



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 185 OF 2016**

**BERYL KUNG'A.....CLAIMANT/APPLICANT**

**VERSUS**

**REMU MICROFINANCE BANK LIMITED.....RESPONDENT**

**RULING**

1. In this matter decided by Hon. Byram Ongaya, J. in a judgment delivered on 21/6/2019, the Court ordered as follows:-

“The respondent to pay the claimant a sum of Kshs.8,885,97.00 by 01/09/2019 failing interest to be payable thereon from the date of filing the suit till full payment.”

2. On 6<sup>th</sup> November, 2019, the parties filed a consent which was adopted as an order of the Court as follows:-

“ That there be stay of execution of the judgment and decree subject to the applicant depositing in 10 days from today the full decretal sum in an interest earning account in the joint names of the parties’ advocates.

3. On 4<sup>th</sup> March, 2020, the Decretal Sum of Kshs.8,885,972 was deposited into a joint interest earning account with ABSA Bank Kenya PLC (formerly Barclays Bank of Kenya), account number 2042381821.

4. On 27<sup>th</sup> July, 2020, the Applicant filed a notice of motion application for release of half the decretal sum and for the Respondent to be directed to deposit Kshs.16,794,487.07 being the interest.

5. On 23/10/2020, the Court dismissed the said application with costs.

6. The applicant filed the present application dated 8<sup>th</sup> December, 2020, seeking the Court to review the order made on 6<sup>th</sup> November, 2019 granting stay of execution of the judgment on aforesaid conditions.

7. The applicant seeks release of half the decretal sum in the sum of Kshs.4,442,489 to the applicant.

8. The application is sought on the basis that the review of the order is necessary and in the interest of justice to balance the scales of the parties.

9. The money was deposited not only subsequent to the judgment of the Court dated 21/6/2019 but more particularly the deposit was finally done pursuant to a consent order by the parties dated 6<sup>th</sup> November, 2019 which is now sought to be reviewed.

10. The application is opposed by the respondent on the basis that the application lacks merit at all the deposit of the decretal sum having been done pursuant to a consent order. That consent orders may not be set aside or reviewed lightly but on four grounds known in law, which grounds do not arise in the present case.

11. In **SMN –vs- SMS and 3 Others [2017] eKLR**, the Court of Appeal affirmed the law regarding setting aside of consents as follows:-

“Generally a Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.”

12. The Court of Appeal cited with approval the case of **Flora N. Wasike –vs- Destimo Wamboko [1988] eKLR** where it was held:-

“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.”

13. From the deposition by the applicant in the notice of motion, no facts have been deposed to which being to demonstrate any grounds know in law that may justify the setting aside of a contract which include that the contract was obtained through collusion; fraud or material misrepresentation of facts and or an ignorance of material facts. The contract may also be set aside if the same was entered into furtherance of an illegal purpose.

14. These are the same reasons that may persuade a Court to set aside a consent judgment or order.

15. The applicant has failed to discharge the onus placed on him in the aforesaid respects. The application lacks merit and is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances:-**

Mr. Mwathe for Claimant/Applicant

Mr. Obonyo for Respondent

Ekale – Court clerk.