Tulsi Construction Limited v Tron Enterprises Limited (Civil Appeal E076 of 2022) [2024] KEHC 11293 (KLR) (Civ) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11293 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E076 OF 2022

CJ KENDAGOR, J

SEPTEMBER 23, 2024

BETWEEN

TULSI CONSTRUCTION LIMITED ..... APPELLANT

AND

TRON ENTERPRISES LIMITED ..... RESPONDENT

(Being an appeal from the Ruling of Hon. H.M. Nyaga, Chief Magistrate (as he then was), delivered on 2nd February, 2022 in MILIMANI CMCC 2104 OF 2019)

JUDGMENT

1. The Appellant and the Respondent entered into various contractual arrangements between 2013 and 2014 under which the Respondent supplied the Appellant cement at various construction sites. A dispute arose about the payments and the Respondent instituted Civil Case No. 2104 of 2019, vide a plaint dated 14th March, 2019. In the Plaint, the Respondent claimed that the Appellant was in breach of contract for failing to settle an outstanding debt of Kshs.8,654,710/=. The Appellant filed an Amended Statement of Defense dated 8th June, 2020. Based on the text of the said Amended Statement of Defense, the Respondent claimed that the Appellant had made an admission and acknowledged a debt to the sum of Kshs.5,808,710/=.

2. As a result, the Respondent made a formal application dated 17th July, 2020 requesting the court to enter partial judgment on admission in their favour for the admitted sum, and the dispute regarding the reminder be left for determination. The Appellant opposed the application and argued that the Respondent had misinterpreted the Amended Defense as an admission. However, the court entered partial judgment for a sum of Kshs.5,808,710/= in favour of the Respondents on 22nd January, 2021. The balance was to proceed for a full hearing. On 16th July, 2021, the Appellant and the Respondent entered into "a Consent."

3. One of the terms of the consent was that the Appellant would pay Kshs.2,800,000/= in place of the Kshs.5,808,710/= decreed by the court. Another term was that the agreed Kshs.2,800,000/= would be paid in instalments. There was also a term that the payment of Kshs.2,800,000/= would be deemed as full and complete settlement and satisfaction of the Kshs.5,808,710/= decretal sum. The duly signed and executed agreement was, however, not filed in court. Nonetheless, on the basis of "the consent," the Appellant made several payments to the Respondents totaling up to Kshs.1,600,000/=.

4. Against this backdrop, the Respondent however went ahead and took out a partial decree with respect to the partial judgment of the Kshs.5,808,710/= and commenced execution against the Appellants. It obtained a Warrant of Attachment and Sale of Property dated 6th August 2021. It also issued a Proclamation Notice dated 12th August, 2021. The Appellant rushed to court to stop the impending execution via an application dated 13th August 2021.

5. In the application, the Appellant sought an interim order of Stay of Execution. It also sought the court to allow them to pay the consented amount by way of instalments. On 29th October 2021, the court dismissed the application without going into its merits due to limitations emanating from the manner in which the orders sought had been framed. It however allowed the Appellant to file a fresh and similar application seeking proper or substantive orders.

6. Consequently, the Appellant filed a new application on the same day seeking a stay of execution of the looming attachment of assets and an order to be allowed to settle the decretal sum in instalments in accordance with the terms of the consent signed by the parties. The court dismissed the application on 2nd February, 2022. It held that the Appellant could not seek to rely on the purported consent because it was not filed for adoption by the court. It also held that the court could not allow the Appellant to settle the amount in instalments because it did not specifically ask for it.

7. The Appellant was dissatisfied with the entire Ruling and appealed to this court vide a Memorandum of Appeal dated 21st February, 2022 and filed to this court on 22nd February, 2022. The Appellant lists ten grounds, namely that;

    1) The learned Magistrate erred in fact and in law by dismissing the Appellant's Application by failing to demonstrate how the Appellant had not satisfied the principles and or requirements of granting an interlocutory injunction.

    2) The learned Magistrate erred in fact and in law by failing to grant the Appellant an interlocutory injunction by failing to elucidate how the Appellant had not established a prima facie case.

    3) The learned Magistrate erred in fact and in law by failing to grant the Appellant an interlocutory injunction by failing to elucidate how the Appellant failed to demonstrate to the court that they shall suffer irreparable harm incapable of being compensated by an award of damages.

    4) The learned Magistrate erred in fact and in law by failing to grant the Appellant an interlocutory injunction by failing to address the issue of where the balance of convenience lies before granting or denying an interlocutory injunction.

    5) The learned Magistrate erred in law and fact and misdirected himself by taking into account irrelevant considerations in denying the Appellant an interlocutory pending determination of the suit.

6) The learned Magistrate erred in fact and in law by wholly misdirecting the application of law and irregularly denying the Appellant an interlocutory injunction pending settlement of the remainder/balance of the decretal sum in instalments.

7) The learned Magistrate erred in law and in fact by misdirecting the application of law and irregularly denying the Appellant an interlocutory injunction pending settlement of the remainder/balance of the decretal sum vide instalments.

8) The learned Magistrate erred in law and in fact by misdirecting the application of law and irregularly denying the Appellant an interlocutory injunction by refusing to take cognizance that the Appellant has good faith by making instalments.

9) The learned Magistrate erred in law and in fact by denying the Appellant an interlocutory injunction pending the determination of the suit since the Appellant was making instalments on monthly basis.

10) The learned Magistrate erred in law and in fact by not appreciating the provisions of Section 44 of the *Civil Procedure Act* which prohibits attaching tools of trade and by extension denying the Appellant an interlocutory injunction to save its life as opposed to ending it since the Appellant has been paying the decretal sum vide instalments.

8. The Appellant asked the court to set aside the Ruling and consequential orders of the trial Court issued and delivered on 2nd February, 2022 in its entirety. The appeal was canvassed by way of submissions.

The Appellants Submissions:

9. The Appellant's submitted that the trial court failed to consider the Appellant's proposal to settle the decretal sum in instalments. They argued that they formally intimated to the trial court that they were willing and ready to settle the decretal sum in instalments. Further, they argued that the court should have acknowledged the consent because both parties duly signed and executed it. In addition, they maintained that the Respondents ought to be bound by the consent because they did not challenge and/or impeach their signatures on the said consent.

10. They argued that the Respondents are bound by the doctrine of estoppel based on their conduct and representation with regards to the consent. They also argued that the signed consent amounted to a binding contract between the parties and thus the lower court erred by failing to give it legal recognition. Lastly, they opined that the Respondents entered into the consent freely and voluntarily, and thus they should not be allowed to unilaterally alter and/or review the terms of the said consent. The Appellants relied on several authorities namely, the Speaker of Kisii County Assembly and Two Others Versus James Omariba Nyaoga [2015] eKLR, The National Bank of Kenya Versus Pipeplastic Samkolit Kenya Limited and Another [2001] eKLR and the 748 Air Limited vs Theuri [2017] eKLR which I have duly considered.

The Respondent's Submissions:

11. The Respondent's submitted that the determination of the subordinate court was sound and that there is absolutely no justifiable reason to interfere with that Ruling. They argued that the Appeal lacks merit and that it ought to be dismissed. They submitted that the "consent" does not reflect the intentions of parties and that its contents are evidently what would be as an unconscionable bargain. They also disassociated themselves with the consent and argued that the consent was being forced upon themselves. They urged the court to disregard the consent because it was tainted with unconscionability.

12. In addition, they submitted that the movable properties sought for attachment do not fall under the category of items prohibited from attachment. The Respondents argued that the protection given under Section 44 of the *Civil Procedure Act* does not extent or apply to the Appellants. They relied on several authorities, namely, Halsbury's Laws of England Volume 2 (2012) 5th Edition at Paragraph 298 states of unconsionability; Margaret Njeri Muiruri vs Bank of Baroda (2014) eKLR and Blackwood (Kenya) Limited vs Lead Gasoline Tank Cleaning Sam & Chase (K) Ltd [1986] eKLR.

13. Being a first appeal, the court is mandated to re-evaluate the evidence submitted at the lower court in line with the principles as set out in Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123:-

> "...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

Issues For Determination: What are the legal implications of post-judgment agreements, especially when not filed in court?

14. The Appellants submitted that the purported consent amounted to a binding contract that effectively replaced the partial judgment entered against them. They argued that the consent set aside the Kshs.5,808,710/= decretal sum and in its place allowed the parties to settle the debt at Kshs.2,800,000/=. On the other hand, the Respondents submitted that the purported consent does not have any legal effects because, among other reasons, it has not been adopted as an order of the court and as such it is not a judgment of the Subordinate Court.

15. There is little controversy on whether the purported consent was filed and adopted by the lower court. Upon my perusal of the pleading placed both at the Lower Court and the parties' submissions before this court, it is clear that the purported consent was neither filed nor adopted at the Lower Court. The Respondents claim that the Consent was not adopted as an order of the court. As for the Appellants, they are silent on whether the consent was ever filed in court or its adoption. Instead, they argue that the said consent was envisaged to be adopted 'automatically' on maturity, which was on 28th February 2022, after all the monies has been duly paid. The lower court also confirmed that it did not find the consent in the court's e-filling platform and file uploads. I have no reason to doubt the court's observation. Thus, this court agrees with the lower court's factual finding that no such consent was filed.

16. Having established that the purported consent was neither adopted nor filed in court, the next issue for consideration is to determine its legal implications. What are the legal implications of post-judgment agreements, especially when not adopted by the court? The issue was handled by the High Court at Kakamega in the case of John Juma & 2 others v Patrick Lihanda & 3 others; Zedekiah Orera & 466 others (Interested Parties) [2019] eKLR, where the court held as follows;

> "I am unable to buy the urguement by Mr. Musiega that adoption of a settlement is a mere formality. Though Section 59B of the *Civil Procedure Act* does not provide for the

adoption of the settlement by the court this is complemented by Rule 12 (b) of the Judiciary Mediation Manual Practice Directions (Amendment) 2018 which provides that:-

> "Any agreements filed with the Deputy Registrar or magistrate or Kadhi as the case may be shall be adopted by the court and shall be enforceable as the judgment or order of the court."

21. It is clear from Rule 12 that for a settlement to be a valid judgment of the court it has to be adopted by the court. In my view a settlement only becomes a judgment upon being adopted by the court and where it has not it cannot be enforced as a judgment or order of the court.

17. The current case bears striking similarity with the case of Fidelity Shield Insurance Co. Ltd v Gabriel Ngaruha Kabue [2021] eKLR (Hereinafter referred to as the Fidelity Shield Insurance Co. Ltd case), where the High Court at Kiambu, exercising its appellate jurisdiction, recognized a post-judgment consent that had not been adopted by the lower court. In the case at the lower court at Thika, the court had entered a default judgment against the defendant. Subsequently, the parties entered into a consent that was filed in the lower court, but was not adopted. The Defendant nonetheless appealed the default judgment, and sought to disassociate themselves with the signed consent on grounds that it was not signed by their authorized agents. The Plaintiffs (Respondents at the High Court) requested the High Court to adopt the consent judgment. The High Court adopted the parties' consent as an order of the lower Court. The Court held;

> " 9. The consent signed on behalf of Gabriel and by Sammy Kamau on behalf of Fidelity is therefore valid. It will be seen from that consent reproduced above in the opening paragraph that the parties requested the court (Thika court), to record, that is adopt, the consent. In my perusal of the Thika court file, I found that, that court by the time the file was brought to this Court, because of this appeal, the consent of the parties had not been adopted as an order of the Thika court. What then should this Court do with that consent which is found to be valid?
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> 10. That question is answered by the Supreme Court's decision in the case of GEOFFREY M. ASANYO & 3 OTHERS VS. ATTORNEY GENERAL (2018) eKLR. The Supreme Court in that case was persuaded by a case of Nigeria Supreme Court where the Nigeria Supreme Court faulted its appeal court for striking out an appeal where parties had consented to resolve the dispute, although terms of that settlement had not been adopted by the High Court. The Supreme Court of Kenya in discussing the provisions of Article 159(2)(c) of *the Constitution* which Article sets out the principles that guide anyone exercising delegated judicial authority to consider alternative dispute resolution in exercise of such authority, was persuaded by the Nigerian Supreme court's decision.
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> 12. This Court, in recognition that parties are entitled to resolve their dispute by use of alternative dispute resolution mechanism, in this case by a consent, the court will proceed to adopt that consent.

18. However, although this court should be guided by this earlier decision, there are several factors that distinguish the two cases. In the Fidelity Shield Insurance Co. Ltd Case, the parties had filed the consent in the lower court, while in this case, the parties did not file the consent. In addition, in the Fidelity

Shield Insurance Co. Ltd Case, the Plaintiff requested the court to adopt the consent, while in this case, the Appellants have not made such a request. Even the Notice of Motion filed at the lower court on 29th October, 2021 did not have such a request amongst the orders sought. Further, in the Fidelity Shield Insurance Co. Ltd case, the Defendant did not dispute the validity of the consent, unlike the current case where Respondents dispute its validity on grounds of unconscionability.

19. Also, the Defendants in the Fidelity Shield Insurance Co. Ltd. case disowned the consent on the ground that it was signed by one of its officers and not its advocate. To this extent, the Defendants were admitting that they recognize the persons who signed the consent and that the persons were actually their officers. In contrast, in the current case, the Respondents argue that it was not signed by its authorized agents and does not recognize whoever signed it on their behalf. Lastly, in the Fidelity Shield Insurance Co. Ltd, it was very easy for the court to ascertain the persons who signed the consent. This is because it bore the specific names of the persons who signed, against the parties they represented.

20. In contrast, in the current case, it is not easy to identify the particular persons who signed the purported consent. I have perused the purported consent dated 16th July, 2021 and I have observed that it only bears the signatures and does not have the names of the persons who appended the signatures. The lack of such particulars made it difficult for this court to independently identify the persons who signed the consent and ascertain their authority to do so as an agent. Including the names of the persons signing would have been beneficial, especially in light of the Respondent's allegations that the purported consent was not signed by their authorized agent.

21. I have outlined the distinguishing factors and peculiar circumstances of this case and found that the court cannot adopt the said consent.

Whether the Appellant should be allowed to settle the partial decree in instalments?

22. The power of the court to order the settlement of a decretal sum in instalments is well acknowledged. In the case of KTK Advocates v Baringo County Government [2018] eKLR, the High Court at Nairobi observed that;

> In that regard, any decision on whether a court should allow a party to settle a decree by instalment is an issue of discretion to be exercised judicially. It is up to the Applicant to show to the court's satisfaction that such a request is deserved in the circumstances of the case. This is because a successful litigant with a decree acquires a right to be protected by courts. The court will not order a judgment debtor to pay by instalment without making a case for it.

23. Whether or not to allow a party to settle a decree by instalment, is a matter of exercise of discretion. And the court must be satisfied that the Applicant deserves exercise of that discretion. Order 21 Rule 12 of the Civil Procedure Rules (2010), grants the court power to allow a judgment debtor pay decretal sum by instalments. The rule provides that;

> "(1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.
>
> (2) After passing of any such decree, the court may on the application of the judgment debtor and with the consent of the decree- holder or without the consent of the decree holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms

as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit."

24. In Hildegard Ndelut v Letkina Dairies Ltd & Another[2005]eKLR it was stated that;

> " a judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment debtor might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount."

25. The prevailing jurisprudence shows that a party seeking to be allowed to settle a decree in instalments should first approach the court with a written proposal of how it intends to pay the instalments. In Lavington Security Limited v Nairobi City Water & Sewerage Co. Ltd [2014] eKLR, the High Court at Nairobi observed as follows;

> " (13) Should I accept one or other of the proposed amount of instalments by parties or should the Court order a separate amount of instalment altogether? In strict sense, the Court is not bound by the proposals made by the parties although such proposals are critical in determining an application to pay by instalments."

26. The Court is also live to the fact that in cases where courts have allowed settlement by instalments, the applicant had made a formal proposal reflecting the decretal sum and a complete proposal on how the entire sum would be paid in instalments. (Sinoven International Group Limited & another v Yalfa Cargo Handling Limited [2021] eKLR, Lavington Security Limited v Nairobi City Water & Sewerage Co. Ltd [2014] eKLR, Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR, *Reliable Concrete Works v Ngewanji Company Ltd (Civil Case 69 of 2016*) [2022] KEHC 12594 (KLR) (28 July 2022) (Ruling)).

27. Applying these principles to the current case, the Appellant did not request the court to order the payment of the decretal sum in instalments. The Memorandum of Appeal dated 21st February, 2022 does not have such a request. They also did not make a specific proposal with regard to the decretal sum of Kshs.5,808,710/=. What is before the court is the instalments captured in the disputed consent. Even so, the instalments captured in the disputed consent would still not apply in the current circumstances because they were dealing with the payment of Kshs. 2,800,000/= as opposed to the decretal sum of Kshs 5,808,710/=, which is way higher than the figure contemplated in the consent.

28. In the end, having considered the appeal, submission and the law, and upon independent review of the evidence on record, I conclude that the appeal has no merit. It is dismissed with costs to the Respondent.

29. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON 23RD SEPTEMBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Hellen

Nchaga: Advocate for Appellant

Biko Angwenyi: Advocate for Respondent