



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Civil Case 142 of 2005 (O.S.)

GIRO COMMERCIAL BANK LIMITED.....CLIENT/APPLICANT

VERSUS

WASUNA & COMPANY ADVOCATES.....ADVOCATE/RESPONDENT

AND

EZRA ODONDI OPAR

t/a KENDU BAY SERVICE STATION.....3RD PARTY

R U L I N G

1, The applicant (the bank) herein and the Respondent (Advocate) on 6th December, 2010 entered the following consent:

- 1. That the respondent is hereby ordered to pay the balance of the sum due and owing in this matter to the applicant and the same be recovered from the third party.**
- 2. That the applicant do establish the exact quantum of the balance owing inclusive of the interest as at the 30th November, 2010 and notify the respondent.**
- 3. That the costs of those proceedings be paid by the respondent.**

2. The said consent has now been challenged by two applications herein as follows. The first application dated 8.3.2012 by the Advocate prays for the following orders:

- a. That the consent order recorded herein on the 6th day of December, 2010 and all or any consequential decree or order be set aside and or varied upon such terms as are just**
- b. That a dispute having arisen on the issue of the balance of the sum the subject matter of the professional undertaking given by the advocate and if interest is payable then quantum thereof and the effective date of such interest those issues should now be referred to the Honourable Court for hearing and determination;**
- c. The Honourable Court be pleased to review and or amend the decree and or order made herein on the 6th day of December 2010 upon such terms as are just.**

The same is premised on the annexed affidavit of **FRANCIS ERICK WASUNA** dated 8th March 2012.

3. The other application which the parties want this court to determine is that dated 20.3.2013 by the 3rd party herein and which he prays that:

- a. **this Honourable court be pleased to set aside the consent order of 6th December 2010 together with the consequential orders and proceedings thereto.**
- b. **The cause of herein be heard and determined inter-parties as may be suitably directed by the court.**

4. The affidavit of **EZRA ODONDI OPAR** dated 20th March 2013 in support in a nutshell states that he was never a party to the consent despite being on record at that particular time.

5. Upon perusing the two applications both essentially attack the consent order of 6.10.2010. The first application by the Advocate argues that the question of interest was not an issue at the time of the consent and thus it was wrong for the applicant (the bank) to demand. On the other hand the 3rd party argues that whichever way the consent goes, he was a central figure in the whole transaction having been loaned by the applicant.

6. It is my considered opinion that it would be prudent and expedient to determine first of all the 3rd party's application. This is informed by the fact that should it be found credible then obviously the consent shall be set aside.

7. From the record I notice that the 3rd respondent was allowed on board the proceedings on 28/9/2006. The consequences therefore was that for all intent and purposes any proceedings herein would therein have to involve him. It then appears from the proceedings that on 6.12.2010 when the parties recorded the consent Mr. Menezes for the applicant and Mr. Amondi for the respondent were present.

8. There was no mention of the 3rd party. Neither is there any indication that he was served or for that matter his counsel.

9. Does the consent affect the 3rd party in anyway? The 3rd party believes so and he argues that he was shut out unfairly yet ultimately he was going to shoulder the decree by way of indemnity.

10. Mr. M. Menezes counsel for the plaintiff (the bank) argues in his affidavit of reply dated 29.5.2013 that essentially the 3rd party was aware all through of the negotiation. In any case, he depones that 3 years have elapsed since the recording of the consent and the 3rd party has been quite.

11. He further stated that the 3rd party is not privy to the consent and that all that he can do is to apply that it does not involve him.

12. Having read the parties submission as well as peruse the respective rival affidavits, the only one fundamental issue to determine herein is whether the impugned consent touch on the 3rd party and if so to what extent.

13. Paragraph (1) of the said consent is worth reproducing. The same states that:

“That the respondent is hereby ordered to pay the balance of the sum due and owing in this matter to the applicant and the same be recovered from the third party” (underlining mine)

14. My simple understanding of the consent is that though the respondent (counsel) was to pay the balance he would have to recover from the 3rd party. Was there an understanding between the counsel and the 3rd party? That seemed to be so as between themselves.

15. However the same is not captured in the consent. Further it appears as argued by the plaintiff (bank) that the consent emanated from a long discussion between the parties which culminated into the professional undertaking by the counsel. Again the same is not captured in the consent.

16. If therefore the 3rd party was to later pay the amount due to the counsel, why not involve him in the consent? Already he was a party and I suppose that the window of enjoining him was so as to ensure that

his liability is well captured.

The law as regards setting aside of consents is now well settled.

17. In the now famous case of **BROOKE BOND LIEBIG (T) LIMITED VRS MALLYA [1975] E.A. 266 LAW JA** stated at page 269 as follows:

18. “The circumstances in which a consent judgment may be interfered with were considered by the court in **HIRANI VRS KASSAM [1952] 19E ACA 131**, where the following passage from Seton on Judgments and Orders 7th edition, Vol, 1 page 124 was approved:

“Prima facie, any order made in the presence with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under then 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.”

19. Taking into account above authority, I find that the said consent ought to be set aside for reason that to proceed with it would greatly prejudice the 3rd party. I believe that had the two parties notified the court that there was a 3rd party in the matter who ought to have been served then definitely the court would not have been **“ignorant of material facts.”**

20. Before finalising on the application by the 3rd party, it would be better to deal with the counsel (applicant's) application albeit in passing.

21. The issue of interest which is a subject of dispute between the bank and the counsel was clearly mentioned in the consent. Paragraph 2 thereof states as follows:

“That the applicant do establish the exact quantum of the balance owing inclusive of the interest as at the 30th November 2010 and notify the respondent.” (underlining mine).

22. Clearly a simple interpretation of the above paragraph of the consent shows that by 6.10.2010 neither the applicant (the bank) nor the counsel (respondent) were aware of the exact interest owing and thus it was incumbent upon the bank to establish the same and thereafter notify the respondent.

23. In light of the above findings I shall not hesitate to state that the consent order of 6.10.2010 was faulty as the 3rd party who was to subsequently shoulder the indemnity was never involved. Nothing was difficult for him to have been involved as he was clearly mentioned by the parties.

24. Further the issue of interest was clearly spelt out in the consent. The same ought to be determined as part of the settlement. If indeed there was an agreement that the 3rd party settles the sum of Shs.2 million all inclusive as suggested by the respondent then the door is still open for such understanding.

25. The application by the 3rd party is therefore allowed and the consent dated 6.10.2010 is set aside together with all the consequential orders.

26. In terms of the application dated 8.3.2012, prayers (2) and (5) thereof are allowed. Each party shall bear their respective costs.

Dated, signed and delivered this 27th day of April, 2016.

H. K. CHEMITEI

JUDGE