



REPUBLIC OF KENYA



**Gupta Sanjay t/a Sahara Boreholes Limited v Ogal (Civil Appeal
E152 of 2023) [2024] KEELRC 1752 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1752 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E152 OF 2023**

**K OCHARO, J
JUNE 28, 2024**

BETWEEN
GUPTA SANJAY T/A SAHARA BOREHOLES LIMITED APPELLANT
AND
SETH TIMOTHY OGAL RESPONDENT

RULING

1. Through its application dated 27th October, 2023 the Appellant sought;
 - a. Spent
 - b. That the Honourable court be pleased to order for a review of this court dated 20th September, 2023 and allow the Appellant/Applicant to deposit half of the decretal sum in both parties' Advocates joint account pending hearing and determination of the Appeal.
 - c. That costs of this application be in the course.
2. The application is anchored on the grounds set out on the face of the application and those on the supporting affidavit sworn by Gupta Sanjay.
3. The Respondent resists the application through his replying affidavit sworn on the 24th October, 2023.

The Application

4. The Appellant/Applicant states that this Court granted it a stay of execution of the decree of the lower court pending the appeal herein on 20th September, 2023 following its application dated 17th August, 2023.



5. The Applicant argues that they are unable to deposit the entire decretal sum of KShs. 151,335.33 but are able to raise half the decretal amount, therefore KShs. 75,667.50. as they are currently facing financial constraints.

The Response

6. The Respondent states that this Court gave a conditional stay order. The Applicant/Appellant has not complied with the order. As a result, they haven't come to court with clean hands.
7. The Applicant/Appellant will not suffer any prejudice if the orders sought aren't granted. The money shall be in a joint interesting earning account for them to retrieve if their appeal herein succeeds.
8. The fact that the respondent is having financial challenges is a red flag. The applicant is likely to dispose their assets and relocate to another country. Then, it shall be challenging to recover the decretal amount.

Determination

9. On the 20th September 2023, when this matter came up for hearing of the Appellant's application dated 17th August 2023 for stay pending appeal, the parties recorded a consent on the same, thus:

“The Applicant's/Appellant's application is hereby allowed in the following terms,

- a. Pending the hearing and determination of the appeal herein, there shall be a stay of execution of the decree in MCELRC /E 1758 OF 2021 on condition that the entire of the decretal sum in this stated matter ids deposited in a joint interest earning account in the names of both counsel for the parties.
 - b. In the defaulting, the order of stay of execution stands vacated.
 - c. The record of appeal be filed within 60 days of today.
 - d. Mention 11th December 2023 for directions on the hearing of the appeal.
10. In essence, the Respondent is seeking to have a review of a consent order. It is trite that a consent order has the effect of a contract on the parties to it. It can only be reviewed and or set aside by the Court either by consent of the parties or upon the party moving the court for review and or setting aside, demonstrating that there exists a ground [s] similar to those that the law recognizes as capable of vitiating a contract, to form the basis for the review sought.
 11. Addressing this issue, the Court of Appeal in the case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR stated thus,

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decisions of this Court in *J M Mwakio v Kenya Commercial Bank Ltd Civil Appeal 28 of 1982.....*”
 12. I have carefully considered the Applicant's application and the grounds upon which it is anchored, with great respect, I take a clear view that the same is a product of ignorance of the above stated principle of law. The application is not predicated on any of those grounds that can vitiate a contract. As a result, I come to the inevitable conclusion that is wanting in merit and it is hereby dismissed with costs.

READ, SIGNED AND DELIVERED THIS 28TH DAY OF JUNE, 2024.



OCHARO, KEBIRA.

JUDGE

In the presence of:

Ms. Kimuge for the Appellant/Applicant.

Mr. Orege for the Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO, KEBIRA.

JUDGE

