



REPUBLIC OF KENYA



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Kuria v Registered Trustees of Catholic Diocese of Nyeri & 2 others (Civil Appeal E001 of 2022) [2024] KEHC 4060 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E001 OF 2022
MA ODERO, J
APRIL 26, 2024**

BETWEEN

WILLIAM KAHUGI KURIA APPELLANT

AND

**REGISTERED TRUSTEES OF CATHOLIC DIOCESS OF
NYERI 1ST RESPONDENT**

ROBERT KARIU MWANGI 2ND RESPONDENT

NICHOLAS TAIKU MAINA 3RD RESPONDENT

JUDGMENT

1. Before this court for determination is the Memorandum of Appeal dated 5th January, 2022 by which the Appellant William Kahugi Kuria seeks the following orders:-

- “1. That this Appeal be allowed.
- 2 That the order of Honourable F. Muguongo, Senior Resident Magistrate delivered on 15th December, 2021 together with the orders issued on 13th October 2021 in Nyeri Chief Magistrate’s Court Civil Case Number 169 of 2020 be set aside and the court substitute therefore an order allowing the Appellant’s Notice of Motion application dated 16th October, 2021 and/or the Honourable court finds and substitutes its own judgment as it may deem just and fit in the circumstances.
3. That the costs of the Appeal be awarded to the Appellant”



2. The Respondents namely Registered Trustees of the Catholic Diocese of Nyeri (1st Respondent), Robert Kariu Mwangi (2nd Respondent) and Nicholas Thiku Maina (3rd Respondent) all opposed the appeal.
3. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 5th June, 2023 whilst the Respondent relied on their written submissions dated 26th June 2023.

Background

4. The 1st Respondent filed a suit vide a plaint dated 17th August, 2020 in the Nyeri Chief Magistrates Court seeking damages for an accident that allegedly occurred on 13th October, 2018. The 1st Respondent prayed for general and special damages, costs of the suit and interest thereon.
5. The Appellant failed to enter appearance in the matter and interlocutory judgment was entered against him on the liquidated claim.
6. The Appellant then filed a Notice of Motion dated 30th July, 2021 seeking to set aside the Ex Parte judgment and to allow him an opportunity to defend the suit.
7. On 11th August, 2021, the parties compromised this application by way of a consent dated 11th August, 2021 clauses (1) and (2) of the consent order provided as follows:-
 - “(1) The notice of Motion dated 30th July, 2021 be and is hereby compromised in terms of prayer number (2) and 1 (h) subject to payment of throw away costs assessed at Kshs. 30,000 all included.
 - (2) The amount of 30,000/= to be paid within 30 days.
 - (3)”[own emphasis].
8. The Appellant failed to pay the amount of Kshs. 30,000.00 within the thirty (30) day period as was required by the consent.
9. The matter came up for pre-trial conference on 13th October, 2021. On that day counsel for the Appellant was absent. The Respondent’s Advocate urged the court to set aside the consent orders of 11th August, 2021 on grounds that there had been failure to abide with the terms of the same. The learned trial magistrate agreed and set aside the consent order.
10. The Appellant then filed an application dated 14th October, 2021 seeking the following orders;-
 - (i) Spent
 - (ii) That the Honourable Court be pleased to stay the execution of the decree issued herein on the 26/5/2021 and all consequential orders thereto against the 1st defendant/applicant pending the hearing and determination of the application.
 - (iii) That the Honourable Court be pleased to review, set aside and/or vary the orders issued on 13/10/2021.
 - (iv) That this Honourable Court be pleased to reinstate the orders issued 11/8/2021 and thereafter be pleased to extend time by seven days for the 1st defendant/applicant to pay to the plaintiff the throw away costs of Kshs. 30,000/= awarded to the plaintiff on 11/8/2021 and to file his witness statement and bundle of documents.
 - (v) That the costs be provided for.



11. In her ruling delivered on 15th December, 2021 the learned trial magistrate dismissed the application seeking review of her orders and reinstatements of the consent order.
12. Being aggrieved by that ruling the Appellant filed in the High Court the Memorandum of Appeal dated 5th January, 2022 which appeal was premised upon the following grounds;-
 - (a) The Learned Trial Magistrate erred in law and in fact in declining jurisdiction and in dismissing application for time extension for the Appellant to fully comply with the consent order recorded on 11th August, 2021.
 - (b) The Learned Trial Magistrate failed to appreciate that the Appellant had substantially complied with the consent order recorded on 11th August, 2021 by issuing a 3rd party notice to the 3rd respondent which precipitated that filing of a defence to the 1st respondent's suit.
 - (c) The Learned Trial Magistrate erred in treating the application for time extension as an application for review of the order of 11th August, 2021.
 - (d) The Learned Trial Magistrate erred in law by failing to appreciate the 11th August, 2021 order had no penal or forfeiture clause and further that the Appellant had complied substantially with the order.
 - (e) That the trial court failed to appreciate that the consent order did not state the payment of the throw away costs was a condition precedent to the setting aside of the ex-parte judgment entered against the Appellant but rather the setting aside of the ex-parte judgment was subject of the throw away costs within 30 days.
 - (f) That the trial court failed to appreciate that the consent order did not finally determine the dispute and thus time could be extended.
 - (g) That the trial court erred in law and fact by failing to exercise her unfettered discretion in the circumstances of the case to grant extension of time despite proven grounds for extension.
 - (h) That the Trial court misapprehended the facts of the case and failed to apply the law.
 - (i) That the trial court failed to appreciate and weigh evenly the various issues of fact and law so as to do justice to meet its ends.”
13. As stated earlier the appeal was opposed.

Analysis and Determination

14. I have carefully considered this appeal as well as the written submission filed by the parties.
15. This is a first appeal, thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Another-vs-Associated Motor Boat Company Limited& Others*[1968] E.A 123, the court of Appeal held that;-

“An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.



In particular this court is not bound necessarily to follow the trial judge's findings or fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.....”

16. It is common ground that the parties did on 11th August, 2021 enter into a consent which compromised the application dated 30th July, 2021 seeking to set aside the interlocutory judgments entered against the Respondent.
17. A consent order once adopted by a court becomes a contract which is binding upon the parties.
18. The consent order of 11th August, 2021 was in my view clear and unambiguous. It provided that the Notice of Motion dated 30th July, 2021 was to be compromised SUBJECT to payment of the throwaway costs within thirty (30) day period. The compromise of the application seeking to set aside the interlocutory orders depended on the payment of the throwaway costs within thirty (30) days. In the event of failure to comply then the Notice of Motion dated 30th July, 2021 would stand uncompromised.
19. The consent provided for payment of throwaway costs on the amount of Kshs. 30,000/= within thirty (30) days. The matter next came up for mention 13th October, 2021. Though he was properly served with a mention notice neither the Appellant nor his advocate was in court on that day. Counsel for the Respondent alerted the court that one of the terms of the consent being payment of Kshs. 30,000.00 had not been complied with. As such the Advocate urged the court to set aside the consent and reinstate the interlocutory judgment;-
20. In the case of Michael Mubea Kamau v. Robert Wanyika Machina & Beatrice Njeri Machina - Civil Appeal No. 305 of 2002 the court of Appeal on consent orders stated as follows:-

“The law concerning the status of consent orders has been stated in several cases among them Flora Wasike v Destino Wamboko (supra) where the Court of Appeal stated as follows, ‘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. In Purcell vs FC Triga Ltd (1970) 3 ALL ER 671, Winn LJ said at 676: “It seems to me that if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.” [own emphasis]
20. In entering into a consent agreement the parties, voluntarily bind themselves to fulfil the terms of the consent within the specified timelines (if any).
21. The Appellant in his application before the trial court sought to have the period of thirty (30) days for payment of the throw away costs expanded by a further seven (7) days. This would amount to varying or altering the terms of the consent. It is not the business of a court to vary the terms of a consent which has been voluntarily entered into by the parties.



22. In *Brooke Bond Liebke, Ltd vs- Maliya* [1975] E.A it was stated that
- “A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”
23. The grounds upon which a consent /contract may be rescinded include fraud, misrepresentation and/ or misapprehension of a material fact.
24. In *Kenya Commercial Bank vs- Specialized Engineering* [1982] KLR the court held that
- “A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud (1) or by an agreement contrary to the Policy of the Court (2) or where the consent was given without sufficient material facts (3) or in misapprehension (4) or ignorance of such facts in general for a reason which would enable the court to set aside an agreement (5). [Emphasis mine]
25. Similarly in *Samson Munikaht/a Munikah& Company Advocates vs- Wedube Estates Limited* [2007] eKLR it was held that
- “a consent order 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”
25. The Appellant argued that they had partially fulfilled the terms of the consent by paying a sum of Kshs. 10,000.00 out of the Kshs. 30,000.00 required. This argument will not wash. Having agreed to the terms of the consents the Appellant was bound to comply with all the terms as set out. There was no provision for payment of the costs in installments. The Appellant’s argument that he had substantially complied with the consent order is not legally sound. The consent order binds the parties in all its aspects. Partial compliance was not an option.
27. If the Appellant faced any difficulty in fulfilling the terms of the consent then he ought to have filed an application in court seeking to vary and /or alter the said terms. The Appellant cannot pick and choose which terms to comply with and which to ignore. If the Appellant required more time to pay the Kshs. 30,000.00 then he ought to have filed an application seeking extension of time. He cannot fail to abide by the timelines given in the consent then blame the court for failing to allow him an extension of time within which to comply. Worse still the Appellant did not even bother to attend court on the mention date.
28. I am satisfied that the learned trial magistrate was right to rescind the consent due to non-compliance by the Appellant. The present appeal has no merit and is dismissed in its entirety. Costs will be met by the Appellant.

DATED IN NYERI THIS 26TH DAY OF APRIL, 2024.

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MAUREEN A. ODERO

JUDGE

