



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL CASE NO. 2 OF 2015

MEDIA SCHOOL AFRICA LTD.....PLAINTIFF/APPLICANT

VERSUS

ZILPER CHEPKEMOI BETT.....DEFENDANT/RESPONDENT

RULING

1. The defendant/applicant moved the court by way of Notice of motion dated 5th January 2019 under order 22 Rule 22, Order 10 Rule 11 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the civil Procedure Act. She is seeking the following orders:

- a) This application be certified urgent and the same be heard *ex-parte* in the first instance.(Spent)
- b) There be stay of execution of the judgment decree herein pending hearing and determination of this application.(Spent)
- c) The consent judgment herein be set aside.
- d) The firm of J.P Makokha be ordered to furnish the court with the letter of instructions.
- e) Cost of this application be in the cause.

2. The application is based on the following grounds:

- a) That Media School Africa Limited is a stranger to this suit.
- b) The Defendant and subject matter to this suit are unknown to the Media School Africa Limited.
- c) At no time did Media School Africa Limited give instructions for either leasing of the Defendant's property or filing of this suit.
- d) Media School Africa Limited is not party to the proceedings or the consent recorded in this suit.
- e) The Deponent of the verifying affidavit is a stranger to Media School Africa Limited.
- f) Media School Africa Limited shall suffer irreparable damage if orders sought are not granted whereas the Plaintiff shall suffer no prejudice if orders sought are granted.

3. The application was opposed by respondent on grounds that:

- a) The suit was instituted by the plaintiff /applicant
- b) The defendant entered appearance after service.
- c) A consent order was entered on 20th April 2015.
- d) The plaintiff /judgment debtor defaulted and execution for arrears commenced.

4. There is no doubt that the present suit was brought to court by the plaintiff. The applicant cannot be heard to claim to be a stranger in this suit.

5. The consent dated 20th April 2015 was entered on behalf of the parties by their advocates. Mr. J.P Makokha was for the plaintiff while Mr. Fwaya was for the defendant. Any order that flows from consent of parties is binding on all the parties and those claiming under them and cannot be varied unless it is shown to have been obtained by fraud or collusion, misapprehension of material facts or if the agreement is contrary to the policy of the court. This legal position is supported by a myriad of decided cases among them **Kenya Commercial Bank Ltd. -v-Specialised Engineering Company Ltd., 1982 KLR 485** where it was stated:

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 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.

This position was re-affirmed by the Court of Appeal in the case of **M & E. Consulting Engineers Limited v Lake Basin Development Authority & another [2015] eKLR**. In the instant application none of the ingredients for setting aside has been proved.

6. Upon my perusal of the plaint, there is *prima facie* evidence that the advocate for the plaintiff was properly instructed. This is evidenced by a copy of Certificate of incorporation of Media School Africa Limited. There is also evidence of payment to the respondent by the applicant by way of cheques.

7. I therefore find that the application lacks merit and the same is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 12th day of June, 2019

KIARIE WAWERU KIARIE

JUDGE.