



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT NO. 23 OF 1993

BETWEEN

BUDHIA BUILDERS AND ERECTORS PLAINTIFF

AND

IMA AGENCIES LIMITEDDEFENDANT

RULING

1. By a Notice of Motion dated 19th February 2016 and made under **Order 25 rule 5(1) and (2)** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)**, the defendant seeks the following orders;

1. *That this honourable court be pleased to make an order that this suit stands dismissed with costs pursuant to the consent order given by the Court of Appeal dated 16/7/2015.*
2. *That the cost of the application be borne by the plaintiff.*

2. The application is supported by the affidavit of its director Mansuklal Raichand Gudka sworn on 19th July 2015. He deponed that the suit was filed on 26th January 1993. After the suit was not set down for hearing, the defendant applied to dismiss the suit for want of prosecution. On 8th May 2003, Gacheche J., dismissed the application. This precipitated an appeal to the Court of Appeal to wit; **Civil Appeal No. 43 of 2005**. When the appeal came up for hearing on 16th July 2015, the Court of Appeal recorded the following order;

By consent of counsel for the parties, it is ordered that this appeal is withdrawn on terms that;

- (a) *The respondent shall within five months from today's date fix High Court Civil Case No. 23 of 1993, Kisumu for hearing and in default that suit shall stand dismissed with costs to the appellant.*
- (b) *The respondent shall pay the appellant's costs of the appeal.*

3. The defendant contends that it filed this this application after the plaintiff failed to fix the suit for hearing as directed in the consent. It now prays that the suit should not be formally dismissed in accordance with the consent order recorded in the Court of Appeal.

4. The plaintiff opposed the application through the replying affidavit of Mawji S. Patel sworn on 17th May 2016 who deponed that after the Court of Appeal recorded the consent order, his advocate on record attempted to fix the matter for hearing on several occasions but could not do so as the file could not be

traced. That prior to that, the Court of Appeal had allowed his appeal against an order striking out his suit on the ground that it was filed by a non-existent person and he was prepared to prosecute the suit in addition to recovering costs awarded to him as a result of reinstatement of the suit. The plaintiff also believed that the file may have been intentionally misfiled. He further deponed that since his advocate's law firm is based in Nairobi, the advocates could not be in Kisumu on a full time basis to trace the file and fix a date for hearing without incurring substantial travel and accommodation costs.

5. In order to support its calculation that the file was missing, the plaintiff annexed a letter dated 18th December 2015 addressed to the Deputy Registrar of the Court stating as follows;

We refer to the above matter and our time and again efforts to trace the court file in vain.

We kindly ask your good officer to intervene to enable us access the file which had been missing for quite some time.

6. The plaintiff avers that the delay in fixing the suit was not deliberate and that he is ready and willing to proceed with the suit. He also contends that the application is actuated by malice filed with the intent of depriving him of the benefit which he is entitled to in law.

7. In brief submissions, counsel for the parties reiterated their positions. Mr Yogo, counsel for the defendant, submitted that the consent recorded in Court of Appeal was clear and since the plaintiff did not take any steps to fix the matter within the time limited, the suit stood dismissed and the application was a mere formality.

8. Mr Othiro, counsel for the plaintiff, submitted that the court had jurisdiction to intervene in the consent where the plaintiff had been frustrated in fixing the date by a missing or misplaced file. Counsel submitted that the matter had been reinstated previously and that the plaintiff was ready to prosecute the suit.

9. Two issues fall for consideration. First, whether this court has jurisdiction to review or set aside the consent to the extent of permitting the plaintiff to prosecute the suit outside the time limited by the consent. Second, whether the plaintiff has established grounds to enable the court permit him to prosecute the suit.

10. In the case of ***Gateway Insurance Company Limited v Aries Auto Sprays*** NRB CA Civil Appeal No. 317 of 2004 [2011]eKLR the Court of Appeal re-emphasised the principle established in ***Brooke Bond Leibig (T) Limited v Mallya***[1975]EA 266 where Law, J.A. stated as follows:-

*The circumstances in which a consent judgment may be interfered with were considered by this court in ***Hirani v Kassam*** [1952], 19 EACA 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 and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... 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.

11. Likewise, in ***Flora Wasike v Destimo Wamboko*** [1988] 1 KAR 625, 629, Hancox JA., observed;

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.

12. Without deciding whether this Court can set aside a consent order recorded in the Court of Appeal,

there is nothing to show there was fraud, collusion or that there was mistake or misapprehension in recording the consent. The consent was entered into freely, and it is unambiguous that the suit would stand dismissed if it is not fixed for within five months from the date of the consent. The case stood dismissed on 16th December 2015.

13. In addition to what I have stated, the facts before me do not persuade me indulge the plaintiff. The last day for fixing the suit for hearing was 16th December 2016. The letter seeking the file, which is not even court stamped, was written outside the time limited by the consent. There is no evidence that the plaintiff has taken any other preliminary steps like filing documents, witness statements or filing the pre-trial questionnaire under **Order 11** of the **Civil Procedure Rules**. In fact, the plaintiff did not file an application for extension of time to comply with the consent but reacted to the application filed by the defendant.

14. The conclusion I have arrived at is that consent order made by the Court of Appeal has taken effect and all I can do is to give it effect and formally dismiss this suit. Accordingly, the suit now stands dismissed.

DATED and DELIVERED at KISUMU this 12th day of October 2016.

D.S. MAJANJA

JUDGE

Mr Othiro instructed by Gicheru and Company Advocates for the plaintiff/respondent.

Mr Yogo instructed by Otieno, Yogo and Ojuro and Company Advocates for the defendant/applicant.