



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL SUIT NO. 14 OF 2016**

**BETWEEN**

**HAUL MART KENYA LIMITED.....PLAINTIFF**

**AND**

**TATA AFRICA HOLDINGS (KENYA) LIMITED.....DEFENDANT**

**(BY ORIGINAL ACTION)**

**TATA AFRICA HOLDINGS (KENYA) LIMITED.....DEFENDANT/COUNTERCLAIMANT**

**AND**

**CANELAND LIMITED.....1<sup>ST</sup> DEFENDANT**

**HAULMART KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**AND**

**SURJIT SINGH PANDHAL.....1<sup>ST</sup> INTERESTED PARTY/ APPLICANT**

**MALKIT SINGH.....2<sup>ND</sup> INTERESTED PARTY/ APPLICANT**

**BHALVINDER SINGH PANDHAL.....3<sup>RD</sup> INTERESTED PARTY/APPLICANT**

**SAMARBHIR KAUR PANDHAL.....4<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**RULING**

**Background**

1. By a judgment dated 19<sup>th</sup> October, 2017, the court made the following orders among others:

(a) The Defendant be and is hereby restrained by way of a permanent injunction from repossessing or otherwise interfering with the possession of 8 tractors and 2 cane loaders registration numbers KTCB 313N, KTCB 314N, KTCB 316N, KTCB 309N, KTCB 315N, KTCB 311N, KTCB 312N, KTCB 310N, KHMA 199G and KHMA 843G (collectively referred to as “the Units”).

(b) The Defendant shall pay the plaintiff’s costs of the original action.

(c) Judgment be and is hereby entered for the Defendant/Counterclaimant against the Defendants to the Counterclaim jointly and severally for the sum of Kshs. 40,007,000.00 together with interest thereon at 12% p.a from 30<sup>th</sup> March 2015 until payment in full together with costs thereon.

**(d) The 1<sup>st</sup> Defendant's to the Counterclaim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to the Further Counterclaim is dismissed with costs to the 2<sup>nd</sup> Defendant to the Further Counterclaim.**

2. Subsequently on 09th May, 2018, a consent was recorded between Decree Holder/Defendant/Counterclaimant and **SURJIT SINGH PANDHAL** and **MALKIT SINGH** (directors of **CANELAND LIMITED**, the 1<sup>st</sup> defendant in the counterclaim) to pay the Decree Holder Kshs. 1,523,930/- together with interest at 14% p.a from 01.01.18 until payment in full.

3. It was also agreed that the sum would be liquidated in 4 instalments with effect from 23.05.15 and thereafter on the 23<sup>rd</sup> of each succeeding month until payment in full and further that in default, **SURJIT SINGH PANDHAL** and **MALKIT SINGH** would be committed to civil jail for one month.

4. On the same date, a consent was recorded between Decree Holder/Defendant/Counterclaimant and the all the Applicants to settle by instalments of Kshs. 5,000,000/- on or before 23.05.18; Kshs. 5,000,000/- on or before 20.06.18; and thereafter Kshs. 3,000,000/- from July, 2018 until payment in full. It was agreed further that in default, all the Applicants would be held personally liable to pay the outstanding sum as at the time of the default.

5. On default, the Decree Holder applied for Notice to show cause (NTC) which was heard on the 14.11.18 by the Deputy Registrar of this court warrants of arrest were issued against the Applicants. On 16.11.18, the court stayed the execution of the warrants on the grounds that the judgment debtors had not been personally served and directed that the NTC be heard on 04.12.18.

6. The court record further confirms that on 16.11.18, the Applicants **SURJIT SINGH PANDHAL** and **MALKIT SINGH** together with **BHALVINDER SINGH PANDHAL** and **SAMARBHIR KAUR PANDHAL** filed applications dated 15.11.18 and 16.11.18 respectively seeking stay of warrants of arrest issued on 14.11.18. The orders were granted pending *interpartes* hearing on 26.11.18.

7. The record demonstrates that the parties appeared before the Deputy Registrar of this court on the 26.11.18, whereupon the warrants of arrest issued against the 1<sup>st</sup> and 2<sup>nd</sup> Applicants on 14.11.18 were set aside and the NTC was listed for *interpartes* on 04.12.18.

8. On 04.12.18 the Deputy Registrar of this court heard the parties 'advocates on the NTC and in a ruling dated 10.12.18 found the Applicants in default of the consent orders dated 09.5.18 and directed that they be committed to civil jail for one month. An order was also made that the Applicants present themselves before the court on 10.12.18.

9. The court record shows that neither of the Applicants appeared in court on 11.12.18 as directed. The court re-issued the warrants of arrest against **SURJIT SINGH PANDHAL** and **MALKIT SINGH** and extended warrants of arrest against **BHALVINDER SINGH PANDHAL** and **SAMARBHIR KAUR PANDHAL**.

#### **Applications dated 03.12.18 and 11.12.18**

10. The orders for warrant of arrest prompted two applications. By a notice of motion dated 03.12.18, the Applicants **SURJIT SINGH PANDHAL** and **MALKIT SINGH** seek orders for stay of execution in respect of the 1<sup>st</sup> consent order on the ground that the debt has been settled in full.

11. The Applicants **SURJIT SINGH PANDHAL** and **MALKIT SINGH** together with **BHALVINDER SINGH PANDHAL** and **SAMARBHIR KAUR PANDHAL** also seek that they be allowed to settle the decretal sum in the second consent in instalments of Kshs. 500,000/- commencing 31.01.19 until payment in full.

12. The application is supported by an affidavit sworn on 29.11.18 by **SURJIT SINGH PANDHAL**. Annexed to the affidavit are a bundle of cheques issued to the Decree Holders advocates in settlement of the decretal sum.

13. The application is opposed on the basis of grounds of opposition dated 04.12.18 in which the Decree Holders contends that the proposal by the judgment debtors is unrealistic and unreasonable in view of the fact that the outstanding sum is in excess of Kshs. 48,000,000/-.

14. Subsequent to filing the notice of motion dated 03.12.18, the Applicants **SURJIT SINGH PANDHAL** and **MALKIT SINGH** filed a notice of motion dated 11.12.18 seeking orders to lift and review the order dated 10.12.18 committing them to civil jail for one month on the ground that there was a consent order dated 26.11.18 which barred committal thereof by the Decree Holder.

15. The application is supported by an affidavit sworn on 11.12.18 by the 1<sup>st</sup> Interested Party. Annexed to the affidavit is a copy of an order for temporary stay of execution against the Applicants.

16. The application is opposed on the basis of a replying affidavit sworn on 10.12.18 by Edwin Too who describes himself as accountant with the Decree Holder. He avers that out of the judgment sum of Kshs. 52,383,960/- plus 12% interest and costs at Kshs. 1,800,000/-, the Applicants have paid Kshs. 13,950,000/-. He avers that the proposal by the Applicants is unrealistic and unreasonable noting that the outstanding sum stands at Kshs. 49,000,000/- and continues to attract 14% interest p.a.

#### **ANALYSIS AND DETERMINATION**

17. I have considered the two notices of motion in the light of affidavits on record, the grounds of opposition and also on submissions filed on behalf of **SURJIT SINGH PANDHAL** and **MALKIT SINGH**; **BHALVINDER SINGH PANDHAL** and **SAMARBHIR KAUR**

PANDHAL and on behalf of the Decree Holder. I will first address the application dated 11.12.18

18. Concerning the application for review dated 11.12.18, the issue in question is whether the applicants, **SURJIT SINGH PANDHAL** and **MALKIT SINGH** have satisfied the threshold for grant of an order of review.

19. Order 45 of the Civil Procedure Rules provides as follows:

**1. (1) Any person considering himself aggrieved-**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

20. In the case of *National Bank of Kenya Limited v Ndungu Njau [1997] eKLR*, cited by the Applicants, the Court of Appeal stated with regard to review that: -

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”**

21. Contrary to the Applicants assertion, the court record demonstrates as I have pointed out hereinabove that the warrants of arrest issued on 14.11.18 were set aside on 26.11.18; the NTC was listed for *inter partes* hearing on 04.12.18 and in a ruling dated 10.12.18, the court found the Applicants in default of the consent orders dated 09.5.18 and directed that they be committed to civil jail for one month. When the Applicants failed to appear in court on 11.12.18 as directed on 10.12.18, the court re-issued the warrants of arrest against **SURJIT SINGH PANDHAL** and **MALKIT SINGH** and extended warrants of arrest against **BHALVINDER SINGH PANDHAL** and **SAMARBHIR KAUR PANDHAL**.

22. Clearly, the orders issued on 10.12.18 and 11.12.18 supersede those issued on 26.11.18 and the Applicants assertion that there exists a consent barring their committal cannot be sustained for the reason that the Applicants have not demonstrated that there exists some self-evident error or omission on the face of the record, or any other sufficient reason that would entitle them to an order of review.

23. Concerning the notice of motion dated 03.12.18 for settlement of the decretal sum in the second consent in instalments of Kshs. 500,000/- commencing 31.01.19 until payment in full, I remind myself that the judgment was a consent judgment and the principles on which it can be set aside are now well settled. A consent judgment 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 the Court of Appeal in *J M Mwakio vs Kenya Commercial Bank Ltd, CA Nos 28 of 1982 and 69 of 1983*).

24. In *Purcell v F C Trigell 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 of rectification of this order looked at as a contract.”**

25. The consent orders were made in the presence and with the consent of counsel for the Applicants. There is neither an allegation nor prove that the orders were obtained by fraud or collusion, or by an agreement contrary to the policy of the Court, or that the orders were given without sufficient material facts, or in misapprehension or in ignorance of material facts. The orders are binding on the parties and cannot be varied or discharged unless by consent of the parties.

26. After due consideration of all the material placed before the court, I find that the notices of motion dated 03.12.18 and 11.12.18 have no merit and both are disallowed with costs to the Decree Holder.

27. For avoidance of doubt, the order issued on 10.12.18 committing the Applicants to civil jail for one month is still in force.

**DELIVERED AND SIGNED IN KISUMU THIS 23rd DAY OF May 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - **Felix**

For Defendant/Counterclaimant/Decree Holder - **Ms. Machage**

For 1<sup>st</sup> Defendant/Judgment Debtor - **Mr. Mweisigwa**

For 2<sup>nd</sup> Defendant/Judgment Debtor - **Ms. Bagwasi h/b for Mr. Okoyo**