



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 108 OF 2012

MUSA KIMENGICH KIMUGE..... APPELLANT/ RESPONDENT

VERSUS

BETH WANGARI NJOROGE RESPONDENT /APPLICANT

RULING

1. On 26th June, 2013 the respondent (hereinafter referred to as "the applicant"), **Beth Wangari Njoro**, under certificate of urgency dated **26th June, 2013** brought the current application (the notice of motion filed on the same day), seeking to vary and/or review a consent order recorded on **27th July, 2012** for stay of release of the rent deposited in court to the applicant pending appeal. The applicant prays that the consent order be reviewed so as to enable her assess the rent deposited in court in Nakuru CMCC NO.230 of 2012.

2. The application is brought under section 1A, 1B, 3B and **80** of the Civil Procedure Act and under **Orders 45 Rule 1 and 50 Rule 1**. The motion is premised on the grounds that the appellant filed Nakuru CMCC NO. 230 of 2012 seeking an injunction against the applicant and specific performance of an alleged lease agreement; that the appellant agreed that the rent payable is Kshs. 103,000/= and on **13th April, 2012** the trial court ordered that the undisputed rent be deposited in court. Subsequently, and in particular, on **25th May, 2012** the trial court ordered that the rent deposited in court be released to the the applicant; that following an appeal by the appellant against the order for release of the money to the applicant, the parties to the appeal recorded a consent to the effect that there be a stay of execution of the order of the lower court pending the hearing and determination of the appeal.

3. The applicant contends that whereas there is no dispute as to who is entitled to the rent deposited in court, she continues to suffer financially. She explains that the amount lying in court and which pursuant to the order sought to be reviewed, she cannot assess is in excess of Kshs.1, 700,000/=. She laments that despite proceedings having been typed and ready for collection, the appellant has not taken steps to prosecute the appeal. She is concerned that the appellant continues enjoying the suit property, yet owing to the order herein, she is unable to access the rent which rightfully belongs to her.

4. For the foregoing reasons, she argues that there are sufficient grounds for review of the consent order hereto.

The application is supported by the affidavit of the applicant in which the grounds thereon are reiterated.

5. In opposing the application, the appellant filed the replying affidavit sworn on **8th July, 2013** in which he has inter alia deposed:-

1. That no lawful grounds have been advanced for review of the orders which were made by

consent of the parties;

2. That he is and has always been desirous of prosecuting the appeal expeditiously. He blames the lower court for having delayed in typing and supplying his advocates with proceedings for the delay in prosecution of the appeal;

3. That the consent for stay of release of the money is informed by his alternative claim in damages against the respondent, which claim the applicant may not be able to meet if the money deposited in court is released to her;

4. That there are no fresh matters warranting review of the consent order hereto;

5. That he is ready to prepare and file the record of appeal and to prosecute the appeal to its conclusion, subject to being supplied with the typed proceeding by the lower court;

6. That just like the applicant he is an elderly citizen (aged 63) and has no intention of treating the respondent unjustly;

7. That his wish is to have the dispute between them resolved by the court before the money deposited in court can be released to either of them.

6. On **3rd December, 2013** directions were given to the effect that the application be disposed off by way of written submissions. Despite that order, at the time of writing this ruling only the advocate for the applicant had filed submissions.

7. In the submissions filed on behalf of the applicant, it is contended that the appellant lodged the appeal herein against the lower court's order for release of the rent deposited in court to the applicant (respondent); that after a consent was recorded for stay of execution of the order appealed from, the appellant failed to diligently prosecute the appeal.

8. Lamenting that the appellant continues to use the suit premises for commercial purposes yet she does not receive the rent therefrom, the applicant argues that the conduct of the appellant of lodging the appeal and failing to prosecute it expeditiously is an abuse of the process of the court.

9. From the pleading hereto and the submissions by the applicant's advocate the sole issue for determination is whether the applicant has made up a case for issuance of the orders sought.

Law applicable to the application

10. The order hereto being a consent order, it can only be reviewed or **varied if it was obtained by fraud or collusion, or by an agreement contrary to the policy of the court.... or if 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.** See the Court of Appeal decision in **Brooke Bond Liebig (T) Ltd v. Mallya** (1975) E.A 269

11. Although in the instant application, the plaintiff does not allege that the consent order sought to be reviewed or varied was obtained by fraud or collusion, or that it was entered into by an agreement contrary to the policy of the court or without sufficient material facts, or in misapprehension or in ignorance of material facts, the applicant maintains that there are sufficient grounds to warrant review.

12. From the supporting affidavit of the applicant and the submissions filed in support of the application it can be inferred that the alleged sufficient ground is that the applicant is being denied rent that rightly devolves to her and that contrary to the applicant's expectation that the appellant would file and expeditiously prosecute the appeal, the appellant has failed to meet that expectation. As a result, the applicant is suffering prejudice as she cannot access the rent deposited in court and which entirely belongs to her.

13. The question that arises from the foregoing is whether the applicant's expectation that the appellant would expeditiously file and prosecute the appeal coupled with the hardship she is suffering owing to the appellant's failure to meet her expectation is a good ground or reason for setting aside a consent judgment.

14. In answering this question, I consider and apply the law as espoused in **Wasike v. Wamboko** (1988) eKLR thus

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out ..."

15. In applying the above position to the circumstances of this case, I note that the consent order sought to be varied or reviewed, *inter alia*, required the appellant to file and serve the record of Appeal within 30 days of **18th June, 2012**.

16. My reading and interpretation of the consent entered into by the parties is that the order of stay of execution was tied to the appellant performing his part of the bargain, which was to file and serve the record of appeal within 30 days of the date of the order (that is **18th June, 2012**).

17. The appellant failed to fulfil his part of the bargain within the covenanted time or within a reasonable time. There is no evidence in the court record that the appellant applied for extension of time within which he was to file and serve the record of appeal as contemplated under **Order 50 rule 6** of the Civil Procedure Rules.

18. In the absence of any evidence of extension of the time within which the appellant was to file and serve the record of appeal, I find and hold that the appellant breached his part of the bargain and cannot be heard to say the consent order he is enjoying cannot be reviewed and/or varied when clearly as a result of his breach of the terms of the consent order, the applicant has been prejudiced and continues to suffer prejudice.

19. The upshot of the foregoing is that owing to the fact that certain conditions of the consent order were not fulfilled as contemplated by the parties, I find and hold that the applicant has made up a case for review of the consent order hereto. Consequently, this court is pleased to review the said consent order, which I hereby do by ordering that pending the hearing and determination of the appeal, the applicant is allowed to access three quarters of the money deposited in court as at the time of delivery of this ruling.

20. The costs of the application to abide the outcome of the appeal.

Date signed and delivered in open court at Nakuru this 7th day of November 2014.

L N WAITHAKA

JUDGE

PRESENT

Ms Magana for the Appellant

Mr Kibet for the respondent

Emmanuel Maelo : Court assistant

L N WAITHAIKA

JUDGE