



**Njeru v Musili (Miscellaneous Application E019 of 2023)
[2024] KEHC 4986 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION E019 OF 2023
LM NJUGUNA, J
MAY 15, 2024**

BETWEEN

PETER MUREITHI NJERU APPLICANT

AND

STEPHEN MALUKI MUSILI RESPONDENT

RULING

1. The respondent/applicant filed a notice of motion dated 16th January 2024 premised on the grounds on its face and in the supporting affidavit thereof, seeking orders that this honourable court sets aside consent orders entered on 21st November 2023 and dismiss the matter with costs.
2. The applicant/respondent, through chamber summons dated 24th May 2023, sought orders for stay of execution and leave to appeal out of time and the court allowed the application on condition that he deposits half of the decretal sum in court within 30 days of the ruling, failing which the stay order shall lapse. The court also directed that the appeal be filed within 30 days and prosecuted within 120 days failing which it shall stand dismissed.
3. The respondent/applicant stated that instead of complying with the orders of the court through the ruling delivered on 09th August 2023, the applicant/respondent filed another application seeking leave to deposit title number Mbeere/Kirima/4999 in place of the decretal sum. That on 21st November, 2023, advocates for the parties agreed that the property was to be subdivided into 2 portions and one half be transferred to the respondent/applicant with the applicant/respondent facilitating the subdivision and transfer formalities. That applicant/respondent failed to comply with the consent and deposited the title document in court on 15th January 2024. That no appeal has been filed nor has any security for performance been deposited as ordered by the court.
4. The application was opposed through the applicant/respondent's replying affidavit dated 19th February 2024 wherein he deposed that following the order of this court on 09th August 2023, he filed



an appeal on 20th November 2023 and served the respondent/applicant's advocate in court. That he filed an application dated 06th September 2023 under order 22 Rule 25 of the *Civil Procedure Rules* to provide security in the form of title deed number Mbeere/Kirima/8857 (which would arise from subdivision of title number Mbeere/Kirima/4999) subject to a consent by the parties. He produced a letter to the Deputy Registrar showing compliance. That prosecution of the appeal was delayed by the registry in availing the lower court file for purposes of appeal. That no transfer of the property was agreed between the parties.

5. The application was disposed of by way of written submissions.
6. The respondent/applicant submitted that the parties, through their advocates agreed that the applicant/respondent would subdivide and transfer the property to him and the same was adopted as a consent order. That he was surprised to learn that the applicant/respondent had submitted the signed transfer forms and the title documents in court and not to him as agreed. That the orders of the court giving conditions for stay of execution have not been set aside or reviewed but the applicant/respondent failed to comply with these orders. He placed reliance on the cases of Samson Munikah Practising as *Munikah & Co. Advocates v Wedube Estates Limited* (2007) eKLR and *Hirani v Kassam* (1952) 19 EACA 131. He urged the court to set aside the consent order for non-compliance and that he be allowed to proceed with the subordinate court's matter in the absence of an appeal
7. On his part, the applicant/respondent re-affirmed the facts deposed in the replying affidavit and stated that the essence of the consent agreement was that he provides security for performance in the form of the title deed to be deposited in court by 15th January 2024, which he did. That he is committed to prosecuting the appeal which was filed within the 30 days ordered and the trial court file was availed. Reliance was placed on the case of *Butt v Rent Restriction Tribunal* (1979) eKLR and he argued that the court is at liberty to grant, deny or extend stay order as it deems fit. He relied on the provisions of Rule 6 of the *Advocates Rules* 1996 which empowers an advocate to enter a consent on behalf of his client. That the respondent/applicant changed advocates in the course of time but his new advocate seems to be mistaken on the position of the matter and that he ought to know that there is an ongoing appeal.
8. The issue for determination herein is whether the consent order meets the threshold for review and setting aside.
9. Following this court's ruling dated 09th August 2023, the applicant/respondent filed an application dated 06th September 2023 seeking to be allowed to provide security in the form of title deed for Mbeere/Kirima/4999 in stead of Kshs.660,350/= which he was unable to raise. When the application was heard, the parties entered a consent which was recorded as follows:
 - “ 1. By consent, parties agree that the applicant apply for Land Control Board for subdivision on 24th November 2023 and subsequent transfer on 15th December 2023;
 2. Thereafter, the applicant shall sign transfer forms and avail the necessary documents on or before 15th January 2024;
 3. In default, the stay orders lapse.”
10. Through this application, the respondent/applicant seeks to set aside this consent order. A consent recorded between parties and adopted by the court as its order, has the effect of a legally binding contract and cannot be reviewed or set aside unless by the same grounds as would apply to setting aside



of a contract. The court made this observation in the case of *Hirani v Kassam* (1952) 19 EACA 131 where the Court of Appeal held;

“It is now well 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: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

11. Further, in the case of *KCB Limited v Specialized Engineering Co. Ltd* (1982) KLR the court held:

“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 in misapprehension or ignorance of suit facts in general for a reason which would enable the court to set aside an agreement.”

12. In this case, the respondent/applicant stated that the consent order has not been complied with, thus it should be set aside. From the foregoing, there is no sufficient reason to set aside a consent order since the court cannot see any vitiating factors. Of importance is that the consent was reached in determination of the application dated 06th September 2023 through which the applicant/respondent sought to replace the form of security ordered by the court with another one. The wording of the consent order is to be taken in light of the fact that the title deed to be provided was meant for purposes of security for performance pending appeal.

13. There was not meant to be any transfer of property at that stage but the respondent/applicant was required to sign the requisite documents so that in the event of default, the transfer would be effected using the signed documents and Land Control Board consent. In the court record, there is a letter dated 15th January 2024 through which the applicant/respondent forwarded the duly signed documents and consent from the Land Control Board to the court as security. The timeline given in the consent orders was complied with and therefore, there was no need for an actual transfer of the property.

14. I have also perused Embu High Court Civil Appeal Number E048 of 2023 and found that the memorandum of appeal was filed within the 30 days ordered by the court through its ruling delivered on 09th August 2023. The appeal is pending determination.

15. Therefore, I find that the application herein lacks merit and the same is hereby dismissed with no orders as to costs.

16. It is so ordered

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF MAY, 2024.

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L. NJUGUNA

JUDGE

