



**Ekirapa & another v Abdi & another (Civil Suit 10 of 2016)
[2024] KEHC 7219 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 7219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL SUIT 10 OF 2016
REA OUGO, J
MAY 23, 2024**

BETWEEN

DOREEN KOKI EKIRAPA 1ST PLAINTIFF

SIMON OKIYA OKIGESERE 2ND PLAINTIFF

AND

ABDIFATTAH ABDI 1ST DEFENDANT

CHRISTOPHER MCLEAN 2ND DEFENDANT

RULING

1. This ruling relates to two applications. The first application dated 31/11/2023 is by the plaintiffs seeking that the court vary and set aside the consent order recorded and adopted on 3rd May 2023. According to the affidavit of the 1st plaintiff, it was averred that on 3rd May 2023 consent was recorded and adopted by the court that the defendants were to comply with the ruling delivered on 7th October 2023 by depositing Kshs 4,807,840/- in a joint interest-earning account within 30 days. The matter was mentioned on 15/6/2023, 13/7/2023, 21/9/2023 and 24/10/23 but the defendant's counsel has yet to comply.
2. The second application by the 1st defendant is dated 10th January 2024 seeking the following orders:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to order for stay of execution of the judgment and/or decree made on 11th May 2022 where the honourable court held that the 1st and 2nd defendants jointly and severally 100% liable for Kshs 12,395,000/- as loss of dependency, Ke 20,000 as pain



and suffering, Kes 200,000 as loss of life expectancy together with costs and interest, pending the hearing and determination of this application.

4. That this Honourable Court be pleased to order for stay of execution of the judgment and/or decree made on 11th May 2022 where the Honourable Court held that the 1st and 2nd defendants jointly and severally 100% liable for Kshs 12,395,000/- as loss of dependency, Ke 20,000 as pain and suffering, Kes 200,000 as loss of life expectancy together with costs and interest, pending the hearing and determination of its appeal.
 5. That this court be pleased to direct the matter be set down for mediation among all parties.
 6. That this honourable court be pleased to exercise discretion to allow the amount of Kenya Shillings Three Million already paid out to the plaintiff be sufficient as security for appeal.
 7. That in the alternative, this Honourable court be pleased to direct that the amount Kenya Shillings Three Million already paid to the Plaintiff be deposited with the court as part compliance of security for appeal.
 8. Costs of this application.
3. The 1st defendant in his supporting affidavit averred that the 2nd defendant should be involved in the proceedings to ensure that all decretal obligations are met in equal measure. The 2nd defendant has not participated in the proceedings and there has been no evidence of service on him. The court directed on 7/10/2023 that the plaintiff had to serve the 2nd defendant within 14 days but no evidence of service was produced. The parties negotiated a consent agreement where the parties agreed to have the matter set down for mediation but the plaintiff is responsible for the breakdown of the mediation.
 4. The 1st defendant averred that the plaintiff served him through his advocate the application dated 13/10/2023 via email however the attachment was damaged/corrupted. On 27/11/2023 the court directed that the application be served again to enable the 2nd defendant to respond accordingly but the plaintiff neglected to do so. Instead, the plaintiff instructed M/s Victoria Blue Services Auctioneers to conduct a proclamation on 8/1/2024 upon the 1st defendant. The plaintiffs have already caused a proclamation of the assets of Luqman Petroleum Limited on 8/1/2024 and the plaintiff intends to carry out the attachment of the assets within 7 days.
 5. The 1st defendant argues that as a show of good faith, he paid Kshs 3,000,000/- to the plaintiffs' advocates but the same is yet to be acknowledged. The plaintiffs are seeking to unjustly enrich themselves having failed to acknowledge that Kshs 3,000,000/- have been paid and they have inflated the sums to a whopping Kshs 22,296,950/-. The plaintiff has shown no good faith in the resolution of the dispute and the 1st defendant has no option to seek refuge before this court.
 6. The plaintiffs in response filed a replying affidavit dated 22/1/2024. Doreen Koki Ekirapa averred that on 3/5/2023 consent was recorded and adopted by the court that the defendants were to comply with the ruling delivered on 7th October 2023 by depositing Kshs 4,807,840/- in a joint interest-earning account within 30 days. The matter was mentioned on 15/6/2023, 13/7/2023, 21/9/2023 and 24/10/23 but the defendant's counsel has yet to comply. They advance that the consent order has been defied and that they seek that the same be varied and set aside.
 7. At the hearing, counsels for the parties made oral submissions.
 8. The plaintiffs through their counsel Mr. Kundu, submitted that the 1st defendant was given a conditional stay. They were to deposit a sum of Kshs 4.2 million as per the Ruling dated 7.10.2022. The monies were to be deposited within 30 days failure to which the orders would lapse. This led us



to record a consent that the said sum be deposited in an account in both counsels and we were to look at mediation to adduce the balance.

9. It was submitted that part of the decretal sum, Kshs 3,000,000/-, was paid by the insurance. The 1st defendant sought a stay some time back, which was the subject of the ruling dated 7/10/2022. The orders they sought during the vacation should be vacated. The application dated 10.1.2024 lacks merit and is a repeat application. The plaintiffs urged the court to allow their application as monies are owed.
10. At the hearing of the two applications, Mr. Githara, counsel for the 1st defendant submitted that they have the application dated 10.1.2024 which they asked the court to consider as a response to the application dated 31.10.2023 as the issues being raised are subjectively similar. In his submissions, he relied on the statement of Justice Gikonyo that procedural law facilitates substantive law. It was pointed out that the 2nd defendant did not enter an appearance in the matter. There is no affidavit of service to show service upon the 2nd defendant. The judgment delivered on 11.5.2022 held the defendants jointly and severally liable for the accident. The 1st defendant would be entitled to reimbursement from the 2nd defendant if the 1st respondent paid the whole decretal sum. While the law allows for this reimbursement, the law is unclear where the 2nd defendant is unaware of the judgment the resultant decree and the matter in general. The court needed to have satisfied itself of the service before trial. This was not done. Since there is no evidence of service against the 2nd defendant nor an application for a judgment against the 2nd defendant, the 1st defendant cited the case of *Pastor Antony Makha Chege vs Nancy Wamattha Magak* 2014 eKLR where the court held that this can only be attributed to a deliberate refusal and on failure by the Plaintiff to comply with Order 5 which offends Order 1 of the *Civil Procedure Rules*.
11. The 1st defendant seeks a stay of execution and the matter be sent to mediation amongst all parties. It was also submitted that it has already paid Kshs 3,000,000/- to the plaintiffs and asked the court to exercise its discretion and order that the money be deposited in court and be held as surety. This is because the 1st defendant may suffer the prejudice of the 2nd defendant not meeting its liability either jointly or severally.
12. Mr. Kundu in a rejoinder submitted the issues of no proper service went to full trial and the 2nd defendant had an advocate on record who was present. The issue ought to have been raised before judgment was delivered.

Analysis and Determination

13. By brief background, this court rendered judgment on 11/5/2022 in favour of the plaintiffs in the sum of Kshs 12,615,680/-. The 1st defendant filed an application seeking a stay of execution of the decree pending the hearing and determination of the appeal. Riechi J. in his ruling dated 7/10/2022 granted an order of stay of execution on condition that the sum of Kshs 4,807,840/- is to be paid to the plaintiffs and the other half to be deposited in a joint interest-earning account in the names of both counsels within 30 days.
14. Following the ruling of Riechi J., the plaintiffs and the 1st defendant entered into a consent which was adopted by the court on 3/5/2023 in the following terms:
 1. The 1st defendant through their counsel to deposit the sum of Kshs 4,500,000/- in a joint interest-earning account in the names of both counsels of the plaintiff and the 1st defendant within 30 days from the date herein.
 2. The matter is to be referred to court-annexed mediation in resolving payments of the balance.



3. The matter to be mentioned within 30 days to confirm compliance.
15. I shall first consider, the 1st defendant's application dated 10th January 2024. It seeks an order of stay of execution which was already made by Riechi J. in his ruling dated 7/10/2022 and the same cannot be re-litigating in the same court. Similarly, prayers 6 and 7 as sought by the 1st defendant would be reviewing the conditions of the stay order. Prayer 5 seeks that the court set the matter down for court-annexed mediation, however, this order was already granted by the court on 3/5/2023. Therefore, the 1st defendant's application dated 10th January 2024 is without merit.
16. For the avoidance of doubt, this court's ruling dated 7/10/2022 gave the orders of stay of execution and the conditions that were to be met by the defendants. The effect of the consent recorded on 3/5/2023 was simply to enlarge the time for compliance with the conditions of the stay order for a further 30 days and it also varied the amount that was paid in the joint-interest earning account to KShs 4,500,000/-. It also allowed the defendants to come up with a proposal on how they were to pay the balance.
17. I now turn to consider the application by the plaintiffs seeking to vary and set aside the consent order recorded and adopted on 3rd May 2023. The Court of Appeal gave the grounds upon which consent judgment may be set aside in the case of *Board of Trustees National Social Security Fund versus Micheal Mwalo* [2015] eKLR as follows;
- “The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”
18. The plaintiffs have made no attempts to show that the consent was obtained by fraud, collusion or an agreement contrary to the policy of the Court. Consequently, their application dated 31/11/2023 is dismissed.
19. I have observed that the 1st defendant was to comply with the terms of the consent recorded on 3/5/2023 within 30 days. The 1st defendant cannot fault the plaintiffs for initiating the execution process where it has failed to comply with the conditions of the stay of execution. The plaintiffs are entitled to the fruits of their judgment. On mediation, where the parties are not in a position to reach an out-of-court settlement, the defendants shall be bound by the conditions of stay set out in this court's ruling dated 7/10/2022.
20. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF MAY 2024.

R.E. OUGO

JUDGE

In the presence of:

Plaintiffs/ Applicants

1st defendant/ Respondent

2nd defendant/ Respondent

Wilkister/ Diana -C/A

