



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 228 OF 2016

AMOS MUTUNGI.....PLAINTIFF

-VS-

FRANCIS NJIHIA CHEGE....DEFENDANT

RULING

1. The application before me for determination is the notice of motion dated 17th October, 2019 brought under Sections 80 and 3A of the Civil Procedure Act and Order 45 Rules 1 and 2 of the Civil Procedure Rules. The defendant/applicant is seeking orders to vary the orders issued on 4th June, 2019 to allow the applicant to effect payment of the decretal sum within a reasonable period as may be directed by the court and for the plaintiff/respondent to accept payment of Kshs.60,000/= as full and final settlement of the decretal sum. In the alternative, the applicant seeks an order that the sum of Kshs.60,000/= to be deposited in the court pending the determination of the main suit.

2. The application is premised on the grounds thereon and is supported by the affidavit of Kihang'a J. Mwangi advocate for the applicant sworn on 14th October 2019 in which he deposes that the parties herein entered a consent on 24th April 2019 wherein the defendant's notice of motion application dated 31st August 2018 was allowed and the defendant ordered to pay throw away costs of kshs.60,000/= within 21 days from the date of the order, in default of payment, the defendant's application would stand dismissed with costs to the plaintiff. Mr Mwangi deposes that in a bid to settle the said decretal amount, he sought to obtain payment details from counsel for the plaintiff which information was not provided. That he decided to settle the sum ordered by issuing a bankers cheque on 15th May 2019 which was sent to the plaintiff's counsel via registered post. That the plaintiff in bad faith declined to accept payment of the sum as ordered claiming that the said payment was made too late. That the delay in satisfying the agreed conditions as per the consent order was not occasioned by any fault on the part of the applicant and the applicant stands to suffer prejudice should his application dated 31st August, 2018 be dismissed. It is the applicant's contention that the failure of the plaintiff to provide payment details and the subsequent refusal to accept payment by way of cheque was in bad faith, ultimately frustrating efforts by the applicant to satisfy the conditions as per the consent order. The applicant has annexed copies of the order of 24th April 2019, letters dated 24th May, 2019 and 25th June, 2019 as well as a Bankers cheque dated 15th May 2019.

3. In opposing the application the plaintiff/respondent filed a replying affidavit sworn and filed by himself on 31st October 2019. He deposed inter alia that the applicant defaulted in paying the costs within the time specified in the consent and therefore his application dated 31st August 2018 stands dismissed with costs. That there is nothing to review more so where the dismissal is as a result of an order emanating from the consent of parties. That when the consent was entered on 24th April 2019, the applicant did not write or call the respondent's advocate to inquire on how payment was to be made. That no payment was made as of close of business on 15th May, 2019 and even the request to provide bank account details was made on the final day. It is the respondent's contention that there is absolutely no reason why the ordered amounts was not paid within time, adding that by entering into a consent, the parties bound themselves by it and must stick to the terms of the consent and or agreement. The respondent accuses the applicant of lack of seriousness in this matter from the inception when summons were served on him and he did nothing.

4. The application was canvassed by way of written submissions which were duly filed by the advocates for the plaintiff and for the defendant. I have considered the application and the submissions made. The only issue for determination is whether or not to review the consent order issued on 4th June, 2019.

5. In this case, ex-parte judgment was entered for the plaintiff against the defendant on 7th March 2018. The court (Komingoi J) was satisfied that the defendant had been duly served but neglected to enter appearance and/or file defence within the prescribed period of at all. Subsequently, the defendant filed the Notice of Motion dated 31st August, 2018 to inter alia, set aside the ex-parte judgment entered on 7th March 2018. When the said application came up before court (Omollo J) on 24th April 2019, the parties, through their advocates recorded consent in the following terms:

“By consent, the application dated 31st August 2018 be allowed as prayed. Travelling costs of Kshs.60,000/= be paid to the defendant/applicant to the plaintiff/respondent within the next 21 days. In default of payment of the costs the said application dated 31st August 2018 stands dismissed with costs to the plaintiff/respondent. ”

The said consent was adopted as an order of the court and the matter was fixed for mention on 10.6.2019.

6. It has now emerged that the applicant did not make the payment within the 21 days as per the consent entered to by the parties. In the application herein the applicant is asking the court to vary the terms of the said consent and allow him to effect payment of the decretal amount within a reasonable period as the court may direct. The applicant is also asking the court to order that the respondent accepts payment of Kshs.60,000/= as full and final settlement of the decretal sum.

7. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated and well settled. In the case of **Board of Trustees National Social Security Fund –vs- Micheal Mwalo [2015]eKLR**, the Court of Appeal stated;

“A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud collusion or by an agreement contrary to the policy of court.”

8. In the case of **Brooke Bond Liebig (T) Ltd –vs- Mallya (1995) EA EA 266**, Law JA stated the law at P. 269 in these terms:

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani-vs- Kassam (1952) 19 EACA 131, where the following passage from Seton on Judgments and orders, 7th edition, Vol. 1P.124 was approved.

“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 an agreement contrary to the policy of the court... or if consent was given without sufficient material facts, or in misrepresentation or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

9. Similarly, in the case of **Flora Wasike –vs- Destimo Wamboko (1988) KAR 625, Hancox, JA** (as he then was) stated:

“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.”

10. The question to consider in this application is whether the applicant has met the threshold for review or setting aside of the consent order entered by the parties on 24th April 2019. The record shows that when the application dated 31st August 2018 came up for hearing, the parties through their advocates compromised the same and recorded the consent which was adopted as an order of the court. The applicant admits that the said consent was recorded by the parties and adopted as an order of the court. The applicant now wants the court to review and/or vary the said consent to incorporate other terms and conditions that were not part of the consent agreed upon and recorded in court by the parties themselves on their own volition. In this case, I find that there was no misrepresentation, mistake or coercion. There is no suggestion of fraud or collusion. All the material facts were known to the parties who willingly consented to compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. A court cannot interfere with a consent order except in such circumstances as would afford a good ground for varying or rescinding a contract between parties. No such circumstances have been shown to exist in this case. And certainly the court cannot re-write the contract for the parties so as to vary the consent that they themselves agreed upon.

11. In the result I find that the notice of motion dated 17th October, 2019 has no merit and hereby dismiss it with costs to the plaintiff/respondent

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 15th day of December 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE