



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 16 OF 1998

BENSON MBUCHU GICHUKI..... PLAINTIFF

VERSUS

EVANS KAMANDE MUNJUA

JAMES MBUTI KUGUDEFENDANTS

RULING

I have before me an application by way of Notice of Motion dated the 10.12.03 and filed on the 24.12.03 that seeks this Court's order to review "a consent order" entered into by the applicant Benson Mbuchu Gichuki and the two defendants Evans Kamande Munjua and James Mbuti Kugu (trading as Uplands Agencies) on the 30th day of June 1999.

The reasons for the review is that the consent was entered into an obtained by "undue influence, inequality of bargaining powers, economic duress and coercion."

ii) That the defendant issued dishonoured cheques amounting to Ksh 3,639,761/- twice.

The application prayed that the whole original application be reheard.

A) History of the Case

i) Contract

Evans Kamade Munyua and James Mbuti Kugu are partners trading in the name and style of Uplands Agencies. Their business is that of transportation.

Sometime between 1993 to 1995 after entering into a contract with an organization known as the Norwegian People's Aid a dispute arose. Their task was to transport food and relief cargo to destinations in Kenya, Uganda, Zaire and Southern Sudan.

When this work was undertaken the defendants experienced certain hardships. They found insecurity; the dollar rates of payment decreased the amount of funds at their disposal. They were not able to meet their obligation due to these factors.

ii) Court case

Sometime in 1996 they filed a suit against the Norwegian People's Aid in Kakamega – High Court of Kenya No 178/96. Although I did not have sight of the case I gathered from the proceeding that the defendants complained that whilst in Zaire they were stopped for 60 days thus losing 10,000/- per month/or per day. There was, as mentioned earlier, delay due to insecurity and lack of funds.

It is not understandable why the suit was filed and if it was whether a defence was filed because the contract between the parties required that the parties refer any disputes to arbitration.

iii) Arbitration

The two defendants instructed an advocate from the firm of M/s Mugo and Co Advocates. The sole proprietor being Njoroge Mugo. It transpired from the correspondence in the court file that this advocate last took out a practicing certificate in 1980. Thus for 16 years he had been conducting himself as an advocate but this fact seems to have been unknown to the parties.

On the 21st of June 1996 Njoroge Mugo wrote to B Mbuchi Gichuki (the original plaintiff herein) to act as an arbitrator on behalf of the two defendants. A complaint and the contract between the two defendants and Norwegian Peoples Aid was enclosed.

B Mbuchi Gichuku accepted to be an arbitrator but on the following conditions.

Date 21.6.96.

". . . as condition for my accepting an arbitral appointment as per your proposal above I require you to confirm in writing that you undertake to perform as stated below.

- 1) To provide adequate security for the due payment of my fees and expenses when I so require.
- 2) To pay all my fees and expenses whether the arbitration reaches a hearing or not and whether the award (if any) is taken or not.
- 3) To make sure that after my accepting this appointment of arbitration, this reference does not go beyond 6 (six) months and once commenced it will be on daily basis until completed.
- 4) To allow me to reserve a right to revise my fee, (or either daily or hourly basis) which I shall demand after the expiry of the agreed contract period of 6 (six) months as shown at No 3 above.
- 5) To bear the cost of obtaining any assistance or advice necessary for this arbitration whether legal or technical.
- 6) To take up the award (if any) within 10 (ten) days from the receipt of notice of publication.
- 7) To pay me a fee of 10% of the claim value or the amount in dispute subject to a minimum of Ksh 20,000/- whichever is higher.
- 8) To pay me reasonable and fair travelling and out of pocket expenses when I am in other venues other than Nairobi.
- 9) To confirm that there is no any other arbitrator who has consented to act on your behalf in this reference and if any you have cleared with him. Please reply soonest that I can give you a go ahead to use my name officially as your arbitrator."

(Emphasis my own)

The above response was given the same day as the request made to the plaintiff to act as arbitrator.

The contract document though required that there be two arbitrators. One from the defendants and another from the Norwegian Peoples Aid.

It seems the defendants changed advocate from M/s Mugo and Co to Atuti Bwonyari & Company advocates (perhaps in another suit as I have not come across this name mentioned any where save in one documents), then M/s Mohammed and Kinyanjui & Co Advocates.

It was M/s Mohammed and Kinyanjui and Co advocates who set the motion rolling by requesting the Norwegian Peoples Aid to appoint an arbitrator of their choice. They had M/s Okuom and Co Advocates act for them but the issue of a sole arbitrator was not dealt with. It was to be explained later that no notice requesting such appointment was made. There was a change of leaders at the Norwegian Peoples Aid.

In the meantime Benson Mbuchi Gichuki continued with the arbitration and dealt with the preliminaries. He admitted he accepted Ksh 20,000/- from the defendant original claimants. That on the 5.8.96 he wrote to M/s Okuom & Co Advocates informing them of his appointment as an arbitrator. The said advocates wrote back to him requesting for an extension of time to sort out their matter with their proposed arbitrator. As this extension of time expired, he proceeded.

First he sent his professional certificate. The defendants (as mentioned earlier) changed advocates. He was appointed a sole arbitrator which he then accepted. He set up meeting whereby M/s Okuom and Co Advocates attended.

Njoroge Mugo was reappointed to act together with M/s Mohammed Kinyanjui.

On 10.3.97 proceedings were adjourned until 25.4.97 when the hearing was held.

Mr G Morara represented the two defendants.

He was then from M/s Mohammed and Kinyanjui & Co advocates

Mr Munjua represented Upland.

I am unclear what his status was.

Mr P Ogonji for the respondent Okuom & Co Advocates.

The respondents – Norwegian Peoples Aid were marked as absent.

After hearing the parties an award was given on 20.6.97.

iii) Award Claim

The defendants had made clear claims amounting to Ksh 35,947,610/20. The arbitrator found that a sum of Ksh 15,735,115/40 was in fact proved. Also proved was an over payment of Ksh 1,530,215/- giving a total sum of Ksh 14,204/00 (see page 34 of the arbitrators award).

This amount was awarded together with costs and interest as follows;-

- | | |
|----------------------|------------------|
| a) Principal sum | Ksh 14,204,900/- |
| b) Interest | Ksh 4,720,534/- |
| c) Cost of the award | Ksh 4,184,761/- |
| d) Legal fees | Ksh 1,250,000/- |

e) Disbursement Ksh 866,000/-

Total Ksh 25,226,195/-

The award was to be paid direct to "the claimant and not their advocates" on or before 24.7.97 failure to interest at 25% would be awarded.

iv) Award Judgment

On receiving the award claim now as a judgment, the two defendants filed miscellaneous application dated 755/97 for purpose of enforcing the said payment. They did this M/s Mohammed and Kinyanjui & Co Advocates through – Gibson Morara by coming to court during the vacation. They prayed that the Norwegian Peoples Aid had neglected to pay Ksh 26,031,178/- as awarded to the defendants on 20.6.97. This application filed on 6.8.97 further prayed as the organization is a foreign owned company they may remove their properties from the jurisdiction of the Court prior to judgment being entered in the award. The award would then be unenforceable. The application was deponed to by Gibson Morara an advocate of the High Court of Kenya.

The aspect of the urgency of the application was rejected by Hayanga J, and Ole Keiwua J and as there was nothing to show that there be a warrant issued.

The Norwegian Peoples Aid appointed advocates being M/s Hamilton Harrison and Mathews. They filed a summons on 19.9.97 seeking for the setting aside of the arbitral award. They claimed that the arbitrator had:-

"gone beyond the scope of his powers,"

"the composition of the tribunal was not in accordance with the agreement of the parties," and "the award was in conflict with the public policy having seriously misconducted himself in circumstances likely to effect his impartially by accepting before hearing payments from the claimants which were not matched by payments from the respondent and which did not arise out of any obligation in the agreement of the parties and by awarding himself fees of Ksh 4,184,761/- which can only indicate his corruption in the matter."

v) Award Settlement

The defendants conceded. The defendants and Norwegian Peoples Aid came into a consent agreement. Namely, that the defendants mark as settled Kakamega High Court Civil Case 178/96 and Nairobi Miscellaneous Application 775/97.

The parties then settled as full and final payment to the defendants a sum of Ksh13,170,000/-. Further to this agreement the defendants were to bear the arbitrators costs. (See agreement dated 27.10.97).

Payment of Ksh 13,170,000/- was done direct to the defendants. They did not pay the arbitrator the balance of his fees.

B: Arbitrators Fees

The advocate for the 1st and 2nd defendant/original claimant M/s Mohamed and Kinyanjui & Co Advocates wrote to M/s Okuom and Co Advocates and presented their bill of costs that had not been taxed for payment of the advocates fees and that of the arbitrators on 11.6.97.

The reaction of M/s Okuom & Co Advocates dated 16.6.97 was:

"We hereby notify you that we shall strenuously contest and strongly challenge the same in the event that our client, the respondents, is ordered to pay the same. The said bill is unrealistic inflated and manifestly

excessive.”

The whole issue of M/s Norwegians Peoples Aid paying the cost, namely;-

a) Mugo & Co Advocates -	Ksh 257,400/-
b) Atuti Bwonyari & Co Advocates	Ksh 111,450/-
c) Mbuchi Gichuki	Ksh 4,184,761/-
d) Legal fees	Ksh 1,010,180.40-
- Plus disbursements total	Ksh 6,429,791.40/

was overtaken by events when the settlement between the parties was reached by agreement of 27.10.97.

The defendants were therefore to settle his costs. From the claim of Ksh 4,184,76/- the plaintiff conceded that he is now owed Ksh 3,639,761/-. According to the defendants they required the award to be released. This was not to be done unless, according to the plaintiff, they paid the said sum. The defendants purposely issued a cheque dated (or they claim undated) 3.7.97 which they did not intend it to be cashed. It was dishonoured. Another cheque was issued on 6.10.97. This too on representation was dishonoured.

On the 7th January 1998 the plaintiff filed suit through his advocate M/s Gatumuta & Co Advocates.

I) Hccc 16/98

The plaintiff sued:-

- 1) Evans Kamande Munjua 1st defendant
- 2) James Mbuti Kugu2nd defendant

t/a Upland Agencies

- 3) Teresa T Mbuti 3rd defendant

In this plaint, it did not disclose that indeed the issue of the bounced cheques was connected to earlier proceedings representing the arbitral award. On the face of the record the suit appeared to be a strait claim for money owed and not paid.

The 3rd defendant had been joined to this suit as a signatory to the first cheque issued and dated 3rd July 1997.

ii) Application of 20.1.98 Osiemo, J

13 days later on the 20.1.98, the plaintiff/arbitrator filed a notice of motion seeking:-

" That summary judgment be entered against the defendant for Ksh 3,639,761/- and interest as prayed for in the plaint.

2) _____

3) _____"

This application disclosed the circumstances in which the money due was owed.

A defence was filed on 27.1.98 by M/s Mohammed and Kinyanjui & Co Advocates.

On the 25.3.98 a notice of change of advocates for the two defendants was filed by M/s Machio & Co advocates of Eldoret The application came for hearing before Osiemo J dated the 20.1.98. On the 18.11.98 the application for summary judgment was dismissed in a ruling of 26.11.98.

The plaintiff by this time was acting in person (8.7.98).

In the ruling of 26.11.98 Osiemo referred to a defence that had been filed. The plaintiff/arbitrator was not aware of this and requested for a copy from the deputy registrar dated 17.12.98. His former advocate deponed to an affidavit to this effect dated the 15.1.99 – namely, that he was never served with the defence.

The plaintiff/arbitrator filed two affidavits deponed by him in additional to that of his advocates namely, he challenged the impartiality of Osiemo J in refusing to enter a summary judgment. By an application dated 24.12.98 and filed on the same day he sort for a review by way of a notice of motion on Osiemo J's orders dismissing his application dated 20.1.98 that was delivered on 26.11.98.

The year was 1999. It was a year in which judges would rotate in duties on the portfolio they would be assigned to. Osiemo J was assigned the running down matters. He referred the file to me when I was a duty judge. This was on the 17.2.99. The parties then insisted that this file be placed before Chesoni CJ (as he then was).

The matter was duly referred by me to the Hon The Chief Justice. The Hon The Chief Justice directed that as it was a review from the orders of Osiemo J it should be listed for hearing before Osiemo, J.

When the matter came for hearing of the review orders before Osiemo J on the 8.3.99 the plaintiff/applicant was heard, the advocate holding brief being released. A ruling was delivered on the 29.3.99 in which Osiemo J set aside his orders dismissing this application for summary judgment. The effect of this ruling was that the application dated the 20th of January 98 was reinstated for hearing afresh.

iii) Application 20.4.98 Ang'awa, J

On the 3.6.99 – this file was placed before me for hearing of the said application dated 20.1.98 for summary judgment.

I heard both parties and delivered my ruling on the 30th day of June 1999.

In the said ruling I too dismissed the application for summary judgment on the grounds that there were trial issues.

C) Consent

On the same day of the 30th of June 1999 the parties came up with a consent. The said consent was drafted by the parties themselves who duly signed the draft and recorded in the court file proceeding at page 102 of the court records. The consent reads as follows:-

" By consent, the claim against the third defendant Teresa T Mbuti is withdrawn with no orders as to costs.

2) The plaintiff claim against the 1st and 2nd defendant is compromised at the sum of Ksh 700,000/-. The plaintiff to have judgment accordingly with no orders as to costs.

4) The decretal sum of Ksh 700,000/- to be paid in two equal installments as follows:-

- a) Ksh 350,000/- on or before 15.8.99
- b) Ksh 350,000/- or on before 30.9.99.
- c) In default of payment of any one installments on its

due date the whole amount standing became due and payable forthwith and the plaintiff be at liberty to execute the decree against the defendant.”

The plaintiff, the two defendants and their advocates duly signed my file.

D) Execution

The two defendants did not pay Gibson Morara, now having his own firm, purported to file an application dated Chamber Summons 06.12.99. This application prayed for:-

"Stay of execution pending determination of the application."

I noted that according to the new rules Gibson Morara had not filed a notice of change of advocates. He made no formal application to come on record as required after a suit is finalized as the rules were not in effect. He rightly withdrew his application dated 6.12.99 on the 19.1.00. On the same day he filed a notice of change of advocate. The same day I had delivered my ruling he appeared before Aluoch J to argue the same application that had been withdrawn. There was an application dated 20.1.00 filed thereafter. Perhaps the date recorded of 19.1.00 may have been a typographical error.

Thus between 1999 to the year 2004 I had not had sight of this file. What was being heard were stay of execution proceeding by the 1st and 2nd defendants. What was clear was that they were unable to pay the decretal amount fully.

In January 2000 (dates of 19th according to the Hon Judge) Aluoch J ordered that the decretal amount be paid. Only Ksh 100,000/- by way of bankers cheques was paid. The Hon Judge ordered that the plaintiff be at liberty to execute.

The plaintiff executed

On 31.3.00 an objector represented by G Morara filed objection proceedings.

Githinji, J was the duty judge. The application of 19.7.00 was stood over generally.

A new application dated 6.7.00 was then served and came for rehearing on 19.7.00 before Aluoch J she declined to hear it. It too was for objection proceeding filed by Gibson Morara.

It was returned to Aluoch J on 27.7.00 – I believe this being an administration error. On 31.7.00 the application of 6.7.00 was placed before Amin, J. He made orders:-

"There [is] no merit in the application. Application dismissed."

An advocate E Wamalwa appeared before Kasanga Mulwa J on the issue of storage charges by the auctioneer. It was referred to the Deputy Registrar but instead, perhaps to the rules being charged was placed before Kuloba J who declined to certify the application as urgent.

The application could not be reached on 6.6.01 Visram J; parties failed to attend on 1.2.01 Visram J; Rimita J – the duty judge certified it as urgent.

The application came before Waki J on 20.5.02 and the same was dismissed on the 14th February 2003.

On the 12th of November 2003 the plaintiff took *ex parte* dates for mention before the duty judge. The duty judge commented that the plaintiff was known to him. The matter was to go before another judge.

The plaintiff then filed the application dated 10th December 2003 and sought to appear again before Nyamu J, the duty judge. He sought to be allocated a judge to hear his matter.

The file was allocated to Visram J. The parties failed to appear on 15.12.03 the application was stood over generally. Fresh dates were taken for 29.1.04 before Mugo J. She referred the application to me. On the same day at 4.00 pm the parties did not attend as directed. The applicant/plaintiff took hearing dates.

E) Application Notice of Motion 10.12.03

The above application which is the subject matter of this suit sought orders of review of this Court's consent order entered by the applicant and respondent.

The hearing of the application, after sorting the issue of representation, whereby the 1st defendant appears in person, was heard on 4.3.04.

The plaintiff/arbitrator and applicant sought that the Court do set aside the consent orders then proceed with the application for hearing. To my recollection, the consent order, if set aside, the only application is that of the summary judgment. This would mean re-hearing an application that has already been disposed off.

I quite sympathize with the applicant as he has had considerable resistance in executing his rightful claim against the defendants. Perhaps the area of execution of court orders should be a concerned subject for reforms in our judiciary.

I am required by the application to look into the issue of review. Am I persuaded by the submissions put forth to review my orders? The rules of review of the courts order and or decree is governed by order 45 r (1) Civil Procedure Rules

Any person considering himself aggrieved

"1a) _____

b) by a decree or order from which no appeal is hereby allowed.

. . . may apply for a review of judgment of the Court which passed the decree or made the order without reasonable delay.

Does the applicant have a right of appeal?

The judgment entered on the 30.6.99 was by the consent of all the parties.

Under section 67 (2) of the CPA it provides.

"67 (1) _____

No appeal shall lie from a decree passed by the Court with the consent to parties."

The applicant was not entitled to appeal against these consent judgment. Nonetheless order 45 r 1 (b) and provisio permits him to come in for a review on certain grounds.

The provisio or the second half of the rule states:-

"Any person . . . who from the discovering of new and important matter or evidence which after the

exercise of due diligence, was not with his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay."

The applicant/plaintiff reasons for applying for a review is that the consent entered on 30.6.99 was:-

"obtained by undue influence inequality of bargaining powers, economic duress and coercion.

ii) the defendants issued dishonoured cheques amounting to Ksh 3,639,761/-".

As a result of the whole application be re-heard.

The applicant had just discovered that all fraudulently obtained decrees/ judgment can be appealed against or reviewed without leave, out of time application.

His main grounds boarded in arguing the summary judgment application namely:-

"The defendants issued dishonoured cheques and having failed to raise any substantive reasonable defence are unfairly benefiting from the applicant rightful money amounting to Ksh 3,639,761/-.

Justice – he argued required that this fraudulently obtained decree through collusion of the defendants and the court be struck out/dismissed or reviewed for having been baked to defeat justice by denying the plaintiff his rightful money amounting to Ksh 3,639,761/-.

The defendants having received the arbitrators money from Norwegian Peoples Aid on 25.11.97 is unfairly trading with arbitrators money.

An order should be made to re-hear the whole of the plaintiff's application afresh"

The question arises as to whether the consent entered into was fraudulently entered?

The 1st defendant acted in person and filed no grounds of opposition or replying affidavit. The 2nd defendant was represented by the advocate holding brief for M/s Machio & Co Advocates. He relied on the case laws of:-

Flora N Wasike v Destimo Wamboko (1982 – 88) IKAR 626.

In a land case that was protracted, parties and their advocates appeared before Gicheru J in chambers and a consent judgment was recorded whereby a fresh agreement for sale of land was to be entered into at a price of Ksh 150,000/-.

The defendant then appealed on the ground that:-

"When she had arrived at the Court the consent judgment was already being recorded, that pressure had been exerted on the parties to consent to its terms . . . that her advocate had acted without her knowledge or authority."

"It was held that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation."

"The Court would not readily assume that a judgment recorded by a judge as being by consent was not so unless it was demonstrably shown otherwise"

"No grounds for concluding the appeal was not validly

recorded"

Per Nyarangi JA.

"Her appeal is an attempt to resile from a valid consent judgment on wrong grounds."

In this particular case the applicant/plaintiff was acting in person. He claims that he was made to enter into the agreement of consent by duress. His action thereafter though was contrary. Instead of returning to court to bring these allegations he proceeded to execution. It was quite clear that the defendants had no money to pay the plaintiff (the file ought to have perhaps returned to me to deal with). The procedure though in the civil section of the High Court of Kenya at Nairobi, as long as an application is not part heard, any judge would deal with the matter. Nonetheless the plaintiff/applicant pursued vigorously the execution. When he had exhausted this, he appeared before Nyamu J for directions. When the case was mentioned before the judge, as a duty judge, the Hon judge declared his interest.

The plaintiff then returned with the application for a review. This application would have been in order if it was put in and filed without reasonable delay. (emphasis my own).

The review application was filed after execution was complete or almost finalized. It was then brought 4 years after the consent had been filed.

The answer to this, stated the applicant, is that the sum already obtained through execution amounting to between Ksh 400,000/- being cash already paid and Ksh 900,000/- or inclusive being attachment rendered should be deducted from his claim of Ksh 3,639,611/-.

The said amount of costs was indeed challenged in miscellaneous High Court Civil Application 755/97 *Upland Agencies v Norwegian Peoples Aid*.

It was an amount that was vigorously protested to by Okuom and Co Advocates and later Hamilton, Harrison & Mathews & Co Advocates.

By executing the decretal sum before filing a review, the plaintiff/applicant has removed his rights to a review. There is nothing to review. To my mind the consent recorded in my present was so done without an undue influence.

The delay in bringing the application is inordinate. The issue of the summary judgment is finalized. It was an application that was dismissed and period for any appeal had expired. The applicant would have proceeded for hearing of his suit but instead opted out for the consent judgment.

I must again highlight the fact that defendants themselves to some extent were mischievous. They knew the consent judgment was against them. They used all manners of tricks to frustrate the plaintiff applicant obtain and enjoy the fruits of his judgment. This was by way of filing objection proceedings. The advocate who filed these objections proceeding was Gibson Morara who acted for the two defendants originally; who appointed the plaintiff as sole arbitrator; then, was removed from record. He then had his own firm of advocates and began acting for the objectors. His interest in this matter seems immense. He was not present during the consent judgment as he was not on record. He came during the execution of the decree when this file was before other judges.

I hereby find that the application to set aside and or review the Court's consent judgment has no merits. No hearing of the application for summary judgment can be re-heard as it is spent. No trial can be conducted as the suit had been finalized through the consent order and execution done.

The application itself has no merits and is defective. I nonetheless heard the parties on their merits.

The application dated 10th December 2003 and filed on 24.12.03 be and is hereby dismissed with costs to the defendants.

Dated and Delivered at Nairobi this 10th day of March 2004.

M.A.ANG'AWA

JUDGE