



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HIGH COURT CIVIL APPEAL E007 OF 2021**

**HONDA MOTORCYCLE (K) LIMITED.....APPELLANT**

**VERSUS**

**JUSTUS MUTUNGA SILA.....1<sup>ST</sup> RESPONDENT**

**XPLICICO INSURANCE COMPANY LTD.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Judgement in the Chief Magistrate's Court at Kitui*

*by Hon. J. Munguti dated 14<sup>th</sup> December 2020 and delivered*

*on 12<sup>th</sup> January, 2021) in Kitui CMCC No. 409 of 2016.)*

**RULING**

1. Before me, is a Notice of Motion dated 17<sup>th</sup> May 2021, lodged by the Appellant/ Applicant seeking the following reliefs: -

*(i) That the application be certified urgent (spent).*

*(ii) That the application is heard Exparte and a date be issued for the inter-parte hearing (spent).*

*(iii) That the court be pleased to review, set aside, and or vary the consent entered on 19<sup>th</sup> April 2021 and the consequential orders.*

*(iv) That the court be pleased to reinstate the application dated 11<sup>th</sup> February 2021 for hearing.*

*(v) That the decretal sum of Kshs. 2,958,663 be deposited in court pending the hearing of the application dated 11<sup>th</sup> February 2021.*

*(vi) Costs.*

2. The Applicant has listed 15 grounds which can be summarized as follows: -

*(i) That the parties in this appeal entered a consent dated 5<sup>th</sup> April 2021, which was adopted by this court on 19<sup>th</sup> April 2021.*

*(ii) The gist of the consent was that the Appellant/Applicant was to pay the Respondent half the decretal amount which was Kshs. 1,479,331.50 within 14 days from the date of the consent and the other half be deposited into a joint interest account in the names of both counsels for the Appellant and the Respondent within the same period.*

*(iii) The Applicant faults the Respondent's Counsel for frustrating the Appellant/Applicant from complying with the consent order by failing to execute the requisite forms to facilitate the opening of a joint account.*

*(iv) The Applicant claims that the Respondent deliberately failed to sign the forms to find a reason to execute.*

(v) *That the Respondent did threaten execution and forced the Appellant to pay.*

(vi) *That the Respondent obtained payment of entire decretal sum through deceit, bad faith, and underhand tactics that prejudiced it.*

(vii) *That the half decretal sum was to secure the Applicant's interests if the appeal succeeds adding that the Respondent may not be in a position to refund.*

3. The Applicant has supported the above grounds with the affidavit of Kieti Ndolo Advocate sworn on 17<sup>th</sup> May 2021 where he has reiterated the grounds above.

4. The Applicant reiterates that, the consent was adopted by this court on 19<sup>th</sup> April 2021 and that the forms to facilitate the opening of joint account were forwarded to the Respondent's Counsel vide a letter dated 21<sup>st</sup> April 2021.

5. According to the Applicant, the Respondent disregarded the terms of the consent and sought to execute on the 13<sup>th</sup> May 2021 prompting the Applicant's advocates to release the remaining amount of Kshs. 1,479,331.50 to forestall execution.

6. The Applicant avers that to secure its interest, the orders sought should be granted.

7. In its written submissions dated 12<sup>th</sup> June 2021, the Applicant submits that, the Respondent blatantly failed to comply with the consent entered on 19<sup>th</sup> April 2021 arguing that, though the consent was recorded on 6<sup>th</sup> April 2021, time began running on 19<sup>th</sup> April, when the consent was adopted by the court.

8. The Applicant submits it was still within the time when it forwarded the forms to the Respondent and faults the Respondent for adopting an impractical argument that time began running on 5<sup>th</sup> April 2021 which in effect could have meant that time ran out on 19<sup>th</sup> April 2021 when the Consent was adopted by this court. It contends that the Respondent should have raised the issue when the consent was adopted.

9. The Applicant submits that; the Respondent should not be allowed to enjoy the fruits of his failure to comply with the consent order submitting that the same is tantamount to contempt and illegality.

10. It is on that basis, that the Applicant seeks to set aside the consent order and all the consequential acts. It relies on the decision in **Brooke Bond Liebig versus Mallya (1775) EA 266**.

11. The Applicant submits that consent has a contractual effect and the same can be set aside on the same grounds as the grounds for setting aside a contract between the parties. On this score, he relies on **Hirani versus Kassam (1952) 19 EACA 131**.

12. The Applicant prays that its application dated 11.2.2021 be reinstated and the entire decretal sum be deposited in court pending the hearing and determination of the said application.

13. The 1<sup>st</sup> Respondent has opposed this application/

14. In his written submissions, he contends that he swore a replying affidavit on 24<sup>th</sup> May, 2021, and filed it in court on 26<sup>th</sup> May, 2021, but when this court retired to write this ruling, it could not trace the cited replying affidavit. The Respondent's replying affidavit dated 12<sup>th</sup> June 2021 and filed on 14<sup>th</sup> June 2021 is all there is in respect to the Respondent's opposition to this application.

15. In the said submissions done through learned counsel, Mulu & Co. Advocate, the 1<sup>st</sup> Respondent submits that the consent entered between the parties herein was recorded in court at Makueni on 6<sup>th</sup> April 2021 and argues that the agreed 14 days began running on that date because the terms of the consent were clear, time was to run from the date of consent which was 5<sup>th</sup> April 2021. According to him, the time did not begin running when the consent was adopted on 19<sup>th</sup> April 2021.

16. The 1<sup>st</sup> Respondent contends that both parties understood clearly the terms of the consent and there is no ground upon which the consent can be set aside, varied or, reviewed. He relies on **Inter-Countries Importers and Exporters Ltd. Versus Tele Posta Pension Scheme Registered Trustees (High Court Civil Case 203 of 2016)**.

17. The Respondent submits that the timelines for compliance with the conditions for stay were set out and that the consent had a default clause. He contends that he proceeded with the execution according to the terms of the consent. He denies that there was any fraud or collusion which could have been a ground to set aside the consent order.

18. The Respondent further submits that, the application dated 11<sup>th</sup> February 2021 sought to be reinstated was compromised in the form of the consent dated 5<sup>th</sup> April 2021 and that having been compromised through consent, the same cannot be reinstated because it is spent.

19. The 1<sup>st</sup> Respondent finally submits that, the entire decretal sum has been paid, and having been paid full compensation, there is no further sum owing capable of being deposited in court.

20. Before I consider this motion, I will look at a brief view of this appeal.

21. This application concerns an appeal preferred by the Applicant/Appellant which arose from a judgment dated 14<sup>th</sup> December 2020 entered in **Kitui Chief's Magistrate Court Civil Case Number 409 of 2016** which suit revolved around a road traffic accident where the Respondent sustained injuries after being knocked down by a motorcycle belonging to the Appellant. The 1<sup>st</sup> Respondent was awarded Kshs. 2,644,400 in damages.

The Appellant felt aggrieved both on quantum and liability and preferred the appeal herein which is pending hearing.

22. The Appellant filed an application dated 11<sup>th</sup> February 2021, seeking a stay of execution pending the hearing and determination of the appeal. That application was slated for hearing on 22<sup>nd</sup> March 2021, but unfortunately, on that date, this court had proceeded on leave and the parties went before the Deputy Registrar who slated the matter for hearing on 19<sup>th</sup> April 2021.

23. The Appellant was faced with the threat of execution and decided to file a 2<sup>nd</sup> application dated 31<sup>st</sup> March 2021, seeking similar orders of stay. The application was fixed for hearing on 6<sup>th</sup> April 2021 before Justice Dulu who was the duty Judge sitting in Makeni High Court.

24. On 6<sup>th</sup> April 2021, the parties appeared the Deputy Registrar Hon. Otieno and recorded the following consent: -

‘‘By consent the application dated 11<sup>th</sup> February 2021, in **Kitui High Court Civil Appeal Application Number 7 of 2021** be compromised in the following terms: -

*(i) That half of the decretal in the sum of Kshs. 1,479,331.50 be deposited in a joint interest-earning account held in the name of both the Appellant and the 1<sup>st</sup> Respondent's Advocates Kilonzo & Company Advocates and Mulu & Company Advocates within 14 days of this consent.*

*(ii) That is the remainder of the decretal sum in the sum of Kshs. 1,479,331.50 be released to the 1<sup>st</sup> Respondent's advocates Mulu & Company Advocates within 14 days.*

*(iii) That the Appellant/Applicant do pay the auctioneer's fees the same to be agreed upon and/or assessed by the court.*

*(iv) That in default of clauses (i), (ii), and (iii) above, execution does proceed.*

*(v) There be no orders as to costs.*

25. Differences arose between the counsels of parties in this appeal after the Appellant's Counsel wrote a letter on 21/4/2021 requesting the 1<sup>st</sup> Respondent's Counsel to sign bank forms to facilitate the opening of a joint account, according to the consent recorded in court on 6.04.2021.

The 1<sup>st</sup> Respondent's reluctance to sign the forms saw the Appellant move this court vide a 3<sup>rd</sup> application dated 4<sup>th</sup> May 2021 seeking for stay and varying of consent terms, to allow them to deposit half the decretal amount in court. The said application was set for inter-parties hearing on 11.05.2021, but on that date, only the Respondent attended, and because they had filed an opposition to the application he sought for the dismissal of the application for want of prosecution which was granted by this court. Later in the day on the same day, the Appellant's Counsel turned up in court and was advised to file a formal application to reinstate the application because the Respondent's Counsel by then had left the court.

26. The Appellant then filed the fourth application dated 12<sup>th</sup> May 2021, seeking for reinstatement of the application dated 4<sup>th</sup> May 2021. Before the said application was canvassed, the Applicant through a notice of withdrawal dated 17<sup>th</sup> May 2021, withdrew its application dated 12<sup>th</sup> May 2021. Upon withdrawal, it then preferred its 5<sup>th</sup> application dated 17<sup>th</sup> May 2021 which is now the subject of this ruling.

27. This application raises the following issues namely: -

*(i) Whether there is the basis to reinstate the application dated 11<sup>th</sup> February 2021.*

*(ii) Whether the consent entered on 5<sup>th</sup> April 2021 should be set aside.*

28. The two issues above are intertwined and I will consider them contemporaneously. There is no dispute that, the application for stay of execution pending appeal dated 11<sup>th</sup> February 2021 was compromised vide a consent recorded in court on 5<sup>th</sup> April 2021 before the Deputy Registrar. The terms of the consent recorded by the Deputy Registrar are clear.

***Clause (i) and (ii) of the consent provided; That half of the decretal in the sum of Kshs. 1,479,331.50 be deposited in a joint interest-earning account held in the name of both the Appellant and the 1<sup>st</sup> Respondent's Advocates Kilonzo & Company Advocates and Mulu & Company Advocates within 14 days of this consent. That is the remainder of the decretal sum in the of Kshs. 1,479,331.50 be released to the 1<sup>st</sup> Respondent advocates Mulu & Company Advocates within 14 days.***

29. The clauses were pretty clear as to when the decretal amount was to be remitted because clause (1) stated that the deposit was to be made ‘‘within 14 days of this consent.’’ This meant that from 5<sup>th</sup> April 2021 when the consent was recorded, the 14 days lapsed on 20<sup>th</sup> April 2021. In clause (ii) parties agreed that the other half of the decretal amount be deposited in a joint account within 14 days but it did not

indicate when the time was to begin running. The parties appear from their conduct that they presumed that the 14 days were to run from 5<sup>th</sup> April 2021 as per clause (i).

30. The parties appeared before me on 19<sup>th</sup> April 2021 and asked this court to adopt the consent recorded on 6<sup>th</sup> April 2021, and this court just adopted the consent as was. This was the adoption order.

***“The consent dated 5<sup>th</sup> April 2021, is hereby adopted as an order of this court.”***

This court did not vary or modify the terms in any way. In effect, the order recorded by Deputy Registrar on 6<sup>th</sup> April 2021, was adopted as was which meant that everything including when the time was to take effect or begin running was as agreed upon between the parties. This was 6<sup>th</sup> April 2021 or the date of the consent. The parties did not agree on 19<sup>th</sup> April 2021. They agreed on 6<sup>th</sup> April 2021 to compromise the application dated 11<sup>th</sup> February 2021. This court, therefore, finds the Applicant’s contention that time was to begin running on 19<sup>th</sup> April 2021, to be contrary to the clear terms of the consent entered by the Deputy Registrar on 6<sup>th</sup> April 2021.

31. As correctly put by both parties in this application, consent entered by parties in court is like a contractual agreement. It is meant to bind parties. Courts usually, will not modify or add terms to an agreement. The only exception is when it can be established that the consent is illegal, against public policy, fraudulent, or obtained through misrepresentation, collusion, or any other illegality in which event, the same is liable to be set aside or annulled/voided. In *Muturi Mwaniki & Wamiti Advocate versus Edward Mukundi Karanja & 2 Others [2017] eKLR*, the court dealt with a similar issue and held as follows:-

***“Consent is binding to the parties and attracts contractual obligations by and to each party to the consent. It may be set aside on grounds of fraud, collusion, contrary to public policy, given without sufficient material facts, misapprehension, or ignorance as espoused by a litany of cases led by Hirani versus Kassam (Supra). The parties have not to case aspersions that they did not voluntarily enter into the consent, that there were any issues to vitiate their consents to the court consent. In the absence of any of the grounds for setting aside consent alleged by either party, this court confirms the validity of the consent.”***

32. The contention by the Appellant, that the consent order only got the force of law, upon adoption by the court is a misconception because it assumed that character on 6<sup>th</sup> April 2021 when the Deputy Registrar recorded the consent in court.

33. In *Stephen Mukiri Ndegwa & Another Versus Kenya Commercial Bank Ltd. [2021] eKLR*, the court was faced with a situation where a written consent had been filed but had not been formally adopted by the court. That notwithstanding, the court held;

***“A consent entered into between parties is deemed to be tantamount to a contract between said parties and will have the same binding force as a contract. As such, the Court cannot interfere with the terms of consent unless circumstances are shown to exist that would amount to grounds for rescinding a contract....***

***The consent dated 15<sup>th</sup> August 2015, though on record in this matter has not yet attained the legal character of a court order. However, in my view, that consent certainly does have legal implications under the law of contract. To satisfactorily impugn the consent, the Plaintiff must demonstrate that the same was procured through ‘fraud’ ‘collusion’ ‘misrepresentation’ or is otherwise contrary to policy.”***

34. In this instance, the consent was recorded by the Deputy Registrar of this court and under the provisions of *Order 49 Rule 3 of Civil Procedure Rule*, a Deputy Registrar has powers and mandate to enter consent so long as the same is in writing. The parties in this matter appeared before the Deputy Registrar on 6<sup>th</sup> April 2021 and recorded a consent which was duly recorded by the Deputy Registrar. The adoption by this court was a mere formality in my view because, the parties willingly entered into a compromise, and to impeach or impugn a consent order it must be shown that the same was obtained by fraud, misrepresentation, collusion or that the consent entered is contrary to the policy of the court or outright illegal.

35. The Applicant has not attacked the consent entered on grounds of fraud, collusion, or illegality. It says the consent was obtained through deceit, which is tantamount to fraud but it has failed to table sufficient facts to prove that fact. It is important to note that the burden always rests on whoever alleges and when allegations of fraud or illegality are made that burden is usually heavier because of the same borders on criminality. The standard of proof applicable is, therefore, higher than the normal standard in civil cases. The Applicant has failed to meet that threshold in this application.

36. This court has been urged to interfere with the consent largely on the ground that the Applicant was forced to pay the half decretal amount to the 1<sup>st</sup> Respondent to avoid execution. The Applicant claims that as far as it is concerned, the time they had agreed for stay had not lapsed by the time the Respondent moved for execution, and that it was coerced into payment but this court finds this contention quite inconsistent with the Applicant’s decision to withdraw its application dated 4<sup>th</sup> May 2021, which application was meant to address the reluctance of the Respondent to execute forms to facilitate deposit of half decretal amount. With the withdrawal of that application, the Applicant lost an opportunity to seek redress if at all it felt hard done by the Respondent’s inaction in respect to signing of forms to facilitate the opening of a joint account.

37. The action by the Applicant to abandon its application and pay the other half of the decretal amount appears to have been done upon the realization that it had made a mistake on 19<sup>th</sup> April 2021, by not asking for an extension of time. The Applicant should have approached this court for an extension of time or any other relief when it received notice from the 1<sup>st</sup> Respondent that it was moving to execute. The Applicant however created its own misfortune because before the matter was canvassed and determined, it withdrew the application and in my view acquiesced to the execution process. I am not persuaded that the Respondent acted in bad faith because there is no evidence placed

before me to demonstrate that fact.

So despite the fact that this court has not found a replying affidavit in respect to this application, I still find that the threshold of setting aside the consent order has not been met. This court's position is guided by the Court of Appeal decision in ***Kuwind Rurinja & Co. Ltd. Versus Ankuwinda Holdings Ltd. & 13 Others [2019] eKLR*** where the court reiterated the legal basis for setting aside a consent order or judgment. The court held;

**“A consent entered into between parties is deemed to be tantamount to a contract between said parties and will have the same binding force as a contract. As such, the court cannot interfere with the terms of consent unless circumstances are shown to exist that would amount to grounds for rescinding a contract...**

**The consent dated 15<sup>th</sup> August 2015 though a record in this matter has not yet attained the legal character of a court order. However, in my view, that consent certainly does have legal implications under the law of contract. To satisfactorily impugn the consent, the Plaintiff must demonstrate that the same was procured through ‘fraud’ ‘collusion’ ‘misrepresentation or is otherwise contrary to policy to policy.’”**

In light of the above, this court finds no merit in this application. The application dated 11<sup>th</sup> February 2021, having been compromised by Counsels appearing for both parties in this appeal by consent was settled as per their consent. I find no merit to vary, review or set aside the consent entered between the parties on 6<sup>th</sup> April 2021 and adopted by this court on 19<sup>th</sup> April 2021.

In the end, the application dated 17<sup>th</sup> May 2021 is disallowed but I make no order as to costs at this stage.

**DATED, SIGNED, AND DELIVERED AT KITUI THIS 5<sup>TH</sup> DAY OF OCTOBER 2021.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**