



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MUSINGA & GATEMBU J.J.A)

CIVIL APPEAL NO. 173 OF 2015

BETWEEN

ISAAC KINYANJUI NJOROGE.....APPELLANT

AND

NATIONAL INDUSTRIAL CREDIT BANK LIMITED.....RESPONDENT

*(Being an appeal from the Ruling of (Ogola, J) delivered on 16<sup>th</sup> May, 2014*

*in*

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 1673 OF 2000)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. This is an appeal from a ruling of the High Court (E. K. O. Ogola, J) delivered on 16<sup>th</sup> May 2014 dismissing the appellant's application for review.

**Background**

2. Under a Hire Purchase Agreement dated 3<sup>rd</sup> June 1994, the respondent, a bank, let to the appellant motor vehicle registration number KAD 402S, Isuzu Lorry, (the vehicle) on the terms and conditions set out in that agreement. The amount payable to the respondent by the appellant under that agreement was Kshs. 6,864,000.00 (made up of balance of the cash price of the vehicle of Kshs. 4,400,000.00 and hire purchase charges of Kshs. 2,464,000.00). That amount was payable to the respondent by 29 monthly rentals.

3. According to the respondent, the appellant defaulted in paying the monthly rentals and its attempts to exercise its right to repossess the vehicle were initially frustrated by the appellant. In a bid to recover the outstanding amount, the respondent filed suit, being High Court Civil Case Number 1673 of 2000, seeking judgment against the appellant for Kshs. 4,718,241.00 and interest at the rate of 36% pa from 1<sup>st</sup> August 2000 until payment in full.

4. In his statement of defence, the appellant admitted having entered into the Hire Purchase Agreement with the respondent but denied the alleged indebtedness. He asserted that at the date of termination of the Hire Purchase Agreement, the arrears stood at Kshs. 208,363.00 and not the amount the respondent claimed. The appellant further contended that the rate of interest charged by the respondent "ignored the interest clause" and exceeded the rate permitted by the Central Bank of Kenya.

5. During the pendency of the suit, the respondent succeeded in repossessing and selling the vehicle. After crediting the sale proceeds to the appellant's account and having acknowledged that the amount pleaded as owing in its plaint was erroneous, the respondent claimed that a shortfall of Kshs. 225, 852.00 remained. However, the respondent offered to write off the said amount "in view of the length of time that had elapsed in recovering the same."

6. Accordingly, on 3<sup>rd</sup> October 2012, the parties through their advocates then on record, recorded a consent order in terms that

“the suit is marked as settled save as to costs”. It was intended that the costs of the suit would be negotiated and agreed upon and the matter brought to closure. That was not to be.

7. Before agreement on costs could be recorded in court, the appellant changed his advocates. His new advocates then filed an application by notice of motion dated 18<sup>th</sup> April 2013 made under Order 45 and 51 of the Civil Procedure Rules for orders that:

“1. THAT this honourable Court be pleased to review the orders made on 3<sup>rd</sup> October 2012.

2. THAT this honourable court be pleased to set aside the order that “this matter is marked “settled” made on 3<sup>rd</sup> October 2012.

3. THAT this honourable court be pleased to set aside the consent judgment recorded on 3<sup>rd</sup> October 2012.

4. THAT this honourable court be pleased to grant leave to the defendant to amend his defence to include a counterclaim for his costs.

5. THAT costs of this application be provided for.”

8. The grounds on which the appellant based that application were that the parties had failed to reach agreement on costs payable to the appellant; that the appellant intended to amend his defence to incorporate a counterclaim on „costs? amounting to Kshs. 71.36 million comprising of loss of income, rent paid by the appellant following loss of his house, value of his house, value of the vehicle, among other claims

9. The respondent opposed the application asserting that it was devoid of merit and did not meet the threshold for review; that the appellant was by his request to amend his defence belatedly seeking to introduce a claim more than 12 years after the suit was instituted; and that the substantive prayers the appellant was seeking to introduce could not be claimed as „costs? of the suit.

10. Upon hearing the application, the court, in its ruling delivered on 16<sup>th</sup> May 2014 that is the subject of the present appeal dismissed it with costs.

#### **The appeal and submissions**

11. In his memorandum of appeal, the appellant complains that the Judge erred in concluding that there was a consent between the parties and in refusing to allow his application. Learned counsel Professor Kiama Wangai, who appeared for the appellant, submitted when highlighting his written submissions that on 3<sup>rd</sup> October 2012, the parties merely proposed that the matter be marked as settled and be mentioned on 13<sup>th</sup> October 2012 to determine the issue of costs but that “no consent on this was ever recorded in court.” Accordingly, counsel argued, the issue of setting aside a consent judgment did not arise as no such consent exists.

12. With regard to the prayer the appellant had made to amend his defence to introduce a counterclaim, counsel argued that the court was duty bound, as required by Article 159(2)(d) of the Constitution to administer justice without undue regard to procedural technicalities. Counsel urged that regard must be had to the admission made by the respondent in the lower court that it was owed a less amount of money by the appellant than it had claimed in the plaint; and that the vehicle was sold during the pendency of the suit and the appellant was not involved in its valuation; that in any event the provision in the „consent? order for the parties to negotiate „costs? would include loss the appellant suffered which he should be at liberty to pursue within the suit.

13. Opposing the appeal, learned counsel for the respondent Mr. Mwangi Githinji also relied on written submissions that he highlighted. He submitted that the record of proceedings is clear and attests to a settlement having been reached and the matter marked as settled with the exception of costs of the suit; that there was a valid and proper consent reached and recorded that could not be set aside unless the appellant demonstrated that the same was procured by fraud, mistake or misrepresentation. In that regard counsel referred us to numerous authorities, including ***Flora N. Wasike vs. Destimo Wamboko [1982-88]1KAR 625***, for the proposition that a consent judgment or order has contractual effect and can only be set aside on grounds that would justify the setting aside of a contract.

14. Counsel argued that there was no basis at all on which the application for review could have been allowed as the appellant did not demonstrate any error or mistake apparent on the face of the record or other sufficient reason to warrant review. In that regard, counsel referred to the decision of the Court in ***National Bank of Kenya vs Ndungu Njau [1997] eKLR***.

#### **Analysis and determination**

15. We have considered the appeal and submissions by counsel. Two issues arise in this appeal. The first is whether the learned Judge was right in his conclusion that the parties recorded a consent order on 3<sup>rd</sup> October 2012. If so, whether the Judge correctly declined the appellant’s request for review of the same.

16. Beginning with the first issue, the contention by the appellant that the Judge erred in concluding that the order made on 3<sup>rd</sup> October 2012 was a consent order is somewhat confounding. Confounding because in prayer 3 of his application that was before the Judge he sought an order that the court “be pleased to set aside the consent judgment recorded on 3<sup>rd</sup> October 2012.” In his supporting affidavit to the

application, the appellant reiterated that prayer. It is, with respect, inconceivable that the appellant would have been applying to set aside an order that he considered did not exist. That said, the record of proceedings of the lower court of 3<sup>rd</sup> October 2012 captures the following:

***“M/s. Ngugi (for the Defendant): We have agreed that this matter be marked as settled and the matter be mentioned on 13<sup>th</sup> November to determine the issue of costs.***

***M/s. Mburu (for the Plaintiff): That is correct.***

***Court: This matter is marked “settled”. It will be mentioned on 13<sup>th</sup> November to determine the issue of costs.”***

17. Although that record in our view speaks for itself, the learned Judge alluded to the background preceding the recording of that order. He pointed out that the parties had over a protracted period of time intimated to the court that they were engaged in negotiations with a view to amicably settling the dispute out of court. The order recorded by the court in terms that “this matter is marked “settled”” was the culmination of those negotiations and an intimation, by both parties, that the dispute was “finally disposed” or concluded and what remained for determination, or what the parties had not resolved between themselves at that stage, was the issue of costs of the suit. The Judge cannot be faulted for finding as he did that there was a consent order.

18. The argument by the appellant that the term “costs” as used in the consent order referred to the loss the appellant suffered, is not easy to comprehend either, given the state of the pleadings at the time. We agree entirely with the learned Judge when he stated in his ruling:

***“Prof. Wangae (sic) for the defendant has submitted that the costs referred to herein are not the costs of the suit but are damages. I disagree. Damages are specifically pleaded while the costs follow the event. Since the defendant had no counter-claim or indeed since before the parties made the said consent there was no reference to damages, parties must have referred to the ordinary costs of the suit.”***

19. There is therefore no merit in the appellant’s complaint that the judge erred in finding that there was a consent between the parties and in rejecting the contention that the reference to “costs” in the consent was reference to loss allegedly suffered by the appellant.

20. The second issue is whether the Judge erred in declining to review that consent order. The grounds on which the appellant had sought review of the consent order of 3<sup>rd</sup> October 2012 were, as already stated, that the parties had been unable to reach agreement on costs payable; that the appellant intended to amend his defence to include a counterclaim; that in the interests of justice all issues relating to the matter needed to be canvassed exhaustively; and that costs had accrued during the existence of the suit that could not have been made earlier.

21. The principles upon which an application for review is considered are well settled. As the Judge correctly stated, this Court held in

***Flora N Wasike vs Destimo Wamboko [1982-88] 1 KAR 625*** that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation. In that case, the Court affirmed the principle in ***Hirani v Kassam (1952) 19 EACA 131*** that:

***“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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”***

22. See also the decision of this Court in ***Tropical Food Products International Ltd vs. Easter and Southern African Trade and Development Bank (The PTA Bank) (2007) eKLR***. None of the grounds on the basis of which the appellant sought review could be a basis upon which the consent order could be reviewed. There was no suggestion that counsel did not have authority to enter into the consent order or that the consent was procured through any underhand dealings or by any misrepresentation.

23. The result of the foregoing is that there is no merit in this appeal. It is accordingly dismissed with costs to the respondent.

Orders accordingly.

***Dated and delivered at Nairobi this 20<sup>th</sup> day of April, 2018.***

**H. M. OKWENGU**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**