



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 247 OF 2015

FORMERLY NAIROBI HCC 842 OF 1997

JULIUS NGURE NGARI.....PLAINTIFF

VERSUS

MICHAEL NGURE KATHIANYU.....DEFENDANT

RULING

1. By notice of motion dated 25th January 2019 brought under the provisions of sections **1A, 1B, 3 and 3A of the Civil Procedure Act, (Cap 21 Laws of Kenya), Order 40 Rule 1, 2 and 4 of the Civil Procedure Rules, 2010** and **all other enabling provisions of the law** the Defendant sought the following orders;

a. That the matter be certified as urgent and service be dispensed with in the 1st instance.

b. That this honourable court do grant an order directing that the Defendant/Respondent be allowed to immediately deposit in court Kshs 193,610/- (Kenya shillings one hundred and ninety three thousand, six hundred and ten only being the bill of costs and Kshs 322,000/-) (Kenya shillings three hundred and twenty thousand only) being the principal amount of the suit land as per the amended plaint dated 19th July 2017, plus the requisite court collection fees.

c. That this honourable court do grant orders restraining the Plaintiff/Respondent, his servants, agents and/or any other 3rd parties acting under his direction from auctioning, selling or dealing with the following parcels of land being Gaturi/Nembure/8619, Gaturi/Nembure/8620, Gaturi/Nembure/8621 and Gaturi/Nembure/8822 until this matter is heard and determined.

d. That the accrued interest against the principal amount of Kshs 322,000/- be calculated at court rates over all the years from the date of the agreement which is 19th March 1996.

e. That costs be in the cause.

2. The said application was based upon the grounds set out on the face thereof and supported by the Defendant's own affidavit sworn on 25th January 2019. As far as the court can gather from the said application, the Defendant wants a *variation* of the consent judgement dated 15th January 2018 whereby the parties had agreed that the Defendant would pay interest on the decretal amount at 14% per annum from the date of filing suit. He, instead, wants to pay interest at *court rates*. He considered the agreed rate of 14% per annum as unfair.

3. It would also appear from the said application that the Defendant wants a stay of execution because he considers the value of his properties to be very high and not commensurate with or proportional to the decretal amount owing. He estimated the value of the said properties to be Kshs 11,000,000/-.

4. The Plaintiff filed a replying affidavit sworn on 14th February 2019 in opposition to the said application. It was contended that the application was an abuse of the court process. It was contended that since the consent judgement was recorded on 15th January 2018 in his presence, the Defendant had defaulted in making payment.

5. The Plaintiff further stated that the Defendant had not demonstrated any legal justification for seeking a stay of execution of the decree. It was contended that the Defendant would not suffer any loss or damage since execution of the decree is a lawful process. It was further contended that the Defendant had not demonstrated any legal grounds for variation of the consent judgement. He considered the instant application as a delaying tactic and urged the court to dismiss it with costs.

6. When the said application was listed for hearing on 20th February 2019, the Defendant's advocate prosecuted the same on the basis of the

grounds set out in the motion and the supporting affidavit. It was submitted that the Defendant had already fully paid the principal sum and costs and that the only issue which was in dispute was the rate of interest. It was submitted that the court should vary the rate of interest from 14% per annum to court rates with effect from date of the sale agreement i.e. 19th March 1996.

7. The Plaintiff's advocate opposed the said application on the basis of the replying affidavit sworn by the Plaintiff on 14th February 2019. It was submitted that the consent judgement was recorded in court on 15th January 2018 in the presence of the Defendant. It was submitted that the Defendant had not established any of the known legal grounds for setting aside or varying the said consent. The Plaintiff's advocate relied upon the case of **SMN Vs ZMS & 3 Others [2017] eKLR** in that regard. It was further submitted that the Defendant did not pay a single cent for one full year after entry of judgement and that he only moved the court upon commencement of execution proceedings.

8. The court has considered the Defendant's said application, the Plaintiff's replying affidavit in response thereto as well as the respective oral submissions of the parties. The court is of the opinion that the following issues arise for determination;

a. Whether the rate of interest in the consent judgement dated 15th January 2018 should be varied from 14% per annum to court rates.

b. Whether the Plaintiff should be restrained from selling the Defendant's properties in execution of the decree.

9. The record of proceedings shows that on 15th January 2018 the Plaintiff's advocate Mr Okwaro and the Defendant in person appeared before me when a consent judgement was recorded in the following terms;

a. *That judgement be entered for the Plaintiff against the Defendant for Kshs 322,000/-.*

b. *That interest shall be payable on the said amount at the rate of 14% with effect from the date of filing suit i.e 8th April 1997. The interest thus far is Kshs 901,600/-.*

c. *The Defendant shall bear the costs of the suit.*

10. The record further shows that the terms of the consent were read out by the Plaintiff's advocate and confirmed by the Defendant who was present in person. The Defendant's advocate was absent on the material date. The Defendant did not claim that he did not appreciate the terms of the consent or that it was procured through fraud, undue influence, coercion or other unlawful means. The record shows that he informed the court that he wanted to negotiate payment of the decretal amount by instalments with the Plaintiff's advocate.

11. The principles to be considered in an application for setting aside or varying the terms of a consent judgement are relatively well settled. One of the earliest cases in East Africa on the subject is **Hiran Vs Kassam [1952] 19 EACA 131** where the court stated at page 134 as follows;

“The mode of paying the debt, then, is part of the consent. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in *Setton on Judgements and Orders* (7th Edn); vol 1, p. 124, as follows:

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

12. The said authority was applied in the later case of **Brooke Bond Liebig Ltd Vs Mallya [1975] EA 266** where Law Ag P stated at page 269 that;

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

13. That legal position has been followed in subsequent cases such as **Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd [1982] KLR 485, Wasike Vs Wamboko [1988] KLR 429**, and the case of **SMN Vs ZMS & 3 Others [2017] eKLR** which was cited by the Plaintiff's advocate.

14. The court finds and holds that there is absolutely no reason or justification to interfere with or vary the terms of the consent judgment recorded on 15th January 2018. It has not been alleged that it was affected by any of the known vitiating factors which can justify the setting aside of a consent judgement. The mere fact that the Defendant thinks that the rate of interest of 14% is unfair or higher than the court rate cannot be a valid ground for interfering with the consent.

15. It is curious that the Defendant took more than a year after the consent judgement was recorded to apply for variation of the rate of interest. Such kind of delay may well disentitle a party from obtaining relief. It is strange that it would take the Defendant one full year to realize that the rate of 14% per annum was not “fair”.

16. The court has, however, noted that the decree as drawn does not fully comply with the terms of the consent recorded on 15th January

2018. According to the terms of the consent, the interest of 14% per annum was to run from the date of filing suits i.e. 8th April 1997 and not the date of the sale agreement. The Deputy Registrar has, however, indicated that interest would run from 8th April 1993 instead of 8th April 1997. The amount of interest for the period up to 15th January 2018 however remains Kshs 901,000/- as per the consent recorded in court. That means that the error appearing on the face of the decree is merely clerical and did not occasion a miscarriage of justice.

17. The second issue is on stay of the intended sale of the Defendant's properties in execution of the decree. This prayer appears to have been spent since it was sought pending the hearing and determination of the instant application. The court had already made an order for maintenance of *status quo* pending delivery of the ruling.

18. The upshot of the foregoing is that the court finds no merit in the Defendant's notice of motion dated 25th January 2019. The same is consequently dismissed with costs to the Plaintiff. The Deputy Registrar shall, however, correct the error on the face of the decree to indicate that interest shall run with effect from 8th April 1997 and not 8th April 1993.

19. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 7th day of MARCH, 2019.

In the presence of Mr. Okwaro for the Plaintiff and the Defendant in person.

Court clerk Mr. Muinde.

Y.M. ANGIMA

JUDGE

07.03.19