



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 43 OF 2017**

**LANDMARK PORT CONVEYORS LIMITED.....PLAINTIFF**

**VERSUS**

**BUZEKI ENTRPRISES LIMITED.....DEFENDANT**

**RULING**

On 30<sup>th</sup> November, 2017 both counsel for the parties recorded consent in the following terms,

**“Ms. Samba - We have a partial consent to record.**

**Ms. Gitau – That is so.**

**Order – By consent**

- 1. The decretal principal sum is hereby varied to Ksh. 105,000,000/= to be paid on or before 28 .2.2018.**
- 2. The costs of Kshs. 1,146,200/= to be paid on or before 31.12.2017.**
- 3. Interest to be calculated at bank rates on Kshs. 95,500,000/=.**
- 4. Mention on 7.3.2018 to record a further consent on interest and charges.”**

This record was signed by both counsel for the parties herein. When the matter came up on 7<sup>th</sup> March, 2018 it transpired that there had not been compliance with the said consent and counsel for the plaintiff stated that an application for execution of the judgement dated 30<sup>th</sup> November, 2017 shall be filed.

It transpired from the counsel for the defendant that costs had been paid to the extent of Kshs. 1.1 million. The court, while observing there has not been full compliance, left it to the plaintiff to take whatever steps deemed necessary.

What followed thereafter were two applications dated 22<sup>nd</sup> March, 2018 by the defendant and 29<sup>th</sup> March 2018 by the plaintiff. The defendant’s application dated 22<sup>nd</sup> March, 2018 sought four substantive orders to the effect that there be a stay of execution until the application is heard and determined; the warrants of attachments dated 15<sup>th</sup> March, 2018 by Moran Auctioneers over the defendant’s properties be recalled, lifted and or set aside. There was also a prayer that the court sets aside, vary and or vacate the consent orders dated/issued on 9<sup>th</sup> March, 2018. The defendant also sought directions for the hearing of the motion dated 12<sup>th</sup> June, 2017.

The reasons for seeking those orders are set out on the face of the application alongside an affidavit sworn by one Denis Wanyonyi, the business manager of the defendant. With reference to the motion dated 12<sup>th</sup> June, 2017 it will be recalled that the court addressed that application under certificate of urgency and ordered that a hearing date be taken in the registry. A stay of execution of the decree was also allowed for 21 days from 12<sup>th</sup> June, 2017. The parties having recorded consent on the substantive claim herein that application has been overtaken by events. In any case, the present application dated 27<sup>th</sup> March, 2018 has also a prayer for stay of execution until the determination thereof.

The plaintiff on the other hand filed the application dated 29<sup>th</sup> March, 2018 which appears to be a reply to the defendant’s application of 22<sup>nd</sup> March, 2018. There are also several grounds set out on the face of the application and supported by an affidavit sworn by one Njenga Peter Kamau a Director of the plaintiff company. These two applications were canvassed together.

It is the defendant's position that the consent order was recorded in good faith in an attempt to settle the suit herein in light of some expected credit facilities, and the facts thereof were within the knowledge of the plaintiff. However, the said credit facilities were delayed leading to failure to meet the consent orders. It is the defendant's position therefore the purported execution which is premised on the consent orders is unprocedural, unlawful and irregular as the subject consent orders had no default clause, and that the defendant committed itself to the consent orders on a without prejudice basis based on expected credit facilities which have been delayed. Further that, the consent orders did not uphold the *ex parte* judgment on record neither did they withdraw the motion application on record.

The purported execution is also faulted for being bad in law as it targets the entire stock of the applicant's tools of trade. It is also pleaded that the move to execute on the basis of the consent defeats the entire proceedings as there are pending notices of objection and application with draft defence raising triable issues. Therefore, should execution proceed the defendant will be totally grounded and suffer irreparable harm, loss and injury.

The plaintiff on the other hand has stated that the consent order recorded was not conditional and default on the part of the defendant led to the application for execution. It is also the position of the plaintiff that the initial judgment was entered on 12<sup>th</sup> May, 2017 after protracted negotiations followed by the consent judgment on 30<sup>th</sup> November 2017 varying that judgment. The plaintiff also states that it continues to suffer economically by incurring irreparable loss and damage.

I have related the two applications to the pleadings and the record before me. I have also heard both counsel for the parties herein. The determination of this matter turns on the construction or appreciation of the consent recorded by both counsel on 30<sup>th</sup> November, 2017. There is nothing more that can be read into or presumed in the wording of the said consent. The contents were simple, clear and predictable in terms of figures and timelines. Like in any judgment, it is expected that any default of an order of that nature shall elicit some action by the aggrieved party. In this case, there was the principal sum stated clearly to be paid on a specific date. The costs were also specified to be paid on a specific date. That the defendant has not met those timelines is clearly in breach of that consent. One may ask, in view of that breach what is the plaintiff supposed to do in the circumstances of the case. In my view, it is clear in any judgment or consent order, where there is breach the next step by the aggrieved party is execution.

The consent order was not conditional. If it were, there was nothing that prevented the parties from including those conditions in the consent order. Counsel on record had ostensible authority to enter into the consent on behalf of their respective clients. They not only dictated this to the court, but went further and signed in the court record the consent thereof. There was no coercion of whatever nature and none has been alleged. For avoidance of any doubt, I have deemed it necessary to set out herein below some authorities relating to consent orders and or judgments.

It is also established law that counsel on record, and holding instructions on behalf of a party, has ostensible authority to compromise an action. **In Civil Appeal No. 276 of 1997 Kenya Commercial Bank Limited Vs. Benjoh Amalgamated Limited & Another**, the Court of Appeal citing the case of **Brook Bond Liebig (T) Limited Vs. Mallya [1975] EA 266** stated,

***“Prima facie, any 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 .... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material fact, or in general for a reason which would enable the court to set aside an agreement.”***

In the same judgment the Court of Appeal cited the judgment of Hancox JA (as he then was) in the case of **Flora Wasike Vs. Destimo Wamboko (1988) 1 KAR 625 at page 626** as follows,

***“it is now 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, which are not carried out.”***

The extent of authority of an advocate on record to compromise a suit is set out in the Supreme Court Practice 1976 (Vol 2) paragraph 2013 page 620 and cited in the **Kenya Commercial Bank case** as follows,

***“Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts *bona fide* and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power.....No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice.”***

In the recent case of **Board of Trustees of NSSF Vs. Michael Mwalo (2015) eKLR at page 35** it was held,

***“1. 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, fact or misapprehension or ignorance of such facts in general for a reason which would enable a 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.”***

The process of execution can therefore not be faulted in the circumstances of this case. I am unable to accede to the prayers sought by the

defendant in its application dated 22<sup>nd</sup> March, 2018. I uphold the move by the plaintiff to proceed with the execution of the consent order, which is valid and binding on both parties.

The end result is that, the defendant's application dated 22<sup>nd</sup> March, 2018 is dismissed with costs to the plaintiff.

Orders accordingly.

**Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of June, 2018.**

**A. MBOGHOLI MSAGHA**

**JUDGE**