



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 222 OF 1999

**IN THE MATTER OF: AN APPLICATION BY EX-COM CORPORATION LIMITED FOR
ORDERS OF CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF: THE SEIZURE BY THE KENYA REVENUE AUTHORITY, CUSTOMS
AND EXCISE DEPARTMENT OF 880 CARTONS OF TOILET SOAP BELONGING TO EX-
COM CORPORATION LIMITED**

NALICHANDRA SHAH.....APPELLANT

VERSUS

HEALTH FIRST INTERNATIONAL LIMITED.....RESPONDENT

RULING

1. The Applicant, **Kenya Revenue Authority** took out an application dated 2nd March, 2016, where it sought order to wit:

- i. THAT this matter be certified urgent and the same be heard ex-parte in the first instance.***
- ii. THAT the respondent's action of discharging the bank guarantee be stayed pending the hearing and determination of this application.***
- iii. THAT the orders granted on the 27th February 2015 be discharged set aside, vacated or varied.***
- iv. THAT no costs be provided for.***

2. When the matter came up for interpartes hearing on 11th April, 2016, learned counsels on record for the parties recorded a consent order to have the matter disposed of by way of written submissions. I have considered the submissions; the affidavits filed for and against the application and I have also considered the facts deponed therein. The Applicant has submitted that following the court order dated 18th January, 2016, the Respondent's advocated on record wrote to the applicant requesting them to forward the original Bank Guarantee number 7774/999 so as to surrender the same to the bank to have it discharged. It is their submission that the consent was illegally obtained and should be set aside failure to which, it will lose huge amounts of money in taxes in the unpaid warehouse rent. It argues that if the applicant had knowledge of the unpaid rent, then the consent order would not have been recorded. It blamed the Respondent for failing to inform the court that though the goods were released from the warehouse, the

rent remained unpaid. The Applicant holds the Respondent liable for material non-disclosure as a result of which it misled the court. It further argued that it will be prejudiced since the consent as drafted will exempt the Respondent from the duty of paying taxes which taxes are outstanding. The Applicant also submitted that a court order whether obtained legally or illegally cannot be enforced or issued against a duty to collect taxes pursuant to statutory provisions and regulations under an Act of Parliament.

3. The Respondent on its part submitted that the Applicant was well versed with the content in the recorded consent and that if its counsel acted negligently, the same cannot affect the validity of the consent judgment. It argued that, it has always disputed the warehouse charges and upon the applicant agreeing to the consent, there was a presumption that the same had also been resolved. It further contended that, the proper procedure for setting aside any consent is by way of filing a substantive suit and not in the manner sought by the Applicant.

It averred that unless fraud, mistake, misrepresentation, collusion, duress or undue influence is shown, then the court cannot interfere with the consent order. It was its submissions, that the Applicant has not shown either of the above. It also stated that no evidence has been tabulated to show that the Respondent misled the court. On the issues as to whether the applicant will be prejudiced if the Consent judgment is enforced, the Respondent argued that the consent was entered on 27th February, 2015 and was extracted on 8th January, 2016 yet the current application was filed on 3rd March, 2016, which is more than a year later. It is therefore the Respondent contention that the applicant should not have waited for a year to lapse before the application was made, and as such, the application herein was an afterthought.

4. The main issue for determination is whether the court can set aside the consent judgment. In the case of **Kenya Commercial Bank Ltd –vs- Benjoh Almagated Limited & Another [1998] eKLR**, the Court of Appeal held *inter alia*:

“The circumstances in which a consent judgment maybe interfered with were considered by this court in the case of Hirani –vs- Kassam (1952) 19 EACA 131, where the passage from Seton on judgments and orders, 7th Edition Vol. 1 P. 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 the consent was given without sufficient material facts or in general for a reason which would enable the court to set aside an agreement.”

The court further in upholding **Hancox JA** decision in **Flora Wasike –vs- Destimo Wamboko [1988] KAR 625** stated that:

“It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on the grounds which would justify setting a contract aside, or if uncertain conditions remain to be fulfilled, which are not carried out”. (emphasis mine)

5. In the instant case, consent judgment was entered by the parties and extracted to the effect that:

“The matter is hereby marked as spent and the applicant's guarantee dated 16th August 1999 be discharged.”

6. It is apparent that when the applicant was entering into the consent, it entered into it knowing that the warehouse rent had been paid. The Respondent on the other hand claims that it had disputed the payment of the warehouse rent and at the time of the recording of the consent, it did so on the presumption that the issue of the warehouse rent had been resolved. The Respondent is not denying that it has outstanding rent payments, it is merely stating that it presumed that the same was settled. Given that the consent was being entered in its favour at the time, it would have been wise for the Respondent to come out clearly on the contents of the consent especially given the fact that the warehouse rent was in dispute.

7. According to the Order arising from the consent judgment, there was no mention of the payment of the warehouse rent which was also a thorn in the flesh of the Applicant. The Respondent should have disclosed the fact that it had not settled the outstanding rent to ensure that the consent recorded touched on that aspect too. Failure to disclose that fact therefore is detrimental to the Respondents case, since it can easily be deemed to have obtained the consent fraudulently.

8. In my view, the Respondent ought to pay the rent and taxes due as provided by the law. If I uphold the consent judgment as entered by the parties, I will be promoting an illegality. In the premise therefore and in the interests of justice, I hereby set aside the consent orders granted on 27th February 2015. The Applicant to have the costs of the application.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent