



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.72 OF 2019

WILLIAM NDETI T/A NDETI ENTERPRISES.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This **Ruling** determines the **Notice of Motion** application dated **19th January 2021** brought by the Plaintiff/Applicant pursuant to **Sections 1A, 1B and 3A**, all of the **Civil Procedure Act, Cap 21 Laws of Kenya, Order 40, Rule 1** and **Order 51 rule 1 both** of the **Civil Procedure Rules**. Prayer Nos (1) (2) and (4) of the said application are spent having been granted vide the Court order issued on 21/2/2021. The remaining prayer being sought in the application is:-

1. *Spent;*
2. *Spent;*
3. *That this honourable court be pleased to set aside the consent order and/or judgment dated 28/08/2019 and all consequential orders made thereto.*
4. *Spent*
5. *That costs of this application be in the cause.*

2. The application is based on the grounds on the face of its body, which are further explicated in the **Affidavit** of **William Ndeti**, sworn on the **19th January, 2021**. The Plaintiff's case as expressed in the application is that he is the owner of the subject suit properties known as subdivision **No.14182(original No.188/65) Section 1MN** and **Subdivision No.14183 (original No.188/66)**. That he instituted **CMCC No.438 of 2015** before the Lower Court on or about **12th March, 2015** seeking for an order of injunction against the Defendant from selling the subject suit properties by **Public Auction**. However, the parties ended up recording a **Consent** dated 2/7/2015 for the settlement of **Kshs.27,503,447.32** at the rate of **Kshs 300,000/=** in monthly instalments until payment in full, subject to an initial deposit of **Kshs.500,000/=**. The **Consent** is annexed as **Annexure "WN-1."**

3. The Plaintiff has averred before the adoption of the consent, he had entered into negotiations with the defendant on 4th May 2018 for the settlement of the loan amount at a rate of **Kshs.15,482,009.02**, which negotiations were not brought to the attention of his advocate **J.M Muthami**. Therefore, the consent was signed without taking into consideration the outcome of the negotiations, which had already circumvented the consent dated 2/7/2015.

4. Consequently, the consent Judgment, was entered into irregularly since there had been negotiations that had taken place and an agreement reached without his advocate being in the loop. Therefore, it is averred that the mistakes occasioned by his advocate in recording the consent should not be visited upon him. **A copy of the Email was annexed as Annexure WN-2**

5. The Plaintiff avers that despite having made some payments and being aware that the loan balance was equal to or less than **Kshs. 15,482,009.02**, the Defendant/Respondent has since engaged the services of **Purple Royal Auctioneers** to sell the suit properties by public Auction. The Plaintiff also disputes the amount he owes and asserts that the amount due to the Defendant as confirmed by a letter from the defendant's advocates was **Kshs. 15,482,009.02** and not **Kshs. 41,498,632.41** as stated by the Defendant.

The Response

6. The Motion is opposed by the Respondent vide a **Replying Affidavit** sworn by **Stephen Atenya**, who is the Defendant's Senior Legal Counsel. He deposes that prayer 4 of the motion has been overtaken by events because the Plaintiff was already supplied with statements on 21/11/2020 and 22/1/2021 respectively, and the receipt of the same was acknowledged vide the Plaintiff's letter dated 28/11/2020. Therefore, the said prayer is *res-judicata* since a similar order was sought by the plaintiff vide an application dated 19/12/2019 and granted on 17/11/2020.

7. The deponent avers that the amount outstanding as at 30/11/2020 was **Kshs.19,346,543.58** in the overdraft account **No.1001347302** and **Kshs.21,898,244.25** in account No. **AA13165RXRS7**. Therefore, the total outstanding amount from both accounts was Kshs. 41,244,787.83 as at 30/11/2020. Further, save from the amount outstanding from the loan account, the amount outstanding under the decree issued on 23/10/2019 and warrants of attachment and sale issued on 26/11/2020 is Kshs.63,947,165.02.

8. It is the defendant's case that the decree was as a result of a consent voluntarily entered into between the defendant and the plaintiff on 2/7/2015, which consent was adopted as an order of the court and formatted as decree on 23/10/2019. However, the plaintiff has failed to honour the consent by failing to pay the principal amount of Kshs.27,503,447.32 which was due as at 12/6/2015 or any other monthly instalments. That he even admitted that the amount of **Kshs.15,482,009.02** had not been paid.

9. Further, the deponent avers that the alleged negotiations of 4/5/2018 were not accepted by the plaintiff and therefore, the same are not binding as the said negotiations were never adopted as orders of this court and as a result they cannot vary the consent of 2/7/2015.

SUBMISSIONS

10. This matter proceeded via oral submission on 12/2/2021 with Counsel for both parties present. **Mr. Mutinda** appeared for the Plaintiff while **Mr. Karina** appeared for the Defendant.

ANALYSIS AND DETERMINATION

11. I have considered the application, the affidavit in support and replying affidavit in opposition, together with the oral submissions made by the parties herein. Having already held that prayer (1), (2) and (4) of the instant application are spent, I find that Once an application for injunction within a suit has been heard and determined under the principles as laid down in the case of **GIELLA –VS- CASHMAN BROWN** a similar application cannot be brought. See the case of **Uhuru Highway Developers Ltd –vs-Central Bank of Kenya and 2 Others [1996]eKLR**. Therefore, the sole issue for determination in this instant motion is *whether the consent dated 2/7/2015 can be set-aside*.

12. This Court vide a Ruling delivered on 17/11/2020 stated as follows at paragraph 28 of the same;

[28]. I also note that the Plaintiff had recorded a Consent and under Clause 4 thereof, agreed that he will be paying the Defendant monthly instalments of Kshs. 300,000/=. The Plaintiff has not adduced sufficient grounds to challenge the Consent nor has he applied to have it set aside. To that extend, I agree with the Defendant's Submission that a Consent is in the form of a Contract and binds all the parties. It follows that the Consent dated 2nd July, 2015 between the parties herein can only be set aside on grounds which would justify the setting aside of a Contract.

13. The Applicant has now moved to this Court in this instant Application seeking to set aside the consent dated 2/7/2015 between the Defendant and him.

14. The principle for setting aside consent orders is well settled. Ideally, *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, collusion or by an arrangement contrary to the policy of the court or if it was given without sufficient material facts or in misapprehension or ignorance of such material facts, or in general for a reason which would enable the court to set aside an agreement.* (See the case of **Isaac Kinyanjui Njoroge –vs- National Industrial Credit Bank Limited [2018] eKLR**).

15. In the case of **Flora N. Wasike -vs- Destimo Wamboko [1988] eKLR**, this Court stated:

*"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 **J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.**"*

16. In the case of **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485**, Harris J correctly held inter alia, that –

"1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side."

17. With the foregoing principles in mind, it is now opportune for this Court to determine whether the consent entered into on 2/7/2015 could be set aside. The burden of proof is placed upon the Plaintiff to prove that the consent was adopted without taking into account the

outcome of negotiations that had resulted into an agreement communicated vide e-mail dated 4/5/2018.

18. **Section 109** of the **Evidence Act** provides that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

19. The e-mail dated 4/5/2018 that is relied on by the Plaintiff states as follows:-

Dear William.

Further to our telecom this afternoon please be advised that the total outstanding principal is Kshs.9.937.947.02/=

Total principle interest - Kshs.5,544,062.97

Total amount the bank is

willing to take in full and final

settlement within 30 days Kshs.15,482,009.99

(Sum exclusive of legal charges)

Total Penalty already waived Kshs.6,670,078.84

Kindly but urgently do let us have your stand on the above as agreed before you leave the country.

Kind regards”

20. The consent the Plaintiff seeks to set aside is dated 2/7/2015 and was adopted on 4/9/2019 by the court. The same was issued as a decree of this court on 23/10/2019. In my view, looking at the email dated 4/5/2018, it is noteworthy, that the e-mail was a proposal/an offer made by the Defendant to the Plaintiff as the same reflected the amount of money the Defendant was willing to take in full and final settlement within 30 days, which in this case was Kshs.15,482,009.00. Further, there was a requirement that the Plaintiff was to communicate his stand on the proposal by the Defendant before he leaves the country.

21. Having found that the consent Judgment was entered into, adopted by the court on 4/9/2019, and issued as a decree on 23/10/2019, and there being no evidence that indeed the Plaintiff acted on the proposal by the Defendant that was communicated vide e-mail dated 4/5/2018, I find and hold that the said offer by the Defendant lapsed after the stipulated 30 days, which in this case was around the 4/6/2018 or thereabout. The Plaintiff cannot therefore rely on a lapsed offer as a ground to set aside a consent Judgement that was entered into by his advocate after the offer made vide e-mail dated 4/5/2018 had lapsed.

22. In the circumstances, I find and hold that the Plaintiff has failed to prove to the required standard that the consent dated 2/7/2015 was obtained by fraud, collusion or by an arrangement contrary to the policy of the court or if it was given without sufficient material facts or in misapprehension or ignorance of such material facts.

23. In the end, the application dated 19/1/2021 to this court is evidently misconceived, and deserves only one fate, dismissal with costs. I can only give to it the predetermined fate, which is, the same be and is hereby dismissed with costs to the Defendant.

It is hereby so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 15TH DAY OF JUNE, 2021.

D. O. CHEPKWONY

JUDGE