



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
INSOLVENCY ACT, 2015
IN THE INSOLVENCY NOTICE NO.5 OF 2018
IN THE MATTER OF VICTORY CONSTRUCTION COMPANY LIMITED

RULING

(1) Before this Court is the Notice of Motion dated **20th November 2018**, in which **VICTORY CONSTRUCTION COMPANY** (hereinafter referred to as the Applicant/Debtor) sought the following Orders:-

“(1) SPENT

(2) **THAT pending inter partes hearing and determination of the Application, the Consent Order made on 12th November 2018 be set aside.**

(3) **THAT in the alternative, the Court be pleased to order a stay of execution of the Consent Order made on the 12th of November, 2018.**

(4) **THAT costs of this application be provided for.**

(2) The application which was premised upon **Article 159** of the Constitution, **Order 51 Rule** of the **Civil Procedure Act, Section 63(e)** of the **Civil Procedure Rules, Sections 1A, 1B, 3, 3A of the Civil Procedure Act**, was supported by the Affidavit of **AVTAR SINGH SURI** a Director of the Company. **AFRIQ EAST IMPEX LIMITED** (hereinafter referred to as “**the Creditor**”) opposed the application through the Replying Affidavit dated **21st November 2018**, sworn by **MR ODERA OBAR KENNEDY** Advocate on record for the Company. The application was argued orally before the court on **22nd November 2018**.

BACKGROUND

(3) It is not in any dispute that by the judgment dated **20th January** entered in **CMCC NO.4361** of **2011**, the Applicant/ Debtor was judged to be indebted to the creditor in the amount of **Kshs.2,552,000/=** together with costs and interest from the date of filing the suit until payment in full. A decree was subsequently issued on **16th March 2017** for a sum of **Kshs.4,398,992.00**. A consent entered was into between the parties dated **23rd February 2017** by which the Applicant/ Debtor was to pay of the decretal sum by way of 4 monthly instalments. However the Applicant/Debtor only made the first two payments amounting to a total of **Kshs. 2,000,000/=**. The balance of the decretal sum remained unpaid and the creditor issued the Applicant/Debtor with a 21 day Statutory Notice for satisfaction of the outstanding debt. In furtherance of this Statutory demand the creditor attached two of the Applicant/Debtors motor vehicle being:-

- Registration KAJ 494K

- Registration KAE 249X

Efforts to sell off the two motor vehicles to satisfy the debt bore no fruit. Accordingly the Creditor filed in the High Court this **Insolvency Petition No.20 of 2018** seeking orders for the liquidation of the company.

(4) The said Insolvency Petition came up for hearing on **8th November 2018** when the court urged parties to try and reach a consent. Accordingly the parties recorded the consent dated **12th November 2018** in the following terms:-

“(1) The debtor shall pay the storage charges in respect of the two (2) motor vehicles.

(2) The decretal sum devoid of interest, legal costs and auctioneers costs shall be paid by the debtor – the sum of Kshs.2,552,000/= to be paid in four (4) equal instalments as follows:-

(a) 1st instalment of Kshs.638,000/= to be paid by close of business on 13th November 2018.

(b) The remaining three (3) instalments to be paid on the 13th day of each successive month.

(3) Insolvency Cause No.20/2018 is hereby stayed.

(4) In default of any one instalment execution to proceed.

(5) Mention on 11th March 2019 to confirm compliance.”

(5) Evidently this consent fell through given that Counsel for the Creditor filed the Notice of Motion dated **14th November 2018** seeking to have the court issue directions for hearing of their Insolvency Petition. It was alleged that the Applicant/Debtor had failed to tender the first payment of **Kshs.638,000/=** in accordance with the terms of the consent. Counsel for the Applicant/Debtor also filed this present application seeking to have the consent set aside. The Court gave directions that the application dated **20th November 2018** would be heard and determined first. The same was argued orally before the Court on **22nd November 2018**.

(6) Counsel for the Applicant/Debtor submitted that the Debtors two motor vehicles **KAE 249X** and **KAJ 497K** had been impounded by Base Auctioneers for purposes of distress. As stated earlier it was indicated that Base Auctioneers were unable despite their best efforts, to find buyers for the two vehicles. The Creditor informed the court that the two vehicles were available for collection by the Applicant/Debtor subject to the payment of storage charges.

(7) Counsel for the Applicant/Debtor averred that she visited the storage yard together with one **Mr. Avtar Jasbir Suri** a Director of the Debtor, with the objective of discharging the outstanding storage charges but to their surprise they discovered that the motor vehicle Registration No. **KAJ 497K** had been disposed of on **26th July 2018**. Upon making enquiry from Base Auctioneers counsel for the Applicant/Debtor was furnished with correspondence relating to the release of the vehicle.

(8) It is submitted that before the consent was recorded counsel for the Creditor had assured the court that both vehicles were still held at the storage yard as Base Auctioneers had been unable to dispose them and that all that was required to enable the Applicant/Debtor reclaim both vehicles was to pay off the outstanding storage charges.

(9) It was further submitted for the Applicant/Debtor that counsel for the Creditor therefore provided false and misleading information which persuaded the Applicant/Debtor to enter into the consent recorded on **12th November 2018**. That had the Applicant/ Debtor been aware that the motor vehicle **KAJ 497K** had already been disposed of, it would not have entered into the consent. It is submitted that the consent was entered into without disclosure of relevant and material facts and that the Creditor was guilty of concealment.

(10) **Mr. Odera** for the Creditor vehemently objected to the allegation that he knowingly misled the Court. He protested the attack by his professional colleague on his integrity as an Advocate of the High Court. Counsel for the Creditor complained that it was the Applicant/Debtors who were guilty of breaching the terms of the consent. The sum of **Kshs.638,000/=** was due to be paid on or before **13th November 2018**. In flagrant disregard of this condition, the Applicant/Debtors Advocate wrote out a cheque for the lower sum of **Kshs.620,000** and worse still postdated that cheque to **15th November 2018** being two days after the due date.

(11) Counsel for the Creditor averred that he was completely unaware of the sale of one of the motor vehicles. A letter dated **26th July 2018** written by Base Auctioneers indicated that the vehicle **KAJ 497K** was released to “**Amritpal Singh Suri** who is one of the directors of the Applicant/Debtor. It was this Director who sold the vehicle to the buyer in question.

(12) When counsel for the Creditor wrote to Base Auctioneers to enquire under what circumstances the said vehicle left the yard he received a reply dated **21st November 2018** in which, Base auctioneers denied any involvement in the sale of the said vehicle. They annexed a sale agreement between the Applicant/Debtor and one **Phillip Ndegwa Owino** the buyer of the vehicle. The vehicle was sold for **Kshs.450,000/=** and the Sale Agreement was executed by **Amritpal Singh Suri** a Director of the Debtor. Counsel submitted that it was dishonest of the Applicant/Debtor to now seek to repudiate the consent based on the action of one of its own Directors in selling off the vehicles.

ANALYSIS AND DETERMINATION

(13) The main issue for determination here is whether the consent dated **12th November 2018** ought to be set aside. In law, a consent is regarded as a contract between the parties and the grounds upon which a consent may be set aside have been elucidated in several cases.

In **BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND –VS – MICHAEL MWALO [2015] eKLR** it was held:-

“...The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was

obtained by fraud or collusion or by an agreement contrary to the policy of the court.”

In ISSAC KINYANJUI NJOROGE –VS – NATIONAL INDUSTRIAL CREDIT BANK LIMITED [2018] eKLR it was stated:-

“.....a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation.”

In HIRANI –VS- KASSAM (1952) 19 E.A.LA (3), the Court held thus:-

“Prima facie, 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 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement “ [own emphasis]

(14) In the matter before this court, the consent of **12th November 2018** was entered into on the understanding and in the belief that **both** motor vehicles were still held in storage. As it transpired one of the vehicles had already been sold off. Counsel for the Applicant/Debtor places the blame for this misrepresentation of the facts at the feet of the Creditor who had assured the Court that both vehicles were in the storage yard available for collection upon payment of the storage charges.

(15) Counsel for the Creditor denies having had any prior knowledge about the sale of the vehicle in question. Given that the sale was effected by a Director of the Applicant/Debtor and did not involve the Creditor at all, I am persuaded that **Mr. Obar** had no way of knowing about the sale of the vehicle at the time the parties were negotiating the consent.

(16) In my own assessment the Applicant/Debtors have not been honest in their averments in this matter. Whilst their lawyer claims surprise at the sale of the vehicle it is evident that said vehicle was sold off by a director of the Applicant/Debtor. They cannot come to court and feign ignorance regarding the sale of that vehicle. I do not for one second buy the story that the vehicle was sold by a rogue director and that the Company had no knowledge about this sale. A company is a juristic person and acts through its directors. The Applicant/Debtor is therefore estopped from denying any prior knowledge of the sale of motor vehicle Registration **KAJ 497K**.

(17) From the sale agreement it is clear that the vehicle Registration No. **KAJ 497K** was released to **Amritpal Singh Suri** a director of the Applicant/Debtor in July 2018 a full four (4) months before the consent was recorded. It is manifest that the Applicant/Debtors instructed their Advocate to enter into the consent of **12th November 2018**, knowing full well that they had already sold one of the vehicles. It is the Applicant and not the Creditor who is guilty of dishonesty and of withholding relevant information. It is duplicitous of the Applicant/Debtor to approach the court seeking to repudiate the consent based on its own deceit.

(18) Secondly the Applicant/Debtor clearly failed to adhere to the terms of the consent regarding the first payment of **Kshs.638,000/=**. This payment was **not** made on or before **13th November 2018** as per the consent but was made by a cheque postdated to **15th November 2018**. Furthermore the cheque was made out for only **Kshs.620,000/=** instead of **Kshs.638,000/=** which was **Kshs.18,000/=** less than the agreed amount.

(19) It is clear to this court that there is a total lack of good will and honesty on the part of Applicant/Debtor in this case. It is further clear that the consent was indeed entered into hampered by a lack of disclosure of a material fact being the fact of the sale of one of the vehicles. The Director who sold that vehicle has not accounted for the proceeds of sale. The Applicant/Debtor is obviously hell-bent on abusing the court process in order to evade paying the debt they owe to the Creditor. I find that this consent order was obtained by misrepresentation which misrepresentation was perpetrated by the Applicant/ Debtor. For this reason the consent order is hereby set aside.

(20) I further direct that the winding up Petition shall proceed for hearing to its logical conclusion.

(21) Finally costs for this application are awarded to the Creditor.

Dated in Nairobi this 15th day of FEBRUARY 2019.

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Justice Maureen A. Odera