



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL CASE NO. 1 OF 2014

BUSIA OUTGROWERS COMPANY LTD.....PLAINTIFF/ RESPONDENT

VERSUS

NILE HAULIERS LIMITED..... 2ND DEFENDANT/APPLICANT

RULING

1. The 2nd defendant/applicant moved the court by way of Notice of Motion under certificate of urgency dated 7th August 2019 under sections 3A, 34 and 63e of the Civil Procedure Act, Order 22 Rule 22, Order 49 Rule 6 and Order 51 of the Civil Procedure Rules and High Court Practice Vacation Rules and all enabling provisions of the law.

2. The application is seeking the following orders:

- a) That leave be and is hereby granted for the 2nd defendant/applicant's application be heard during the court's vacation period. (Spent)
- b) That this application be certified as urgent and be heard ex-parte in the first instance. (Spent)
- c) That there be a stay of sale of the 2nd defendant/applicant's attached property pending the hearing and determination of the application inter-partes. (Spent)
- d) That there be an order of a stay of sale of the 2nd defendant/applicant's attached property pending the hearing and determination of the application.
- e) That the period within which the 2nd defendant/applicant should deposit the cash security of Kshs. 10,000,000 for the stay pending the appeal be extended by a further period of 30 days.

3. The application was premised on the following grounds:

- a) That the respondent has directed the auctioneer to sell the applicant's attached property upon the lapse of the period for depositing security and such sale shall be done at meager values and will result in great suffering and losses to the applicant.
- b) The applicant has made a loan request from their bankers to raise the cash deposit but the application was turned down thus forcing the applicant to resort to sell a developed plot to raise the deposit cash which will be available by 10th September 2019.
- c) That the applicant has made proper arrangements to fully implement and comply with the condition of depositing the cash security as the pre-condition for stay pending appeal and requests for more 30 days to comply owing to hardship from the late decline of their loan request and the substantial sum that is involved.
- d) That there shall be no prejudice to the respondent as it can be compensated through costs of the application and payment of auctioneer's costs.

4. The application was opposed by the respondent on the following grounds:

- a) That the order sought to be extended was entered to by the consent of both parties.
- b) That the applicant obtained ex-parte orders through suppression of some material facts.

5. On 28th of March 2019, the plaintiff/respondent obtained an order in her favour after trial. When the respondent kicked off the process for execution by attachment of the property of the applicant, the latter moved to court, by an application for stay of execution pending appeal. The application was dated 28th June 2019.

6. When the parties appeared before Judge Stephen N. Riechi at Bungoma on 3rd July 2019, the parties recorded the following consent:

“By consent between counsel for the applicant and the respondent the application dated 28th June 2019 is compromised as follows:

- 1. The judgment debtor do deposit Kshs. 10,000,000/= in a joint account between Balongo & Company Advocates and Wanyama & Company Advocates within 30 days hereof.**
- 2. There be a stay of execution pending hearing of the appeal No. 91/2019 in the Court of Appeal at Kisumu.**
- 3. The auctioneers’ costs be agreed within 14 days and be paid within 30 days. In event of disagreement of disagreement the auctioneer bill of costs within 7 days upon disagreement and taxed by court. (Sic).**
- 4. In default of any terms hereinabove, execution to issue forthwith.**
- 5. Costs of the application to the respondent.**

7. The applicant having failed to deposit Kshs. 10,000,000/= in a joint account between Balongo & Company Advocates and Wanyama & Company Advocates within 30 days as agreed, filed the current application. Although the applicant is not expressly stating that she is seeking the terms of the consent vacated, in actual sense that is what the application is seeking. When the consent was entered, the applicant ought to have negotiated for a favourable mode of execution of the same. The law is very clear on varying or setting aside a consent. A consent judgment or an order has a contractual effect and can only be set aside upon satisfaction that certain conditions exist. In **Purcell vs F C Trigell Ltd [1970] 2 All ER 671**, Winn LJ said at 676;

It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons...

In **Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485**, Harris, J correctly held, *inter alia*, that:

- 1. 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 the 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.**
- 2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.**

8. From the foregoing legal position, it is clear that the application not only lacks merit but also succeeded to dupe the court to extend the time by failure to disclose the existence of the consent order. I accordingly dismiss the application with costs.

DELIVERED and **SIGNED** at **BUSIA** this 17th day of September, 2019

KIARIE WAWERU KIARIE

JUDGE.