



**Olekina v Keroche Breweries Ltd (Cause 1218 of 2016)
[2023] KEELRC 1059 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1059 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1218 OF 2016**

JK GAKERI, J

MAY 4, 2023

BETWEEN

LEDAMA OLEKINA CLAIMANT

AND

KEROCHE BREWERIES LTD RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Respondent/Applicant dated 1st December, 2022 filed under Certificate of Urgency seeking orders that:-
 1. Spent.
 2. The firm of Gichuki Kimere & Co. Advocates be granted leave to come on record on behalf of the Respondent/Applicant herein after judgement.
 3. Spent.
 4. The Honourable Court be pleased to order that the payment of the Decretal balance of Kshs.2,856,904.79 plus interest from date of judgement and costs of the suit in monthly instalments of Kshs.500,000/= to the Claimant/Respondent herein from February 2023 until payment in full.
 5. In the alternative, the Honourable Court be pleased to extend time to comply with the consent judgement dated 9th November, 2021 for a further period of 5 months.
 6. Costs of this application be provided for.
2. The Notice of Motion is based on the grounds set out on its face and the Supporting Affidavit sworn by Nicholas Kechir, the Head of Operations of the applicant company who depones that.



3. The claim herein was filed in 2016 and parties entered into a consent judgement on 9th November, 2021 under which the Claimant was awarded Kshs.5,000,000/= payable in 10 monthly instalments of Kshs.500,000/= from 1st December, 2021 and has paid Kshs.2,300,000/= to date and desirous of paying the amount in full.
4. The affiant urges the court to take judicial notice that its operations were frozen by the Kenya Revenue Authority for the last 3 years, an unforeseen occurrence when the consent judgement was entered into and the default is unintentional.
5. The affiant further states that on 23rd November, 2022, the Claimant/Respondent's agent, Icon Auctioneer proclaimed the applicant's goods including computers, seats, chairs, office desks, five (5) motor vehicles and other attachable goods which are tools of trade and essential in the smooth operations of the applicant's business.
6. That since the applicant's business is now operational, it is in a position to pay the balance by instalments as proposed.
7. That the applicant is willing to abide by any terms set by the court in granting the orders sought and has been co-operative and demonstrated good will by having paid Kshs.2,300,000/=.
8. That it is in the interest of justice that the application be allowed as prayed.
9. In its further Affidavit sworn by Nicholas Kechir dated 13th February, 2023, the affiant states that on 26th January, 2023, the applicant deposited Kshs.230,000/= into the Respondent's counsel Account.
10. That the Applicant's closure of business and suspension of operations was within public knowledge and had envisioned that the Respondent would indulge them having paid a substantial sum.
11. That the applicant seeks time to make full payment and the instalment sum remains the same.

Response

12. In his Replying Affidavit sworn on 26th January, 2023, the Claimant/Respondent states that the applicant failed to honour the consent judgement dated 9th November, 2022 demanding follow ups by the Claimant.
13. That the proclaimed assets are not tools of trade as the applicant is an alcoholic beverage industry and motor vehicles cannot be tools of trade and the applicant's business was not frozen for 3 years.
14. That the applicant was in operation on 9th November, 2021 until December 2021, re-opened on 15th January, 2022 and continued in operation until the second closure on 15th May, 2022 and re-opened on 29th July, 2022 and has been in operation ever since and had not remitted any further payment.
15. That blaming the Kenya Revenue Authority was a scapegoat as the applicant had not indicated its desire to negotiate the timelines on account of hardship.
16. The affiant further states that having mutually agreed, it is in bad faith that the applicant was seeking refuge in hardships.
17. That before proclamation, the Claimant was accorded four months since re-opening of business but failed to pay and would have approached the Claimant for further negotiations and vary the terms of the consent.
18. That the applicant was indolent and was jolted to action by the proclamation and warrants of attachment.



19. That the court has no express or inherent power to extend time limited by consent of parties, only a subsequent consent could enlarge such time.
20. That a consent judgement had contractual effect and can only be set aside by the parties or either of them on recognized grounds.
21. That the allegations by the applicant are not reasons in law on which the consent judgement may be set aside or interfered with and the court cannot extend time as it was fixed by the parties and the application was an abuse and waste of judicial time.
22. The affiant urges the court to decline the application.

Applicant's submissions

23. The Applicant's counsel submitted on three issues, namely; whether the applicant had met conditions for the grant of stay of execution, whether applicant is entitled to pay the decretal amount in instalments and whether the applicant seeks to set aside the consent.
24. As regards the 1st issue, counsel submitted that the applicant had met the condition for grant of stay of execution as it had demonstrated that it stood to suffer substantial loss if the same was not granted as some of the items proclaimed such as the motor vehicles were tools of trade and their attachment affects the operations of the company.
25. Reliance was made on the sentiments of Odunga J. in *Invesco Assurance Co. Ltd V Kinyanjui Njuguna & Co. Advocates & another* (2020) eKLR to urge that the attached motor vehicles are used to transport goods to the market and will hugely affect the applicant.
26. That the application was made without unreasonable delay as it was made as soon as execution commenced.
27. As regards payment of the decretal amount by instalments, counsel relied on Order 21 Rule 12(20) of the Civil Procedure Rules, 2010 which gives the trial court discretion to order payment of decretal sum by instalments.
28. Reliance was made on the decision in *A Rajabali Alidina V Remtulla Alidina & another* (1961) EA 565 and the sentiments of Dulu Ag J. in *Hildegard Ndalut V Lelkina Dairies Ltd & another* (2005) eKLR to reinforce the submission.
29. Counsel submitted that it was public knowledge that the applicant had financial challenges owing to its protracted issues with the Kenya Revenue Authority resulting in closure of the plant and resumed in Mid December 2022 and paid Kshs.350,000/= in January 2023 as a sign of good faith.
30. Counsel did not submit on the last issue but prayed that the application be allowed.

Claimant/Respondent's submissions

31. Counsel for the Claimant/Respondent isolated two issues for determination, namely; whether the court should vary the parties consent adopted as judgement of the court and whether the proclaimed motor vehicles are tools of trade.
32. As regards the 1st issue, counsel relied on the decision in *SNI V AOF* (2020) eKLR where Nyakundi J. relied on the sentiments of Harris JA in *Frank Phipps & Pearl Phipps V Harold Morrison SCCA* 86 of 2008 as regards the nature of consent judgement.
33. The decision in *Wildung V Sanderson* (1897) 2 CL 534 was also cited to reinforce the submission.



34. Counsel submitted that while the applicant had the right to seek the setting aside of the consent judgement, it could only do so on certain grounds and in the case of a variation, consensus was the best option and could not resist execution by relying on a variation as a defence.
35. That since the applicant had not established fraud, mistake, misrepresentation or undue influence, the application was bound to fail.
36. Counsel urged that the applicant ought to have approached the Respondent and re-negotiated the time for compliance but instead waited till execution commenced despite warnings and was therefore not genuine and intended to frustrate the decree holder from enjoying the fruits of his judgement.
37. That the dispute between the applicant and Kenya Revenue Authority was alive when the consent was concluded and a stay of execution was granted on 6th December, 2022 and the applicant remained in default.
38. Reliance was made on the decision in Divisional Integrated Development Programmes Co. Ltd V Nelson Mbuva Kithuka & another (2022) eKLR where the court declined to enlarge time.
39. That the court should allow the consent of the parties to stand.
40. As to whether the proclaimed motor vehicles are tools of trade, counsel submitted that not every chattel qualified as a tool of trade and motor vehicles were not in this case as the applicant was a manufacturer of drinks and transport was not its trade and the applicant had not provided the provisions that prohibit the attachment of company property as tools of trade.
41. Counsel urges that exemption is only intended to protect a person's ability to earn livelihood not to protect an industry.
42. In conclusion, counsel urged that the applicant had not demonstrated any justification for varying the consent and should not be allowed to depart from its obligations.

Findings and determination

43. After careful consideration of the application, response and rival submissions, the singular issue for determination is whether the application dated 1st December, 2022 is merited.
44. The present suit was filed on 22nd June, 2016 where the Claimant/Respondent sought various reliefs totalling Kshs.30,315,000/= for wrongful, unlawful, unfair, malicious and unconstitutional termination of the Claimant's employment contract.
45. The Respondent/Applicant entered appearance in June 2016 and filed its response on 21st July, 2016.
46. However, after several adjournments owing to absence of counsel for the Respondent, a consent between the parties was adopted by the court in the presence of both counsels on 24th February, 2022 in the following terms;
 1. Judgement be entered in favour of the Claimant for an all inclusive sum of Kshs.5,000,000/=.
 2. The decretal sum be liquidated 10 monthly instalments of Kshs.500,000/= commencing December 2021.
 3. In default of payment of any instalment, execution to issue for the entire outstanding decretal sum.



47. This is the consent judgement the applicant seeks to vary on the ground that owing to its disputes with the Kenya Revenue Authority, its business premises were closed for a duration of 3 years, a duration it has not demonstrated by documentary evidence.
48. According to the Claimant/Respondent, the applicant's business was closed in December 2021 and re-opened on 15th January, 2022 and was closed again on 15th May, 2022 and re-opened on 29th July, 2022 by court order.
49. Assuming that the Claimant/Respondent's dates are correct since the applicant provided none, the applicant was not in business for about one (1) month under the first closure and one and half months under the 2nd closure, a total of 3¹/₂ months from the date of the consent judgment to date.
50. Since payment was to commence effective 1st December, 2021 and by 6th November, 2022, the Applicant had paid a total of Kshs.2,300,000/=, even assuming that the applicant's business was closed for a total of 4 months, the payments by 6th November, 2022 ought to have stood at Kshs.3,500,000/= with only Kshs.1,500,000/= outstanding, excluding costs.
51. The law on consent order or judgement is well settled and there is sufficient judicial authority.
52. In *Flora Wasike V Destino Wamboka* (1982-1988) 1 KAR 625, Hancox JA (as he then was) stated at page 626,
"It is now settled law that a consent judgement 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.
53. In *Brooke Bond Liebig V Mallya* (1975) EA 266, the court stated as follows;
"A consent judgement may only be set aside for fraud, collusion, or for any reason which would enable the court to set aside an agreement."
54. Similarly, in *Hirani V Kassam* (1952) 19 EACA 131, the Court of Appeal cited with approval the following paragraph from *setton on Judgements and Orders*, 7th Edition Vol. 1 page 124 as follows;
Prima facie any order made in the presence and with 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 set aside an agreement."
55. Similar sentiments were expressed in *Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd* (1982) KLR 485 and cited with approval by the Court of Appeal in *Samuel Mbugua Ikumbu V Barclays Bank of Kenya Ltd* (2015) eKLR where the court stated as follows;
"The law on variation of a consent judgement is now settled. The variation of a consent judgement can only be on grounds that would allow a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to policy of the court, absence of sufficient material facts and ignorance of material facts."
56. The court is guided accordingly.



57. As adverted to elsewhere in this judgement, the applicant is seeking a variation of the consent judgement issued on 9th November, 2021 as regards duration to comply.
58. According to the consent adopted by the court, the decretal sum was to be liquidated within 10 months effective 1st December, 2021 at Kshs.500,000/= per month.
59. It is common ground that the Respondent defaulted.
60. Copies of email communication between the applicant and the Respondent's counsel reveal that between 23rd May, 2022 and 2nd November, 2022, no payment was made and the instalments due in March and April 2022 were made late and as early as May 2022, the Respondent had threatened to execute for the entire balance but did not until the proclamation dated 23rd November, 2022 which appear to have triggered the instant Notice of Motion.
61. Strangely, and for unexplained reasons, the applicant having consented to the settlement of the dispute, did not find it prudent to reach out to the Respondent's counsel for reprieve if it was facing financial challenges. The retort that it was the Kenya Revenue Authority (KRA) which froze its operations and business could not avail the applicant as it did not provide evidence as to when the freezing of operations took place and when it resumed operations.
62. In the court's view, the applicant ought to have approached the Respondent's counsel and disclose the challenges it was facing and propose a way forward in liquidating the amount it owed the Respondent.
63. Having undertaken to pay the amount due by 10 instalments, it was legally bound to do so and cannot at this late hour rely on closure of operations by the Kenya Revenue Authority as a reason. If it was the reason for the default, why was it not communicated to the Respondent's counsel by email or letter?
64. When the consent between the applicant and the Respondent dated 9th November, 2021 was adopted as a judgement of the court, it became a court order for the applicant to pay the amount owing in 10 monthly instalments. It need not be gainsaid that court orders must be obeyed.
65. In *Trusted Society of Human Rights Alliance V Cabinet Secretary for Devolution & Planning & 3 others* (2017) eKLR, Mativo J. (as he then was) stated as follows;

“It cannot be disputed that an order of the court has to be respected by the parties who are bound by it. Therefore, every effort must be made to implement the order of the court and not to disobey the same. It is not up to that party to choose whether or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned, subject to the party's right to challenge the order in issue, in such a lawful way as law permits . . .”
66. The court is in agreement with these sentiments.
67. In the instant case, the applicant defaulted in its undertaking and did not notify the Respondent's counsel or challenge the consent judgement in court.
68. As demonstrated elsewhere in this judgement, a consent order or judgement can only be varied in defined circumstances essentially those in which a contract may be vitiated, such as mistake, illegality, misrepresentation, duress and undue influence among others. The applicant has not relied on any of these reasons in its application for extension of time to pay the amount owed to the Respondent.
69. Had the applicant approached the Respondent's counsel with a reasonable proposal and the Respondent's counsel declined to accommodate the applicant, the court would have viewed the



application here through a different prism as it would have demonstrated that the applicant was alive to the obligations it had imposed on itself and was eager to fulfil them.

70. However, in the circumstances, the court is constrained to agree with the Respondent counsel's submission that the applicant was jolted to action by the proclamation in November 2022.
71. For the foregoing reasons, the court is satisfied and finds that the applicant has failed to prove on a balance of probabilities that the Notice of Motion dated 1st December, 2022 is merited and it is accordingly dismissed save for the order that the firm of Gichuki Kimere & Co. Advocates be granted leave to come on record on behalf of the Respondent/Applicant herein after judgement.
72. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF MAY 2023

DR. JACOB GAKERI

JUDGE

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 *Civil 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.

DR. JACOB GAKERI

JUDGE



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