



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 1277 OF 2015

COMPEX LIFE ASSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

CHANEY'S AUTO SERVICE LIMITED.....DEFENDANT

RULING

1. This suit was marked as settled on 30.7.2018. The Applicant/Defendant filed an application dated 2.2.2021 seeking to vary or review the orders of 30.7.2018 so as to provide for costs in favour of the Applicant.

2. The Applicant contends that the advocate who appeared for them recorded that the matter was settled with costs, so Applicant proceed to file their party and party bill of costs only to later learn that the orders for costs had not been provided for. They aver that this was an omission as they had incurred costs in defending the suit.

3. In their submissions, the Applicant reiterated the contents of their averments as raised in their application. In addition, they blame their advocates stating that they did not give instructions for the consent to be recorded in such terms as not to provide for costs. On this point, the Applicant cited the case of **Protos Hamis Wambada & Another v Eldoret Hospital (2020)eKLR**.

4. The Applicant has further submitted that the Plaintiff had filed a similar suit before the tribunal prompting the current Applicant to file an application dated 23.10.2017 to have this suit dismissed. That is when the Plaintiff opted to have the suit withdrawn. In support of this point, the Applicant cited the cases of **Dhiraglae J Shah & Another v Vijay Amritlal Shethia (2018) eKLR**, and **Owners of Motor Vessel Lillan "S" v Caltex Oil Kenya Ltd (1989) eKLR**.

5. Finally, the Applicant submitted that costs follow events as is provided under **Section 27** of the **Civil Procedure Act**. It was submitted that the issue of costs was crucial but was omitted in the consent. The Applicant contends that a consent judgment/order has contractual effects just like conditions in a contract. To this end, the Applicant cited the cases of **Kuwinda Rurinja Co. Limited v Andkuwinda Holdings Limited & 13 Others (2019) Eklr**, **Flora Wasike vs. DestinoWamboko (1988)eKLR** and **Purcel v F C Trigell Ltd (1970) 2All ER 671, Winn LJ said at 676** to buttress the point that a consent can 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.

6. The Applicant also relied on the case of **Morgai Air Cargo Limited v Guvet Enterprises Limited (2014 eKLR** where the court stated thus in relation to compromise of suit.

“But, it does not necessarily mean that, where parties have entered into consent to settle a proceedings, no costs should be awarded, or there is no successful party in the matter. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs and I, would, therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case.”

7. In conclusion, the Applicant stated that the consent order was devoid of instructions and did not address the question of costs.

8. The Application was opposed vide the replying affidavit of **Peter Ogunnirai, the managing director** of the Plaintiff dated 3.3.2021. He contends that Defendant was their tenant whom they served upon a notice to vacate their premises as they wanted to sell the said property but Defendant/ Applicant had declined to vacate the premises. Defendant then filed a reference to the Business Premises Rent Tribunal (BPRT) under **Case No. 152 of 2016** but the parties opted to settle the matter amicably.

9. The Respondent further contends that the application filed by Defendant dated 23.10.2017 in this suit was not prosecuted. This is because, the parties opted to settle the matter in terms of the consent filed in the Business Premises Rent Tribunal (BPRT) case. Thus the matter was settled with no orders as to costs. The Defendant only decided to pursue the issue of costs later. The Respondent therefore contends that there

was no omission on issue of costs.

10. In their submission, the Respondents reiterated their averments as set out in the replying affidavit. They added that no material has been placed before the court to prove fraud or collusion in so far as the consent recorded in this case is concerned and that the parties had opted that the only issue between the parties was payment of Kshs.5,000,000 to the Defendant/Applicant; That there is nothing to suggest that the comments made by Counsel holding brief for Mr. Kabiru were contrary to the instructions issued to Mr. Kabiru by his client (Defendant).

11. In support of their case, the Plaintiffs relied on the following cases: **ELC No. 46 of 2015 (Eldoret) Protos Hamis Wambada & Another vs Eldoret Hospital, Flora N. Wasike vs Detino Wamboko (1982-1988)IKAR 626, Ratilal Goordhabhai Patel v Lalji Makingi (1957) EA 314, Ulmina Mahindra Shah v Barclays Bank International (1979)KIR, I M Mwakiso vs Kenya Commercial Bank Limited CIV (APPs 28 of 1982 and 69 of 1983 and Civil Aviation No 1 of 2015 Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Ltd.**

Determination

12. The issue for determination is whether this court should review the orders entered on 30.7.2018 so as to award costs of the suit to the Defendant/Applicant.

13. Both parties are in agreement on the legal principles that guide a court in setting aside a consent judgment, that the consent order judgment, has contractual effect and can only be set aside on grounds which would justify the setting aside a contract. See **Flora N Wasike vs Detino Wamboko (1988) eKLR.**

14. The orders given by the court on 30.7.2018 read as follows:

“By consent this matter is marked as settled. The case shall be marked as closed.”

15. Thus the plain interpretation of these proceedings is that the issue of costs was not factored in the consent of 30.7.2015. The parties have no issue with the settlement of the case save the point on costs. It follows that this is not a situation whereby the parties are reneging on the substratum of the consent to have the matter settled. Borrowing the words of Gikonyo J in **Morgan Air Cargo limited v Guret Enterprises Limited (2014) eKLR** quoted by the Applicant, I say that **“in absence of a consent stating that no costs are payable, this court falls back to its discretion which it has been said time and again should be exercised in accordance with the established legal principles not whimsically not capriciously”**

16. This court has keenly read the consent recorded in the Business Premises Rent Tribunal (BPRT) matter availed by the Applicant as annexure “HK 1”. The same reads as follows:

1. Pursuant to the consent made on 11th August, 2016 the Tenant shall be paid five million (5,000,000).

2. The Tenant’s Advocate acknowledges receipt of Kshs 500,000/_

3. The Tenant shall vacate the suit property on or before 15th January 2018.

4. The balances of Kshs 4,500,000 shall be paid to the Tenant immediately after confirmation by the parties Advocates that the Tenant has vacated and after receipt of the keys of the premises by the landlord’s Advocates.

17. The suit filed by the Plaintiff was apparently for *inter alia*, the eviction of the Defendant/Applicant. The parting of ways of the two litigants as a landlord and tenant were aptly captured in the aforementioned consent before the Business Premises Rent Tribunal (BPRT).

18. A perusal of the records in this file indicate that from an early stage, the issue of settlement was at the core of the proceedings. The very first time that both counsels for the litigants appeared in court was on 24.4.2017 and the proceedings there in are captured as follows:

“24/4/2017

Before Hon. B. M. Eboso J

Court Assistant: John

Owaga for Plaintiff

Kabiru for Defendant

Kabiru:

We are before court on the DR’s directions in respect of the Plaintiff’s application dated 25/11/2015 for injunction orders. The material dispute was compromised through a consent in the Business Premises Rent Tribunal (BPRT). What is pending is remittance of the agreed sum in accordance with the consent.

Owaga

That is the position. We request for time to comply with the terms of the consent in the Business Premises Rent Tribunal (BPRT) and come back to confirm settlement.

Court

Mention on 11/7/2017 to record a final settlement.

B.M.Eboso

JUDGE

24/4/2017”

19. In light of the foregoing analysis and noting that the issue of settlement was the common thread running through the proceedings therein and having in mind the consent recorded in the Business Premises Rent Tribunal (BPRT), I find that the order appropriate in this matter is for each party to bear their own costs of the suit.

20. In the circumstances, the application dated 2.2.2021 is hereby dismissed, and again each party is to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/S Nyamolo holding brief for Owaga for the Plaintiff

Kabiru for the Defendant/Applicant

Court Assistant: Edel Barasa