

Munyiri v Ndunguya

Court of Appeal, at Nyeri May 24, 1985

Nyarangi JA, Platt & Gachuhi Ag JA

Civil Appeal No 60 of 1983

(Appeal from the High Court at Nyeri, VV Patel J, Civil Case No 7 of 1971)

May 24, 1985, Platt Ag JA delivered the following Judgment.

On May 31, 1983 in the presence of Mr Ndirangu for the applicant, and Mr C C Patel for the respondent the following entry was made:

“By consent it is ordered that this case will be marked settled upon payment by the plaintiff of a sum of Kshs 25,000 to the defendant, which the defendant hereby agreed to accept in full settlement by monthly instalments of Kshs 3,000 each with effect from July 5, 1983 and then on 5th of each month UDC. In default execution to issue.

Earlier orders for costs are set aside. It is ordered that there be no order for costs. The land registrar to remove the caution lodged by the defendant on the land parcel No Mwerua/Mukure/28 forthwith.

V V Patel

Judge

31/5/83.”

The defendant became dissatisfied and appealed on several grounds. It is alleged that no consent had been reached between the defendant and plaintiff or between their advocates. The judge ought to have entered judgment for the plaintiff or dismiss the suit. The valuation report had not been taken into account Judgment should have been entered in terms of an award. There was the question of an eviction order.

The appeal had been commenced before another bench of this court, and it was suitable to consider the matter de novo .

The salient features of the situation are that there is upon the record a detailed consent order, from which section 67 (2) of the Civil Procedure Act (cap 21) provides no appeal. This court has given an interpretation of that section in *Flora Wasike v Destimo Wamboko*, Civil Appeal 81 of 1984. The consent order was entered in the presence of the advocates for the parties. Although it has been suggested by the appellant in this court, that the order might have included the phrase, “by consent of the parties”; or the order might be difficult to interpret; it seems on the face of it a perfectly intelligible consent order, including each paragraph, as set out above.

There are now rival claims that this consent order does or does not represent the true intention of the parties. In the circumstances of this case, there is no possibility of going behind the record. It would appear that the parties must set aside the consent order either by review or the bringing of a fresh suit; see *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266. It was there said:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

That decision merely followed *Hirani v Kassam* [1952] 19 EACA 131. The affidavits in this case, ordered by the previous court, illustrate the futility of attempting to arbitrate at this stage between the rival claims.

The parties are therefore left to their well-known remedies, and the appeal must fail. However, we may observe that as there appears to be a good deal of argument about the contents of some consent judgments and orders, it would be wise to obtain the signature of the advocates, or the parties if they are present. In this way, it will then be clear that the terms were known and agreed to, at the time that the consent order or judgment was entered into, and may help to avoid later recanting by the parties themselves, which is also a well recognised feature of life, despite instructions earlier given to their advocates. Indeed, if the parties wish to resile, they can always do so, by consent.

I would dismiss the appeal with costs, in accordance with section 67(2) of the Civil Procedure Act (cap 21).

Nyarangi JA. I agree with the judgment of Platt Ag JA which I have read in draft and with the order proposed by him.

None of the parties to the saga which emerges from the proceedings is without blame. The appellants were determined to resile from the judgment without justification. The advocates should, in the circumstances, have appended their signatures to the judgment or registered their disapproval of the judgment as soon as it was delivered. The judge should, as a precaution, have made a full and careful note of what each advocate said to him which culminated in the consent judgment.

As Gachuhi Ag JA agrees, the appeal is ordered to be dismissed with costs. Gachuhi Ag JA. I have read the judgment of Platt Ag JA, in draft form, and I agree with it.

I have nothing more to add.