



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: A. C. MRIMA, J.]

CIVIL APPEAL NO. 118 OF 2018

1. THE CHAIRMAN, CDF SUNA EAST CONSTITUENCY

2. CDF COMMITTEE SUNA EAST.....APPLICANTS/APPELLANTS

-VERSUS-

JAMBO CONSTRUCTION CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. Odenyo, Senior Principal

Magistrate in Migori Chief Magistrate's Civil Suit No. 96 of 2014 delivered on 22/08/2018)

RULING

1. The Applicants herein, **The Chairman, CDF Suna East Constituency** and **CDF Committee Suna East**, filed a Notice of Motion on 16/04/2019 (hereinafter referred to as '**the application**'). The application was evenly dated. It sought for the following orders: -

1. THAT this application be certified as urgent and be heard during the courts vacation.

2. THAT the firm of Messers Okoth & Company Advocates, of Six Eighty Hotelbld, 4th Floor Room 428, P. O. Box 18699 - 00100 Nairobi, be granted leave to appear and represent the applicants and or defendants herein.

3. THAT this Honourable court be pleased to set aside the consent order recorded on the 15th October, 2018 and the garnishee order issued on the 8th April, 2019.

4. THAT upon grant of prayer 4 above this honourable court be pleased to order stay of execution of the judgment dated 22nd August 2018 and or decree extracted there from pending hearing and determination of the appeal No. 118 of 2018.

2. The body of the application contained the grounds upon which the application was premised on. The application was supported by the affidavit of **Alphonse Ouma Ombok**, the 1st Applicant herein. The affidavit was sworn on behalf and with the authority of the 2nd Applicant.

3. The Respondent herein, **Jambo Construction Co. Ltd**, opposed the application. It filed a Replying Affidavit through **Lucas Onanda**. The affidavit was sworn on 02/05/2019.

4. Directions were taken and the application was heard by way of written submissions. Both parties duly complied and were represented.

5. The background of the application is that the Respondent filed **Migori Chief Magistrates Court Civil Suit No. 96 of 2014** (hereinafter referred to as '**the suit**') against the Applicants. It claimed for *inter alia* the sum of Kshs. 3, 825,366/= as the balance due on a construction contract, Kshs. 200,000/= being the value of the seized materials and tools among other orders.

6. The suit was defended. A hearing was conducted. The trial court rendered its judgment on 22/08/2018. The court entered judgement for the Respondent in the sum of Kshs. 1,912,683/= with interest and costs.

7. The Applicants appealed against the judgment. They filed a Memorandum of Appeal on 14/09/2018. That was **Civil Appeal No. 118 of 2018**; the current appeal.

8. On 17/09/2018 the Applicants filed a Notice of Motion evenly dated before the trial court. I will henceforth refer to that application as '**the Motion**'.

9. The Motion sought for the following 4 orders: -

1. **The instant application be certified urgent and the same be heard Ex-parte in first instance.**
2. **Pending the inter-parties hearing and determination of this application or further orders of the court, this honourable Court be pleased to issue an order of an interim stay of execution of the judgment and decree issued herein on 22nd August 2018.**
3. **Pending the hearing and determination of the defendants'/applicants' appeal, to wit, MIGORI High Court Civil Appeal No. 118 of 2018, there be a stay of execution of the judgment and decree issued herein on 22nd August 2018.**
4. **The costs if this application be in the cause.**

10. On 15/10/2018 the parties recorded the following consent on the Motion: -

- (1) **There be stay pending determination of Civil Appeal No. 118 of 2018.**
- (2) **The decretal sum plus agreed costs in this file be deposited in a joint interest earning account in the names of the counsel for the parties within 45 days.**
- (3) **Costs of the application be in the cause**

11. The above consent was not complied with on the part of the Applicants herein. The Respondent then moved the trial court in execution of the decree. The Respondent instituted garnishee proceedings through an Exparte Notice of Motion dated and filed on 20/03/2019. The Co-operative Bank Migori Branch was the garnishee. The trial court issued a Garnishee Order directing the garnishee to pay the Respondent's Advocates the sum of Kshs. 2,107,361/=.

12. On 17/09/2019 this Court (**Majanja, J.**) issued an interim stay of execution of the decree pursuant to the filing of the application.

13. The parties submitted on the application. The Applicants raised two issues for consideration. The first one was that the garnishee order was not available to the Respondent in view of the consent recorded by the parties on 15/10/2018 and adopted as an order of the court. It was submitted that if the Respondent was desirous of levying execution then it had to set-aside the consent first. The second issue was that the Applicants had made a clear case for the grant of the orders sought.

14. The Respondent submitted that the application was an abuse of the Court process since the Applicants had failed to comply with the consent order. It was further submitted that the application could not vary the consent order. The Respondent also submitted that the execution was in order since the consent order had a default clause. The Respondent prayed for the dismissal of the application.

15. I have carefully considered the application and the submissions. I will deal with the two issues raised by the Applicants in support of the application.

16. There is no doubt that the parties entered into a consent on 15/10/2018. The consent has been reproduced hereinbefore. The consent was adopted as an order of the court. Contrary to the submissions by the Respondent, the consent did not have a default clause. That is what the parties agreed on.

17. A consent is a contract between the parties. The parties are firmly bound by the terms of such a consent. The consent being a contract can only be set-aside or varied on settled legal principles. This position in law is well settled. (See the Court of Appeal in **Hiran vs. Kassam (1952) 19 EACA 131** at page 134, **Brooke Bond Liebig Ltd vs. Mallya (1975) EA 266**, **Flora Wasike vs. Destimo Wamboka (1988) 1 KAR 625**, **East African Portland Cement Company Ltd vs. Superior Homes Limited (2017) eKLR** among many others).

18. The consent being a contract or an agreement, the parties could not therefore import into the consent what was not part of it. The consent did not have a default clause and that is it. The Respondent could not initiate any execution proceedings on the basis of the consent. There were only two options available to the parties. Either, for the parties to await the determination of this appeal or the consent order be set-aside or varied.

19. I must hence find, which I hereby do, that the garnishee proceedings were hence initiated contrary to the express contents of the consent of the parties which was adopted as an order of the court. The proceedings were contrary to law. They lacked any legal basis. They cannot stand.

20. I will now deal with the second issue. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** gives the conditions precedent to granting a stay of execution order. The conditions are that the Applicant must demonstrate that it will suffer substantial loss unless the order is made, the application is made without any unreasonable delay and the Applicant offers security for the due performance of the decree.

21. However, this case avails a scenario where this Court cannot purport to venture into the consideration of the said issues. I say so because of the terms of the consent order. There is nothing to stay. Any order affecting the consent of the parties will be tantamount to interfering

with the consent order on record. I am legally restrained from doing so on the basis of the current application.

22. The upshot is that the application is allowed in terms of prayer 3 and 4.

23. Orders accordingly.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 14TH DAY OF NOVEMBER 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open court and in the presence of: -

Mr. Okoth, Counsel instructed by the firm of Messrs. Okoth & Company Advocates for the Appellants/Applicants.

Mr. Kerario Marwa, Counsel instructed by the firm of Messrs. Kerario Marwa & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant