



Wangari v Dinara Developers Limited; Muhiu (Judgment debtor) (Miscellaneous Application 366 of 2018) [2023] KEHC 1110 (KLR) (Civ) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1110 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION 366 OF 2018
CW MEOLI, J
FEBRUARY 16, 2023

BETWEEN

JOHN KAHUGU WANGARI APPLICANT

AND

DINARA DEVELOPERS LIMITED RESPONDENT

AND

ANDREW KAMAU MUHIU JUDGMENT DEBTOR

RULING

1. For determination is the motion dated 09.09.2022 by John Kahugu Wangari (hereafter the Applicant) seeking among others that the honorable court be pleased to vary its orders of 23.05.2022 and provide for execution in default of payment. The motion is expressed to be brought under section 1A, 1B, 3 & 3A of the *Civil Procedure Act* (CPA), on grounds on the face of the motion as amplified in the supporting affidavit sworn by David Kamau Githinji, counsel having conduct of the matter on behalf of the Applicant.
2. To the effect that on 23.05.2022 the court marked the instant matter as settled on the basis that Andrew Kamau Muhiu (hereafter the Judgment-debtor), had settled as substantial amount of the decretal sum and had meanwhile issued various post-dated cheques worth Kshs. 1,600,000/- in part settlement of the decretal sum. That upon the Applicant banking some of the post-dated cheques, they were returned as dishonored and despite engaging the Judgment-debtor to settle the outstanding decretal sums, he had failed to do so. That while the Applicant's advocate has in his possession of four (4) cheques issued by the Judgment-debtor, he is hesitant to bank them as they may be dishonored causing even greater embarrassment to his law firm. The deponent states that in good faith he had engaged the



Judgment-debtor who remains non-committal since the last court appearance on 26.07.2022 and has failed to make any payments towards settlement of the decretal sum.

3. In conclusion he asserts that unless the motion is allowed the Applicant will be unable to execute the decree against the Judgment-debtor as the matter had been marked as settled and yet the Judgment-debtor has exhibited no intention of settling the balance on the decretal sum.
4. The judgment debtor opposes the motion by way of a replying affidavit dated 26.10.2022. He deposes that the Applicant's allegations are falsehoods; that having been informed by the Applicant of the dishonored cheques totaling Kshs. 320,000/- he made good by depositing Kshs. 250,000/- leaving a balance of Kshs. 70,000/-; and thereafter made deposits of Kshs. 120,000/- and Kshs. 100,000/- respectively in settlement of the balance of the decretal sum.
5. That on account of the foregoing, the Applicant has a surplus of Kshs. 150,000/- and the four (4) other cheques which he has failed, or neglected to bank. He expresses willingness to settle the entire decretal sum. In conclusion he asserts that the motion is untenable and devoid of merit and ought to be dismissed with costs.
6. In a rejoinder by way of a further affidavit counsel for the Applicant reiterated that the order issued on 23.05.2022 was predicated on the fact that the Judgment debtor had issued post-dated cheques totaling Kshs. 1,600,000/- in part settlement of the decretal sum. That given the casual conduct of the judgment-debtor execution in default of payment is available to the Applicant. He further deposes that as in the recent past, further payments by the judgment debtor ought to be made through Mpesa. In conclusion he asserts that the Applicant is entitled to the fruits of his decree and if the motion is not granted as prayed, the Applicant will be unable to execute the decree against the judgment debtor who is in default.
7. Parties hereto agreed to canvass the motion on the basis of their respective affidavit material in support and opposition to the motion. This court has considered the respective material canvassed in respect of the motion.
8. The key question for determination is whether the Applicant has established grounds for the setting aside or variation of the order of this court issued on 23.05.2022. In that regard, the court has taken the liberty of perusing the record of proceedings to contextualize the instant motion.
9. On 08.12.2021 Serگون. J allowed the Applicant's motion dated 06.08.2021 by requiring the Judgment-debtor to attend court on 25.02.2022 to be cross-examined on his means and the prayer that the corporate veil in respect of the Dinara Developers Limited (hereafter the Respondent) be lifted and the judgment-debtor ordered to personally satisfy the judgment entered against the Respondent. The Judgment-debtor thereafter filed a motion dated 14.12.2021 which was apparently not prosecuted.
10. Thereafter, the Judgment-debtor moved this court vide a motion dated 09.02.2022, on which directions were taken and matter slated for mention on 23.05.2022 for further directions in respect of the pending motions before the court. On the latter date, Mr. Githinji was appeared for the Applicant while Ms. Wangu was holding brief for Mr. Kago for the Judgment-debtor. The proceedings in respect of the foregoing date are reproduced verbatim as follows;

“Mr. Githinji

The Respondent is at advanced stage in settling decretal sum. We have cheques in sum of Kshs 1.6m. The application is of no consequence. We are almost fully paid.

Ms. Wangu



Litigation ought to come to an end.

Court

By consent the matter is herein marked as settled. Parties to bear own costs” (sic)

11. The grounds upon which a consent order may be set aside are settled. Hancox JA in the celebrated Court of Appeal decision of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR stated that: -

“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 *JM Mwakio v Kenya Commercial Bank Ltd*. Civil Appeals 28 of 1982 and 69 of 1983. In *Purcell v F. C. Trigell Ltd* [1970] 2 ACCER671, Winn LJ said at 676:

“It seems to me that, if a consent order is to be set aside on grounds which 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...”

12. The learned Judge continued to state that: -

“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, 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.”

See also *Brook Bond Liebig (T) Ltd v Mallya* (1975) EA 266.

13. The latter passage was also followed by the High Court in *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1980] eKLR where the court held that:-

“..[A]fter the commencement of an action, the solicitor for a party has an implied general authority to compromise and settle the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the notice of the other side.”

14. Both the courts in the *Brook Bond Liebig* (supra) and the above case refused to set aside the disputed consent orders. On an appeal in respect of the *Kenya Commercial Bank Ltd* (supra), the Court of Appeal held that the advocate had both the implied and ostensible general authority to bind the appellant client “in effecting the compromise”. The court affirmed the judgment of the High Court and dismissed the appeal. In a more recent decision in *Intercountries Importers and Exporters*



Limited vs. Teleposta Pension Scheme Registered Trustees & 5 others [2019] eKLR, the Court of Appeal pronounced itself as follows:-

“Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside...”

15. This court has to determine based on the material before it whether the Applicant has made out a case for setting aside of the consent order on grounds of either fraud, non-disclosure of material facts, misrepresentation or mistake.
16. The consent order herein was agreed upon by counsel representing the parties who had the requisite authority to compromise the motion as they did. Black’s Law Dictionary defines misrepresentation as:

“1. The act or an instance of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion. 2. The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.”
17. Having looked at the depositions of the parties, the court notes that during the proceedings in which the consent was recorded, the intimation concerning settlement of the decretal sum came from the Applicant’s counsel while the Judgment-debtor’s counsel merely affirmed the fact that “litigation ought to come to an end”. It can thus be argued that the Judgment-debtor did not verbally induce the Applicant’s counsel to consent to record the consent . However, by not disputing the assertions by the Applicant’s counsel, counsel for the judgment debtor by conduct and his subsequent affirmatory statement created the impression that he was aware of the fact that the cheques had been issued by his client and would ultimately clear therefore settling the matter.
18. In the court’s view, the Judgment-debtor’s conduct appears mischievous and borders on misrepresentation at best, or fraud at worst. The issuance of the post-dated cheques that were dishonored would constitute an offence under section 316A of the Penal Code. Thus, by misrepresentation, the judgment debtor obtained settlement of the matter and protection from execution. As stated by the Applicant’s counsel, so long as the decretal sums remain unpaid, the Applicant retains the right of execution against the judgment debtor. The judgment debtor herein acknowledges that the some of the post-paid cheques were returned and that he attempted to make good by remitting monies through Mpesa towards settlement of the decretal sum. However, it is undisputed that the sum outstanding is yet to be paid in full.
19. Considering all the foregoing, the court is of the view that the motion 09.09.2022 is merited. The consent recorded on 23.05.2022 is hereby set aside to facilitate execution in satisfaction of the outstanding decretal sums in the event the judgment debtor fails to settle the said sums. The judgment debtor will bear the costs occasioned by this motion.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 2023

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Githinji



For the Respondent/ judgment-debtor: Ms. Macharia h/b for Mr. Kago

C/A: Carol

