



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL APPEAL NO. 52 OF 2003
SAJJAN BUILDING CONTRACTORS LTD APPELLANT
VS
MARGARET OPARANYA RESPONDENT

RULING

The appellant took out a Notice of Motion dated 15th January 2004 under the provisions of Section 3A of the Civil Procedure Act and Order XLIX rule 5 of the Civil Procedure rules. The appellant sought for three main prayers namely: For time to comply with the consent orders recorded on 6.10.2003 to be extended. Secondly, for an order to release to the applicant the attached Motor reg. No. KAC 995 D.

Thirdly, for a temporary stay of execution.

The motion was supported by the affidavit of Sajjan Lall Singh Bhambra sworn on 16th day of January 2004.

The motion was strenuously opposed by the Respondent who filed a replying affidavit sworn by William Ndiya Omollo, the respondent's advocate.

This appeal is against the Judgment of L.N. Mutende, S.R.M, Webuye vide S.R.M.C.C.C. No. 31 of 2001 delivered on 14th March 2003. However the appeal was compromised on 6th day of October 2003 by a written agreement executed by the advocate appearing for the parties in this appeal. The contents of the consent were as follows:

“By consent of both counsels the decretal sum herein be paid in equal monthly instalments of Ksh.10,000/= payable on the 10 th of every month until payments in full.

In default of any one instalment execution to issue. Payment to commence on 16 November, 2003.

Dated 6 th October 2003.”

It would appear this consent was recorded in court on the same date when the matter was listed before the Hon. Mr. Justice Mitey.

The consent order recorded herein contains the terms and a default clause. The motion herein, the subject matter of this ruling is the product of the consent Judgment or order.

The first ground put forward by the applicant is that the appellant defaulted in paying the 1st instalment on 16.11.2003 due to the fact that the date fell on a Sunday which the parties did not foresee. The applicant also stated that the appellant was constrained financially to meet the obligation imposed by the consent order. It is the submission of the applicant that the delay to comply with the consent order was not inordinate and that it was not intentional. This court was therefore urged to exercise its inherent power under Section 3 A of the Civil Procedure Act and discretion under Order XLIX rule 5 of the Civil Procedure rules to extend time for the appellant to comply with the consent order. It is stated that the respondent executed the warrant by attaching the appellant's motor vehicle registration number KAC 995 D Peugeot 504 Saloon on the 19th day of November 2003. It would also appear that the same was advertised for sale on 18th December 2003. It is also shown by the appellant that it forwarded a cheque on 21.11.2003 to cover the first instalment by a banker's cheque prepared on 18th November 2003, about 2 days from the date said to be when the first instalment was to be paid. It is said that the Respondent's advocate refused to accept the payment hence the appellant was forced to forward payment through the Auctioneer, Femfa Traders.

The respondent opposed the appellant's line of argument saying that the appellant waited until the last minute when he rushed to make arrangements instead of doing the same earlier than 16.11.2003. However it is admitted that 16th November fell on a Sunday. It is the view of Mr. Ndinya that the applicant deliberately sought to delay in complying with the consent order. The respondent also complained of the defect in the affidavit of Sajjan Lall Singh Bhambra. It is stated the exhibits annexed to the affidavit were not properly executed. I have examined the affidavit and I think I agree with the submissions of Mr. Ndinya that the annexures attached to the affidavit of Sajjan Lall Singh Bhambra marked as exhibit 'S.L.S.B.1' were not properly attested. A piece of paper was instead attested. This of course is contrary to the provisions of rule 9 of the oaths and statutory Declarations Rules. The annexures are therefore incompetently on record. The end result is that paragraph 5 of the supporting affidavit of Sajjan Singh Lall Bhambra is ordered struck out and the disputed annexures are ordered expunged from record. The ground that the appellant was faced with financial constraints lacks evidential support in view of what I have just decided. That ground is hereby dismissed.

However I have noted that the annexures marked as exhibit S.L.S.B.2, S.L.S.B.3, S.L.S.B.4 and S.L.S.B.5 are properly executed and commissioned as required by law. Consequently I will consider the merit raised by the remaining paragraphs.

The question which remains for me to decide is whether I have the jurisdiction to entertain this application? The law is well settled in the matter before hand. I will refer to the case cited by the respondent. In the case of **KENYA COMMERCIAL BANK LTD VS SPECIALISED ENGINEERING CO. LTD (1982) K.L.R. P. 485**. It was held inter alia as follows:

(1) A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

(2) The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.

The applicant has submitted that it was not within its knowledge that 16th November 2003 would fall on a Sunday. This fact is not also denied or controverted by the respondent. I am urged to consider this as a fact which the applicant was ignorant of. This court has been persuaded to only vary the date of compliance leaving the consent intact.

This court has qualified or conditional discretion when it comes to interfering with consent Judgments or orders. Moreover, where the consent order or Judgment is still executory, the court may refuse to

enforce it if it would be in equitable to do so. The mode of paying the debt, then is part of the consent Judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. It has been stated that the applicant's failure to comply with the court order was not intentional or contumelous. I have examined the provisions of Order XLIX rule 5 of the Civil Procedure rules which is reproduced as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court the court shall have power to enlarge such time upon such terms (if any) as the Justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

It should be noted that the consent order or Judgment dated 6.10.2003, was duly recorded and approved by this court on 6.10.2003. In short, the order has become the order of the court having been domesticated upon approval. Consequently, though the order was recorded by consent, the jurisdiction of the court is not ousted but only restricted. Thus any variation has to be qualified. Section 3 A of the Civil Procedure Act is where this court sources its inherent power. In other words the court can interfere with any order whether by consent or otherwise for the sole purpose to meet the ends of Justice or to prevent abuse of the process of the court.

Earlier I reproduced the consent order of Judgment. The same sets the date in which the applicant was to start making payments. The last part of the order says:

“In default of any one instalment execution to issue. Payment to commence on 16.11.2003”

It is not denied that 16.11.2003 fell on a Sunday. I can also discern from the consent order that payments were expected as from 16.11.2003. The order did not restrict the date to be on or before. The next payments were stated to be paid on the 10th day of each succeeding month until full payment. In the absence of the consent being specific, then this court has the Jurisdiction to vary the consent in that regard depending on whether the delay to comply was intentional or not. If the delay is found to be unintentional the the court should consider whether the delay was inordinate.

The applicant has conceded that it spent the whole of Monday organizing to secure a banker's cheque which was finally obtained on 18th November 2003. It is alleged by the applicant that an attempt was made to present to the Respondent's advocate's office the banker's cheque but the cheque was rejected. This forced the applicant to present the cheque to Femfa Auctioneers who in turn forwarded the cheque to the Respondent's Advocate. I have taken considerable amount of time to consider these averments. I think I am convinced the applicant attempted to present the banker's cheque to the Respondent's Advocate but the applicant did not get assistance. It is accepted that the date to make payments to the Respondent was fixed to be 16.11.2003 then logically the date shall shift to 17.11.2003 to be the last day when payments were expected. The applicant delayed upto 18.11.2003. It is obvious that this was only a delay of one (1) day. It is in my considered opinion that the delay was not inordinate.

In final analysis I am prepared and inclined to accept the explanation given by the applicant. I will grant an extension of 14 days from the date of this ruling. I will also treat the payments already received vide the bankers cheque to cover the first instalment as per the consent order. The effect of the extension is that the applicant is required to remit the second instalment to the Respondent's advocate on or before the 13th day of February 2004 and thereafter payment shall be made on or before the 10th day of each succeeding month until payment. This of course is in conformity with the consent order or Judgment recorded on 6.10.2003.

I will also exercise my discretion by granting an order for the release of motor vehicle registration number KAC 995 D to the applicant by Femfa Auctioneers forthwith pending payment of their costs. The

auctioneers should have their costs taxed and or agreed upon which costs shall be paid by the applicants in terms of the consent.

The Respondent shall also have costs of this application.

READ AND DELIVERED THIS 30th DAY OF January 2004

J.K. SERGON

JUDGE