**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL CASE NO 33 OF 1990**

**UASIN GISHU WEEKLY**

**ADVERTISER LTD.....APPLICANT**

**VERSUS**

**ABDUL AZIZ KANJI & 2 OTHERS.....RESPONDENTS**

**RULING**

On 1st March 1990 the applicant filed a suit in this Court and sought a number of orders, namely:

(a) An order restraining the defendants from in any way interfering with the plaintiff's business or premises until the determination of the suit;

(b) An account of the business and profits made thereat;

(c) Damages;

(d) Costs of the suit, and

(e) Further or other relief the Court may deem fit.

On the same day the suit was filed the same applicant filed an application by way of chamber summons praying for an order :

(1) That there be issued a temporary injunction against the defendants jointly and severally by themselves, their agents, servants or employees pending the hearing of the application inter parties; for what purpose the temporary injunction was sought was not clarified; and

(2) That the costs of the application be provided for.

The application was argued by counsels on 13th March, 1990, and a ruling thereon made on the 8th May, 1990.

However, on 22nd May 1990 the parties to the suit entered into a consent order, one of which terms numbered "D" stated as follows:

"Of the monies owing to Abdul Aziz Kanji, the said Abdul Aziz Kanji to prove the indebtedness in the sum of Kshs 300,000/- or thereabouts within one month from today before the advocates of both parties."

It is not clear what happened thereafter but it appears counsel for the respondents drew up a decree for execution in terms of what they termed “the consent order” which decree was filed in Court on 28th May, 1991. That decree gave the following amounts as being the subject of execution:

a) Money contributed into business by way of a loan - Kshs 249,344.20

b) Monies contributed by way of cash - Kshs 282,042.00

Total - Kshs 931,386.20

Less monies not yet proved - Kshs 300,000.00

Total - Kshs 631,386.20

It appears counsel for the respondents wanted to execute for this amount and they made an application for execution in this regard but on 11th June 1991 an application was filed in Court for this decree and application for execution to be struck off from the record and costs of the application to be provided for.

This application was adjourned from time to time to give parties room to resolve the amount said not to have been proved and to present this to the Court but to no avail until 10th of August 1992 when the counsels appeared to argue the application.

During the hearing of the application, counsel for the applicant submitted that first and second defendants had filed a decree for execution on a purported previous consent order entered by the parties. According to him the first and second defendants were required to prove a sum of Kshs 300,000/- within one month of the signing of the agreement, which had not been done up to the time the application was being heard.

According to him, therefore, these defendants were not supposed to execute the decree for the amounts in excess of Kshs 300,000/-.

He referred to an affidavit which had been sworn by the Rift Valley Provincial Commissioner in support of the applicant’s affidavit to the effect that the amounts due from the applicant to the first and second defendants was Kshs 300,000/- and no more, and that this was why he sought to strike out the application to execute the decree for the amount in excess of Kshs 300,000/-.

On the other hand, counsel for the respondent in opposing the application referred the Court to orders 20 and 21 of the Civil Procedure Code and emphasised that once a consent order was filed in Court it became a judgment of the Court and that such consent could not be challenged. He said that since all the other paragraphs of the consent order had been complied with except paragraph D, there would be no justification in striking out the decree drawn in furtherance of the consent order.

Counsel for the respondent argued further that since the decree is part of the judgment one would not urge striking it out without going into the merits of the judgment and that the provisions under which the application had been filed in Court were inconsistent with the application itself. He prayed that the application should be dismissed.

Having listened to the arguments by both counsels, I do not actually understand what this application is all about. How does the Court strike out a decree from the court record unless one wants it to be amended and/or reviewed?

On the other hand the record does not bear out the amounts included in the decree which is intended to be executed by the defendants. Paragraph D of the consent order indicates that there is actually more money payable to Abdul Aziz Kanji, the first defendant, than Kshs 300,000/-. This is why the paragraph states thus:

> “Of the monies owing to Abdul Aziz Kanji the said Abdul Aziz Kanji to prove the indebtedness in

the sum of Kshs 300,000/- or thereabouts".

If Abdul Aziz Kanji was owed only Kshs 300,000, then the words "of the monies" owing would not have been included in this paragraph.

Where then did the counsel for the defendants get the figure of Kshs 649,344.20 being monies contributed into the business by way of a loan or Kshs 282,042/- contributed by way of cash? This money is not included either in the consent order or in the plaint!

Paragraph 4 and 5 of the plaint only talk of the friendly loan which the plaintiff sought from the first defendant but the amount of the loan is not disclosed except in paragraph 19 where the 3rd defendant sought payment of a loan of Kshs 1,126,200.15 from the plaintiff.

Even then, how does the Court deal with the decree filed in Court in compliance with the judgment of the Court without going into the merits of such judgment? Maybe the applicant wanted or intended to apply for stay of execution but if that were so then it should have been pending some other action; say, an appeal or hearing of the application inter parties. Otherwise to strike out a decree which has been drawn without going into the merits of the judgment seems to be an act not covered by the Civil Procedure Rules.

In the case of *Hirani v Kassam* (1952)19 EACA 131 where the Judge of Appeal followed a passage from *Seton of Judgements and orders,* 7th Ed Vol I page 124 it was stated:

> "*Prima facie* any order made in the presence of and with consent of the counsel, is binding on all parties to the proceedings or action, and on those claiming under them …and cannot be varied and discharged unless 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."

This reasoning was adopted and approved in the case of *Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 260.

What the parties were required to do in this particular case was to find or work out and establish the total amounts owing to the first defendant, Abdul Aziz Kanji apart, of course, from the amounts owing to the bank which was made a party to the suit. Of this total amount, Kshs 300,000/- was to be proved by the said Abdul Aziz Kanji within one month from the date of the consent order and in the presence of both advocates.

Without that initial stage being accomplished, there was no way the parties were going to resolve this matter except to have the whole suit heard on merits; hence the present application.

Another point to remember is that under section 67(2) of the Civil Procedure Act once parties have entered into the judgment by consent the same is not appealable and can only be set aside on grounds which would necessitate setting aside a contract ie fraud, collusion or any other reason which would enable a Court to set aside an agreement. See *Hirani v Kassam* (1952) 19 EACA page 131 and *Manji v Arusha General Store* [1970] EA at page 137. Otherwise in certain circumstances an aggrieved party should apply for review of a court order under order 44 of the Civil Procedure Rules.

In the circumstances and while not giving a go ahead to the execution of the decree, I would not hesitate dismissing the application which I feel is misplaced. The parties should meet and discuss the amount involved and reach a settlement, otherwise the case should go to full trial on the actual amount payable to the said Abdul Aziz Kanji.

Dated and delivered at Eldoret this 9th day of October 1992.

**D.K.S AGANYANYA**

**JUDGE**