

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 25 OF 2016

LEITICIA AKINYI OGOLA.....APPELLANT
VERSUS
NIC BANK LIMITED.....RESPONDENT

(Appeal from the ruling and orders, of Hon. P Muholi, Resident Magistrate, of 13th January 2016, in Milimani CMCCC No. 4897 of 2013)

JUDGEMENT

1. The suit herein was initiated by the respondent, against the appellant, seeking recovery of a sum of Kshs. 1,572,442.01, being moneys, plus interest, that it had loaned to the appellant.
2. The appellant did not enter appearance nor file defence, and a default judgement was entered, on 30th October 2013. She filed an application, dated 2nd December 2013, seeking the setting aside of that judgement, and leave to file a defence. The said application was dismissed, in a ruling delivered on 19th March 2014, on grounds that there had been proper service of summons, and the appellant did not have a defence, which raised triable issues.
3. Execution proceedings were initiated against the appellant, to recover the decretal amount. The appellant filed a Motion, dated 18th July 2014, seeking to stay the execution. That Motion was dismissed, on 25th February 2015, on grounds that it was vague and ambiguous.
4. A notice to show cause was served upon the appellant, and she appeared in court, on 28th April 2015, and recorded a consent, undertaking to liquidate the decretal amount in monthly instalments of Kshs. 30,000.00. In default, a warrant of arrest was to issue. Thereafter, the appellant approached the court, by a Motion, dated 25th August 2015, for review of the terms of the consent of 28th April 2015, on grounds that she faced financial constraints. That Motion was dismissed on 13th January 2016, on grounds that the application did not come under any of the circumstances, stated in *Ismail Sunderji Hirani vs. Noorali Esmail Kassam* [1952] 19 EACA 131 (Sir Barclay Nihill P, Sir Newnham Worley VP & Mayers J), upon which a consent order could be interfered with by the court.

5. The appellants were aggrieved, hence the appeal herein. The grounds revolve around the trial court not appreciating that the terms of the consent were reviewable after 3 months, the court failed to consider that the entire suit was against the *in duplum* rule, the claim by the respondent was founded on an illegality, the appellant was denied a fair hearing, among others.
6. Directions were given, on 9th February 2024, for disposal of the appeal, by way of written submissions. I see written submissions, in the file before me, by the respondent, which essentially support the ruling delivered by the trial court on 13th January 2016.
7. The appellant has raised a lot of issues in her grounds of appeal. Yet, the ruling, whose order she challenges, turned on only 1 issue, whether the consent order recorded should be reviewed. The arguments, in support of the plea for review of the consent, did not raise any other issues, apart from her financial difficulties, which had something to do with her salary being low, and, therefore, unable to support the instalments, the subject of the consent. She sought that the court considers ordering a payment of a lower amount, in monthly instalments, and suggested Kshs. 10,000.00. There would be no basis for considering issues that were not raised in that application, and I shall limit myself, in determination of the instant appeal, to the prayer for variation of the terms of the consent, on the grounds advanced.
8. The case classicus, in Kenya, for interference with or review of a consent order, is *Ismail Sunderji Hirani vs. Noorali Esmail Kassam* [1952] 19 EACA 131 (Sir Barclay Nihill P, Sir Newnham Worley VP & Mayers J), where it was stated that:

“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...”
9. *Brooke Bond Liebig (T) Ltd vs. Mallya* [1975] EA 266 (Law Ag P, Mustafa Ag VP & Musoke JA) followed, citing *Ismail Sunderji Hirani vs. Noorali Esmail Kassam* [1952] 19 EACA 131 (Sir Barclay Nihill P, Sir Newnham Worley VP & Mayers J), [1952] 19 EACA 131, with approval, where it was said that:

“Prima facie, any order made in the presence and with the consent of the 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an Agreement.”

10. Those 2 decisions still remain the law on the subject, and they have been cited with approval, in such cases as *Flora N. Wasike vs. Destimo Wamboko* [1988] eKLR [1985] KECA 149 (KLR) (Hancox JA, Nyarangi & Platt Ag JJA), *Samson Munikah practicing as Munikah & Company Advocates vs. Wedube Estates Limited* [2007] eKLR [2007] KECA 176 (KLR) (Tunoi, O’Kubasu & Githinji JJA), *Board of Trustees National Social Security Fund vs. Micheal Mwalo* [2015] eKLR [2015] KECA 782 (KLR) (GBM Kariuki, Ouko & Mohammed, JJA) and *Gatheru Gathemia & Co Advocates vs. Dado & another* [2023] KEHC 21472 (KLR) (Mong’are, J).
11. The appellant, in her application, at the trial court, did not allege that fraud or collusion was exercised to procure the consent order, or that the consent was contrary to the policy of the court, or that she conceded to it without sufficient material facts, or she misapprehended the material facts, or was ignorant of them. She entered into the consent willingly, and with the intent of escaping civil jail. She did not meet the undertakings, that she had committed herself to, under the terms of the consent. She did not even pay a single coin, before seeking review, 4 months after the consent was entered into.
12. I see, from the grounds of appeal, that it is being argued that the terms of the consent were subject to review after 3 months. That is true. However, such review could only ride on the good faith of the parties. The appellant clearly had no good faith when she entered into the consent. If she had any, she would have paid some amount of money to the respondent, including the Kshs. 10,000.00 she was proposing, before moving the court for review. The respondent had advanced some money to her, on certain terms. She did not repay the money, within the time agreed upon, in their money-lending contract, hence the suit. Despite the suit being filed against her, she did not

make good. Despite an olive branch being extended to her, to settle the debt in instalments, she still did not pay even a single cent. Surely, such a debtor should not expect any sort of further accommodation.

13. There can possibly be no merit, at all, in the appeal herein. I, consequently, dismiss it, with costs to the respondent. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT
BUSIA, ON THIS 14TH DAY OF OCTOBER 2025.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyne Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

**Mr. Ombwayo, instructed by Andrew Ombwayo & Company,
Advocates for the appellant.**

**Mr. Muthoni, instructed by Wainaina Ileri Advocates LLP, Advocates
for the respondent.**