



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 100 OF 2017

MARGARET WAMBUI GATONYE.....CLAIMANT

VERSUS

HOMAGE SERVICES STORES LIMITED.....1ST RESPONDENT

KENYA UNION OF COMMERCIAL FOOD &

ALLIED WORKERS (KUCFAW).....2ND RESPONDENT

RULING

1. The Notice of Motion application before me is the 1st Respondent/Applicant's application dated 31st October 2018 seeking the stay of execution of the warrants of attachment issued on 24th October 2018. The 1st Respondent also sought the varying of the consent order to permit the variation on payment of the decretal sum to installments of Kshs. 50,000/- as opposed to Kshs. 100,000/- agreed upon. The 1st Respondent asserts that this is the low season and cash flow is not at its best and it is incapable of sustaining the proposed payments which will lead to its shutdown. The Claimant is of course opposed and urges the court to permit the execution as the terms of the consent were that in default of any one installment execution to issue.

2. The law on setting aside of consents is well settled. A consent is a contract between parties and it can only be set aside for the same reasons that a consent may be set aside. The consent entered into therefore can only be set aside for fraud, collusion, illegality or the like. In the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR** the Court of Appeal (Koome, Azangalala, Kantai JJA) held as follows:-

The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.

Hancox JA (as he then was) in the case of **Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625**, said in his judgment 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." See the decision of this Court in **J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983,***

This Court in the case of **Brooke Bond Liebig v. Mallya 1975 E.A. 266** held:-

"A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement."

In **Hirani v. Kassam (1952), 19EACA 131**, this Court with approval quoted the following passage from **Seton on Judgments and Orders, 7th edition, Vol. 1 p.124** as follows:

"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 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. "

3. The consent entered into was from the evidence placed before me by the 1st Respondent, freely entered into. There was no fraud, collusion, illegality, mistake, it is not contrary to the policy of the court, or made in the absence of sufficient material facts and/or ignorance of material facts. The agreement being a contract that is binding can only be set aside by the parties themselves. In my view, the application before me is thus devoid of merit and is dismissed with no order as to costs. Execution may proceed keeping in mind the provisions of Section 44(ii) of the Civil Procedure Act.

It is so ordered.

Dated and delivered at Nyeri this 13th day of December 2018

Nzioki wa Makau

JUDGE