



REPUBLIC OF KENYA



Bliss GVS Health Care Limited v Consolata Hospital Mathari & 2 others (Civil Appeal E049 of 2021) [2024] KEHC 7646 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E049 OF 2021
DKN MAGARE, J
JUNE 20, 2024**

BETWEEN

BLISS GVS HEALTH CARE LIMITED APPELLANT

AND

CONSOLATA HOSPITAL MATHARI 1ST RESPONDENT

AUTO GALLERY (MOMBASA) LIMITED 2ND RESPONDENT

CHADOR AUCTIONEERS 3RD RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. J. Macharia -
SPM in Nyeri CMCC No. 51 of 2018, delivered on 7th September, 2021)*

JUDGMENT

1. This is an appeal from the Ruling and order of the Hon. J. Macharia given on 7/9/2021 in Nyeri CMCC 51 of 2018. The Appellant was a defendant in the matter in the court below.
2. The Appellant was aggrieved by the decision of the court and filed a 7 ground Memorandum of Appeal. The said was to the effect that:
 - a. The learned magistrate erred in law and fact in failing to deliberate on and consider the general pleadings and submissions of the Appellant, specifically the Notice of Preliminary objection dated 10th August, 2021, the same was unopposed.
 - b. The Honourable court misdirected itself by handling the matter when it lacks jurisdiction to entertain and take cognizance of the plaintiff's application in light of the express mandatory provisions of section 11-15 of the *Civil Procedure Act*, Cap. 21 pursuant whereto, the law requires a suit to be filed in the court within the local limits of whose jurisdiction the defendant



resides or carries business or where the cause of action arose. Further that the recording of the consent and the cause of action arose in Nairobi and not Nyeri.

- c. That the court misdirected itself by handling the matter when it lacks jurisdiction to entertain and take cognizance of the plaintiff's application in light of the express mandatory provisions of section 7 of the *Civil Procedure Act*, Cap. 21. The matter res judicata having been heard and determined in the High Court Civil Appeal 33 of 2019 whereupon the aforesaid application was dismissed with costs.
- d. The learned magistrate erred by amending the consent dated 20th August, 2019 when the threshold for amendment of consents by a court of law had not been met.
- e. The learned magistrate erred by amending the consent dated 20th August, 2019 going against the principle of contra proferentem rule as it is the Applicant that prepared and filed the aforesaid consent and further that the alleged arithmetical error, if at all, was not attributable to the Appellant herein.
- f. That all in all, the learned magistrate erred in fact and in law by failing to appreciate the salient provisions of *the Constitution* and the civil procedure, the law of contracts on setting aside consents.
- g. That in light of the above, the learned magistrate failed to do justice to the Appellant.

Background

3. The respondent filed an application dated 28/11/2018 seeking the following orders:
 - a. Spent.
 - b. That this Honourable court be pleased to set aside the default judgment entered against the Defendant/Applicant and grant the Defendant/Applicant leave to file its defence out of time.
 - c. That the draft defence annexed to the instant application be deemed as duly filed upon payment of the requisite court fees and service of the same upon the Plaintiff/Respondent be dispensed with.
4. The court dismissed the said application on 19/2/2019. The matter proceeded and the Appellant closed their case. The court fixed the matter for judgment on 14/5/2019.
5. On the said date Judgment was entered for Ksh. 9,348,837 with interest from 1/1/2016 till payment in full.
6. On 20/5/2019 the court certified the Application dated 15/5/2019 as urgent and granted prayers 1 and 2. Parties agreed to proceed by way of written submissions. A ruling was reserved for 18/6/2019.
7. The Application dated and filed on the same day 15/5/2019 sought the following prayers: -
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That the Judgment and Order of Honourable magistrate P. Mutua made on 14th May, 2019 at Chief Magistrate's Court, Nyeri in CMCC No. 51 of 2018, between Consolata Hospital



Mathari and Bliss GVS Healthcare Limited be set aside and substituted with an order admitting the draft defence on record to be deemed duly filed upon payment of requisite court fees.

- e. That an order to issue that the matter be set down for hearing and to proceed on merits.
- f. N/a
 1. A response was filed on 27/5/2019. The court made a decision on 18/6/2019 where he ordered that: -
 - a. A sum of 12,692,646.3 be deposited in a reputable account within 14 days pending Appeal.
9. On 21/8/2019, the parties entered into a consent to the effect that: -
 1. The judgment debtor herein having failed to honour the terms of the consent entered into on the 8th of July 2019, it is hereby agreed by the parties as follows:
 - a. The parties hereby agree and consent that the total decretal amount is Kshs.12,000,000/=
 - b. The Judgment debtor to pay the plaintiff/Decree holder's advocate the sum of Kshs.4,000,000/= immediately and the plaintiff's advocate undertakes to release the attached goods forthwith receipt whereof is hereby acknowledged.
 - c. The sum of Kshs.500,000/= to be paid immediately upon filing of the consent in court.
 - d. The Judgment debtor to liquidate the remaining balance in the sum of Kshs.7,500,000/= in the following manner:-
 - i. Kshs.3,225,000/= on or before the 31st of August 2019.
 - ii. Kshs.3,225,000/= on or before the 30th of September 2019.
 - e. Failure by the Judgment debtor to pay any one single installment on the said date, execution process to issue.
 - f. Cost of the suit to be borne by the Defendant/Judgment debtor herein.
 - g. The matter to be marked as fully settled upon payment of the decretal amount.
10. The said consent was adopted as an order of the court on 14/11/2019 and an order extracted on 20/1/2020.
11. The plaint related to breach of contract where the Respondent sought general damages for breach of contract at Ksh.9,348,837.30/= in the plaint dated 7/5/2018.
12. There appears to have been demands for unpaid amounts of Ksh.21,654,028/= out of which Ksh.12,617,764/= was paid after demand and a balance of Ksh.9,031,264/= remained.
13. The Appellant indicated that they were aggrieved by the entire judgment given on 14/5/2019. The application dated 15/5/2019 though in the file is indicated was responded to by an affidavit dated 21/5/2019.
14. The background to the consent was that as at 18/6/2019, the application for stay pending appeal was allowed on condition that a sum of Ksh.12,692,646.30/= and Ksh.392,820/= to be deposited in a joint account pending appeal. It is not clear which application led to the order of stay pending appeal.



- However, this is a 2021 appeal. Meaning that as at 18/6/2019 the decretal sum was Ksh.12,692,646.30/ = plus 392,820/= making a total of Ksh.13,085,466.30/=.
15. An application was filed on 23/5/2022 to review an apparent arithmetic error on a consent. A sum of Ksh.9,348,837.30/= and interest of Ksh. 3,343,809/= was compromised to Ksh. 12,000,000/=.
 16. The Respondent is said to have filed HCCA 33 of 2019. The court directed that an application be filed in the lower court. The consent reached compromised the earlier application. The parties agreed on a sum of Ksh. 12,000,000/=. In the breakdown the following sums were covered:
 - i. Ksh.4,000,000/= be paid immediately to release attached goods. This was acknowledged.
 - ii. Ksh.500,000/= was to be paid upon filing, which is 27/1/2020.
 - iii. Ksh.3,225,000/= on 31/8/2019.
 - iv. Ksh.3,225,000/= on 30/9/2019.This totals up to Ksh.10,950,000/=
 17. There is a balance of Ksh.1,050,000/= not covered in the payment schedule.
 18. However, clause 6 provided that the matter will be marked as settled upon payment of the decretal amount. This means that the matter cannot be marked as settled without the full payment.
 19. There is therefore correctly an error in omitting the said sum. The said amount was due and payable as per clause 1. The error in not indicating the same, does not vitiate the consent. The last bit of Ksh.7,500,000/= is thus complete to the extent of Ksh.6,450,000/=. The balance of Ksh.1,050,000/= is due and owing.
 20. The respondent made an application dated 17/5/2021 seeking the following: -
 - a. That the orders made by this Honourable court on the 14th of November, 2019 be set aside in their entirety.
 - b. That this Honourable court be pleased to issue the Plaintiff/Applicant with fresh warrants of attachment and to allow the Plaintiff/Applicant proceed with execution process to recover the decretal sum plus costs and interest therefrom.
 - c. That in the alternative this Honourable court be pleased to review its order made on the 14th November, 2019 to correct the apparent arithmetic error on the face of the record.
 - d. That the Plaintiff/Applicant to have costs of this application.
 21. The court delivered a ruling on 30/9/2019 to the effect that: -
 - i. That the consent order dated 20/01/2020 is hereby varied and reviewed in clause 4 (paragraph 4) of the consent.
 - ii. That paragraph 4 of the consent is hereby reviewed and orders to read;
4. THAT judgment debtor to liquidate the remaining balance of Kshs.7,500,000/= in the following manner;
 - a. Kshs.3,750,000/= on or before 31/8/2019.
 - b. Kshs.3,750,000/= on or before 30/9/2019.
 22. This was the basis for the Appeal herein.



Analysis

23. The Appellant's raised issues in the memorandum of Appeal do not arise from the decision of the court. The only issue before the court was whether, the consent order had a gap of Ksh. 1,050,000/=.
24. The court corrected the amendment by changing the installments. It did not need to amend the instalments. The said amount is a hanging instalment. Where there is no agreement on when the account is due and payable, the same is due on the earliest date it could be paid. In this case, it was due and payable on 31/8/2019.
25. The court erred in amending the consent but was correct that a sum of Ksh.1,050,000/= was due and available. The consent remains as:-
 - a. Ksh.3,225,000/= on or before 31/8/2019.
 - b. Ksh.1,050,000/= on or before 31/8/2019.
 - c. Ksh.3,225,000/= on or before 30/9/2019.
26. The court did not err in correcting the error. The same was not an arithmetic error but an omission. The Appellant cannot escape liability simply because the instalment for Ksh.1,050,000/= was not captured. The amount of Ksh.12,000,000/= was agreed. Instalment of Ksh. 10,950,000/= were agreed.
27. It must be remembered that a consent is a contract between the parties. Where, the same has been recorded, it is an order of the court. The same cannot be set aside whimsically. In Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd (1982) KLR 485. It was held inter alia in this regard as follows:

“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 Court of Appeal in *Munyiri vs Ndunguya* (1985) KLR 370 also held that the only remedy available to parties who want to get out of a consent order is to set aside the consent order by way of review or by bringing a fresh suit in court

28. In the case of *Brooke Bond Liebig Ltd vs Mallya* (1975) E.A 266 it was held that a court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for varying and rescinding a contract between the parties. This position was also reiterated in *Contractors Ltd vs Margaret Oparanya* [2004] eKLR where this court stated as follows;

“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.”



29. In the case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR, Hancox JA, Nyarangi & Platt Ag JJA) justice Hancox JA, Nyarangi & Platt Ag JJA stated as follow: -

“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: see the decision of this court in *J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983*. In *Purcell v F C Trigell Ltd* [1970] 2 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 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...”

30. It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in *Hirani v Kassam* (1952) 19 EACA 131, at 134, as follows:

“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. No such ground is alleged here. The position is clearly set out in *Setton on Judgments and Orders* (7th edn), 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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

31. *Purcell V. F.C. Trigell Ltd.* [1971] 1 QB 358 (at pg. 364), Lord Denning, M. R. in his judgment stated-

“But, even though the order cannot be set aside, there is still a question whether it should be enforced. The Court has always a control over interlocutory orders. It may, in its discretion vary or alter them, even though made originally by consent.”

31. In this case there is an agreement to pay Ksh.12,000,000/=. Therefore, the total decretal sum was Ksh. 12,000,000/= as compromised. A sum of Ksh 1,050,000/= was not covered in the consent, however due and owing. Such mistakes are valid for setting aside a consent. In this matter it is not setting aside but correcting an error.

32. There is no waiver in the consent of the payment. It is thus due and payable.

33. The issue of *contra proferendum* is simply legal verbiage with no inkling towards the settlement of the case herein. For jurisdictional issues, the same are otiose, the consent having been entered into. There are no two ways of interpreting the consent other than the decretal amount of Ksh. 12,000,000/= was due and owing. The rule is therefore not applicable.

34. Questions related to the merit of defence were already dealt with on dismissal of the Application dated 28/11/2018.



35. The amount of 1,050,000/= remained payable independent of the instalment. Without agreement on payment, the Respondent should have executed immediately. They did not. The parties either by omission or deliberately did not cover the instalment of Ksh. 1,050,000/=. They however did not remove it from the decretal sum. Decretal sum must be paid whether or not parties agree.
36. In the circumstances, I find that a sum of Ksh.1,050,000/= was due and owing. The appeal has no merit and is consequently dismissed in limine.
37. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
38. Section 27 of the *Civil procedure Act* provides as follows: -
- (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.
39. The Appellant filed a frivolous appeal. It should never have been filed. Given the humongous default, the sum of Ksh.1,050,000/= shall attract interest of 6% from 7/9/2021, the date of ruling, pursuant to section 26 of the *Civil Procedure Act*, until payment.
40. The Respondent shall have costs of Ksh.195,000/= payable within 30 days.

Determination

41. In the circumstances I make the following orders:



- a. The Appeal lacks merit and is consequently dismissed with costs of Ksh.195,000/=.
- b. The sum of Ksh.1,050,000/= was due and owing independent of the instalments.
- c. The said sum shall attract interest at 6% from 7/9/2021.
- d. The interim orders are vacated. In lieu thereof all securities be released to the Respondent.
- e. The Appellant to pay Auctioneers costs and storage charges before collecting any attached goods.
- f. The amounts due and owing shall be paid within 14 days in default execution shall issue.
- g. Any security to be released to the Appellant shall be released within 7 days in default the Deputy Registrar to sign on behalf of the Appellant.
- h. The file is closed.
- i. Right of appeal 14 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Obani for the Appellant

Mr. Mugambi for the 1st Respondent

Mr. Ombiro for the 2nd Respondent

Court Assistant – Jedidah

