



Ndumia & 3 others v Redall Capital Limited & another; Gitundu (Interested Party) (Civil Suit 345 of 2012) [2023] KEHC 19924 (KLR) (Commercial & Admiralty) (10 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL SUIT 345 OF 2012
JWW MONG'ARE, J
JULY 10, 2023**

BETWEEN

**DAVID MUGO NDUMIA 1ST PLAINTIFF
DANIEL K MUOKI 2ND PLAINTIFF
BETHUEL NJUGUNA KEINAMA 3RD PLAINTIFF
FIDELIS WANJIRU KEINAMA 4TH PLAINTIFF**

AND

**REDALL CAPITAL LIMITED 1ST DEFENDANT
OASIS SYNDICATE LIMITED 2ND DEFENDANT**

AND

JAMES MUBIA GITUNDU INTERESTED PARTY

RULING

1. On 14th April 2016 a consent judgment between the 3rd & 4th Plaintiffs' and the Defendants for the sum of Kshs.8.5 million was recorded before the court and that the decretal amount was to be paid within 120 days from the date thereof. On 24th January 2017, a further consent judgment was recorded between the 1st and 2nd Plaintiffs' and the Defendants for the sum of Kshs.14,980,000/-. The decretal amount was similarly to be paid within 120 days from the said date. On 1st August 2017 an order confirming the consent judgments was issued by this Honourable court.
2. Since then the said two consent judgments have not been satisfied necessitating the filing of the Notice of Motion application by the Plaintiffs jointly seeking the following orders:-



1. Spent
 2. The Honourable Court be pleased to apply commercial interest on the judgment sums herein from the respective dates of the judgments in full.
 3. The Honourable court be pleased to allow the Plaintiffs' realize the judgments herein by selling through public auction all that piece of land situated in Utawala, Embakasi Estate within the City of Nairobi being L.R 9363/43.
 4. The Honourable court be pleased to grant any further orders it may deem appropriate with a view of concluding this matter.
 5. The costs of this application be provided for.
3. The Application is supported by the grounds set within it and a supporting affidavit sworn by Bethuel Njuguna M, Keinama, the 3rd Plaintiff herein. The Application is opposed and the Defendants have filed a replying affidavit sworn by James Mubia Gitundu, a director of the second Defendant.
 4. It is the Plaintiffs' position that the Defendants despite consenting to the debt herein and recording the consent orders with all the Plaintiffs, the Defendants have made no effort to pay the judgment sums. The Plaintiffs aver that since there is no order for interest on the said judgment sums, the Defendant see no urgency to settle the same and as such, the Plaintiffs continue to suffer loss. The Plaintiffs urge the court to vary the court order and order that the Defendants pay interest on the decretal sum for as long as the same remains unpaid.
 5. The Plaintiffs pray that in the alternative, the court does allow them to sell by public auction all that parcel of land situated in Utawala area, Embakasi Estate, Nairobi, being LR. No. 9363/43 to recover the judgment debt and remit any balances to the Defendants (if any) to the Defendants. The 3rd Plaintiff argues that he is advanced in age and would wish to have the matter concluded sooner as the same has been pending for a long period of time.
 6. The Respondents oppose the application. The Respondents argue that the application is misconceived and an abuse of the court process as the Plaintiffs, despite being in possession of a valid judgment of the court, as a result of the consent orders have made no efforts to execute the same as provided for under Order 22 of the *Civil Procedure Rules*. The Respondents argue that the said Order 22 cited above lays down an elaborate procedure for execution of judgments in civil suits. The Defendants argue that the filing this Notice of Motion as the Plaintiffs have done is not one of them.

Analysis and Determination: -

7. I have considered the application by the Plaintiffs and the supporting documents adduced in its support. I have also considered the response filed by the Defendants. I note that it is not disputed that there is between the Plaintiffs and the Defendants two consent judgments entered on 14th April 2016 in respect of the 3rd and 4th Defendants and on 24th January 2017 in respect of the 1st and 2nd Defendants. Both judgments were consolidated and order issued to that effect by this Honourable court on 1st August 2017. To my mind, a consent judgment once adopted by the court is a valid judgment.
8. The Plaintiffs seek that the court do vary the judgment herein by imposing interest on the outstanding judgment sums from the date of the said judgment till payment in full. This, in my view would amount to the court interfering with the wishes of both parties as demonstrated in their consent judgments.



As has been held previously by the Court of Appeal in the case of *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266 at 269 Law Ag P 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.”

It is trite law that a consent order can only be varied with the consent of the parties to the consent. This therefore means that the prayer by the Plaintiffs that this court do order payment of interest to the decretal amount cannot issue unless the parties to the consent judgment agree to have the same varied by their consent. For a court to vary a consent order, it must be demonstrated that the same was obtained by mistake, misrepresentation or undue influence. This is as was held in the case of *Flora N. Wasike v Destimo Wamboko*(1988) eKLR where the stated:-

“it is now settled law that a consent Judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain fulfilled, which are not carried out.”

Similarly in *Windsor Commercial Land Company Ltd. vs. Century National Merchant Bank Trust Ltd* SCCA 114 of 2005 it was succinctly put that:-

“The Court will not interfere or disturb a consent order between the parties other than on those grounds in which it would interfere with any other contract. These would be mistake, misrepresentation, duress and undue influence.”

The consent judgments herein are valid judgments of the court and no material has been placed before me to demonstrate if there was a mistake, misrepresentation or undue influence on either of the parties to warrant interference by this court. This therefore means that the prayer for interest on the judgment sums cannot be issued by the court unilaterally unless the parties thereto consent to it.

9. On execution of judgments the *Civil Procedure Rules* under Order 22 has set out an elaborate procedure to be followed by a decree holder in order to realize the fruits of the judgment therein especially where the Defendant does not move to settle the same upon entry of judgment. On attachment of movable property in satisfaction of a judgment debt under Order 22 Rule 9 of the *Civil Procedure Rules* provides as follows:-

“Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

- (a) a description of such property sufficient to identify the same, and, in case such property can be identified by boundaries, or numbers in Government records or surveys, a specification of such boundaries or numbers; and
- (b) a specification of the judgment-debtor’s share or interest in such property to the best of the belief of the applicant, and so far, as he has been able to ascertain the same.”

10. From the material placed before this court, it has not been demonstrated that the Plaintiffs, having been beneficiaries of a consent judgment where the decretal sums were to be paid within 120 days in both instances, have moved the court appropriately as per order 22 herein to execute the said judgments. In the application before this court, it has not been pleaded or demonstrated what steps the Plaintiffs have taken from 2017 up to today, to commence the execution process. I am therefore persuaded that the Plaintiffs have not established a case to be awarded the orders prayed.



11. Flowing from the above analysis, I find and hold that the application by the Plaintiffs lacks merit. The same is dismissed with costs to the Defendant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JULY 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Kimathi holding brief for Mr. Agwara for the 3rd & 4th Plaintiffs/Applicants.

Ms. Gikonyo Holding brief for Mr. Thuita for the 2nd Defendant.

Sylvia - Court Assistant

