



REPUBLIC OF KENYA

IN THE COURT OF KENYA

AT MACHAKOS

CIVIL SUIT NO. 11 OF 2017

EUNICE MWENDE NZIOKA.....PLAINTIFF

VERSUS

LYDIA KALONDU WAMBUA & EUNICE MUTINDA WAMBUA

(Sued on their own behalf and on behalf of the estate of the late

PATRICK WAMBUA MWANIKI).....RESPONDENT

RULING

1. The Defendants' notice of motion dated 16th January, 2018 seek orders:

a) That judgment be entered for the Plaintiff against the Defendants for the unpaid sum of KShs. 3,000,000/-.

b) That the Defendants be granted leave to liquidate the decretal sum by equal monthly installments of KShs. 250,000/- till full and final payment.

c) That the plaintiff be restrained from levying execution against the Defendants and the estate provided that the Defendants meet the proposed monthly installments.

d) That costs of the application be in the cause.

2. In her supporting affidavit, Eunice Mutua Mutinda stated that the issue in contention arose in High Court Succession Cause No. 974 of 2013 wherein it was agreed by both parties through a confidential deed of settlement dated 14th October, 2016 that the Plaintiff would be paid KShs. 5,750,000/-. That KShs. 3,750,000/-, the sum claimed in this suit, the Defendants made part payment of KShs. 3,000,000/- hence showing their commitment in settling the debt owed to the Plaintiff. That by virtue of such payment, the Defendants have not reneged on the deed of settlement but were hindered in fulfilling the full payment to the Plaintiff due to financial constraints. That the Defendants seek to offset the balance owed to the Plaintiff through instalments due to the fact that they recently restructured a KCB Bank Kenya Limited loan owed by the estate that was in excess of KShs. 38,000,000/- in order to reduce installments and pay arrears. That further to the loan restructuring, the estate incurred quite a high electricity bill (in excess of KShs. 3 Million) on the rented building that they had to pay to Kenya Power and Lighting Company Limited rendering the estate finances to be very low. That the deceased estate has other debts which they, as a family have to settle hence making it impossible to pay off to the Plaintiff the amount owed at once. That through a letter dated 30th June, 2017 the Defendants' advocates proposed to the Plaintiff's advocates the option of allowing the Defendants to settle the debt by monthly installments but the said offer was rejected, which, without prejudice rights, their advocates waived. That the offer would have enabled the Defendants to pay off the debt amicably as per the letter dated 30th June, 2017 from their advocates addressed to the Plaintiff's advocates. That in order to pay off the said debt to the Plaintiff, the Defendants were to borrow financial assistance from the banks but the process was hampered by the General Election of 2017 which affected borrowing from banks hence they could not be able to meet the demands of the Plaintiff. That they are unable to liquidate the decretal sum at once, but are able, ready and willing to pay in installments of KShs. 250,000/- per month as proposed.

3. In response thereto, the Plaintiff filed a replying affidavit on 31st January, 2018. She stated that she is not opposed to the Defendant's prayer asking court to enter judgment in her favour for KShs. 3,000,000/- but contended that the same should be entered with interest at the agreed rate of 14.5% per annum from the date of default being 1st March, 2017 plus costs as prayed for in the plaint. She opposed the prayer seeking payment in installments for reasons that; the basis of the present suit is a confidential deed of settlement dated 14th October, 2016 whereby the estate of Patrick Wambua Mwaniki voluntarily agreed before court to pay a sum of KShs. 3,750,000/- to her on or before expiration of 3 months from 1st December, 2016; than it is more that 12 months since the consent judgment in terms of the letter dated 13th

October, 2016 was adopted by the court in Machakos High Court Succession Cause No. 974 of 2013 on 1st December, 2016; that a consent judgment cannot be varied at the instance of one party; that the consent was to the effect that the parties shall abide by the confidential deed of settlement agreement entered into between the parties; that in any case, the agreement will show that the parties had agreed on the settlement of KShs. 5,750,000/- by way of two (2) installments of KShs. 2,000,000/- on 1st December, 2016 and the balance within 90 days from the 1st payment and that the agreement contemplated default and to address it, the parties mutually agreed to insert clauses 2.15 and 2.16, that pursuant to clause 2.15, the executors took personal responsibility to pay the amount from their pockets and that they are aware that the Defendants have sufficient resources to pay off the amount at once. She stated that it is not undisputed that the amount owed is KShs. 3,000,000/- and the defence should be struck out since it is a mere denial. That the reasons for default in payment are not any new developments to the estate of the deceased since the same liabilities were known to the Defendants when the consent agreement was recorded before the court and that the confidential deed of settlement was entered into on the 14th October, 2016 while the Loan Restructure letter is dated 11th May, 2017. That the Defendants' letter was sent to her advocates on record after she filed the present proceedings as a reaction to the suit. That in addition, the Defendants had the opportunity to provide a response on the payment due after the lapse of 90 days but did not reply to the several emails sent by his advocates on record. That the Defendants should not be entitled to make part payment on account of debts that pre-existed at the time of execution of the confidential deed of settlement. That the due performance of the confidential agreement was not subject to the Defendants' successful application for a loan. That each party ought to perform its obligations pursuant to the terms of any contract and it would be unjust to vary the terms of the confidential deed of settlement to her detriment without any mutual agreement of the parties for the benefit of the Defendants only.

4. It was the Defendants' submission that the power to order payment by installments of the decretal amount is purely a matter of discretion by the court, except the discretion is circumscribed; sufficient cause must be shown and the indulgence to pay by installments may be on such terms that the court thinks fit and that the onus of establishing sufficient cause rests on the applicant. The case of **Jabali Alidina v. Lentura Alidina [1961] EA 565** at page 566 was cited in that regard. Other cases that were cited in reliance were **Freight Forwaders Ltd v. Elsek & Elsek (K) Ltd (2012) eKLR** where the Court highlighted what amounts to sufficient cause thus; the debtor is unable to pay in lumpsum; the debtor can pay by reasonable monthly installment and the application is made in utmost good faith. **Medol Group Ltd v. Adrian Company Ltd & Another (2012) eKLR**, **Singh Gitau Advocates v. City Finance Bank Limited (2013) eKLR**. That the Defendants have met the conditions to warrant an order by court for payment of the decretal sum by instalment. That the Defendants have demonstrated bona fides by paying the Plaintiff KShs. 1,750,000/-. It was submitted that no serious rebuttals have emerged from the Plaintiff's pleading with respect to the Defendants' application. That the Plaintiff has alleged that the consent recorded in High Court Succession Cause No. 974 of 2013 Machakos cannot be varied at the instance of one party but that the matter before court is a brand new suit for payment of a debt in the sum of KShs. 3,750,000/- plus costs and interest and not a suit seeking enforcement of a consent judgment.

5. The plaintiff on the other hand submitted that the Defendants are seeking this court's intervention for the variation of the consent judgment entered on the 1st December, 2016 which prayer is not allowed as it is already settled law that a consent can only be set aside or varied in certain circumstances as enunciated in **Samuel Mbugua Ikumbu v. Barclays Bank of Kenta Limited (2015) eKLR**. That the amount has been made in sporadic part payments despite the agreement on the timeline payments and the accrual of interest for non-payment of the amounts made. That the Defendants' application is neither timely nor made in good faith for their failure to fulfil their obligations leading to the institution of this suit. That the allegation that the estate of the deceased is greatly in debt and that the Defendants are only victims of the debt incurred by the deceased is untruthful on the face of it since the administrators were aware of their duties as executrices and the liabilities and assets of the estate were known to them having been required to give the inventory of the estate of the deceased upon the application for grant of representation. In this regard, the Plaintiff relied on **Lavington Security Limited v. Nairobi City Water & Sewerage Co. Ltd (2014) eKLR**. It was further submitted that the Defendants cannot seek the court's intervention in matters agreed mutually which they personally and jointly guaranteed to make payment should there be a default in the payment of debt and they can therefore not be termed as victims of the estate's debt. It was submitted that the courts can only interpret contracts between the parties and not rewrite them unless it is proved that there was coercion, fraud or undue influence. To so illustrate, the Plaintiff relied on the case of **National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd & another (2001) eKLR** and **Lalji Karsan Rabadia & 2 Others v. Commercial Bank of Africa Limited (2015) eKLR**.

6. I have carefully considered the application herein. The Defendants have not denied owing the Plaintiff the sum of KShs. 3,000,000/- and they further do not dispute that the same arose from a consent entered into by the parties. It is further not disputed that a consent was entered into on 1st December, 2016 in the following terms inter alia "That the parties shall abide by the confidential deed of settlement entered into between the parties dated 14th October, 2016". The application herein therefore in my view seeks a review of the said consent order. To have such a consent varied or reviewed, an applicant must establish that the same was entered into through coercion, misrepresentation and or fraud. Such has not been established rather the Defendant have merely expressed their difficulty in raising the money which does not fall among the circumstances under which a consent judgment can be varied. In any event, the Defendants gave their personal undertaking by virtue of being executors of the estate and they bound themselves to honour the agreement entered into. The Defendants are now trying to change the goal posts to the disadvantage of the Plaintiff. The consent entered into can only be varied by the parties themselves or by the court if it is shown that the same had been entered into through fraud, mistake, misrepresentation or contrary to the policy of the court. As long as the consent is still in force, the Defendant's Application is untenable. They should first have the consent removed after which they could then address the court on any other issues. Hence they cannot skirt around it since the consent is still in existence and its terms must first be adhered to.

7. In the result, it is the finding of this court that the Defendant's Application dated 16th January, 2018 lacks merit. The same is ordered dismissed with costs to the plaintiff.

Orders accordingly.

Dated and delivered at Machakos this 9th day of October, 2018.

D. K. KEMEI

JUDGE