CJK v KK (Civil Suit 46 of 2011) [2023] KEHC 17472 (KLR) (Family) (9 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17472 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL SUIT 46 OF 2011

DKN MAGARE, J

MAY 9, 2023

BETWEEN

CJK ..... PLAINTIFF

AND

KK ..... DEFENDANT

RULING

1. This matter is over 11 years old. I have done my best to read the history and understand the same. However, I am handicapped in some of the aspects where handwriting is the usual Greek that we usually apply. However, I have read the applications herein. I shall be referring the parties as plaintiff and defendant since both have applications.

2. My surmise is that this matter together with Nairobi Petition No. 12 of 2011, Milimani Divorce No. 116 of 2011 and Nairobi Children's Case No. 96 of 2011 were initiated when things fell apart. There is a fair split with the plaintiff initiating two cases and the Defendant also initiating two others.

3. Unfortunately, the matter had dealt with everything except the core issues in controversy. What started as enforcements of 76(5) of the *Children's Act* simultaneous with the main Originating Summons of 12/9/2011, has morphed into and snow balled into a cat fight. The parties were married on 10/4/1991 and begat a child on 11/9/2000. He is now an adult.

4. My understanding is that the Defendant is an officer of this Court. The plaintiff is indicated as a marketer. The initial Originating Summons was accompanied by another application dated 9/9/2011. Soon thereafter, another application dated 21/9/2011 was filed for substituted service on 1/3/2012. Subsequently, Justice GBM Kariuki as then he was struck out the 2-6 Defendants with costs against the plaintiff.

5. This was pursuant to a preliminary objection raised as they were third parties and were not to be sued under the married women. The Plaintiff made another application on 4/7/2019 for Amendment. The Application was allowed and Amendment done. There has been a series to other applications. The matter has stayed in the corridors of justice for over 12 years.

6. Subsequently, parties valued some properties and agreed that the defendant was to pay Ksh. 1,500,000/= on filing of the consent and Ksh. 38,500,000/= within 12 months from the date of filing all totaling to Ksh.40,000,000/=

7. The Plaintiff was to collect her belongings from the former matrimonial house not later than 28/7/2020. This must have been done, since nothing around it has been raised again. Ipso facto, the Plaintiff has complied with her part of the bargain.

8. The Plaintiff gave up all claims on 10 Retreat Villas on LR No. 209/354/11 Nairobi. There was to settle the matrimonial home at a sum of Ksh. 40,000,000/= being full and finals settlement. The consent was adopted on 4/11/2021.

   The court adopted and sealed the same as the decree of the Court. Once at because a decree of the court, it became a subject of the Court and its directions.

Duty of The Court

9. Consent are not easy to vary. They are binding on parties. To set the same aside, you need to do so on the same grounds as setting aside a contract. In *Brooke Bond Liebig Ltd vs Mallya* (1975) E.A 266 and *Flora Wasike vs Destimo Wamboko* (1988) KLR 42, the court was of the view that: -

> " The reason for this position was stated in Brooke Bond Liebig Ltd vs Mallya (1975) E.A 266 where 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."

10. In *Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd* (1982) KLR 485 the Court held 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."

11. 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.

12. Luckily in this case, the parties are not setting aside the consent. It is that they are unable to complete the same due to supervening factors. The magnitude and extent of Covid-19 was underestimated, especially its effect on the economy. There has been a two-year hiatus in implementation of the consent. The court then has to use its wisdom to unlock the stalemate without changing the fundamentals of the consent. This is so, because even within the consent, it was not settled on individual installments.

13. In *County Government of Migori v Hope Self Help Group* [2020] eKLR, the court, Justice R. Wendoh, has this to say: -

> " The Court of Appeal in Nairobi Civil Appeal 155 of 1992 Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993] eKLR had occasion to consider the effect of variation of contract both prior to reducing to writing and after. It observed;
>
> Evidence of negotiations is never admissible to vary the terms of the written contract. However, where there is a latent ambiguity, extrinsic evidence may be given of surrounding facts to explain the ambiguity. But certainly no evidence or correspondence on prior negotiations may be admissible. It is assumed that the intentions of the parties to a written contract are embodied in a written contract itself. I have used the phrase "priority negotiations" because subsequent correspondence may affect the written contract where it is clear from the wording that the parties intended such subsequent correspondence to affect the written contract. For instance, subsequent correspondence may vary the terms of the written contract if it is clear from the correspondence that the parties intended to vary the contract. (underline mine)"

14. This was an answer to the question raised in Civil Appeal No. 330 of 2003, *Hussamudin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of Gulamhussein Ebraihim Pothiwalla -vs- Kidogo Basi Housing Cooperative Society Limited and 31 Others* where it was held;

> " A court of law cannot re-write a contract between the parties. ... it is clear beyond peradventure that save for those special cases where equity may be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

15. However, the implementation cannot be left to the parties. It is left to the court. The court subsumed the consent and made it its own order. That is to say, should the Court wish to implement the order, it cannot be tied to requirement for the consent of parties.

16. We are faced with a situation where there is already default. The consent has to be implemented. However, the Defendant has paid a bit of the moneys due.

17. The plaintiff's bid to execute hit a snag. There after she has come back to court for help. The defendant has also run to court for protection. The irony is that these are people who shared a lot include a child now a budding young adult. I have two options, to strictly adhere to the consent increase acrimony between parties and escalate hostilities or I have also an option of taking the higher ground. This includes appealing to voluntarily compliance.

18. Last time, the parties were submitting before me, the plaintiff's Advocate beseeched me to give a break-in order as they were unable to collect attached goods. At the same time, I was told that the Defendant may have moved. I have seen the proclamations on the file. Even if the attached were to be sold they will not fetch anything serious. I note the goods proclaimed may not fetch enough to cover even a fraction of the decree.

19. I have seen good faith from both sides. They are willing to battle but not fight. From 19/11/2021, the amount recovered through auctioneers is negligible. All payments were made through voluntary payment. It is my view that the Application dated 8/3/2022 has merit. The merit is not inherent but a way of having voluntary payments made to obviate the checkmate that the parties are in. it is my sincere hope, that for the sake of their child, they mature up and finish this matter amicably. This has to be accompanied by a perpetual threat of force.

20. But I am not going to allow the same on a straight line basis. Parties are playing Russian roulette with each other. The Application dated 25/11/2021 was dealt with partly and the same is largely overtaken by events in terms of the date ending in December 2022 as proposed. However, the many prayers can be tinkered and dealt with.

21. I have noted that an amount of about 10.5 million or thereabouts has been paid. Though the Defendant is not serious, he has come to court in good faith. I have agonized on both Applications. The parties have checkmated each other, to the detriment of the plaintiff.

22. I was saddened that despite Ms. Shaw's frantic plea for assistant, the Defendant did not show mercy and compassion. The Defendant does not appear to be fully candid on the reasons for not paying the debt. In time It may be because of the sudden break up. He may have agreed just to get the plaintiff out of the house.

23. We will never know since the intentions of a man cannot be known. Lord Bowen LJ, in *Edgington v. Fitzmaurice* (1885) 29 Ch D 459, Court of Appeal. The state of a man's mind is as much a fact as the state of his digestion (paraphrase mine)

24. The relationship between the parties appear to have gone from bad to worse. This can be worked out but not here and not today. The Defendant does not have a good excuse since this was a Covid – 19 consent. The defendant had offered to settle in less than two years. Up to now, that is two years later, he has not settled. It is truly one of those moments that we are called to exercise of discretion. I must however, exercise it judiciously.

25. I am aware that in the current economic times, it may not all be rosy for the parties. The same pain the decree holder is feeling could cut across. To insist over one bullet payment, when parties have been in a stand still many not be prudent. Noting the good faith payments of Ksh. 10,500,000 to 12,500,000/ = depending on who you ask, guided payment may open the stalemate and settle the dispute.

26. Were it not a matrimonial matter, I will have insisted otherwise. I allow the application dated 25/11/2021, to pay by installments in the terms I set out herein below.

27. However, to be able to keep the judgment debtor on a short leash, I direct that application dated 8/3/202 be equally allowed as earlier stated. It is a Russia Roulette game. One shot, it falls on either side. The Breaking in order shall however be suspended till any default occurs.

28. Further parties did not agree on interest either way. Given that the judgment debtor has already stepped outside the boundaries of the consent, there will be no harm pushing the boundary a little further. In order to encourage the judgment debtor to pay, on or in time, I shall order that interest will start applying on the date of default till payment in full.

29. The interest shall continue despite any subsequent rectification. Aware that the judgment debtor has come to court many times, I shall tie this ruling (Except payment of interest) to faithful compliance. Should the Judgment Debtor be tempted to file other applications for stay, the order for payment by installment shall lapse and the judgment debtor be liable to payment with interest from the date of filing of such an application.

Determination

30. I therefore make the following orders: -

a. The Applications dated and 25/11/2021 and 8/3/2022 are allowed in the following terms: -

a. The judgment debtor to pay a sum of Ksh. 850,000/= per month effective 30/5/2023 and every 30th of the month for 6 months.

b. The balance thereof be paid by monthly installments of 2 million from 30/11/2023, payable on every 30th (and on 28th February) where applicable) till payment in full.

c. The application for breaking orders is equally granted, however, the same is however suspended till default. In case of default, the OCS Karen police station or any OCS in the place where the auctioneer will have executed should supervise the break in and carrying of attached goods

d. They attached goods to remain on as running attachment till payment.

e. The judgment creditor to get costs of both applications of 60,000/= payable in 30 days.

f. The court orders that the judgment debtor shall be deemed to have defaulted on the date of filing any other Application for stay.

g. In the meantime, the parties to take accounts and settle on the exact amount due.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Miss Shaw for the plaintiff

Mr. George Owino for the Defendant

Court Assistant - Firdaus/Steve