



REPUBLIC OF KENYA



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**CMAWM v PAWM (Civil Application 76 of 2018)
[2022] KECA 638 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 638 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION 76 OF 2018
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JUNE 24, 2022**

BETWEEN

CMAWM APPLICANT

AND

PAWM RESPONDENT

(An application against directions and orders given by Honourable Mr. Justice W. Korir on 16th February 2018 in Malindi High Court Divorce Cause No. 1 of 2010)

RULING

1. This ruling relates to the applicant's application to set aside a consent order recorded by the Court pursuant to a consent letter dated and filed on 28th February 2018 in Civil Application No. 21 of 2018.
2. Although, based on the record, this matter appears to have a long and acrimonious litigation history between the parties that has also drawn in their advocates into the fray, the relevant background to the present application is that by an application dated 12th February 2018 (but indicated as 15th February 2018) presented before the High Court of Kenya at Malindi in Divorce Cause No. 1 of 2010 between the parties, the present applicant, CMAWM sought orders to stay execution of warrants of arrest issued against him by the Deputy Registrar of that court on 22nd December 2017.
3. In an order given on 16th February 2018, the High Court (W. Korir, J.) gave directions regarding the hearing and disposal of that application and at the same time declined to grant, at that stage, the applicant's request to lift a committal warrant issued by the Deputy Registrar. Aggrieved by the order and directions given on 16th February 2018, and intending to challenge the same before this Court, the applicant filed a notice of appeal dated 16th February 2018.
4. Shortly after filing the notice of appeal, by an application dated 18th February 2018 and lodged before this Court on 20th February 2018 in Civil Application No. 21 of 2018, the applicant invoked provisions



of the Constitution and Rule 5(2)(b) of the [Court of Appeal Rules](#) and sought orders that: the warrant of arrest and committal given by the Deputy Registrar of the High Court be stayed pending the hearing and determination of the application; that further proceedings including a contempt of court application against the applicant and his advocate and proceedings on the notice to show cause be stayed pending the hearing and determination of the application; that the warrants of arrest and of committal given by the Deputy Registrar of the High Court be stayed pending the hearing and determination of the intended appeal; and that all further proceedings including the contempt of court application against the applicant and his advocate and proceedings on the notice to show cause be stayed pending the filing and determination of the intended appeal. It would appear that the committal proceedings before the High Court arose from an alleged default by the applicant to make maintenance payments in favour of the respondent.

5. That application was compromised by the parties through a consent letter duly signed by Kinyua Muyaa & Co Advocates for the applicant and Chepkwony & Associates Advocates for the respondent and dated and filed before this Court on 28th February 2018.
6. The Court was thereby requested by the parties to record orders by consent firstly, that the warrants of arrest given on 22nd December 2017 and issued on 24th January 2018 for the arrest of the applicant; the warrant of arrest given on 14th February 2018 and issued on 20th February 2018 and the committal warrants given on 14th February 2018 be suspended; and that the applicant's passport be released to him upon his depositing in court the original title and original certificate of search for Plot No. xx of Group V Kilifi registered as No. xxxx. The consent also provided that the orders given by the High Court on 27th February 2018 requiring counsel for the applicant to produce him before the Deputy Registrar be suspended. Under item 3 of that consent, the parties set out in great detail the terms and conditions upon which those consent orders were hinged upon.
7. Some months later, the applicant filed the present application dated 30th June 2018 and made under Sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and Rule 5(2)(b) of the Court of Appeal Rules and Sections 3 and 3A of the [Civil Procedure Act](#) in which he seeks: an order for the immediate release of the applicant's passport held by the Deputy Registrar of the High Court and that certain letters addressed by the respondent's advocates to the British High Commissioner and to the Director of Immigration Services be disregarded; and that the said consent orders endorsed on 28th February 2018 in Civil Application No. 21 of 2018 be stayed, be declared null and void, and be set aside as a matter of right. Twenty-five grounds in support of the application are set out in the body of the application which is further supported by the applicant's affidavit running into 39 paragraphs in 17 pages as well as a lengthy supplementary affidavit sworn by F. Kinyua Kamundi and a further supplementary affidavit.
8. In opposition to the application, the respondent filed a replying affidavit in which she deposes that the application is made in bad faith and is an abuse of the court process.
9. During the virtual hearing of the application on 14th March 2022, learned counsel Mr. Kinyua appeared for the applicant while Miss. Metto, learned counsel, held brief for Ms. Chepkwony for the respondent. Urging the application, Mr. Kinyua relied on the applicant's written submissions dated 13th November 2018 which he orally highlighted. He indicated at the onset that the prayer in the application relating to release of the applicant's passport has been overtaken by events as the applicant recovered his passport and returned to the UK in August 2018.
10. In support of the prayers in the application seeking: stay of execution of the consent; a declaration that the consent is null and void; and an order to set aside the consent, it was submitted that the consent was procured by fraud and duress and that the Court lacked jurisdiction to endorse it.



11. It was submitted that this Court had no jurisdiction to record the consent because there was no notice of appeal arising from any execution proceedings with regard to Kshs. 3,000,000 payable under the judgment of the High Court in HCCC No. 33 of 2015 as varied in Civil Appeal No. 104 of 2016 and therefore the Court had no jurisdiction to record a consent in an application for stay pending appeal arising from Divorce Cause No. 1 of 2010; that the consent related to the amount claimed as installments of maintenance that were barred under Section 82 of the *Marriage Act*; that the respondent's claims on the basis of which the warrants were issued was statute barred; that the claim was subject of bankruptcy proceedings in the UK; and that the matter related to pounds 72,200 as opposed to 82,000.
12. It was submitted that the consent orders were procured by duress as the applicant and his advocate were at risk of being jailed under illegal and invalid committal warrants; that the applicant was therefore forced to enter into the consent; that warrants were issued by the lower court for alleged failure to pay when in fact payment had been made; and that on 28th February 2018, when the application for stay of execution was scheduled to be heard, counsel were directed by the Court to negotiate and given 30 minutes to do so.
13. Counsel for the respondent submitted that the application is an abuse of the process of the court; that the terms of the consent were fully complied with; that the applicant paid the amount in question in full; that there is nothing to set aside as all issues between the parties were concluded in terms of the consent.
14. It was submitted that the complaint that the Court lacked jurisdiction to endorse the consent is baseless; that the Court did not hear or make any finding but rather, on request of the parties, accepted to adopt the consent; that it is settled that a consent has contractual effect and can only be set aside on grounds that would justify the setting aside a contract and that there are no grounds in this case for doing so; that the applicant has not established the consent was entered into on account of any unlawful threat or coercion or that any false representation was made to the applicant; and that the applicant has therefore not established that the consent was procured by either duress or by fraud.
15. We have considered the application, the affidavits and the submissions. With respect, the application before us is somewhat bizarre. We say so because it is the applicant, who, being aggrieved by the orders and directions of the High Court given on 16th February 2018, filed a notice of appeal intending to challenge the decision of the High Court before this Court. On the basis of that notice of appeal, the applicant then filed the application under Rule 5(2)(b) of the Court of Appeal Rules to stay proceedings before the lower court pending the hearing and determination of the intended appeal. Consequently, based on the applicant's notice of appeal, the Court had jurisdiction to entertain the application under Rule 5(2)(b) of the Rules. See *Equity Bank Ltd vs. West Link Mbo Limited* [2013] eKLR.
16. The impugned consent of 28th February 2018, as already stated, compromised that application by which consent parties agreed to suspension of warrants issued against the applicant and also the suspension of order of the High Court conditional upon the terms set out under items a) to f) of consent order number 3. It is surprising therefore that the applicant, who is the one who filed the application for interlocutory relief pending the hearing of his appeal, is the same person who now claims that the Court lacked jurisdiction to dispose of the same application on the terms agreed by the parties.
17. As for the contention that consent should be annulled and set aside on grounds of duress and fraud, it is an established principle that a court cannot interfere with a consent order or judgment except in circumstance as would afford a good ground for varying or rescinding a contract. See for



instance *Hirani vs. Kassam* [1952] 19 EACA 131; and also, *Flora N. Wasike vs. Destimo Wamboko* [1988] eKLR. In that regard it is noteworthy that the grounds on which applicant sought relief in his application under Rule 5(2)(b) of the Rules of the Court, are practically the same grounds on which, having secured some relief, he is now impeaching the consent entered into compromising that application. There is no material before us on the basis of which we can conclude as claimed by the applicant, that the consent was procured by either fraud or by duress.

18. Moreover, it is conceded that based on the consent, the applicant's passport was released. It was asserted that the terms of the consent were fulfilled and fully complied with. It would therefore be futile, even if the remedies sought would otherwise be justified (and we have found they are not) to grant a remedy in vain. See the Court's decision in *Eric V.J. Makokha & 4 Others vs. Lawrence Sagini & 2 Others* [1994] eKLR.
19. In the result, the application dated 30th June 2018 has no merit. It is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR

