



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.2 OF 2015

JOHN MUNGAI KARIUKI.....CLAIMANT

VERSUS

MUMATI STAFF SAVINGS AND CREDIT CO-OPERATIVE SOCIETY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 7th April, 2016)

RULING

By consent of the parties on 28.07.2015, the court recorded a consent judgment for orders, thus, **“By consent judgment is entered for claimant against the respondent for Kshs.1, 219,088.00 with costs to the claimant to be agreed upon failing to be taxed in the usual manner. There be stay of execution for 60 days from today.”**

On 30.11.2015 the respondent filed the notice of motion under Order 10 Rule 11, Order 22 Rule 1, Order 51 Rule 1, of the Civil Procedure Rules, sections 1A and 3 of the Civil Procedure Act and All other enabling provisions of law. The substantive prayers in the application are for orders:

- a. The honourable court is pleased to set aside the consent orders of 28.07.2015.
- b. The amount of Kshs.195, 054.80 in the court order is substituted with Kshs. 1, 024,033.20.
- c. The honourable court is pleased to stay taxation in the bill of costs dated 4.11.2015 pending the hearing and determination of the application.
- d. The claimant being the respondent in the application is ordered to pay the costs of the application.

The application was supported with the affidavit of Rufus Karanja, the respondent’s chief executive officer and upon the following grounds:

1. The judgment of 28.07.2015 was entered by error through misrepresentation of facts as the judgment does not reflect the admitted amount.
2. In particular, counsel for the claimant at recording of the judgment failed to disclose that the admitted amount was Kshs. 1, 219, 088 less the deductible taxes of Kshs. 195, 054.80.
3. At paragraph 6 of the supporting affidavit it is stated that the admitted money was Kshs. 1,024, 033.20 less statutory deductions of Kshs. 195, 088.80.
4. In the letter dated 14.08.2015 being exhibit RK1(a), the applicant’s advocates Gitonga Muriuki & Company Advocates stated that the tax amount is Kshs. 195, 054.80 and the judgment should have been for Kshs. 1, 024, 033.20.

The claimant being the respondent in the application filed on 13.01.2016 the grounds of opposition

through Kirubi Mwangi Ben & Company Advocates. The stated grounds of opposition were as follows:

1. That the application as filed is frivolous, vexatious, and an abuse of the due process of the court.
2. That the honourable court has no powers or jurisdiction to set aside a consent judgment but can only review the same on grounds of fraud, collusion, irregularity or mistake which grounds have not been demonstrated in the application.
3. That the application having been brought under Order 10 Rule 11 of the Civil Procedure Rules, it is fatally defective and should be struck out.
4. The prayer thus, **“The amount of Kshs.195, 054.80 in the court order is substituted with Kshs. 1, 024,033.20,”** makes no sense both in law and equity.
5. That the applicant is not a body appointed by the government to collect taxes on its behalf and as such the application to levy taxes against the applicant is misconceived.

The parties filed submissions to urge their respective cases.

The **1st and main issue** for determination is whether the court enjoys jurisdiction or authority to set aside the consent judgment. In **Munyiri-Versus-Ndunguya[1985]KLR** it was held that the remedy that was open to the parties desirous to set aside a consent order was either by review or a fresh suit, because, a court can only interfere with a consent judgment in such circumstances as would afford a good ground for varying or rescinding a contract between the parties. In **Samuel Mbugua Ikumbu-Versus- Barclays Bank of Kenya Limited [2015]eKLR**, the Court of Appeal again held that the variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated including, but 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. The court follows that settled position. In the present case there is no application for review or a fresh suit. The court therefore returns that the present application would fail. In any event, the applicant has alleged mistake but which has not been established so as to justify the varying of the consent judgment. The court record for 28.07.2015 is clear. The advocates duly authorised and appearing for the parties addressed the court, judgment by consent was recorded, and the advocates’ respective signatures were endorsed to signify the consent.

As submitted for the claimant, the prayer thus, **“The amount of Kshs.195, 054.80 in the court order is substituted with Kshs. 1, 024,033.20,”** has not been justified at all. The court has observed the inconsistencies of alleged facts in the applicant’s prayers and grounds and returns that such inconsistencies act as a bar to the success of the application. It is not clear whether the amount due, for the applicant, is Kshs. 1, 024, 033.20 or that amount less Kshs. 195, 088.80 (and which amount is not clear whether is tax or statutory deductions).

In conclusion, the notice of motion dated 30.11.2015 and filed on the same date is hereby dismissed with orders that the applicant will pay the resultant costs.

Signed, dated and delivered in court at Nyeri this Thursday, 7th April, 2016.

BYRAM ONGAYA

JUDGE