Perera v Nation Media Group & 2 others (Civil Appeal 122 of 2016)
[2021] KECA 135 (KLR) (5 November 2021) (Judgment)

Neutral citation: [2021] KECA 135 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 122 OF 2016

RN NAMBUYE, SG KAIRU & K M'INOTI, JJA

NOVEMBER 5, 2021

BETWEEN

ANURA PERERA ..... APPELLANT

AND

NATION MEDIA GROUP ..... 1ST RESPONDENT

WANGETHI MWANGI ..... 2ND RESPONDENT

JOSEPH ODINDO ..... 3RD RESPONDENT

(Being appeal from the Ruling of the High Court of Kenya (R.E Aburili, J.) dated 7th October, 2015) in Nairobi HCCC No. 101 of 2006)

JUDGMENT

1. The appeal arises from the ruling of R. E. Aburili, J. dated 7th October, 2015.

2. The background to the appeal albeit in a summary form is that the appellant filed a plaint dated 16th January, 2006 seeking general, aggravated and exemplary damages, a permanent injunction restraining the respondents jointly and severally and each of them or through servants or agents or howsoever or any of them from continuing to publish any such words or any words to the like effect against the appellant at any time, costs, interests on (a), (b) and (d) and such other or further relief as the Court may deem fit to grant.

3. In rebuttal, the respondent filed a defence dated 22nd February, 2016 admitting publishing the article entitled "The Anglo Leasing: The Truth" as set out in paragraph (5) of the plaint but denied that the same was defamatory of the appellant or at all and put him to strict proof, to which the appellant joined issue in his reply thereto dated 28th February, 2016.

4. Thereafter, both the appellant and the respondents filed interlocutory applications. The one of concern to us herein is the respondents chamber summons dated 30th March, 2006 seeking from

the appellant security for costs in the sum of kshs. 3,000,000.00 or such other sum as the Court may deem just, together with an attendant order for costs, based on the ground that the appellant who was neither a Kenyan citizen nor a person with any known property interests in Kenya may not be able to meet costs incurred in defending the suit should the claim against the respondents fail resulting in the consent order endorsed on record by the respective parties herein on 2nd October, 2014 (the consent) as follows:

> " By consent, the chamber summons dated 30th March, 2006 be settled upon the following terms: -
>
> 1. The plaintiff do deposit the sum of kshs. 500,000.00 as security for the defendants' costs in a joint interest earning account in the names of the parties advocates of Equity Bank Limited – Kilimani Branch.
> 2. The said deposit be made within thirty (30) days of today.
> 3. In default of such deposit, the suit shall stand dismissed with costs to the defendants.
> 4. Costs of the application shall be in the cause."**

5. The thirty (30) days stipulated in item 2 of the consent apparently lapsed on 2nd November, 2014 without appellant complying with the timeline therein. Appellant's advocates efforts to have that default resolved through consensus of the respective parties' advocates bore no fruits triggering the filing of the notice of motion dated 24th February, 2015, (the motion) under section 95 of the *Civil Procedure Act* (CPA) and Orders 26 Rule 5(2), 50 Rule 6 and 51 Rule 1 of the *Civil Procedure Rules* (CPR), seeking orders as follows:

> 1. That this Honourable Court do enlarge time for the plaintiff to provide security for costs.
> 2. That the security for costs provided by the plaintiff on 5th January, 2015 be deemed to have been provided within time and same be ratified accordingly.
> 3. That costs of the application be in the cause.

6. The motion was opposed by respondents' preliminary objection (P.O.) not included in the Court record as the one included in the Court record at pages 159 – 160 of the record was dated 31st October, 2008 directed at the application dated 5th October, 2006 and therefore has no relevance to the issues currently in controversy as between the respective parties herein. However, from the learned Judge's summary of its contents in the impugned ruling, it was to the effect that the timeline for compliance with the timeline set in item 2 of the consent having lapsed on 3rd November, 2014 the Court lacked jurisdiction to entertain the application for enlargement of time within which to comply.

7. The P.O. was canvassed through written submissions at the conclusion of which the learned Judge analyzed the record, identified issues for determination and considering those issues in light of the rival submissions of the respective parties herein; distinguished case law relied upon by the appellant in support of their opposition to the P.O. in favour of the threshold set by the Court in the case of *Flora N. Wasike vs. Destimo Wamboko (1982-88) KLR 625* and expressed herself inter alia as follows:

> " ... an order of the court which is recorded out of or arising from a consent of the parties is a binding contract between the parties to the dispute and as such, is like any other order of the court leaving no room for the discretion of the court to set aside that order save where

the complaining party shows to the satisfaction of the court that the consent was entered into by mistake, fraud or misrepresentation. ..."

8. The learned Judge went further and reviewed the following authorities;

Samson Ole Tina vs. Clerk, Transmara County Council [2010] eKLR; *R vs. District Land Registrar & Another Exparte Kiprono Tegen & Another [2005] eKLR*; *Otieno Mak'onyango vs. Attorney General [2012] eKLR*; *Brooke Bond Liebig Ltd vs. Mallya [1975] E.A 266*; *Kenya Commercial Bank Ltd vs. Specialized Engineering Company Ltd [1982] eKLR 485*; *Ismail Surndery Hirani vs. Nourali & Esmail Kassam* [1952] EACA 131; and applying the threshold in the principles/propositions enunciated therein to the rival position before the Court declined to interfere with the freedom of the respective parties herein to willingly enter into the consent and relieve the appellant from the consequences of noncompliance with the timeline in item 2 of the consent.

9. The learned Judge also reviewed the Court of Appeal decision in *Gateway Insurance Company Ltd vs. Aries Auto Sprays [2011] eKLR*, in whichthe Court expressed itself clearly that Section 95 of the CPA on enlargement of time, and Order 50, Rule 6 of the CPR did not apply to cases where the time sought to be enlarged was fixed by consent of both parties and concluded that the Court had no jurisdiction to enlarge the timeline fixed by the respective parties' consent and sustained the respondents' P.O. against appellant's application dated 24th February,2015.

10. Sustaining the respondents' P.O. against appellant's application notwithstanding, the learned Judge interrogated the merits of the application in light of the rival positions on record and declined to sustain it, firstly, for failure to demonstrate that the signatory to the account was out of the country for close to two months; and second, because by mid-December, 2014, when appellant's advocate's offices allegedly closed down for Christmas vacation the appellant was already out of time. Thirdly, nothing stopped the appellant from applying for enlargement of time immediately after reopening their offices in early January 2015.

11. The learned Judge also rejected appellant's plea that the default was curable under Article 159(2)(d) of the *Constitution of Kenya, 2010*, because according to the learned Judge, the Article requires explicitly that justice shall not be delayed and dismissed it with costs to the respondents.

12. Aggrieved, the appellant is now before this Court raising ten (10) grounds of appeal which may be paraphrase as follows: that the learned Judge erred in law and in fact in failing to: find that the consent entered into by the respective parties herein was a procedural technicality curable under section 95 of the *Civil Procedure Act* (CPA) and Order 26(5)(2) of the CPR; find that the appellant had given sufficient cause to warrant granting of the reliefs sought; appreciate that the consent entered into by the respective parties herein was not the kind contemplated by the Court in the Case of Flora N. Wasike vs. Destimo Wamboko [supra]; properly exercise judicial discretion in declining to grant the relief sought resulting in an injustice being meted out against the appellant; properly appreciate and apply Article 159(2)(d) of the Constitution of Kenya, 2010 resulting in appellant's suit at the High Court being dismissed on a point of technicality; appreciate that the decision in Flora N. Wasike vs. Destimo Wamboko [supra] was decided before enactment of Article 159(2)(d) of the Constitution of Kenya, 2010 and was therefore no longer good law; appreciate that the conclusion reached by the Court contravened the overriding objective principle of the Superior Court enshrined in sections 1A and 1B of the CPA; appreciate that in arriving at the impugned conclusion punished the appellant an innocent litigant for mistakes committed by his advocates; appreciate that the respondent stood to suffer no prejudice incapable of compensation by damages were the relief sought granted by the court; erroneously disregarded decisions of this court relied upon by appellant in support of its case

resulting in a conclusion not only highly prejudicial but also which occasioned grave injustice against the appellant which should not be sustained.

13. For plenary hearing of the appeal conducted virtually on the Go-To-Meeting platform due to the ongoing Covid-19 pandemic challenges was canvassed through written submissions filed, fully adopted by learned counsel Mr. Ongicho for the appellant and M/s. Wanjiru Ngige for the respondent without oral highlighting.

14. Supporting the appeal, appellant faults the learned Judge for failure to appreciate that: they gave sufficient reasons for the failure to comply with the timelines set in the consent, the factual basis proffered by them for seeking extension of time within which to comply had not been rebutted by the respondent through a replying affidavit and should have been deemed as admitted, the suit did not stand dismissed upon failure to comply with the timeline within which to deposit security in terms of Order 26 Rule 5(1) of the CPR, noncompliance with the consent order warranted the respondent to apply for the dismissal of the suit, the respondents' submissions that a consent order can only be set aside on the same grounds as would satisfy the setting aside of a contract was not part of the P.O. and should not have been relied upon by the learned Judge as basis for vitiating the motion, issue of timelines within which security for costs ought to be provided is one of procedural law and not substantive law curable under Article 159(2)(d) of the Constitution of Kenya and Order 26 Rule (5)(2) of the Civil Procedure Rules, default of appellant's advocate should not have been visited on the appellant who is an innocent litigant, it was erroneous for the learned Judge to elevate rules of procedure to the level of mistresses when they ought to have been treated as hand maidens for justice to the respective parties.

15. To buttress the above submissions, the appellant relied on the following authorities: High Court case of *Fatuma Zainabu Mohamed vs. Ghati Dennitah & 10 Others [2013] eKLR* for the proposition that the timeprescribed for deposit of security for costs in civil proceedings is a matter of procedure not cast in stone; the Supreme Court of Uganda decision in the case of *Banco Arabe Espanol vs. Bank of Uganda S.C.C No. 8 of 1998* for the holding inter alia that an error by counsel should not be visited on an innocent client; and lastly, the case of *Githere vs. Kimungu [1976 – 85] E. A 101* for the holding inter alia that: where there has been a bona fide mistake and no damage has been done to the other side which cannot be sufficiently compensated by costs, the cause should be sustained for merit consideration.

16. Turning to the trial court's conclusion on the merits of the motion, the appellant faulted the learned Judge for failure to appreciate that: nowhere in the correspondences exchanged between the respective parties herein prior to the conclusion of the consent were timelines discussed and agreed upon; the rule for vitiating a contract has now been extended to include "any other ground or reason which would enable a court to set aside an agreement"; the reasons proffered by appellant as reasons for enlargement of time within which to comply with the consent were sufficient reasons for the exercise of the Court's discretion in his favour; and, lastly, that the learned Judge's failure to consider and apply the overriding objective principle in sections 1A and 1B of the CPA occasioned an injustice against the appellant which should be interfered with.

17. To buttress the above submission, appellant relied on the holdings/ propositions inter alia in the following authorities; *Nairobi City Council vs. Thabiti Enterprises Limited [1995 – 1998] 2 EA 231*, that a Judgehas no jurisdiction to decide on an unpleaded issue unless pleadings were suitably amended; *Ismail Sunder Itarani vs. Noorali Esmail Kassam [1952] EACA 131* that a consent may be varied or discharged for a reason which would enable the Court to set aside an agreement; *Wangechi Kimita vs. Wakibiru Mutahi [1985] eKLR* on the meaning of the words"any other reason" as construed by the Judge therein.

18. In rebuttal, the respondents relied on the case of Flora N. Wasike vs. Destimo Wamboko [supra] and submitted that appellant only sought toextend time within which to comply but not to set aside the consent, the facts deponed to by appellant regarding negotiations/discussions between the respective parties herein prior to the consent were rightly ignored by the learned Judge as in their opinion, the motion was a disguised appeal against the consent, which in law is prohibited by section 67(2) of the CPA, and lastly, that item 3 of the consent is a clear demonstration that parties intended the consent to be determinative of the application of 30th March, 2006 by stating expressly that "the suit would stand dismissed".

19. Relied on the following authorities; *Habo Agencies Limited vs. Wilfred Odhiambo Musingo [2015] eKLR*; *Bains Construction Co. Ltd vs. John Mizare Ogowe [2003] eKLR*; *Kenya Commercial Bank Limited vs. Specialized Engineering Co. Ltd [1982] KLR 485* and *Board of Trustees National Social Security Fund vs. Micheal Mwalo [2015] eKLR*, and submitted, that since there was no application before court for setting aside the consent, the learned Judge cannot be faulted on the conclusion reached.

20. Relying on the case of *Flora N. Wasike vs. Destimo Wamboko* [*supra*] and *Gateway Insurance Company Ltd vs. Aries Auto Sprays* [*supra]*, submitted that parties agreed on the consequence of appellant's default in complying with the consent namely that: "the suit would stand dismissed" which according to them, stood dismissed on 2nd November, 2014. There was no application before the Court to set aside the consent as all appellant sought from the Court was merely extension of time within which to comply. In the absence of reinstatement of the suit which stood dismissed upon noncompliance with the timeline stipulated in the consent, it is only the parties herein themselves who could have altered the terms of the consent as previously endorsed. On the totality of the above submission prayed for the appeal to be dismissed with costs to them.

21. The appeal arises from the learned Judge's exercise of judicial discretion, firstly to sustain the respondents' P.O. against the appellant's application for enlargement of time within which to comply with the conditionalities set out in the consent; and, second, declining to exercise its discretion in favour of the appellant to sustain his application on the ground that the application was unmeritorious.

22. The approach we take in resolving the rival positions herein and which we fully adopt is as has been numerously restated both by the Court and its predecessor on the issue. Ringera, J.A (as he then was) in *Githiaka vs. Nduriri [2004] 1 KLR 67* was explicit that judicial discretion isunfettered with the only caveat being that it should be exercised without whim, caprice or sympathy but with good reason with the sole purpose of doing justice to the parties before the Court. In *Mbogo & Another vs. Shah [1968] E.A 93*; at page 94, paragraph H - 1 Sir Clement De Lestang V.-P: had this to say:

> " I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

See also Sir Charles Newbold, P., in the same decision at page 96 paragraph G - H who expressed himself as follows:

> " For myself, I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong

decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

23. In reiteration of the above principle, the Court in the *United India Insurance Company Limited vs. East African Underwriters Kenya Ltd [1985] KLR 898* was explicit that interference with exercise of judicial discretion only arises where there is clear demonstration of misdirection in law, misapprehension of the facts, taking into consideration factors the Court ought not to have taken into consideration or failure to take into consideration factors that ought to have been taken into consideration or looking at the decision generally. The only plausible conclusion reached is that the decision albeit a discretionary one is plainly wrong.

24. We have considered the record in light of the above threshold. The issues that fall for consideration are basically two, namely, whether the learned Judge erred both in law and in fact:

    1. In sustaining the respondent's preliminary objection raised against the appellant's notice of motion dated 24th February, 2015.

    2. In declining to exercise discretion to grant relief sought by the appellant in the application dated 24th February, 2015 on merit.

25. We adopt the assessment set out above on the record as basis for resolving the above issues.

26. Starting with the first issue, the threshold to be applied by the learned Judge at the trial and now us on appeal in determining whether the P.O. was sustainable or not is that crystallized by the predecessor of the Court in the case of *Mukisa Biscuit Co. vs. West End Distributors Ltd [1969] E.A 696*, wherein at page 700, Law, J.A, at paragraph D-E had this to say:

    " ...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court..."

    See also Sir Charles Newbold, P.:, in the same decision at page 701,

    Paragraph; A – B who added the following:

    " ...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

27. Our take on the above exposition is that in order to succeed a P.O must have the characteristics specified therein as aptly restated by the court in the case of *Jack Kaguu Githae vs. James Mugo Kinga & 9 Others [2019] eKLR*; that is, there must be demonstration that, firstly; the preliminary objection raises a pure point of law. Secondly, that all the facts pleaded by the opposite party are correct. Thirdly, that there is no fact that needs to be ascertained.

28. We have applied the above ingredients to the rival position herein and are satisfied that the threshold for raising the P.O had been met. Our reasons are as follows: the core objection was on want of jurisdiction in the Court to entertain and pronounce itself on the merits of the application which the predecessor of the Court in the Mukisa Biscuit Co. vs. West End Distributors Ltd case [supra] stated explicitly that it is an example of apure point of law. It was pleaded by the respondents in their P.O. If sustained it would dispose of the application because the position in law on jurisdiction and which is now trite

is that where the issue of jurisdiction is raised, it has to be determined first and once a court is of the opinion that there is want of jurisdiction in it to proceed with the matter, it has to down tools. See the case of *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR.*

29. There was no fact to be ascertained as all that the trial court was confronted with was whether in light of the existence on record of the consent duly endorsed by the respective parties herein in which item 3 thereof stated explicitly that upon noncompliance, the suit would stand dismissed, the Court had jurisdiction to extend the timeline within which to comply, absence of an application to reinstate the suit, set aside the consent order, restore the suit and the respective parties "ante" to the pre-consent stage, become properly seized of the application, hear the parties thereon and if successful extend the timeline within which to comply. Issue of existence of judicial discretion did not therefore arise in the circumstances of this appeal as the position in law as stated in the case *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [*supra*] highlighted above is that without jurisdiction, a court cannot proceed with the matter. It has to down tools. The P.O. was therefore well laid.

30. As to whether there was basis for sustaining the P.O, we make findings thereon as follows: with regard to complaint that the learned Judge erroneously disregarded authorities relied upon by the appellant in support of their opposition to the respondents' P.O, the record is explicit that the Judge considered those authorities and found them distinguishable in so far as they had no bearing to matters in controversy before the Judge, as already highlighted above in the conclusions reached by the learned Judge. Those authorities are the same that appellant has cited before us in support of the appeal whose holdings/ proposition are as already highlighted above. Considering these in light of what the learned Judge was confronted with, we find no error in the learned Judge's approach in distinguishing those authorities from the issues in controversy before the trial judge and now before us on appeal. Our reason for reaching this conclusion is because the learned Judge was not confronted with a P.O against an application of enlargement of time for complying with an order for depositing security by a defaulting party in an ordinary procedural matter, but one arising from a party's default in complying with a timeline set out in a consent order of the Court. The learned Judge then at the trial and now us on appeal could not then and we cannot now ignore that legal position.

31. The legal position before the trial court then and now before us on appeal as already observed above was and still is that all that appellant sought from the Court was simply an extension of time within which to comply with the timeline set in item 2 of the consent order, in the absence of: firstly, an application to restore the suit deemed to have been dismissed under item 3 upon noncompliance with item 2 thereof; second, an application to set aside the said consent order and restore the parties "ante" to the position they were in prior to the entry of the consent to capacitate them and the Court to revisit the issues that led to the endorsement of the said consent.

32. The next complaint relates to alleged heavy reliance by the Judge on the threshold in *Flora N. Wasike vs. Destimo Wamboko* [*supra*] which according to the appellant is no longer good law since the promulgation of the Constitution of Kenya, 2010 incorporating Article 159(2)(d) enshrining the non-technicality principle which unclutches Court's from being subservient to technicalities as opposed to obedience to substantial justice. The record is explicit that the learned Judge appreciated and correctly so in our view that the position taken by the Court therein has withstood the test of time but did not stop there. The learned Judge went further and considered the Court of Appeal decision in *Gateway Insurance Company Limited vs. Aries Auto Spray* [*supra*] decided bythe Court on 14th October, 2011 after the promulgation of the Kenya Constitution, 2010 which reiterated the same position as in the *Flora N. Wasike* [*supra*] case. The Judge added also correctly so in our view thatthe Court was bound by the decision in the *Gateway Insurance Company Limited vs. Aries Auto Spray* [*supra*] being a decision

of a court superior to the trial court, we therefore, find no basis to depart from the position held by the Court in the above case.

33. The above conclusion notwithstanding, we find it prudent to interrogate appellant's complaint against the Judge's failure to apply the non-technicality principle in Article 159(2)(d) of the Constitution of Kenya, 2010. Case law on the invocation and application of the above principle now form a well-trodden path. We take it from the cases of *Jaldesa Tuke Dabelo vs. IEBC & Another [2015]eKLR*; *Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR*; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others [2014]eKLR*; *Patricia Cherotich Sawe vs. IEBC & 4 Others [2015]eKLR*. The principles enunciated therein and which we find prudent to highlight are as follows: Rules of procedure are handmaidens of justice; a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case; the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice also that Article 159 2)(d) of the Constitution is not a panacea for all procedural ills.

34. We find nothing in the above principles/propositions to suggest that Article 159(2)(d) of the Constitution of Kenya, 2010 is a panacea for all procedural ills. Nor that it provides succor for a party who has defaulted on compliance with timelines in a consent to wriggle out of his/her obligation under a consent voluntarily executed by the respective parties to such a consent and endorsed by the Court as a court order and which has not been set aside. We find this argument also has no basis and reject it.

35. The appellant also faulted the learned Judge for failure to invoke the overriding objective principle enshrined under sections 1A and 1B of the CPA for the trial court and Sections 3A and 3B of the *Appellate Jurisdiction Act* for this Court. Principles that guide the Court in the application of the above overriding objective principle also now form a well-trodden path. We take it from the case of *Hunter Trading Company Ltd vs. Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010*,stated inter alia as follows:-

> " It seems to us that in the exercise of our powers under the "02 principle" what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are "02" compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the "02 principle" could easily become an unruly horse."

Further in *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No.199 of 2008)* (unreported) the Court reiterated that: -

> " That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."

36. We find nothing in the above principles/propositions that would have permitted the trial court and now us on appeal to overlook the fact that there was a binding consent before the Court that had not been set aside and by reason of which the court had no mandate to extend the timeline for compliance with the conditional timelines therein. This complaint also fails.

37. On the totality of the above reasoning, we find no basis to fault the trial Judge for sustaining the respondents P.O.

38. Turning to the merits of the impugned decision, we similarly adopt the conclusion reached by the trial judge as highlighted above, in light of the rival position on this issue and find no basis for faulting the trial court's failure to exercise its discretion in favour of the appellant to sustain his application as in our view and as correctly submitted by the respondent, there was no way the trial court could then and now this court on appeal can interfere with the consent order as endorsed by the court, enlarge the conditional timeline therein for compliance in the absence of a court order, firstly, reinstating the suit that was deemed dismissed under item 3 of the consent order upon noncompliance with item 2 of the order thereof; secondly, setting aside the said order and restoring the parties "ante", to the position they were in prior to 2nd October, 2014, for them to revisit the issue of extension of time. The learned Judge in the circumstances rightly declined to exercise direction in favour of the appellant as in our view extension of time was untenable in the absence of existence of a suit on which it could be anchored.

39. There was issue also raised by the appellant that the learned judge failed to appreciate that appellant's suit was and still is alive and would have been resuscitated in the absence of respondents filing an application to have it dismissed pursuant to order 26, Rule 5(2)(b) of the CPR. As contended by the respondents which in our view is the correct position on record as already ruled above, item 3 of the consent order explicitly provided that "the suit shall stand dismissed upon noncompliance" which in our view left no room for the respondents to take any further procedural steps in the matter to have the suit dismissed.

40. The upshot of the totality of the above assessment and reasoning is that we find no merit in the appeal. It is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb.

.....

JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR