



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 135 OF 2006

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR AN ORDER OF MANDAMUS DIRECTED TO THE PERMANENT SECRETARY, MINISTRY OF EDUCATION

BETWEEN

ONGATA WORKS LIMITED.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 10th October, 2012, the Applicant in the instant application, the Attorney general, seeks the following orders:

1. **THAT the consent order dated 8th December 2006 and issued on the 15th day of September 2006 be set aside and/or be reviewed.**
2. **THAT cost of this application be provided for.**

Applicant's Case

2. The Application was supported by an affidavit sworn by **Peter Thande Kuria**, an advocate practicing as a State Counsel in the Attorney General Chambers.

3. According to him, the Plaintiff in Nairobi Civil Suit No. 1916 of 1996 entered into a consent judgment in which the Defendant was to pay the Plaintiff Kshs. 27,346,204.43 all inclusive in settlement of the Plaintiff's claim and the Plaintiff extracted the decree to that effect.

4. The plaintiff then moved the Court on 13th April 2006 by way of a Notice of Motion seeking for an order of Mandamus directed against the respondent to pay the Applicant Kshs 27,346,209.43 as the decretal sum all inclusive and on 15th December 2006, parties recorded a consent allowing the Notice of Motion with no orders as to costs. However, the Court Order extracted thereto does not reflect the consent that was signed by the parties as there was an addition of payment of interest which is not reflected in the suit record.

5. According to the deponent, the Court would not have issued an order that neither reflects the intention of parties nor any prayer sought by the Applicant in the Notice of Motion and the statement and the order

should be set aside/reviewed. Whereas, the applicants have demonstrated their willingness, ability and readiness to comply with the consent order and pay the Plaintiff its dues, it is being frustrated by the erroneous claim for interest which was not part of the consent order or prayer in the Notice of Motion.

Respondent's Case

6. In opposition to the application the Respondent filed the following grounds of opposition:

1. **THAT the delay in presenting the application is manifestly inordinate**
2. **THAT there is no error on the face of the record.**
3. **THAT the Respondent has not come to this Honourable Court with clean hands in that he has refused and/or omitted to exhibit:**

(a) in his ground 2, the Notice of Motion dated 13th April 2012 and presented to the court on 20th April 2004;

(b) in paragraph 5 of the said Affidavit, the court record of 15th December 2006;

(c) in paragraph 6 of the Supporting Affidavit the alleged consent that was "signed by the parties".

4. **THAT the application is an attempt to mislead this Honourable Court.**

7. The Respondent also filed a replying affidavit sworn by **Gibson Githumbi Wambugu**, the Respondent's Managing Director on 8th November, 2012.

8. According to him, it is true that on the 29th day of September 2005, the Applicant obtained a decree against the Respondent as set out in paragraph 5 of the applicant's affidavit. After obtaining of the said decree, the Respondent refused, failed and or neglected to honour the said decree in spite of the Applicant beseeching the Respondent to do so. Consequently the Applicant instructed it's Advocate to apply for orders for Mandamus for the enforcement of the said decree. Having obtained leave to apply for the writ of Mandamus, the Applicant filed the Notice of Motion dated 13th April 2006 and presented it to court on 20th April 2006. The Respondent having stubbornly refused to settle the said decree, the Applicant prayed for interest on the decretal amount at court rates as set out in prayer 1 of the said Notice of Motion.

9. According to him, under Section 26(2) of the **Civil Procedure Act**, where a decree is silent with respect to the payment of further interest from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 percent per annum. It was therefore deposed that by virtue of the said law entitled to interest at court's rate and the Respondent was equally under statutory obligation to pay the interest. In the **"High Court of Kenya Practice Notice No. 1 of 1982 Interest Rates"** the courts rate of interest was increased to 12% per annum.

10. The deponent deposed the said Notice of Motion of 13th April 2006 was duly served on the Honourable Attorney General who neither filed any grounds of objection nor any replying affidavit in opposition to the said application which application was heard on 15th December 2006 at which the Honourable Attorney General was fully represented by a Senior State Counsel and the Respondent stated that he was not opposed to the application save for the costs, where upon the court then ordered that "By consent the application dated 13th April 2006 is hereby allowed with no order as to costs". Subsequently, on 8th January 2007 the court issued the decree following which a **"Certificate of Order against the Government"** was issued in the following terms:

"I, HEREBY CERTIFY that the amount payable to the Plaintiff by the Defendant in pursuance of the said decree is Kshs. 27,346,204.40 as set out below together with further

interest at the rate of 12% per annum from 24th day of October 2005 until payment in full.

ISSUED at Nairobi on this 13th day of May 2008.

11. According to the deponent, with regard to ground No. 2 of this application, the application is misleading in claiming that the court order (decree) does resonate with the prayers of the Notice of Motion dated 13th April 2006 and that the court order extracted thereto does not reflect the consent that was signed by the parties as there was an addition of interest which is not reflected in the suit. According to him, a glance on the face of the court proceedings there was no such signed consent and moreover, the Applicant has not exhibited the alleged consent.

12. It was deposed that contrary to the allegations by the applicant, since the original consent decree of 24th October 2005 was issued, the Respondent delayed failed refused and or neglected to settle the judgment debt thus forcing the Applicant seek for the writ of Mandamus to enforce payment in December 2006. Worse still, after the Applicant obtained the January 2006 decree of Mandamus, the Respondent still stubbornly persisted in such refusal to satisfy the decree and it was not until 6th August 2012 that the Respondent conditionally agreed to settle the judgment debt of 27,346,209.43 and refused to pay the lawfully accrued interest. In his view, up to 30th November 2012 the decretal amount together with interest owing to the Applicant shall be Kshs 50,658,660.40. To him the order (decree) subject of this application was issued by the court on 8th January 2006 which is now well close to six years since then hence the delay is bringing this application is manifestly excessive and only meant to delay the fair and just settlement of this suit.

13. In a further affidavit sworn on 5th December, 2013, the deponent stated that after the Consent Order of 24th October 2005, the Respondent/Applicant did not settle the aggregate sum amounting to Kshs 27,346,209.43 as decreed by the court until February 2013 after a period of seven (7) years when the Applicant settled the said amount of Kshs. 27,346,204.43 excluding interest pending the outcome of this application after the parties herein exchanged numerous correspondence as the judgment creditor persistently and stubbornly resisted settling the judgment debt.

Applicant's Submissions

14. It was submitted on behalf of the applicant that the relief sought in the Motion was at variance with the purported final order yet the Court order extracted ought to have resonated with the relief sought. In support of this submission the applicant relied on **R vs. Registrar of Societies ex parte Julius Nyangaya and Others [2005] eKLR.**

15. It was submitted that as the relief in the plaint had been compromised by a consent, the provisions of section 26 of the Civil Procedure Act did not come into play since that would have been expressed in the consent. In support of this submission the applicant relied on **Flora Wasike vs. Destimo Wamboko** and submitted that the Respondent cannot unilaterally vary the consent by concealing material facts before Court and praying for an order outside the scope of the relief sought in the statement of facts hence the Court ought to set aside the erroneous order dated 8th November 2006 and direct the parties to strictly be bound by the consent as per the applicant's statement of facts.

Respondent's Submissions

16. On behalf of the Respondent it was submitted that Order 45(1) obligates an applicant for review to do so without unreasonable delay. Whereas the order in question was issued on 15th September, 2006, this application was not presented until 10th October, 2012, well over six years since it was issued during which period several correspondences were exchanged between the parties. In support of this application the Respondent relied on **Ikere Gitau vs. Charles Okoth Nyajwaya Civil Appeal No. 196 of 2005.** It was contended that since the applicants claims that there is an error on the face of the record it was necessary that the applicant show that the ground relied upon was after exercise of due diligence not

within his knowledge or could not be produced by him at the time when the decree was passed. In this case it was submitted that the applicant did not exercise due diligence.

17. On the authority of **John Peter Kamau Ruhangi vs. Kenya Reinsurance Corporation Civil Appeal No. 208 of 2006** and **National Bank of Kenya Ltd vs. Ndungu Njau Civil Appeal No. 211 of 1996**, it was submitted that an error apparent on the face of the record is not one which is to be established by a long drawn process of reasoning or on points where there could possibly be two points. In this case, it was submitted that the proposition on the formula to be used is contested and hence calls for arguments.

Determinations

18. I have considered the foregoing. The Court of Appeal in **Wangechi Kimita & Another vs. Mutahi Wakiburu [1985] KLR 317; [1986] KLR 578; 1 KAR 977; [1976-1985] EA 229**, while citing **Flora N. Wasike vs. Destimo Wamboko [1988] KLR 429; [1982-88] 1 KAR 625**, and **Sadar Mohamed vs. Charan Singh [1959] EA 793** expressed itself as follows:

“Notwithstanding the contractual effect of a consent order Section 67(2) of the Civil Procedure Act is not a bar to setting aside a Judgement and decree by consent or grounds which would justify setting aside a contract...The acts of the appellant in visiting the land to witness the surveying and establishing once and for all the acreage of the land is sufficient reason analogous to the discovery of new and important matter. There is no reason why the words “for any other sufficient reason” need be analogous with the other grounds in Order 44 because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words “for any other sufficient reason” need not be analogous with the other grounds specified in the Order.”

19. With respect to the grounds upon which such a consent would be set aside, the same Court in **Flora N. Wasike vs. Destimo Wamboko** (supra) held that it is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons. In other words *Prima facie* a consent order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. The East African Court of Appeal on its part in **Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266** expressed itself as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement... It is well settled that a consent judgement can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.”

20. However, in **Ismail Sunderji Hirani vs. Noorali Esmail Kassam [1952] 19(1) EACA 131** the same Court held that where a suit has been settled by a compromise the decree is passed upon the new contract between the parties which supersedes the original cause of action and in that case the contract of the parties is not the less a contract, and subject to the incidents of a contract because there is superadded the command of a Judge.

21. In this case the parties are agreed that a consent judgement was entered in the original suit which compromised the same. Accordingly, the original cause of action was subsumed in the consent hence the original cause of action was, save for fraud no longer of any relevance. If the consent judgement was settled, the issue of interest would not arise at that point in time.

22. If the said judgement was not settled, the decree holder therein, the Respondent in this ruling was entitled in the circumstances as he did to institute judicial review application for an order of mandamus compelling the judgement debtor, the applicant herein, to settle the said sum. However in Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR it was held by the Court of Appeal that:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.” [Emphasis mine]

23. Therefore for an order of mandamus to issue the Applicant must show that the Respondent is legally bound to perform the action whose performance the Applicant seeks to compel. Where therefore the judgement which led to institution of the proceedings for mandamus was expressed to be all inclusive, the Court in granting the order for mandamus has no power to in effect vary the original decree by granting other reliefs other than the one which were issued in the original judgement. However, an order of mandamus being a separate order the Court may perfectly award costs of the application and being a separate judgement the Court may also impose interest thereon. However, it is my view that unless expressly provided otherwise, the interest would only run from the date of the judgement since to order otherwise would amount to variation of the original judgement in which no interest was awarded. This however, does not preclude the parties if they so wish from imposing interest to accrue from the date of the original judgement since as stated hereinabove a properly entered consent judgement supersedes the cause of action. Therefore, I do not agree that in entering judgement in an application for judicial review the parties are restricted to the reliefs sought in the Statement. In my view a consent judgement being a contract, so long as it complies with the contractual principles is not restricted to the cause of action in question.

24. In this case, however, the order which the Court granted on 15th December, 2006 was to the effect that the application dated 13th April, 2006 was allowed. The said application sought payment of Kshs 27,346,209.43 together with interest at court rate thereon. In my view there was nothing illegal about that order. However the said interest would only accrue from the date of the filing of the application for mandamus till payment in full. For avoidance of doubt, since it is conceded that the principal sum has been paid, the only sum due in this case is interest from the date of filing of the application till the date when the said sum was paid.

25. In the result, the Notice of Motion dated 10th October, 2012 fails and is dismissed but since the history of these proceedings shows that the parties have been magnanimous with each other when it comes to costs, in the spirit of Article 159(2)(c) of the Constitution, there will be no order as to costs.

Dated at Nairobi this 14th day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mungai for the Respondent

Miss Maina for Mr Kuria for the Applicant

Cc Kevin