeal.
- (vii) That costs of this application be borne by the Respondent.

5. From the grounds stated on the face of the application, and the supporting affidavit sworn by Jacob Juma, it is contended that the above consents were negotiated and entered into in good faith, and that it was later realized that due to inadvertence on the part of the appellant's counsel, the issue of return of goods worth Kshs.200,000/= being held by the respondent was not addressed. Counsel for the appellant wrote to the appellants demanding either the return of the goods or a reduction of the decretal sum by the value of the goods. However, the parties were unable to agree.

6. The applicant now urges this Court to review and set aside the consent orders which were entered into, and reinstate the appeal to be heard on merit. The applicants have pleaded that it would be grossly unfair and unjust for the respondent to keep the returned goods and the entire decretal sum. They urge the Court not to visit the mistake of their counsel upon them. It was further maintained that the issue of the returned goods was contained in the pleadings and also arose during the trial.

7. Grounds of opposition to the Notice of Motion were filed on 23<sup>rd</sup> March 2009 raising the following

grounds:

- (i) That the said application lacks merit.
- (ii) That the said application is misconceived, incompetent and an abuse of the Court process.
- (iii) That there are no sufficient grounds and/or reasons given to warrant the grant of the orders sought.
- (iv) That in the interest of justice litigation should come to an end at some point.
- (v) That the appellant's counsel entered into the consent in good faith and there is no basis for the appellant's plea of mistake, misrepresentation or otherwise.
- (vi) That the said application is an afterthought intended to deny the appellant of the fruits of successful litigation.
- (vii) That there is no basis in law for the grant of the said set off/counterclaim where none was pleaded by the appellants.

8. It was submitted that the issues now being canvassed, were issues raised in the appeal, and that the appeal having been voluntarily withdrawn, the issues cannot be litigated on again. It was maintained that the appellant having conceded to and undertook to liquidate the full decretal sum, there was an implied admission that the respondent was entitled to the full decretal sum. It was further submitted that since the appellants had no claim for set off or counterclaim in the pleadings there was no basis for deducting the sum of Kshs.200,000/= from the decretal sum.

9. In response to the submissions made on behalf of the respondent, it was submitted on behalf of the appellant that the issue of implied admission does not arise. It was contended that the consent was negotiated in good faith, and that since there was an obvious mistake the respondent should have conceded to a further consent. The Court was therefore urged to allow the application.

10. I have given due consideration to the application, the affidavit in support and in reply, the submissions and the record of the lower Court. It is evident that the orders issued on 11<sup>th</sup> November, 2008 and 11<sup>th</sup> December, 2008 which are now sought to be reviewed and set aside, were consent orders recorded by the Court at the request of the parties. The orders effectively determined the appeal and therefore was a consent judgment.

11. In *Wasike vs. Wamboko (1988) KLR 429*, the Court of Appeal in considering whether a consent judgment can be set aside on appeal held that a consent judgment has contractual effect and can only be set aside on grounds which would justify setting a contract aside. The Court of Appeal followed an earlier decision *Brooke Bond Liebig Ltd. v. Mallya (1975) EA 266* wherein Law Ag. P. stated that:

*“A Court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”*

12. The above case sets out the principles upon which a consent order or judgment can be reviewed or set aside. Thus it was upon the applicants to satisfy this Court that the circumstances justifying the review and setting aside of the orders issued on the 11<sup>th</sup> November, 2008 and 11<sup>th</sup> December, 2008 had arisen.

In an effort to discharge this obligation, the applicants have alleged that there was a mistake made by their counsel during the negotiation of the consent in failing to take into account goods worth Kshs.200,000/= alleged to have been returned back to the respondent.

13. Thus it is necessary to consider when a mistake may discharge a contract. In this regard paragraph

290 of Halsbury's Laws of England 4<sup>th</sup> edition is instructive. It states as follows:

*“Mistake nullifies consent when the parties reach an agreement but that agreement has no legal effect because it is based on a fundamental mistaken assumption. A mistake will not negative consent unless it is material to the formation of the agreement in the sense that if the party mistaken had realized his mistake, he would not have entered the agreement.”*

14. The question therefore is whether the applicants were mistaken as to the terms of the consent judgment which they entered into, and if so whether that mistake was fundamental to the consent judgment entered into as to nullify the applicant's consent to that judgment.

15. From the pleadings and the evidence which was adduced before the lower Court, it was evident that the issue of the return of certain goods by the applicants to the respondent featured prominently. In her judgment the trial Magistrate had made a finding that *“the goods that were returned were not given any values and moreover the plaintiff contends that some were not hers.”* In their memorandum of appeal, the applicants raised that issue in their first ground as follows:

(i) The learned trial Magistrate erred in law and fact by failing to give credit in respect of the goods the appellants had returned to the respondent whose value is Kshs.492,500/= the return of which was admitted in evidence by the respondent which goods the respondent has retained to date.

The issue of the applicant's advocate having inadvertently failed to address the return of the goods cannot therefore arise as that issue appeared to have been central to the appeal.

16. It is noteworthy that in the consent letter dated 26<sup>th</sup> August, 2008, the applicants completely withdrew their appeal and agreed to pay the decretal sum together with costs and interest as awarded. The applicant's intention to completely withdraw the appeal and satisfy the judgment of the lower Court is reinforced in the second consent letter signed about 3 months later, wherein the costs and interest are apparently assessed on the decretal sum as awarded by the lower Court.

17. The applicants now blame their counsel for having failed to take into account the issue of the returned goods at the time the consent was entered into. However, this is a clear case of the applicants trying to pass the buck to their counsel. The applicants obviously must have discussed the consent with their counsel vis-à-vis their appeal before they agreed to the consent. Indeed, the applicants had the opportunity to re-examine the consent judgment before the second consent which concerned the issue of costs and interests was entered into. Obviously the costs and interests were based on the consent judgment which was agreed thereby confirming that the intention of the parties was to confirm the judgment of the lower Court.

18. Moreover although the applicants now claim that their counsel failed to take into account the return of goods worth Kshs.200,000/=, this is at variance with ground No.1 of the applicant's memorandum of appeal wherein the value of the allegedly returned goods was stated at Kshs.492,500/=. Looking at the statement of the applicant's defence, which never stated the value of the returned goods, nor raised any set off or counterclaim, arising from the returned goods the applicant cannot convince me that the issue of credit for the returned goods was omitted in the consent by mistake. Noting that the 2<sup>nd</sup> applicant who was the only witness who testified for the applicants, did not state the value of the returned goods, the trial Magistrate's finding that the goods that were returned were not given any value is understandable.

19. Under these circumstances it cannot be concluded that the failure in the consent judgment to take into account the return of the goods or the offsetting of the value of the goods against the decretal sum was a fundamental mistake such as to vitiate the consent judgment which was entered into in respect of the appeal. I find that the applicants have failed to satisfy this Court that there is sufficient reason to justify the review or setting aside of the consent judgment.

20. For the above reasons this application must fail. It is accordingly dismissed with costs.

Dated and delivered this 16<sup>th</sup> day of September, 2009

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Advocate for the appellant/applicant, absent

Olonde for the respondent