



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CIVIL APPEAL NO. 22 OF 2018

ESTHER TARGOK AYABEL.....1ST APPELLANT/RESPONDENT

JANE AYABEL.....2ND APPELLANT/RESPONDENT

VERSUS

KIHENJO NJUGUNA.....1ST APPLICANT/RESPONDENT

FRANCIS MAINA NDERITU.....2ND APPLICANT/RESPONDENT

RULING

1. Upon the filing of the appeal herein by Memorandum of Appeal dated 23rd July 2018, the appellant made an application by Notice of Motion of even date for stay of execution of the decree of the trial court pending appeal. The decretal sum according to the decree of the court in Eldama Ravine PMCCC NO. 79 of 2016 was a sum of Ksh.758,104/= together with costs assessed at ksh.114,630/=. Warrants of attachment and sale of property dated 23rd July 2018 were issued by the court for recovery of Ksh.876,684/=-, and a Proclamation of attached assets of the appellants was made by a firm of auctioneers on 26th July 2018.

2. At the hearing of the application for stay of execution on 31st July 2018 the counsel for the parties entered into a consent which was adopted as an order of the court as follows:

“By consent the Notice of Motion dated 23/7/18 be allowed in the following terms:

1. THAT the appellant deposit ½ of the decretal sum that is to say Ksh.436,367/= in a joint interest earning account in the names of the advocates on record for the parties within 30 days from today.

2. THAT there be stay of execution pending the hearing of the appeal.

3. THAT the appeal be deemed as properly filed.

4. THAT appellant to file record of appeal for directions as to hearing on 9/10/2018.

5. THAT cost be in the cause.”

3. The court required Counsel for the parties to countersign the consent order as counseled by Nyarangi, JA in *William Karani & 47 Ors. v Wamalwa Kijana & 2 Ors*, (1987) KLR 557 that –

“It would be recommended to Judges to adopt the practice of requiring parties and their advocates to append their respective signatures to consent order as this practice might reduce subsequent argument about the consent order.”

4. By a Notice of Motion dated 11th February 2019, upon default of the appellants to honour their part of the consent, the respondents sought the setting aside of the Consent Order to allow them to execute the decree of the trial court as follows:

“NOTICE OF MOTION

(Under Order 10 Rule 11 and Order 9 Rule 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Respectively)

TAKE NOTICE THAT this Honourable Court will be moved on theday of 2019 at 9 O'clock in the forenoon or so soon thereafter when the counsel for the Applicants shall be heard on an application **FOR ORDERS**:

(a) THAT this Honourable Court be pleased to set aside the consent judgment entered on the 31st July 2018 and the consequential orders thereof.

(b) THAT the costs be provided.

WHICH APPLICATION is grounded on the following grounds:

(a) THAT the appellants herein have blatantly refused to comply with the consent orders.

(b) THAT failure so to do has been prejudicial to the respondents.

(c) THAT Court orders are not issued in vain.

(d) THAT it is now clear that this appeal was only filed for the sole purpose of procuring stay of execution orders which in effect has denied the applicants the chance to enjoy the fruits of the lower Court judgment.

(e) THAT the ends of justice dictate that justice delayed is justice denied.”

The application was supported by the affidavit of the 1st respondent /applicant setting out the facts relied on for the application for setting aside.

5. The matter was adjourned severally to allow the Counsel for the appellant to take instructions to respond to the application. In the end, there was no response to the application despite ample opportunity by service on both counsel and the appellants in person when counsel sought, by application dated 16th April 2019, to cease acting for the appellants on the ground of their failure to give him instructions, the hearing of which application to cease acting and the motion for setting aside being adjourned severally on request of counsel for the appellant. The Court must agree with the respondents' submissions that the application to cease acting and the numerous adjournment requests by Counsel for the appellants were merely a ruse to delay the day of reckoning by staying the execution of the decree of the trial court.

6. The terms of the Consent order of 31st July 2018, over one year five months now, are clear that the appellants should have in 30 days therefrom deposited the sum of Ksh.436,367/= being half the decretal sum then into a joint interest earning account in the names of the counsel on record for the parties.

7. As urged by counsel for the respondents, there was no evidence of any attempt on the part of the appellant to progress the appeal to hearing by seeking the supply of certified copies of proceedings and judgment of the trial court to enable them prepare the record of Appeal in line with directions as to its hearing as scheduled for the 9th October 2018. Over one year later the record of appeal has not been prepared and no directions may be given for the hearing of the intended appeal.

8. As held by the Court of Appeal in **Wasike v. Wamboko** (1988) KLR 429, “it is now settled that a consent judgment can only be set aside on the grounds which would justify setting a contract aside,” per Hancox, J. with Nyarangi, Ag.JA. at 434 observing that –

“There is ample authority that a decree passed by a court with the consent of the parties may in appropriate circumstances be challenged on grounds that it was obtained by fraud or mistake or **misrepresentation** or any other reason which would persuaded a court to vary or set aside the consent decree: See for example *Siebe Gorman & Co. Ltd v. Pneupac Ltd. (1982) 1 WLR 185, Brooke Bond Liebig Ltd v. Mallya (1975) EA 266 and J M Mwakio v. Kenya Commercial bank Ltd., Civil Applications Nos. 28 of 1982 and 69 of 1983....*”

9. I would accept, as held by Deverell, JA. in **Gichuki v. Munjua & 2 Ors.** (2004) 2 KLR 112, 118 that “the remedy for any failure to perform the installment provisions in the consent judgment was to enforce the judgment itself by execution not to seek to set aside the judgment itself” but the situation here is different as the consent order sought to be set aside is an interlocutory order (to which the principle of **Wasike v. Wamboko** applies as in the case of a decree) for stay of execution pending appeal on conditions set out in the consent for the payment of half the decretal sum in the trial court. The consent order for stay of execution pending appeal must be taken to contain, or to be subject to, a condition precedent of deposit of the half the decretal sum. Otherwise, the respondent who is entitled to benefit from the terms of the order may not be able to execute for the half the decretal sum subject of the consent order.

10. On a balance of probability, I would also find misrepresentation as a ground for setting aside a consent order demonstrated by the promise to pay half the decretal sum into a joint interest earning account in the names of counsel on record for the parties within 30 days, a condition the appellants never intended to fulfill, no action towards such a deposit, or extension of time therefor, having been made one and half years later.

11. I am satisfied on the test of **Wasike v. Wamboko**, supra, that the consent order may, as in a contract, be set aside for misrepresentation. Discussing consent orders and misrepresentation, the learned authors of **Chitty on Contracts**, 29th ed. (2004) at paras. 6-110, p.486 observed

citing *Dietz v. Lennig Chemicals Ltd.* (1969) 1 A.C. 170 that –

“Misrepresentation inducing consent order. Where proceedings are compromised by agreement, and the compromise is made the subject of a consent order, the court may set aside he consent order if it is shown to have been based on an agreement induced by misrepresentation.”

12. Indeed, for ***breach of fundamental term*** of the contract, *to wit*, the payment of half the decretal sum into a joint account, the respondents were entitled to repudiate. See *Tin Containers Ltd. v. Kencon* (1971) EA 216.

Orders

13. For the reasons set out above, the court must find that the appellant by misrepresentation obtained a consent order, which they did not intend to honour and, consequently, the consent order dated 31st July 2018 is set aside, and the respondent is at liberty to proceed with execution of the decree of the trial court.

14. As costs follow the event, the respondents are entitled to costs both for the Notice of Motion dated 23rd July 2018 for stay of execution pending appeal and for the Notice of Motion dated 11th February 2019 for setting aside of the consent order.

Order accordingly.

DATED AND DELIVERED THIS 10TH DAY OF DECEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S. Arusei & Co. Advocates for the Appellants.

M/S. Gichuki Karuga & Co. Advocates for the Respondents.