



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OKWENGU, AZANGALALA & MOHAMMED, J.J.A.)

CIVIL APPEAL NO.282 OF 2007

BETWEEN

ADIEL MURIITHI PHILIP.....APPELLANT

AND

THOMAS MAINGI.....RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Meru (Lenaola, J.), dated 1st November, 2007

in

H.C.C.C. No.28 OF 2001)

JUDGMENT OF THE COURT

[1] This appeal arises from a ruling in a notice of motion that was lodged in the High Court by **Thomas Maingi** (the respondent), who was seeking orders of injunction under **Section 63(e)** of the Civil Procedure Rules and **Order XXXIX Rule 2** of the former edition of the Civil Procedure Rules. The respondent sought to have the sale by auction of his motor vehicle a Mitsubishi Lorry, set aside and a temporary injunction granted restraining **Adiel Muriithi Philip** (the appellant), his advocates and or any other person, from transferring or obtaining transfer of the motor vehicle.

[2] The sale of the motor vehicle was in purported execution of a decree in a suit that had been filed by the appellant against the respondent. Judgment was delivered by **Kasanga Mulwa, J.**, in favour of the respondent for the sum of Kshs.2,495,425/= together with costs and interest thereon. Subsequently, the parties filed a consent letter in which it was agreed that in lieu of the judgment of **Kasanga Mulwa, J.**, the respondent would pay the appellant the sum of Kshs.1,898,978/= in full and final settlement of his claim; and that this amount was to be paid in two instalments failing which, execution was to issue. Although the decretal sum was paid by the respondent's insurers, the appellants instructed a new firm of advocates who obtained warrant of attachment from the court on the original judgment, attached and sold the respondent's vehicle. This is what led the respondent to file the motion for injunctive orders.

[3] In his ruling, the learned judge (**Lenaola, J.**), who heard the respondent's motion identified the issue for determination as: the effect of the consent letter *vis a vis* the decree, whether the consent letter could vary, amend or otherwise change the import and tenure of the judgment and decree. The learned judge

found that the consent entered into by the parties compromised the decree on quantum and that the appellant signed a discharge voucher acknowledging the amount paid in full settlement thereby discharging the respondent's, his advocates and the insurance company.

[4] The learned judge rejected the appellant's attempts to disown the consent and ruled that the failure by the Deputy Registrar to extract the consent order did not nullify the consent and intent of the parties dutifully brought to the attention of the court through the consent letter. The learned judge therefore allowed the respondent's motion and granted orders as prayed.

[5] The appellant has now lodged this appeal raising 17 grounds, contending *inter alia* that the learned judge erred both in law and fact: in failing to find that the judgment of **Kasanga Mulwa, J**, had not been reversed, set aside or reviewed, and therefore was still valid and enforceable; in failing to find that the appellant was entitled to execute the entire amount of the decree that remained unpaid by the respondent or the respondent's insurers; in failing to find that the Registrar of the High Court lacked jurisdiction to act on the belated consent filed after the High Court was *functus officio*; in failing to find that the consent could not be relied upon as the judgment and decree by the Hon. Justice **Kasanga Mulwa** superceded the consent judgment; and in failing to find that the parties never intended to be bound by the consent judgment as the consent judgment was not filed in the Court of Appeal nor did the respondent withdraw his notice of appeal that had been filed in the Court of Appeal. The appellant also maintained that the decision of the learned judge was incompetent and against the weight of the evidence and occasioned injustice to him by violating his constitutional right to a fair trial.

[6] Learned Counsel Mr. O. P. Ngoge Esq., who appeared for the appellant argued that although the consent recorded by the parties on 21st August, 2003 was intended to vary the judgment of the High Court, the consent was a nullity as it was filed when the court was *functus officio*. This is because a notice of appeal had already been lodged, and it was the Court of Appeal that was then seized of the matter. Counsel noted that the consent entered into by the parties did not just relate to execution, but was varying the decision of the High Court, and such action could only be done by the Court of Appeal under **Rule 31** of the Court of Appeal Rules.

[7] Mr. Ngoge further argued that the learned Judge **Lenaola J**, had no jurisdiction to validate the consent or to stop the execution proceedings. Relying on **Board of Trustees of National Social Security Fund vs Michael Mwalo [2015] eKLR**, counsel submitted that jurisdiction is conferred by law and not by the parties. He noted that since the Deputy Registrar did not act on the consent, the learned judge had no right to sanction it as it was an illegality. On the issue of injunction, counsel pointed out that the learned judge failed to take into account that equity only aids the vigilant and the respondent had come to court late.

[8] On his part, Learned Counsel Mr. T. M. Macharia who appeared for the respondent, submitted that the execution by the appellant of a decree that had been compromised was an abuse of the court process. He drew the Court's attention to **Section 2** of the Civil Procedure Act that defines a decree holder to include an assignee. Counsel maintained that a decree could therefore be assigned and that under **Section 92** of the Civil Procedure Act, a person other than a judgment debtor could take upon himself the responsibility of meeting the decree. He dismissed the appellant's contention that the High Court was *functus officio*, maintaining that **Section 34** of the Civil Procedure Act reserved to the High Court as the trial court all questions relating to the execution or discharge of the decree.

[9] Counsel pointed out that the appellant had signed a discharge voucher acknowledging having received all his money and fully discharging all the parties from any further liabilities. He made reference to an affidavit sworn by Mr. Mugambi Mithega the appellant's former lawyer in which the lawyer swore that the appellant received money paid pursuant to the consent agreed upon. The respondent's advocate therefore argued that the appellant is therefore estopped from denying the consent. In support of his submissions counsel relied on **Ndege Wholesalers Ltd vs Chiku Investment Ltd & another H.C.C.C No.788 of 1997**.

[10] We have carefully considered this appeal, the submissions of the respective counsel, and the authorities cited. The appeal herein is anchored on a consent letter dated 20th August, 2003 that was filed

in the High Court in the respondent's original suit. It is common ground that the consent was duly signed by both parties' advocates and that at the time the consent was filed, the appellant had already lodged a notice of appeal against the judgment of **Kasanga Mulwa, J.** The issue therefore is whether the High Court was *functus officio* at the time when the consent was filed and whether the consent was a nullity. Conversely, whether the parties were bound by the said consent.

[11] In order to address these issues, it is necessary to examine what was agreed upon by the parties in the consent. The consent letter stated as follows:

“By consent, and in lieu of the judgment of this hon. court’s judgment given on 15th may 2003, the 1st and 2nd defendants do pay to the plaintiff the sum of Kshs.1,898,978/= in full and final settlement of this claim. That the same be said in two instalments as follows;

(a) Kshs.1,500,000/= to be paid on or before 25th August, 2003,

(b) Kshs.398,978/= to be paid within 21 days from the date hereof,

(c) in default of any one of the instalments, execution for the full amount to issue forthwith.

Signed

Mithega & Company Advocates for the Plaintiff. Signed

Ndonye, Mbugua, Atudo & Macharia Advocates for the 1st & 2nd defendants.”

[12] From the content of the consent, it is obvious that the consent letter was a compromise of the decree issued pursuant to the judgment that was entered against the respondent by **Kasanga Mulwa, J.** By that consent, the appellants agreed to accept less than what was decreed to him in the judgment provided that the lesser amount was paid to him in two instalments within the agreed period. The question is whether since the respondent had already moved to the Court of Appeal by filing a notice of appeal, the High Court had jurisdiction to accept and record the parties consent and compromise the decree.

[13] In this regard, **Section 34** of the Civil Procedure Act is relevant. That provision provides as follows:

“34(1)All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.” (Emphasis added).

[14] A plain reading of the above provision shows that matters concerning discharge or satisfaction of a decree are determined by the court executing the decree. Thus, the High Court being the court that was concerned with the execution of the decree, issued by **Kasanga Mulwa, J.** had jurisdiction to deal with the consent filed by the parties as the consent related to a compromise and satisfaction of the decree. The fact that the respondent had filed a notice of appeal in the High Court did not change this position as jurisdiction still remained with the High Court to deal with issues concerning the satisfaction of the decree. Indeed, **Order 41 Rule 4** of the Civil Procedure Rules then in existence, stated as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order.....”

[15] Therefore, without an order of stay of execution, either from the High Court or the Court of Appeal, the High Court remained seized of jurisdiction to deal with matters concerning the execution of the decree even where an appeal is pending in the Court of Appeal against the decree. The issue of the High court being *functus officio* does not therefore arise.

[16] In our view, the consent entered into by the parties, did not vary the judgment of **Kasanga Mulwa, J.** but merely compromised the judgment by providing for acceptance of a lower sum in satisfaction of the decree in consideration of the settlement of the claim which would have otherwise still been subjected to an appellate process.

[17] In the circumstances, we find that the learned Judge (**Lenaola, J.** as he then was), did not err in finding that the consent letter duly executed and on record was proper and that the failure by the Deputy Registrar to formally have the same extracted could not nullify the consent. The attempt by the appellant to distance himself from the consent letter cannot hold as the consent letter was clearly signed by his advocate, who was an agent fully authorized by him. There was also clear evidence that the appellant signed a discharge voucher.

[18] The upshot of the above is that we find no substance in this appeal and do therefore dismiss it with costs.

Dated and Delivered at Nairobi this 24th day of March, 2017.

H. M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR