



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 16 OF 2014**

**JULIA TAATU M'MWAMBIA.....APPELLANT/APPLICANT**

**VERSUS**

**JOHANA KINGANGA MAILUTHA.....RESPONDENT**

**RULING**

The application before me is the Notice of Motion dated 25<sup>th</sup> May 2018 brought under **Section 1A, 3 & 3A C.P.A, Order 50 Rule 6, Order 45 Rule 1, Order 12 Rule 7 CPR** and all enabling provisions of the law. The Appellant/Applicant sought the following orders:

- (1) That this Honourable Court be pleased to set aside, vary and/or review the orders made on 14<sup>th</sup> February 2018 and on 14<sup>th</sup> May 2018 and reinstate the appeal for hearing.***
- (2) That this Honourable Court be pleased to extend and give a little more time to the Appellant to put in her written submissions.***
- (3) That the costs of this application be provided for.***

The application is premised on the supporting affidavit of the Applicant and grounds apparent on the face of the said application. The said application is opposed with grounds of opposition dated 15<sup>th</sup> November 2018. The gist of the application is a consent order entered between the parties on 14<sup>th</sup> February 2018 which read as follows:

- “(1) This Appeal to be disposed of by way of written submissions.***
- (2) The Appellant to file and serve his written submissions within 30 days from today.***
- (3) The Respondent to file and serve their submissions within 30 days from the date of service thereof.***
- (4) Failure by the Appellant to file and serve their submissions as indicated in paragraph (2) above, this Appeal will stand dismissed with costs to the Respondent.***
- (5) Mention on 14/5/2018 to confirm compliance before the Deputy Registrar who will then forward the file to Garissa Law Courts for writing of judgment”.***

When the file came up for mention before the Deputy Registrar on 14<sup>th</sup> May 2018, the Appellant had not filed and served his submissions pursuant to the consent order. The Deputy Registrar confirmed that suit stood dismissed as per the consent order. Those directions prompted the Applicant to file the present application.

**APPLICANT'S CASE**

In her supporting affidavit, the Applicant deponed that she relied on her advocate to take care of her interests but was informed that the advocate who was working on her file could not be traced by other advocates in that firm. She stated that given another chance and a little more time, the matter will be handled by the Senior Advocate in the firm.

**RESPONDENT'S CASE**

The Respondent through his grounds of opposition stated that the application is a mere after-thought solely meant to prolong and delay the course of justice. He also contends that the Applicant has not satisfactorily explained her failure to prosecute her own appeal as no tangible evidence has been availed to support her allegations. In conclusion, the Respondent stated that the Applicant shall not suffer any damage as she clearly has an alternative recourse in law if her allegations for failure to comply with the Court orders are true.

#### APPLICANT'S SUBMISSIONS

The Applicant through the firm of Maitai Rimita & Co. Advocates submitted that the advocate handling the file was indisposed and therefore could not attend Court and submit orally as earlier directed by the Court. He submitted that failure to attend Court was not intentional. The Applicant further submitted that **Article 50 of the Constitution** guarantees a right to fair hearing and that justice shall be administered without undue regard to technicalities and that the Courts should facilitate the overriding objective in the resolution of disputes between parties. He cited the following cases:

- (1) *Richard Ncharpileyagn Vs I.E.B.C & 2 Others (2013) e K.L.R.*
- (2) *Harisson Wanjohi Wambugu Vs Felista Wairimu Chege & Another e K.L.R*
- (3) *Ghehona Vs Seventh Day Adventist Church of East Africa Union (2013) e K.L.R*
- (4) *An Associated Warehouse Co. Ltd & Others Vs Trust Bank Ltd HCCC No. 1266.*
- (5) *Shah Vs Mbogo*

#### RESPONDENT'S SUBMISSIONS

The Respondent through the firm of Mithega & Kariuki Advocates submitted that from the supporting affidavit, the Applicant majorly laid blame on an advocate in the firm of Advocates who was to work on her submissions. However, the advocate who was not even mentioned did not swear any affidavit to corroborate the allegations. The Respondent argued that when the directions to have the appeal disposed of by way of written submissions were taken, the Applicant was represented. He submitted that the Appellant did not abide by the orders entered into by consent and that she cannot disregard the orders of the Court and expect the same Court to make a review. The Respondent further submitted that the firm of Advocates on record being agents of the Appellant

herein, have to be held liable for what transpired during their representation. In conclusion, the Respondent argued that litigation must come to an end. He cited the following case:

- (1) *Ceres Estate Limited Vs Kifran Day & 4 Others (2013) e K.L.R.*

#### DISPOSITION

I have considered the application dated 25<sup>th</sup> May 2018 and the supporting affidavit. I have equally considered the grounds of opposition and the submissions by the parties. The Applicant is seeking to set aside and/or review a consent order entered between the parties in this case on 14<sup>th</sup> February 2018. The principle for setting aside and/or varying a consent order is now well settled. In ***HIRANI VS KASSAM (1952) 19 E.A.C.A 131 at page 134***, the Court of Appeal held as follows:

***“The mode of paying the debt, then, is part of the consent judgment. 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 judgments and orders (7<sup>th</sup> Edition), Vol. 1 page 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 set aside an agreement”.***

Again in ***Brooke Bond Liebig Ltd Vs Mallya (1975) E.A 266***, the Court held thus:

***“A consent order 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”.***

The Applicant seeks to set aside and/or vary the consent order entered into by the parties on 14<sup>th</sup> February 2018. However, the Applicant has not given sufficient grounds why the submissions were not filed and served as agreed in the consent order. There is no affidavit sworn by the lawyer handling the matter and any treatment notes indicating that indeed he was sick and incapable of writing the submissions. There is also no explanation why another lawyer could not write and file the submissions in place of the sick advocate. The consent order which was entered by the counsels for the parties on 14<sup>th</sup> February 2018 has to be set aside and/or varied on the same grounds as those for setting aside a contract. The arguments and authorities cited by the Applicant in support of this application are distinguishable and irrelevant. The Applicant engaged a firm of advocates to advise her diligently and professionally.

I agree with the submissions by counsel for the Respondent in the case of **CERES ESTATE LIMITED VS KIERAN DAY & 4 OTHERS (2013) e K.L.R** where it was held as follows:

***“The plaintiff may have been prejudiced by the conduct or failures of its previous counsel. The plaintiff stated at paragraph 11 of the supporting affidavit that its former lawyers failed to notify it of the developments or steps taken to safeguard its interests. Those may not be ordinary mistakes that should not be visited on the plaintiff. They seem to me to border on serious lapses of negligence. The plaintiff, if well advised, has a clean remedy”.***

I agree with that decision. The consent order by the parties gave a clear default in the event that the Applicant/Appellant failed to file submissions within the stipulated period. There is no affidavit sworn by the Advocate why he failed to comply with the consent order. The Applicant’s remedy in my view lies elsewhere but not setting aside the consent order.

For all the reasons, the order that comments in this case is to dismiss the application dated 25<sup>th</sup> May 2018 which I hereby do with costs to the Respondent. It is so ordered.

***READ and SIGNED in open Court at Meru this 3<sup>rd</sup> day of June 2019.***

**E.C. CHERONO**

**ELC JUDGE**

**3<sup>RD</sup> JUNE, 2019**

*In the presence of:*

- 1. M/S Rimita for Applicant*
- 2. M/S Nyaga for Respondent*