



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. E07B OF 2020

CORAM: HON R.E. ABURILI J

DUNCAN ONYANGO ODERA.....APPELLANT

VERSUS

MARY ADHIAMBO WASONGA & ELIUD OTIENO ODINGO

(Suing as Legal Representatives of the Estate of BENARD OOKO OTIENO alias

BENARD OTIENO ODERO [DECEASED].....RESPONDENT

(an appeal against ruling and order Hon J. Ong'ondo, SPM made on 30/7/2020

in Siaya PM's Court Civil Suit No. 89 of 2019)

JUDGMENT

1. This is an appeal against the ruling and order of Hon. J. Ong'ondo delivered on the 30.7.2019 in Siaya Principal Magistrates Court Civil Case No. 89 of 2019.

2. The appellant filed his memorandum of appeal dated 26/10/2020 on the 27.10.2020, premised which memorandum is premised on the following grounds:

a) The Honourable Trial Magistrate erred in law by dismissing the Appellant's application without considering the harm that would befall the Appellant.

b) The Honourable Trial Magistrate erred in law and fact when he pronounced himself that the application has no merit.

c) The Honourable Trial Magistrate erred in law in disregarding the appellant's prayer under Order 10 rule 11 of the civil procedure rules 2010.

d) The Honourable Trial Magistrate erred in law in disregarding the appellant's prayer under Order 50 rule 5 of the civil procedure rules 2010.

e) The Honourable Court erred in fact in disregarding the fact that the failure by the appellant to comply with the terms of the said consent was due to the COVID 19 pandemic prevalent in the country at the moment which greatly frustrated and/or made the defendant/applicant unable to fully comply within the stipulated period in the said consent.

f) The Honourable Trial Magistrate erred in law and in fact when he pronounced himself that the balance of convenience tilts in favour of not granting the orders sought by the Appellant.

3. The background to this matter is that the respondents herein filed suit against the appellant's in the trial court for general damages under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act following a road traffic accident allegedly caused by the appellant on the 10.11.2018 along the Siaya – Kisumu road.

4. The appellant having been duly served with summons to enter appearance and all relevant pleadings, failed to enter appearance or file a

statement of defence within the period required by law and upon request, judgement was entered against the defendant on the 16.10.2019 and subsequently Notice of Entry of Judgement was served on the appellant on the 21.2.2020.

5. Eight days later, the appellant appointed the firm of Kairu & McCourt to act on his behalf and subsequently the parties filed a consent setting aside the ex-parte judgement entered against the appellant of Kshs. 9,853,024 on the following terms;

a) The said defendant do pay to the plaintiffs a sum of Kshs. 35,000 being thrown away costs within 30 days from 10th March 2020.

b) The said defendant do deposit in court sum of Kshs. 2,500,000 as part of the sum awarded at judgement within 30 days from 10th March 2020

c) The said defendant be granted leave to file his defence within 21 days from 10th March 2020.

d) The plaintiffs to be called only for cross-examination.

e) In default of clauses 1 (a) and (b) herein above the Exparte judgement entered herein do revert.

f) Matter be mentioned on the 16th April 2020.

6. The appellant failed to comply with the aforementioned terms of the consent and subsequently filed an application dated 30.6.2020 seeking to stay execution of the ex-parte judgement entered against him on the 20.2.2020 and further that time be enlarged to enable him comply with the conditions set out in the consent order dated 10.3.2020.

7. The trial court delivered its ruling dismissing the aforementioned application, which ruling is subject of this appeal. The parties agreed to canvas the appeal by way of written submissions.

The Appellant's Submissions

8. It was submitted that it was in the interest of justice for the court to enlarge time for compliance of the consent dated 10th March 2020 as the same was entered a few days before the declaration that Covid-19 had hit the country and travel restrictions imposed during which time there was a freeze by Direct Line Assurance on taking insurance premiums.

9. It is the appellant's case that the court has discretionary powers to enlarge time for compliance under Order 50 Rule 6 of the Civil Procedure Act. Reliance was further placed on the case of **Patricia Musembi v Peter Khakali & Another [2021] eKLR** where the court allowed extension or compliance of the consent judgement due to the effect the COVID 19 pandemic had on the appellant's business.

10. It was submitted that the defence dated 13th March 2020 and filed on the 8th May 2021 ought to be deemed as filed as the delay in filing the defence out of time was due to the Covid-19 pandemic which had caused the shutting down of courts and there was thus not possible to file the defence within the stipulated time in the consent.

11. The appellant further submitted that the thrown away costs of Kshs. 35,000 was paid on the 15.4.2020, five days' shy of the compliant period whereas the decretal sum of Kshs. 2,500,000 ordered to be paid was deposited in a joint interest earning account on the 29.5.2020, a month and 21 days after the time which the same was to be done as per the consent order.

12. The appellant attributed this delay to the Covid 19 pandemic which had crippled its insured's business and submitted that it was in the interest of justice that the defence be deemed as properly served as he had a strong defence.

13. It was submitted that as the terms of the consent judgement had been complied with, though out of time, the delay having been occasioned by the Covid 19 pandemic, the court ought to exercise its discretion and deem the appellant as having complied with the said consent order.

14. Relying on the case of **Patriotic Guards Ltd v James Kipchirchir Sambu, Nairobi CA No. 20 of 2016 [2018] eKLR** the appellant submitted that the court 's discretionary powers must always be exercised judiciously and not capriciously.

15. The appellant further submitted that the Rules of Natural Matters as well as Article 50 (1) of the Constitution requires cases to be determined on merit as was held in the case of **Brance Arabe Espanol v Bank of Uganda [1999] 2 EA.**

16. The appellant further submitted that his insurance liability of third party per person was capped at Kshs. 3,000,000 as per the Insurance (Motor Vehicle 3rd Party Risks) Act and as such the respondents cannot compel the appellant's insurance to pay more than the prescribed amount under the Act. Reliance was also placed on the Court of Appeal case of **Justus Mutiga & 2 Others v Law Society of Kenya & Another [2018] eKLR**. It was submitted that the respondents had not demonstrated what prejudice they would suffer if the court enlarged time for compliance with the consent order and for the same to be deemed as duly complied with whereas the appellant stood to suffer irreparable harm, loss and damage if the court did not deem the consent of 10.3.2020 as having been complied with.

The Respondents' Submissions

17. It was submitted that the appellant failed to adhere to the terms of the consent order of 10.3.2020 as both the thrown away costs and deposit of the decretal sum were paid after the period stipulated in the consent had elapsed and when the judgement of 20.2.2020 had already reverted back. Reliance was placed on the Court of Appeal case no 293 of 2014 where the court held *inter alia* that it would not interfere with a consent judgement unless fraud or collusion was used to obtain the same.

18. It was submitted that in the absence of fraud or collusion or any agreement contrary to court policy, as well as the appellant's failure to comply and seek for more time prior to lapse of the same, the trial magistrate was right in refusing to give any reason for failure to vary, set aside or enlarge the time for compliance with the consent order.

19. It was submitted that the appellant's delay in complying with the consent order of 10.3.2020 was due to an advocate's mistake and not Covid 19 pandemic as is evidenced from page 37 paragraph 8 of the record of appeal where the appellant states the same.

20. It was submitted that the trial court and similarly this court has no discretion to vary the terms of the consent agreed by the parties herein and having breached the same, the appellant is not entitled to the orders sought.

21. The respondents further submit that under section 27 of the Civil Procedure Act, costs follow the event and thus if the honourable court finds no merit in the instant appeal, the costs ought to be awarded to the respondents. It is submitted that the instant appeal is frivolous and an abuse of the court's due process and thus the same ought to be dismissed.

Analysis & Determination

22. I have considered the grounds of appeal as well as submission by all counsel and the authorities filed in the matter. Being a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions. In **Selle vs. Associated Motor Boat Co. [1968] EA 123**, it was expressed as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270.”

23. The issue for determination in this appeal is whether the learned trial magistrate erred in law and fact in declining to enlarge time for compliance with the consent order recorded on 10.3.2020.

24. In the instant case, the appellant alleges that the delay in complying with the consent order of 10.3.2020 was as a result of the Covid 19 pandemic that impacted its insurer's business as the insurer was no longer accepting insurance premiums as a result of the travel restriction and further as a result of the shutdown of courts during this period.

25. In rejoinder, the respondents submit that the failure by the appellant was not a result of the Covid 19 pandemic but because of a mistake of their advocate as admitted at paragraph 8 of page 37 of the record of appeal.

26. I have examined the trial court record and note that at page 42, paragraphs 7 & 8 of the record of appeal, the appellant cites the Covid 19 pandemic and mistake of advocate respectively, as the reasons for failure to comply with the consent order.

27. The principles that appertain to setting aside of a consent orders are well established in a line of cases including **Brooke Bond Liebig vs Mallya (1975) EA 266** where Mustafa Ag. VP stated thus;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

28. In the case of **Flora N. Wasike vs Jestimo Wamboko [1988] eKLR** Hancox JA cited **Setton on Judgments and orders (7th edition) vol 1 page 124**, and reiterated that;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”

29. The same position was reiterated by the Court of Appeal in the case of **Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others [2019] eKLR. Perera v Nation Media Group & 2 others (Civil Appeal 122 of 2016) [2021] KECA 135 (KLR) (Civ) (5 November 2021) (**

30. The above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside.

31. The Black's Law Dictionary defines "fraud" as:

"1. Knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime."

32. The same dictionary defines misrepresentation as:

"1. The Act or an instance of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.

2. The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.

33. And "mistake" as:

"1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (1) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.

34. From the averments by both parties, none of the conditions for setting aside a consent judgement are evident. In the premise, this court has to determine whether extension of time ought to be granted to enable the appellant to fully comply with the consent order of 10.3.2020 noting that only order (a) has been complied with whereas order (b) is partially complied with as the remittance advice annexed to the appellant's record of appeal at page 135 only shows Kshs. 1,500,000 having been paid to court instead of Kshs. 2,500,000.

35. Needless to say that it is within the discretion of the Court to grant the extension sought, since **Order 50 Rule 6** of the **Civil Procedure Rules** stipulates that:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

36. In this matter, the appellant has demonstrated partial compliance with the consent order. The only outstanding aspect is the depositing of the remaining half of the decretal sum in court in terms of Clause (b) of the consent order. The appellant blamed the corona virus pandemic for his failure to comply with Clause (b) of the consent order as well as his failure to comply with Clause (c) of the consent order.

37. It is public knowledge that on 13th March 2020, three days after the consent order herein had been entered into, Kenya confirmed the first case of COVID-19 in a traveller who had arrived from London a week earlier which lead to lockdowns and limitations on travel which adversely affected business operations of the majority of companies as well as public institutions such as courts and schools as a result of the containment measures put in place by the Government of Kenya in a bid to slow down the spread of the contagion. Consequently, it is not farfetched at all for the appellant to blame his woes on the pandemic.

38. In **William Olotch vs. Pan Africa Insurance Co. Limited [2020] eKLR** the Supreme Court accepted as plausible a similar explanation and granted extension of time. It held that:

"[3] UPON considering the written submissions on record for the Applicant and the Respondent dated 29th June 2020 and 14th July 2020, respectively, wherein the Applicant contends that the delay in filing the application for review to this Court was inadvertent, and was caused by the adverse effects posed by the Covid 19 pandemic, including restrictions on travel imposed by the Government and coupled with the challenges in accessing reliable internet; and

The Respondent in opposing the application submits that the explanation advanced by the Applicant is not plausible; that the reasons for the delay are not satisfactory, and, that the application lacks merit, is an abuse of the processes of this Court and does not disclose any substantial grounds for the Court to exercise its discretion; and

[4] HAVING considered the application, the Grounds of Opposition and the submissions filed by the respective parties, by a unanimous decision of this Bench, we find that ... the Applicant has a reasonable and cogent explanation and adduced sufficient reasons for the inadvertent delay in filing his application for review of the Court of Appeal decision on certification in Civil Application No. SUPP 15 of 2019..."

39. The above decision of the apex Court overrides all other cases where courts are deprived of jurisdiction to interfere with and or vary consents entered into between parties because whereas a court would not interfere with consents reached by parties by setting them aside unless the conditions for such setting aside as would be in the case of setting aside a contract between the parties arise, the situation at hand,

as was in the above Supreme Court case is totally different. Indeed, courts have had to take judicial notice of the occurrences after the covid 19 case was first reported in the country leading to closure of businesses and creating untold unintended hardship to the entire population. This situation is not strange to the respondents who live in this country and know that the whole world was adversely affected by the C19 pandemic and its resultant effects on livelihoods and businesses and the global economy at large.

40. Courts do not exist in a vacuum and must therefore be responsive to the global effects. Courts exist to do justice and to make such orders that are just and expedient in the circumstances, each case being treated on its own peculiar merits. It would therefore be in the interest of justice that this court finds that there are extraordinary circumstances necessitating this court to accord the appellant enlargement of time for compliance with the consent order of 10.3.2020, confident that an award by way of costs would sufficiently compensate the respondents for any inconvenience suffered. In my view, had the respondents considered these unique circumstances, they would not have waited for this long to have this appeal determined one year after its initiation.

41. I Therefore find and hold that the ruling by the trial magistrate delivered on the 30.7.2020 in Siaya Principal Magistrates Court Civil Case No. 89 of 2019 did not take into account the exceptional circumstances then prevailing when he rejected the appellant's application to enlarge time within which to comply with the consent order of 10/3/2020.

42. Accordingly, I find this appeal meritorious. I allow it and set aside the ruling and order of 30/7/2020 and substitute it with an order that the appellant is granted an enlarged period of ten (10) days from the date of this judgment to fully comply with all the terms of the consent order dated 10/3/2020 and in default, this order lapses.

43. Regarding the issue that the appellant's insurance liability of third party per person is capped at Kshs. 3,000,000 as per the Insurance (Motor Vehicle 3rd Party Risks) Act and as such the respondents cannot compel the appellant's insurance to pay more than the prescribed amount under the Act, I had already pronounced myself on this issue and guided that the same can only be determined by the trial court which is still seized of the jurisdiction to hear and determine the suit fully once the appellant fully complies with the consent order of 10.3.2020 as decreed herein.

44. Costs follow the event. In the instant case, and owing to the circumstances described in this judgment, I find that the appropriate order on costs is that each party shall bear their own costs of this appeal and costs of the dismissed application for enlargement of time in the lower court.

45. This file is closed. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 14TH DAY OF DECEMBER, 2021

R.E. ABURILI

JUDGE