



Case Number:	Tribunal Case 728 of 2019
Date Delivered:	25 Nov 2021
Case Class:	Civil
Court:	Cooperative Tribunal
Case Action:	Ruling
Judge:	Hon. B. Kimemia Chairperson Hon. J. Mwatsama Deputy Chairperson Mr. Gitonga Kamiti Member Mr. B. Akusala Member Mr. P. Gichuki Membe
Citation:	P.C.E.A Ruiru Sacco Limited v P.C.E.A Ruiru Sacco Limited [2022] eKLR
Advocates:	Hafsa holding brief for Mr. Wanjohi for the Respondent Njuru for the Claimant
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE CO-OPERATIVE TRIBUNAL**

**AT NAIROBI**

**TRIBUNAL CASE NO.728 OF 2019**

**P.C.E.A RUIRU SACCO LIMITED .....CLAIMANT**

**VERSUS**

**SAMUEL KARIUKI NGUNYI .....RESPONDENT**

**RULING**

1. The matter for determination is Notice of Motion Application Under Certificate of Urgency dated **12.3.2021** seeking the following prayers:

*a. That this matter be certified urgent and heard exparte in the 1<sup>st</sup> instance.*

*b. That a temporary injunction be and is hereby issued restraining M/S. KINGPIN Auctioneers, M/S BRAIFUS Auctioneers & storage yard, their agents and/or any one claiming under them from selling Motor vehicle Registration KAT 205 K until this Application is heard and determined.*

*c. That Madam Ruth T/A KINGPIN Auctioneers be enjoined in these proceedings.*

*d. That motor vehicle registration number KAT 205K be released to the Respondent unconditionally.*

*e. That KINGPIN Auctioneers fees and charges be taxed or evaluated by this Honourable Tribunal or the Auctioneers Licensing Board.*

*f. That the Claimant be ordered to remove the Respondent's name from Credit Reference Bureau.*

*g. Costs of this Application be paid by the Claimant and the Auctioneer.*

2. The Application is based on the grounds on the face of the application and supported by the Affidavit of **Samuel Kariuki** deponed on **12.3.2021**.

3. The Application is opposed vide the Replying Affidavit deponed on **9.4.2021** by **Edward Ngarega** the treasurer of the Claimant.

4. The Application was ordered to be determined by way of written submissions. The Claimant filed written submissions on **26.5.2021** and the Respondent filed on **30.8.2021**.

**Applicant's Written Submissions**

5. The Applicant submitted that they wanted **Ruth T/A KINGPIN Auctioneers** to be enjoined in the proceedings since she attached the motor vehicle **KAT 205K** which she had not proclaimed.

6. That the Auctioneer did not follow the law where discharging her instructions and there is no consent to ratify her actions.

7. That the warrants were issued on **5.8.2020** and proclamation is dated **25.7.2020** hence there was fraud and illegality by the Auctioneer.

8. That the motor vehicle **KAT 205K** be released unconditionally since it was attached illegally.

9. That the Auctioneer has been holding the motor vehicle since **25.7.2020** and to date, 1 year later, is still holding the motor vehicle which has been attracting Kshs. 100/= storage charges daily. That since the motor vehicle has been held illegally, it should be released unconditionally.

10. That the Auctioneer's fees and charges be evaluated. That the Claimant frustrated the consent by declining to accept the title deed **LR. KAJIADO/KAPUTIE/NORTH/20786** as per the consent hence the consent became void.

#### **Respondent's/Claimant's Written Submission**

11. The Claimant submitted that the suit was compromised vide a consent dated **7.9.2020** which was adopted on **11.12.2020**. That the consent has neither been dissolved nor set aside. That the consent is therefore contractually binding on the parties.

12. That the Respondent did not comply with the terms of the consent and only paid **Kshs. 44,850/=** leaving a balance of **Kshs. 7,355/=** for legal fees.

13. That he did not pay the agreed Auctioneer and storage charges.

14. That having entered into a consent which is now an order of the Tribunal, the Respondent seeks to set aside the consent judgment through the back door.

15. That the consent was not obtained by fraud or illegally hence it is contractually binding.

That the Application should be dismissed with costs.

#### **Determination**

16. We have carefully considered the submissions of the parties.

It is clear that the suit was comprised vide the consent dated **7.12.2020** and adopted as an order of the Tribunal on **11.12.2020**.

The consent reads as follows:-

By consent:

*1. That the Respondent shall pay without fail the loan amount due and owing in the sum of Kshs. 461,366.50/= as at 2<sup>nd</sup> November 2020 together with all accrued interest and charges within three (3) months of the date of execution of this consent.*

*2. That to secure the Respondent's obligations under clause 1 above the Respondent shall present the original title deed for land parcel title No. KJD/KAPUTIEI-NORTH /20786 for valuation and lien by deposit of title documents and shall execute a loan agreement and lien documentation in favour of the Claimant.*

*3. That the Respondent shall bear the cost of valuation and lien by deposit of title documents.*

*4. That upon execution of this consent and the loan agreement, the Claimant shall cause the Respondent to be delisted by the Credit Reference Bureaus.*

5. That in the event of non-compliance with clause 1 above, the Claimant shall be at liberty to transfer into its name and/or sell land parcel Title No. KJD/KAPUTIEI-NORTH /20786 for purposes of recovery of the outstanding loan amount, interest and charges.

6. That the Respondent shall pay the costs of the suit in the sum of kshs. 52,185/= and Auctioneer costs in the sum of Kshs. 60,000/= together with accrued storage charges within thirty (30) days of the date of this consent. Upon payment of the foregoing, motor vehicle registration number KAT 205K will be released to him.

7. That in the event of non-compliance with Clause 6 above, the Auctioneer shall be at liberty to sell motor vehicle registration number KAT 205K to recover the costs of the suit, Auctioneer costs and storage charges.

17. The terms of the consent judgment are clear on the outset. The said consent was entered freely by the parties, the same has neither been challenged nor set aside.

18. The Applicant himself has not demonstrated that he has on his part honoured the terms of the consent judgment.

In the Board of Trustees National Social Security Fund – vs- Michael Mwalo [2015] eKLR it was held that :

*“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. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of court.”*

In Setton on Judgments and Orders (7<sup>th</sup> Edn), Vol. 1 page 124 the author states that:

*“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.....it 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 general for a reason which would enable the court to set aside an agreement. “*

19. In totality, the terms of the consent are clear and binding upon the parties.

The consent judgment was entered by the Tribunal and it is therefore executable as an order of the Tribunal.

20. The Application of the Respondent, in light of the consent judgment, therefore lacks merits and the same is dismissed with costs.

Ruling signed, dated and delivered *virtually* at **Nairobi** this 25<sup>th</sup> day of **November**, 2021.

**Hon. B. Kimemia Chairperson Signed 25.11.2021**

**Hon. J. Mwatsama Deputy Chairperson Signed 25.11.2021**

**Mr. Gitonga Kamiti Member Signed 25.11.2021**

**Mr. B. Akusala Member Signed 25.11.2021**

**Mr. P. Gichuki Member Signed 25.11.2021**

**Tribunal Clerk R. Leweri**

**Hafsa holding brief for Mr. Wanjohi for the Respondent**

**Njuru for the Claimant.**

**Hon. J. Mwatsama Deputy Chairperson Signed 25.11.2021**



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