



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 13 OF 2008

ARGOS FURNISHERS LIMITED.....PLAINTIFF/DECREE HOLDER

VERSUS

COUNTY GOVERNMENT OF

MOMBASA.....DEFENDANT/JUDGMENT DEBTOR

RULING

1. On 6th March, 2018, the defendant/Judgment debtor filed an application of even date premised on the provisions of Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Section 21(4) of the Government Proceedings Act and Order 10 rule 11, Order 22 rule 22 and Order 29 rule 2(2) (c) of the Civil Procedure Rules, 2010. It seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That after interpartes hearing this Honourable court be pleased to vary, set aside and/or discharge the order dated 13th February, 2018; and

(iv) That the costs of this application be in the cause.

2. The application is supported by the affidavit of Mtalaki Mwashimba. In essence, the Judgment debtor seeks to set aside a consent recorded before Hon. D. Wasike, Deputy Registrar on 13th February, 2018, on allegations that the consent was entered into under duress due to an order made for the Judgment debtor's Chief Finance Officer to be committed to civil jail for a period of 7 days until payment due under the consent order was made.

3. The Managing Director of the decree holder by the name of Susheel Shah filed a replying affidavit sworn on 20th April, 2018 to oppose the application.

4. This court granted interim orders on 7th March, 2018. On 7th May, 2018, directions were given as to the hearing of the application dated 6th March, 2018. The said application was set for hearing on 24th July, 2018. Come the said date, there was no appearance by the Judgment debtor or its Advocate.

5. Mr. Simiyu Wabuke for the decree holder relied on his written submissions filed on 24th July, 2018. He expounded on the same by stating that the annexure marked SS3 attached to the decree holder's affidavit originated from the County Government of Mombasa, yet in its application, it had claimed that the consent was obtained by threats.

6. On the issue of setting aside consent orders, Counsel relied on the case of the **Board of Trustees, National Social Security Fund vs Micheal Mwalo** [2015] eKLR, where the court stated that a consent can only be set aside based on the conditions outlined therein.

7. Counsel submitted that in the present case no duress had been established and that the Judgment debtor had shown no interest in the matter. Mr. Simiyu prayed for the application to be dismissed and relied on the decree holder's replying affidavit.

8. This court has established from the Judgment debtor's deponent's affidavit that allegations have been made that its Chief Finance Officer was subjected to duress, which led him to record a consent. The Judgment debtor or its Counsel failed to attend court to argue its application.

The allegations therefore deposed to in the supporting affidavit were unsubstantiated and unverified.

9. The Court of Appeal in the case referred to by Mr. Simiyu of the **Board of National Social Security Fund vs Michael Mwalo** (supra) cited with approval the holding in the case of **Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd** [1982] KLR 485, where Harris J held as follows:-

“1. A consent order entered into by counsel 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 facts or in misapprehension or ignorance of such facts in general for a reason which would enable the 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.”

10. The consent letter dated 13th February, 2018 attached to the decree holder’s affidavit and marked as SS3 originated from the County Government of Mombasa. It was duly signed by the County Attorney. The said letter was adopted as a consent of the parties and an order was extracted therefrom.

11. The Judgment debtor’s failure to prosecute its application leaves this court with no option other than to hold that the consent recorded was valid and that the Judgment debtor’s Chief Finance Officer was not threatened or put under duress so as to enter into the same.

12. The application dated 6th March, 2018 is hereby dismissed for being unmeritorious. Costs of the application are awarded to the plaintiff/decreed holder.

DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of October, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. P.S. Wafula for the plaintiff/decreed holder

No appearance for the defendant/Judgment debtor

Mr. Oliver Musundi - Court Assistant