



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO.61 OF 2017**

**JONATHAN MANG'ERE.....APPLICANT/APELLANT**

**VERSUS**

**FRIDAH CHEBET.....RESPONDENT**

**RULING**

1. On the 18/7/2018 parties in this matter recorded a consent as follows:

**That there be a stay of execution of the judgment delivered on the 28/6/2017 in Kilgoris Principal Magistrate's Civil Case No.33 of 2016 on condition that the appellant herein does deposit Kshs.150,000/= in a joint interest earning account in the names of the advocates for the parties within 30 days from the date herein. In default execution to issue for the entire decretal sum.**

2. The consent was recorded subsequent to an application filed by the applicant/ appellant (applicant) dated the 16/7/2018 brought under Order 42 rule 6(i) of the Civil Procedure Rules and section 3A, 1A and 1B.

3. On the 17/9/2018 the applicant filed the application dated the 17/9/2018 brought under Order 22 Rule 22 of the CPR and Sections 1A, 1B and 3A of the CPA. The applicant seeks that there be issued a stay of the arrest warrants meant to commit the applicant to civil jail and that there be an extension of time for the order requiring the applicant to deposit security of costs in a joint interest earning account in the names of the advocates of the parties. That the applicant be allowed to deposit the security of kshs.150, 000/= in a joint interest earning account in the names of the advocates of the parties within 7 days from the date herein. The application was opposed.

4. I have read the supporting affidavit of the applicant dated 17/09/2018. I have also read the replying affidavit of the respondent dated 18/09/2018. The applicant admits that he has not complied with the consent of 19/7/2018. His reason for none compliance is that he suddenly got ill and he has been incapacitated for about 2 months. That on the 6<sup>th</sup> September the respondent gave a Notice to show cause why he should not be admitted to civil jail for failure to deposit the said security. Since he had not fully recovered he was not able to attend court and he has been reliably informed that a warrant had subsequently issued. That had it not been for the force majeure which was unforeseeable he would satisfy his obligations. He is committed to abide by terms of the consent and has deposited the security sum with his advocate. He attached a letter from Nasha Lengot Medical Centre dated 6<sup>th</sup> September 2018. Mr. Omotto for the respondent in his affidavit gave a background of the matter stating that the applicant had sought a stay in the Lower Court through an application dated 4<sup>th</sup> August 2017 which was allowed unconditionally on 3<sup>rd</sup> November 2017. The applicant was to deposit the entire decretal sum in a fixed joint interest earning account in the names of both counsels within 30 days failure to which execution was to proceed. He did not comply and a notice to show cause was issued on the 28<sup>th</sup> June 2018 which was scheduled for hearing on 19<sup>th</sup> July 2018. Three days before the said hearing the applicant filed the application for stay pending appeal orders and parties recorded a consent. According to counsel consent orders are binding and cannot be subjected to review 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. That applicant is fond of breaching court orders and allegations that he was indisposed and failed to comply with the said court cannot sell. That in the unlikely event that the court finds that the instant application is meritorious, it is in the interest of justice that the applicant herein deposits the full decretal amount of Kshs.448,835/= in the joint interest earning account of the advocate of the parties herein. The respondent relied on two cases namely **SMN vs. ZMS & 3 others [2017] eKLR** and **Board of Trustees National Social Security Fund vs. Michael Mwalo [2015] eKLR**.

5. In the case of **S.M.N –versus- ZMS & Others [supra]** the Court of Appeal, held as follows; *“There is now dearth of authorities on the law governing the setting of consent Judgments or order.... Generally a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties....The onus of proving those assertions to the required standard was on the appellant.* The applicant seeks an extension of time for the order requiring to deposit the security with costs and also a stay of the warrants issued. It is argued that the applicant wants the orders reviewed which he cannot unless it is proved 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. The consent order was recorded on the 18<sup>th</sup> July 2018. 30 days from 18<sup>th</sup> July 2018 expired on the 18<sup>th</sup> August 2018. Execution was to proceed in default. What the applicant seeks is an extension of time for the order requiring him to deposit security of costs in an interest earning account. His explanation is that he was unwell and he attached a note dated 6<sup>th</sup> of September 2018 signed by Dr.Ellen Brady stating the applicant was under medical care a period of one month, three weeks. That the applicant was diagnosed with chronic pylonephritis, infectious cystitis, and bilateral esticular trauma. The applicant was done unilateral orehidotomy on 11<sup>th</sup> August 2018 and he was put on intravenous medication and was on a follow up clinics after every three days for dressing. The note indicates that the appellant was unwell and without evidence to contrary I will give him the benefit of doubt as he has explained the circumstances that caused him not to comply with a consent order. The respondent shall not be prejudiced if an extension of 7 days is granted. The applicant shall deposit the sum of **Kshs.150, 000/=** in a joint interest earning account held in the names of the advocates to the parties herein within 7 days from the date

herein. A stay of the arrest warrants meant to commit the applicant to civil jail shall issue for 7 days. Mention on the 1<sup>st</sup> of October 2018 to confirm compliance and to find out if the applicant has filed his record of appeal. Directions to issue thereafter.

**Dated signed and delivered this 20<sup>th</sup> day of September 2018.**

**R.E OUGO**

**JUDGE**

**In the presence of:**

Mr. Okemwa holding brief Mr. Begi for the Appellant/Applicant

Mr. Nyantika holding brief Mr. O.M Otieno for the Respondent

Court clerk                      Ms Rael