



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 75 OF 2018**

1. **PETER KARIUKI KINYANJUI**
2. **HON. KABIBI KINYANJUI.....APPELLANT**

**Versus**

**MARGARET NG'ENDO.....RESPONDENT**

**(Being an appeal from a judgement delivered by D N Musyoka PM**

**on 22<sup>nd</sup> September 2015 in Senior Principal Magistrate's Court at Kikuyu)**

**RULING**

1 The backdrop to the two motions before me, as filed on 9<sup>th</sup> October, 2018 and 28<sup>th</sup> November 2018 by the Respondent and the Appellants, respectively, is as follows. The Respondent had obtained judgment in her favour in the court below. In the judgment, delivered on 22<sup>nd</sup> September 2015 the court below awarded the Respondent, general damages in the sum of KShs.2000,000/=. Aggrieved with the outcome the Appellants lodged an appeal to this court on 22<sup>nd</sup> October 2015.

2. After about 2 years of inaction on the part of the Appellants, the Respondent applied through a motion dated 23<sup>rd</sup> May 2018 to have the appeal dismissed for want of prosecution and the release to her of monies deposited as security pursuant to an order of the lower court granting conditional stay of execution .When the dismissal motion came up for hearing before **Thuranira J** on 5/7/18 , the parties recorded a consent to compromise it in terms that, the Appellants were to file the record of appeal within 30 days, and in default, the appeal would stand dismissed with costs. By the 9<sup>th</sup> October 2018, the date when the Respondent next moved the court, neither the record of appeal had been filed nor application made to enlarge time.

3. The key prayer in the Respondent's motion seeks an order for the release and transfer of the security funds held in the advocates'/ parties' joint account into the Respondent's account. The motion is supported by the affidavit of the Respondent's counsel wherein he deposes *inter alia* that the Appellants have been indolent and in the meantime, the Respondent has been kept away from enjoying the fruits of her judgment for 2 years. On 28<sup>th</sup> November 2018 the Appellants contemporaneously filed a replying affidavit opposing the Respondent's motion, as well as their own motion, expressed to be brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules.

4. The Appellants pray in the latter motion that this court does enlarge time within which they can comply with the orders of 5<sup>th</sup> July 2018. On grounds *inter alia* that, the Appellants' endeavors to comply with the order made before Thuranira J., were frustrated the lower court's delay in furnishing them with proceedings, and that the Appellants will suffer irreparable damage if their prayer is declined. On 29<sup>th</sup> November 2018 the Respondent filed grounds in opposition to this motion asserting among other grounds, that the Appellants' motion is misconceived and bad in law; is devoid of merit and untenable; that orders sought therein are untenable and cannot be granted and that the court lacks jurisdiction to grant the same.

5. Although this court directed the parties to simultaneously file submissions in respect of both motions, and set the ruling date for 8<sup>th</sup> February 2019, only the Appellants filed submissions a day to the ruling date. The ruling was therefore adjourned. The Appellants' submissions relate to the second motion. Beyond the grounds opposing the Appellants' motion, no submissions have been filed on behalf of the Respondent in respect of any of the motions.

6. The Appellants' submissions despite opening with a reiteration of the prayer for enlargement of time appear to dwell predominantly on the applicable principles regarding a motion for the dismissal of a suit/appeal for want of prosecution. The authorities cited also relate to

dismissal of suits for want of prosecution. The dismissal motion having been compromised before **Thuranira J**, these submissions appear misplaced.

7. The Court having considered the undisputed background to the present motions and material canvassed in that regard, takes the following view of the matter. The terms of the consent order recorded before **Thuranira J** on 5/7/18 were crystal clear: the Appellants were to file the record of appeal in 30 days in default of which the appeal would stand dismissed with costs. The Appellants did not comply with the said order, and notwithstanding their reason for default, their appeal consequently stood dismissed by 5<sup>th</sup> August 2018.

8. For this reason, the Appellants' submissions before this court appear misconceived. At present, there is no subsisting appeal in light of the terms of the consent order of 5<sup>th</sup> July 2018 and the failure by the Appellants to comply therewith. Secondly, the essence of the prayer for enlargement as contained in the Appellants' motion, is effectively a prayer to set aside or review of the terms of the consent order of 5<sup>th</sup> July 2018. Thus, in this case, the enlargement of time as sought is not a matter for the inherent jurisdiction of this court under Section 3A of the Civil Procedure Act or this court's discretion under Order 50 Rule 6 of the Civil Procedure Rules.

9. My considered view is that, the moment the parties compromised the dismissal motion in the terms recorded before the learned Judge on 5<sup>th</sup> July 2018, and defaulted, it was no longer available to the Appellants to seek enlargement of time allowed therein, without first undoing the terms of the consent and consequences flowing from default therefrom.

10. In **Board of Trustees National Social Security Fund v Michael Mwalo [2015] e KLR** the Court of Appeal discussed the nature and effect of a consent order or judgment. The Court quoted **Setton on Judgments and Orders (7<sup>th</sup> Edn) Vol. 1 page 124** as follows:

**“Prima facie, any consent 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 .... 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 a reason which would enable the court to set aside an agreement”.**

11. The Court proceeded to state that:

**“In Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd, Githinji J (as he then was) considered the circumstances under which a consent Judgment can be set aside and referred to and relied on the decision in *Hirani v Kassam [1952] 19 EACA 131* in which the above passage from section on judgments and orders was opposed. (The decision by Githinji J) was revised by this court on a different point):**

**“It is now well 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....”**

12. The Court of Appeal then quoted with approval the decision of **Harris J in Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1982] KLR 485** to the effect that:

**“A consent order entered into by consent 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 or in general for a reason which would enable the court to set aside an agreement”.**

13. The consent order recorded by the parties herein on 5/7/18 had the potential to determine the appeal with finality in the event the Appellants failed to comply with the terms. Indeed, that is what happened: the appeal stood determined by way of dismissal with costs upon the Appellants' admitted default. Thus, it is not open on the facts of this case to the Appellants to seek to enlarge time to comply, as they have done in this case. I think I have said enough to demonstrate that the motion filed on 28<sup>th</sup> November 2018 by the Appellants is untenable, misconceived and devoid of merit. It is dismissed with costs.

14. The appeal having been dismissed, the stay orders have also lapsed , and there can be no further justification for the continued retention of the decretal sums now admittedly held in the advocates' joint account. Accordingly, the court grants with costs the Respondent's motion filed on 9<sup>th</sup> October 2018.

**DELIVERED AND SIGNED AT KIAMBU THIS 15<sup>TH</sup> DAY OF MAY 2019**

.....

**C. MEOLI**

**JUDGE**

**In The Presence of:-**

**Appellants absent**

**Respondent absent**

**Court Assistant - Nancy/Kevin**