Afro Steel & Concrete Limited v Bamburi Special Products Limited (Civil Suit 157 of 2015) [2024] KEHC 1086 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1086 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 157 OF 2015

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

AFRO STEEL & CONCRETE LIMITED ..... PLAINTIFF

AND

BAMBURI SPECIAL PRODUCTS LIMITED ..... DEFENDANT

RULING

1. This matter was filed as a dispute between the Judgment Debtor and the Judgment Creditor over Ksh. 29,999,997. 80. The dispute was instituted to avoid payment of Bank Guarantee. There was also dispute whether the agreement was tax exempt or not. Whether there was a dispute, the Plaintiff sought the following orders in the Plaint: -

    a. An Order restraining the Defendant, its employees, servants and or agents from enforcing the Bank Guarantee for Ksh. 29,999,997.80 or claiming any monies thereunder pending the arbitration proceedings.

    b. Costs.

2. The parties recorded a consent on 6/6/2016 to the effect that: -

    a. The Plaintiff pays the sum of Ksh. 28,659,849 to the Defendant within 7 days of the date hereof.

    b. In default of payment, the Defendant be at liberty to execute the Bank Guarantee in the sum of Ksh. 28,659,849/=

    c. The Defendant to deliver to the Plaintiff any undelivered and damaged concrete blocks.

    d. Costs to be determined by the court

    e. The matter be mentioned on 15/8/2016.

3. On the next mention the parties' advocates confirmed that Ksh. 28,659,849 had been paid. Though Mr. Njeru raised an issue of whether a sum of 1,300,000/= was due or not, the court stated that the only issue remaining between parties was costs. This was to stand unless review was done. Parties were given 60 days to agree.

4. There was a lull till 18/10/2022 when the suit was listed for hearing on 6/2/2023. Mr Njeru informed the court that there was one outstanding issue and a balance of 1,300,000/=.

5. As at this time the Defendant had neither filed defence not counter claim. When parties came to me on 27/2/2023, I sent the parties for mediation on the one outstanding issue. The Plaintiff's advocates maintained that the matter was settled long ago and have no further instructions.

6. When the matter again found itself before me on 7/11/2023 I listed the same for hearing on the one issue that was outstanding. This issue was costs. The sum of Ksh. 1,300,000/= was not in issue in any of the pleadings.

7. On the eve of the hearing, the Defendant filed defence and counterclaim. On the hearing date, Mr Njeru misled the court that the Plaintiff have not attended court to defend the counterclaim. The truth was the counterclaim was filed a day before and neither was it served not the Plaintiff given time to respond. Having been filed after the consent and after setting the matter down for hearing, I have no option than to find and rightly so, that the same were filed out of time and till they are not properly on record. My duty is to strike out the same from the record. Only documents that were on record on 6/6/2016 are useful in determining the remaining issue- costs.

8. I am inclined to find that the Court was functus officio on the issues raised in the belated and unfortunate Counterclaim.

9. The Supreme Court of Kenya in *Raila Odinga – v- Iebc & 3 Others* Petition No. 5 Of 2013 cited with approval the following passage from "The Origins of the *Functus Officio* Doctrine with Specific Reference to its Application in Administrative Law" by Daniel Malan Pretorious:-

   ..."The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

10. If there were other issues, then the same ought to have been reserved for hearing by the parties. Only costs were. The court has no jurisdiction to interpret a consent entered by the parties. I have not been moved to set aside the consent. In any case a consent is a contract between the parties adopted and sanctified by the court.

11. In *Hirani v Kassam* [1952], 19EACA 131, the Court of Appeal with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:

> " Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement."

12. The Court of Appeal in the case of *Brooke Bond Liebig v. Mallya* 1975 E.A. 266 held as follows:-

> " A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the Court to set aside an agreement."

13. The Court of Appeal in the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR P. 485 held that:

> " 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 by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.....An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding".

14. In the case of *Joseph Munyoki Kalonzo v Kenya Wildlife Services* [2015] eKLR, the court stated as doth: -

> " With regard to liability, the parties counsel filed a written consent. The same counsel on both sides asked this court to adopt the same as an order of the court, after the closure of the plaintiff's case. The court so adopted the consent. It was a proper recorded consent and it was thus contractual and binding on all parties and their counsel. In the said consent it was agreed that the defendant takes 80% liability and the plaintiff 20% I so find. I uphold that consent as binding on the parties. That settles the issue of liability."

15. In the case of *Salim Peter Murithi v Kasiwa Gona Kirao* [2021] eKLR, Justice D O Chepkwony stated as doth: -

> " 21. In the case of Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd [1982] KLR 485, Harris, J correctly held, inter alia, that: -
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> "...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 facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement..."

16. In the case of *Charles Kiptarbei Birech v Paul Waweru Mbugua & another* [2021] eKLR, justice Dr. Iur Fred Nyagaka stated as doth: -

@34. The import of the Application before me is that the Applicant sought to challenge the consent entered into on the 3/12/2013. The law on setting aside a consent entered into by parties is now not in doubt. A consent can only be set aside in clear cases of fraud, misrepresentation, coercion and the related vitiating factors of contracts. In the case of *James Muchori Maina v. Kenya Power & Lighting Company Ltd* [2005] eKLR the court, approving the case of Flora Wasike observed as follows:

"Consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal

validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd.* - Nairobi Civil Appeal No. 276 of 1997, wherein the Court of Appeal applied the reasoning in the case of *Flora Wasike v- Destimo Wamboke* [1988] 1 KAR 625 at page 626 where Hancox JA (as he then was) stated-

" It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out". That consent was binding on the parties, and can only be set aside as enunciated above by the Court of Appeal. That consent still being intact on record cannot be challenged in this appeal."

35. Similarly, in *John Waruinge Kamau v Phoenix Aviation Limited* [2015] eKLR the court considered the circumstances in which a consent order can be set aside and stated:-

"The circumstances under which a consent order may be set aside are grounds which would justify the setting aside of a contract, or if the conditions required to be fulfilled by the agreement have not been fulfilled. The grounds for setting aside contracts are fraud, coercion, mistake or misrepresentation.

17. In this case there was even no attempt to set aside the Consent Order. The Defendant simply proceeded as if the consent does not exist. It is not something surprising. Mr Justice P J O Otieno had clearly stated what is in the file on 21/11/2016. The pronouncement by the court as to the state of the file remains until set aside. The setting aside has not happened.

18. Regarding the subject matter, it is only the Defendant who was to supply damaged concrete and deliver any undelivered concrete.

19. The Court cannot re-open the matter while the consent is in situ. The same is not said to be a partial consent and nothing was left for the trial court except costs.

20. Even the undelivered concrete was not reserved for the court. To what was the defendant filing defence, the plaintiff's case having been determined by consent. the consent was binding on parties as far as supply of the concrete blocks is concerned.

21. The sum of Ksh. 28,659,849 agreed upon does not arise from any pleadings. It is a figure reached upon by the parties. What they considered was not disclosed and we cannot ask now. It is not possible to presume that it was part payment when parties were categorical. The counter claim is therefore built on quick sand.

22. The Defendant stated that The Plaintiff and Defendant herein entered into an agreement for the supply of concrete paving blocks and as per the terms of the agreement, the Defendant supplied to the Plaintiff 6,000,000 interlocking concrete blocks and subsequently, an additional 2,000,000 blocks making a total of 8,000,000 blocks. The fact of supply is not in dispute. 2. The Plaintiff settled part of the payments due and owing to the Defendant in respect of the supplies leaving a balance of as seen in the statement herein.

23. They stated that the Plaintiff contended VAT that the Plaintiff ought not to pay as the transaction was TAX Exempt. The Defendant made several demands to the Plaintiff to settle the outstanding amount and when the Plaintiff failed to settle the said amount, the Defendant, in an effort to recover it, called in the irrevocable guarantee of Ksh 30,000,000 issued by CFC Stanbic as security for payment of merchandise delivered to the Plaintiff but not paid for. When the Defendant attempted to call in the irrevocable bank guarantee of Ksh 30,000,000 to recover the sum of Ksh. 29,999,997.80 due and owing to it from the Plaintiff, the Plaintiff obtained an injunction herein contending that the transaction was tax exempt yet the transaction was taxable.

24. In order to resolve the issue as to whether the transaction was taxable or tax exempt, the Court (Justice P.J. Otieno, J) summoned the Commissioner, Domestic Taxes, Kenya Revenue Authority to Court on 25.02.2016 to clarify whether the transaction between the Plaintiff and Defendant was tax exempt or taxable.

25. The Commissioner, Domestic Taxes, Kenya Revenue Authority deputed a Manager to Court on 25.02.2016 and the said Manager confirmed that the transaction was taxable and pursuant to the said confirmation by the Kenya Revenue Authority, the dispute was out rightly, conclusively and finally settled and the Plaintiff conceded the Defendant's claim of Ksh. 29,999,997.80.

26. The only issue in the suit was whether the transaction was taxable or tax exempt and that issue was resolved when Kenya Revenue Authority attended Court on 25.02.2016 and confirmed that the transaction was taxable pursuant to which the plaintiff conceded their indebtedness to the defendant in the sum of Ksh. 29,999,997.80 in writing and made an offer to settle the whole amount.

27. Although the Plaintiff had admitted and was willing to pay the entire sum of Ksh. 29,999,997.80, the said Plaintiff contended that some concrete blocks had not been delivered by the Defendant and / or had been damaged and as a consequence, the Plaintiff and Defendant entered into a consent on 17.06.2016 for payment of Ksh 28,659,840 as part payment by the Defendant to the Plaintiff, a sum that was duly paid, leaving a balance of Ksh. 1,340,157.80 which the Plaintiff contended was the value of some of the alleged undelivered and / or damaged concrete blocks.

28. Since 2016 when the consent was signed, the Plaintiff has never returned any of the alleged damaged blocks nor indicated how many the said damaged blocks were and further, has never made any follow-up with the Defendant on its allegation of undelivered and/ or damaged blocks and as such the balance of Ksh. 1,340,157.80 is now due and payable.

29. The Defendant submits that the sum of Ksh. 29,999,997.80 initially due and owing was an amount that was the VAT element in the price of concrete blocks supplied and was remitted to the Kenya Revenue Authority and as a result, it is a sum directly expended on behalf of the Plaintiff and ought to be paid in full without fail, especially since its admitted.

30. The Defendant urges the Court to find that the Plaintiff, having made part payment of Ksh 28,659,840 of the admitted sum of Ksh. 29,999,997.80 that was due and owing to the Defendant and having failed to return any of the alleged damaged blocks nor call for delivery of the alleged unsupplied blocks ought to settle the balance of Ksh 1,340,157.80 which it has refused to settle despite repeated reminders and despite mediation efforts.

31. The Defendant prayed that the Plaintiff's suit be dismissed with costs and the Defendant's Counterclaim in the sum of Ksh 1,340,157.80 be allowed with costs and interest be payable w.e.f. 07.12.2015 at Court interest rates of 14% until payment in full.

32. The funniest of all these is the audacity to claim interest from 7/12/2015 when the counterclaim was filed on 21/11/2023. It is my desire that advocates be candid and not to imagine that the courts are manned by morons who will take everything and are not even capable of any intelligible reading of the proceedings. The lack of candour on part of counsel for the defendant reminded me of It is such conduct on the part of a witness that Odunga J (as he then was), alluded to in the case of *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of *N v. N* [1991] KLR 685. The Learned Judge lamented as follows:

> " Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or

no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in *N v. N* [1991] KLR 685 when he expressed himself in the following terms:

"I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

33. How can counsel, file defence and counterclaim a=on the eve of the hearing and expect that we shall not know. I asked the advocate for the defendant whether he was sure he was ready to proceed and he answered in the affirmative. I have not seen any defence on the file and did not expect one to have been field a day before.

34. When is the Defence to be filed? The civil procedure rules govern this. However, none can be legitimately field after directions on hearing. When the matter was fi3/12/2015, summons to enter appearance were issued on 7/12/2015. Upon service the firm of Njeru and company advocates filed a replying affidavit dated 14/12/2015. To date they did not serve memorandum of appearance. It is till 2023 November 21st that they filed a defence and counterclaim.

35. The matter had been settled in 2016. Having not filed defence or appeared, only costs on the table were those of the application. This was spent and determined in favour of the Plaintiff. An amount of Ksh 29,999,997.80 was not ordered but a consent order for Kshs. 28,659,840.th other positive order was in favour of the Plaintiff for supply of any undelivered and damaged concrete. The suit was thus settled amicably.

36. The only order that is available is for parties to bear their own costs. The settlement was done before a memorandum of Appearance was filed. Section 27 of the *civil procedure rules* proved as doth: -

    1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

    Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

37. I am aware that costs are a discretionary order. The Defendant has not shown that they are more entitled and the Plaintiff is less entitled. The dispute was on VAT and undelivered or damaged concrete blocks. The parties settled for less. It was a win-win for both.

38. I therefore disagree with the defendant that they are entailed to costs.

Determination

39. The upshot of the foregoing I make the following orders: -

    a. The sole question remaining pursuant to the consent of the parties herein is costs.

    b. Pursuant to the foregoing, I find that each party shall bear their costs in the suit.

c. The Counterclaim was filed when the court is *functus officio* and is accordingly dismissed in *limine* with each party bearing its own costs.

d. The file is closed and marked as settled.

e. There appears to be an Application on record filed after closure of the defence case, the same is marked as spent.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant - Brian

M.D. KIZITO, J.