



**Abura v Wapangana & another (Civil Case 15 of 2012)
[2023] KEHC 3404 (KLR) (Commercial and Tax) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 15 OF 2012
JWW MONG'ARE, J
APRIL 18, 2023**

BETWEEN

HARRIET MAIRAGA ABURA PLAINTIFF

AND

ERIC KIMINGICH WAPANGANA 1ST DEFENDANT

EUNICE MWIHAKI KARIUKI 2ND DEFENDANT

RULING

1. By a Notice of Motion dated January 25, 2023 the 1st defendant /Judgment Debtor has moved to court under a certificate of urgency brought under order 21 rule 12(2) of the *Civil Procedure Rules, 2010*, Section 63(e) of the *Civil Procedure Act* and all the enabling provisions of the law, seeking the following orders;
 - i. Spent
 - ii. Spent
 - iii. That the Honourable Court be pleased to vary/review the consent order of May 4, 2018 and allow the Judgment debtors to liquidate the decretal amount in Monthly instalments of Kshs 50,000
 - iv. In the alternative, the Honourable Court be pleased to suspend the payment of the balance of the decretal amount for a period of 12 months.
 - v. Costs be provided for.



2. The application is supported by the grounds on the face of it and the sworn affidavit of Eric Kimingich Wapangana, the 1st Defendant/Judgment-Debtor dated January 25, 2023. In his affidavit, the Judgment-Debtor deposed that he has so far made a substantial payment to the judgment debt herein amounting to Kshs 8,332,290 leaving a balance of 1,668,710 of the sum Kshs 10,000,000. He further deposes that having fallen in hard times, he has been unable to meet the monthly instalments set under the consent order between the parties of Kshs 160,000 monthly and has moved to court for the variation of the said consent order
3. The application is opposed and the Decree holder has filed a Replying affidavit sworn on the March 7, 2023. She deposes that the parties entered into a consent order on May 4, 2018 and the Judgment-debtor agreed to make monthly instalments to liquidate the judgment debt. She further stated that despite the judgment herein been a consent one, the judgment-debtors have not been cooperative and have done everything within their power to frustrate the same.
4. She further argues that the only time the judgment debtors have made any payments has been when she has moved to court to obtain warrants of arrest and the last time they made payment was in July 27, 2022 when they issued her with a cheque which on presentation to the Bank was dishonored.
5. She urges the court to dismiss the application and order that the Applicant do complete payment of the judgment-debt and bring this long outstanding matter to a close.
6. Both parties filed written submissions and also orally highlighted the same before me in open court. The applicant in his submissions urged the court to find that because of the changes in his financial circumstances, he has fallen into difficulties that make it impossible to comply with the orders of the court.
7. In opposing the application for variation of the consent order the Decree holder submitted that this being a consent order it was binding on all parties and could not be set aside or varied without proof that:-
 - a. It was obtained by fraud or collusion, or,
 - b. It was obtained by an agreement contrary to the policy of the court, or
 - c. That the consent was given without sufficient material facts or misapprehension or ignorance of such facts.
8. Barring the above facts, a consent order cannot be varied unilaterally on the application of one party as varying goes against the spirit of the consent which binds both parties. The decree holder further argued that the last time the judgment-debtors attempted to make any payment of the instalment sums was in July 2022 and to avoid arrest they issued a cheque which on presentation to their bank was dishonored. The balance due is at kshs 1,700,000 and installment of kshs 160,000 would see the debt cleared in 10 months at most. The Decree-Holder submitted that since filing of this application, the Judgment-Debtor has not made any attempts to redeem the bad cheque, and yet he has had a lot of time to do so, or even make any further payments and as such he is coming to Equity with unclean hands.

Analysis and Determination

9. I have considered the documents filed by the parties in this matter including the submissions and the oral arguments made before me by the parties and I note that this matter was initiated and filed before this court in 2012, and as such the same has been pending in court for 21 years. This in my view, is a very long time to have a dispute alive in the courts. It is also unconscionable.



10. I have also noted that the matter was resolved through a consent order by the parties that excluded payment of interest on the sums due and owing on the same. I note that several applications have since been made before this court for enforcement of the consent judgment including an application for committal of the Judgment-debtors to civil jail at one point. In arriving at a decision in this matter, I am guided by the decision of the Court of Appeal in the case of *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266: It was there 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.”

11. Having considered the totality of the documents filed before me I find that the Applicant/Judgment-Debtor has not made a case to demonstrate why I should move and set aside a consent order herein. I therefore find the applicant’s application unmerited and will dismiss the same with costs to the Decree holder.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF APRIL, 2023.

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J. W. W. MONGARE

JUDGE

In the presence of: -

1. Mr Nzioki for the Applicants/Judgment-Debtors
2. Mr. Ogude for the Respondent
3. Sylvia- Court Assistant

