



REPUBLIC OF KENYA



Abdalla v Jamadar (Civil Appeal E343 of 2023) [2024] KEHC 9119 (KLR) (8 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E343 OF 2023**

DKN MAGARE, J

JULY 8, 2024

BETWEEN

FATUMA MOHAMED ABDALLA APPELLANT

AND

SALIM ALI JAMADAR RESPONDENT

RULING

1. This is an application dated 28/11/2023 by the Applicant and brought under Section 3A and 95 of the *Civil Procedure Act*, Cap. 21, Laws of Kenya and Order 42, Rule 6, Order 50 Rule 6, Order 51 Rule 3 of the Procedure Rules seeking the following Orders: -
 - a. Spent
 - b. That in view of the urgency of this matter, this Honourable Court do grant a stay of execution of the Honourable Chief Magistrate's Court's Order and/ruling made on the 9th November 2023 pending the hearing of the application inter partes.
 - c. That this Honourable Court be pleased to grant stay of execution of the Order and/or decision of the Honourable Chief Magistrate Court made on the 9th November 2023 until the hearing and final determination of the Intended Appeal to the High Court by the Appellant/Applicant
 - d. That the costs of this application be provided for.
2. The application is premised on the grounds that the Appellant is the actual and beneficial owner of a Swahili house without land located on Plot No. 64/II/MN house No. 36 since 1992 and that the Respondent sub-divided the land and obtained title for the Appellant's portion and they agreed on a repayment plan.
3. It was his case that on 14th June, 2018, the Appellant executed a consent agreement with the Respondent's advocate of which the terms were that the Applicant pay a sum of Kshs. 576,600/= in



a period of 48 months from 1st July 2018 for the transfer of the house in her name which was entered as judgment. However the Appellant thereafter fell into ill health rendering her unable to meet her obligation.

4. It was further stated that on 24th October 2022 the Appellant made a proposal to the Respondent on a repayment plan which was rejected in spite of the Appellant still being in ill health and frail.
5. The Respondent subsequently filed the Application of Notice to Show Cause seeking for the arrest and imprisonment of the Appellant in execution. The Appellant/Applicant is dissatisfied with the Ruling and/or decision of the Honourable Chief Magistrates Court made on 9th November 2023 and has instructed her Advocate to lodge an appeal to the High Court against the said Ruling and/or decision.
6. They were apprehensive that execution of the decree would be drastic as the Appellant will be arrested and imprisoned which would further escalate her frail prevailing circumstances. She averred that she had to date deposited a sum of Kshs. 100,000/- with the advocates herein and that despite her poor financial state, shall attempt to finalize payment of the decretal sum in monthly instalments of Kshs 10,000/-, which money she was to deposit either with the Court or in a joint interest earning account in the names of the advocates of the parties. Their take was that her appeal is arguable and has high chances of success.
7. The Respondent filed submissions and a replying affidavit dated 6/12/2024 stating that no reasonable proposal has been given and the proposal was not made in good faith. He prayed that the application be dismissed.
8. Parties filed written submissions which are comprehensive. The Respondent vide their submissions dated 16/1/2024 stated appeal is against the refusal of the mode of payment. The matter had been agreed to be paid by consent dated 14/6/2018.
9. The Applicant filed an application for stay pending the appeal from the decision of 9/11/2023 stating that the applicant is the owner of a Swahili House on Plot 64/II/MN house No. 36 and there was a consent on payment.

Analysis

10. There is no stay from the main decree. An order of stay cannot be appealed from. There is nothing to stay. There is nothing to execute as the order dismissing the stay application is not executable.
11. There is nothing to be heard on this matter. The Judgment in the lower court was by consent. There has been no challenge on the consent Judgment. A party cannot Appeal on matters already agreed by consent.
12. In the Court of Appeal in the case of *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266 at 269 Law Ag P said:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”
13. In *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485, Harris J correctly held inter alia, 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 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.

A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

14. In *Hirani v. Kassam* [1952] 19 EACA 131 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.

15. In the case of *Flora N. Wasike v. Destino Wamboko* [1988] eKLR this Court 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: see the decision of this Court in *J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.*”

16. 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...”

17. The consent was on a specific order. It is for payment by instalments. The Applicant has not brought herself within the parameters for setting aside a consent order. This is different from a case where judgment is already entered and parties agree to payments. The breach thereof does not go to the judgment.

18. The consequence of this is that there is no appeal before the court. The application filed with it is thus untenable. I dismiss the application dated 8/4/2023.

19. There is no decree arising from the application dated 9/11/2023. It was all application for stay of a crystallized and un-appealed consent order.

20. Consequently, the entire appeal is struck out in limine with no order as to costs as the Appeal has not been admitted.

Determination

21. The upshot of the foregoing is that I make the following orders: -

a. The appeal herein is struck out but with no order as to costs.



- b. The application dated 28/11/2023 is dismissed with costs of Kshs. 25,000/= payable within 30 days in default execution to issue.
- c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF JULY, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Wambui for Applicant

No appearance for the Respondent

Court Assistant – Jedidah

