



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 253 OF 2016

RHINO AGRIMAC & EQUIPMENT LIMITED.....PLAINTIFF/APPLICANT

VERSUS

EGERTON UNIVERSITY INVESTMENT LIMITED.....DEFENDANT/RESPONDENT

RULING

1. *Rhino Agrimac & Equipment Limited*, the plaintiff, obtained judgment by consent against the defendant ***Egerton Univesity Investment Limited***. That consent judgment, was executed by the advocates for the plaintiff and the defendant. That judgment is in the following terms:

“That the suit herein be and is hereby settled in the following terms:

- (1) That the principal balance due from the supply, purchase and delivery of equipment is Kshs. 6,196,832/=*
- (2) That the principal sum of Kshs 6,196,832 be paid in full in four (4) months commencing on 15th March 2017. For avoidance of doubt, the sum must be paid by the end of July 2017.*
- (3) That the interest accrued and charged on the outstanding principal sum is negotiated to Kshs 11,000,000/= which will be payable within ten (10) months from August 2017 hence the same shall be paid on or before 31st May 2018.*
- (4) That each party shall bear its costs of the suit.*
- (5) That parties be at liberty to apply.*

Yours faithfully

.....

WAITHAKA & ASSOCIATES

ADVOCATES FOR THE PLAINTIFF

.....

WEKESA & SIMIYU

ADVOCATES FOR THE DEFENDANT”.

- 2.** It is important to state that the consent judgment was in favour of the plaintiff.
- 3.** Following this court’s adoption of that consent, on **20th September 2017**, a decree was issued in terms of that consent.
- 4.** It would seem that the defendant failed to settle the judgment amount as agreed because the plaintiff applied and obtained warrants of attachment against the defendant for the total sum of Ksh 17, 200,582.
- 5.** The execution of the judgment by the plaintiff provoked the defendant to file a notice of motion dated **19th March 2018**. By that application the defendant sought stay of execution, the setting aside of the decree, the recalling and cancellation of warrants of attachment, the varying of the consent judgment recorded, extention/ enlargement of the period of payment of Ksh 2,146,829 by defendant to the plaintiff, and extension/enlargement of the period of payment of ksh 11 million by defendant to the plaintiff.
- 6.** That application was supported by an affidavit of **Jane Bii** the company secretary of the defendnat. She deponed therein that subsequent

to the entry of the judgment by consent the plaintiff and the defendant engaged in further negotiations which culminated in the following consent:

- i. That the principal balance due from the supply, purchase and delivery of equipment is Kshs. 6,196,832/=
- ii. That the principal sum of Kshs 6,196,832 be paid in full in four (4) months commencing on 15th March 2017. For avoidance of doubt, the sum must be paid by the end of July 2017.
- iii. That the interest accrued and charged on the outstanding principal sum is negotiated to Kshs 11,000,000/= which will be payable within ten (10) months from August 2017 hence the same shall be paid on or before 31st May 2018.
- iv. That each party shall bear its costs of the suit.
- v. That parties be at liberty to apply.

7. The defendant's application dated **19th March 2018**, was fixed for directions before court on **17th April 2018**. On that date, the parties learned advocates recorded the following consent:

- “(1) The warrants of attachment dated 6/03/2018 stand cancelled.
- (2) The Respondent has until 30/04/2018 to pay Kshs 1,946,839/=.
- (3) The Respondent has until 30/09/2018 to pay Ksh 11,000,000/=.
- (4) In default of any of the 2 payments, execution to issue.
- (5) Mention on 17/05/18 to record a consent on the rest of the application dated 19/3/2018.”

8. It is that consent that has led the plaintiff in filing the notice of motion dated **14th May 2018**. That application is brought under section 80 of the Civil Procedure Act Cap 21 and Order 45 of the Civil Procedure Rules (the Rules). The plaintiff seeks a review of the consent recorded before court on **17th April 2018**, by substituting the word respondent with the word applicant in Orders 2 & 3 of that consent before court.

9. The application was supported by the affidavit of the plaintiff's advocate. By that affidavit he deponed that although the consent as dictated to the court was that it was the applicant who was to make payment the learned judge recorded that it was the respondent who would make payments. It is that which the plaintiff prays be reviewed to reflect that it is the applicant, meaning the defendant, who was to make the payment.

10. What is the purpose of review or when can an order for review be granted? This was considered in the case *Abdullahi Mohamud vs Muhammad Kahiye* [2015]eKLR where the court stated:

“On the purpose of review, *Mwihoko Housing Compaby Limited vs Equity Building Society* [2007] 2KLR 171 is relevant. It was held, *inter alia*:- “A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established.”

The court when considering whether a consent which stipulated a period within which to do an act could be reviewed, had this to say in the case **Gateway Insurance Company Ltd vs Aries Auto Sprays** [2011] eKLR

“The contention by Mr. Wasilwa that court has no jurisdiction to extend time stipulated in a consent judgment or order is not with respect, entirely correct. In my view a consent or compromise reached by parties is, when recorded and signed by the court merged or subsumed in the judgment or order of the court. It becomes a judgment or order of the court. In particular, the time stipulated in such a consent order or judgment becomes the time fixed or granted by the court and the court would generally have discretion to enlarge such time in furtherance of the ends of justice.”

11. I have set out in extenso the background of this matter and how consents were recorded. From that it becomes clear that it was the defendant who was indebted to the plaintiff and not the other way round. It therefore follows that when the consent of **17th April 2018** was recorded, it would seem to have changed the order of liability. In my view that is an obvious error.

12. The application was opposed by the defendant but that opposition was very flimsy. The opposition was that the order of **23rd April 2018** was illegal, null and void.

13. In the first place, there is no order which was made on the **23rd April 2018** and so it is not clear which order the defendant was referring to in opposition.

14. This court has jurisdiction to review orders even consent orders on account of some mistake or error apparent on the face of the record or for any other sufficient reason as provided under order 45 of the rules. The error made in the consent recorded before court on **17th April 2018** is apparent on the face of the record. It is clear from the beginning of this suit that the party who was to pay the debt is the defendant

and not the plaintiff.

15. In view of the above finding, I make the following orders:

a. The consent order of 17th April 2018 is hereby reviewed by substituting 'the defendant' instead of 'the respondent' in Order number 2 & 3 of that date. To that end the consent of 17th April 2018 shall be as follows:

“(1) The warrants of attachment dated 06/03/2018 stand cancelled.

(2) The Defendant has until 30/04/2018 to pay kshs 1,946,829/=.

(3) The Defendant has until 30/09/2018 to pay Kshs 11,000,000/=.

(4) In default of any of the 2 payments, execution to issue.”

b. There shall be no orders on costs in respect to the application dated 19th March 2018.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE