



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 186 OF 2010

OSCAR OTIENO ODONGO t/a ODONGO INVESTMENTS..... APPELLANT

VERSUS

EDWARD JUMA OCHICH t/a JUMAMA

EXPRESS INSURANCE AGENCIE.....RESPONDENT

(Appeal from the Ruling and Order in Kisii CM Misc. Application No. 30 of 2010 (Hon. M.N Gicheru - CM.)

JUDGMENT

1. This appeal arises from a ruling of the Chief Magistrate made on 22nd April 2010, in Kisii **CM Misc Application No. 30 of 2010**, in which the applicant/appellant, **Oscar Otieno Odongo** trading as **Odongo Investment**, filed a notice of motion dated 10th March 2010, seeking orders against the respondent, **Edward Juma Ochich** trading as **Jumama Express Insurance Agencies**, for “inter-alia” leave to tax the applicant’s bill of costs against the respondent and for judgment to be entered against the respondent in terms of the certificate of taxation.

2. The application was made under Rules 7 a-c and 55 of the Auctioneers Rules 1997.

However, a consent dated 30th March 2010, was filed on 8th April 2010, to the effect that:-

(i) The Applicant/Auctioneers Bill of Costs dated 10th March 2010 be and is hereby compromised at Kshs. 113,840/= only against the respondent in favour of the applicant.

(ii) That the sale proceeds of Ksh. 43,840/= be deducted from the amount herein.

(iii) The balance of Ksh. 70,000/= be paid by monthly instalments of Ksh. 10,000/= per month beginning 25th April 2010 till payment in full.

(iv) That the respondent herein do issue post dated cheques for the every month to Pst David Okumu to hold pending banking by the applicant on their due dates.

(v) That the Pastor shall only release the cheques to the applicant for banking only on their due dates.

(vi) That in default, execution to issue upon the applicant giving the respondent one week written notice.

3. The consent was signed by both the appellant and the respondent and on the date of the filing of the same they appeared before the trial court and prayed for the matter to be marked as having been settled.

The trial court did not immediately mark the matter as having been settled but instead, made a ruling on the 22nd April 2010, respecting the application dated 10th March 2010.

4. In the said ruling, the learned trial magistrate dismissed the application and directed the appellant to file a suit against the respondent.

Being dissatisfied with the ruling, the appellant preferred the present appeal on the basis of the grounds contained in the memorandum of appeal dated 11th August 2010.

5. The appeal was canvassed by way of written submissions and in that regard, the appellant filed theirs through **M/s Oguttu-Mboya & Co. Advocates** and the respondent through **M/s Bana & Co. Advocates**.

Having considered the appeal in the light of the rival submissions, this court sees that what was actually before the trial court on 8th April 2010, when the consent was filed was the Notice of Motion dated 10th March 2010.

6. The filing of the notice of motion was the beginning of civil proceedings against the respondent by the appellant based on the existing state of affairs between themselves. This in effect amounted to a suit as defined in Black's Law dictionary 8th edition to wit "Any proceedings by a party or parties against another in a court of law".

7. As between the parties, the motion was not argued. They did not wish to argue it out for a determination by the court. Instead, they agreed to compromise it and hence filed a consent which they presented for the court's approval and/or adoption as an order of the court. Their desire was to have the matter marked as settled as per the terms of the consent.

8. However, the court did not grant their request and instead opted to give its opinion on the notice of motion. This action may not have been proper as the court would simply have declined to mark the matter as settled and state its reasons for so doing. Nonetheless, no prejudice was occasioned on either party as the reasons for declining to mark the matter as settled were clearly spelt out in the impugned ruling.

9. The reasons which may be singled out as having been the determinant factor in the dismissal of the application altogether was associated with the process of execution of an order of the court by the appellant while his auctioneer license was suspended and therefore invalid for purposes of a lawful execution.

Given that scenario, it was not possible for the trial court to approve or adopt the consent or mark the matter as settled for doing so would amount to condoning an illegality and a gross abuse of the court process. So that, even if the application had been argued as between the parties the prayers sought could not be granted.

10. The application and the consent were clearly an attempt by the appellant to use the court process in obtaining a judgment against the respondent arising from an execution process which was null and void "ab-initio".

A court of justice cannot approve and/or adopt a consent emanating from an unlawful transaction. The best the parties herein could have done is not involve the court in their personal agreements.

11. One wonders why a third party in the person of a pastor should be co-opted into a consent arising from a matter in which he is not a party.

The pastor's involvement in this matter was an invitation to have the matter taken out of the court into the realm of alternative dispute resolution mechanism. The appellant in that case should have withdrawn the matter from the court and sought alternative dispute resolution mechanism.

12. In the end result, this court finds this appeal lacking in merit. It is accordingly dismissed with each party bearing their own costs.

[Delivered and signed this 7th day of February 2017].

J.R. KARANJAH

JUDGE

In the presence of

Mr. Magara holding brief for Mr. Bana

for Respondent

Appellant Absent

CC Njoroge/Dorothy