



**ORIGINAL**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO. 161 OF 2012**

**LINUMAK INVESTMENTS LTD.....PLAINTIFF**

**VERSUS**

**DIAMOND SHIELD INTERNATIONAL LTD.....DEFENDANT**

**RULING**

- 1). The defendant/applicant notice of motion dated 25-10-2013 prays that:
    - a. **The consent order dated 30-10-2012 be set aside.**
    - b. **The interlocutory judgment dated 12-11-2012 be set aside.**
    - c. **The orders dated 26-4-2013 lifting the corporate veil against Joyce Wanyiri Mwaura be set aside.**
  
  - 2). The application is supported by the affidavit of **Joyce Mwaura** and **Geoffrey Ouma Mulanya** Advocate. The applicants contention is that the consent order dated 30-10-2012 was entered by an advocate not duly instructed. According to the applicant, one Perez Odero did not have a practicing certificate. Consequently, any proceedings undertaken by the said advocate were fraudulently done and they ought to be set aside.
  
  - 3). The application has been opposed by the respondent through the replying affidavit of **Erick Ojuro** advocate and the grounds thereof.
- This matter has had a history of its own. The contention by the applicant is that it is the advocates who have conspired to fix it and that the mistakes of counsels should not be visited upon the client.
- 4). I have perused the entire proceedings herein and it appears that the first salvo ought to be thrown by the applicant against one Lilian Nchogu & Co. Advocates. There was an objection by the respondent that they did not have practicing certificate and therefore the notice of appointment dated 22-10-2013 was illegal.
  
  - 5). Apparently contemporaneously with filing the notice the applicant filed a replying affidavit sworn by its director on 22-10-2012. On 26-10-2012 Sane & Company Advocated filed a memorandum of appeal as well as notice of appointment on behalf of the applicant.
  
  - 6). Interestingly on 25-10-2012 Joyce Wanjiru Mwaura was served with an order by one George Odundo Ngau vide an affidavit of service dated 30-10-2012 indicating that she personally received the same.

On 7-11-2012 the firm of Sane & Co. Advocates filed an application dated 6-11-2012 seeking to set aside the orders on 23-10-2012. The application however has since been marked abandoned.

7). The said firm of Sane & Co. Advocates proceeded on 23-11-2012 to file on behalf of the defendant/applicant a notice of preliminary objection, list of witnesses as well as the statement of Joyce Wanjiru Mwaura and also list of documents that were to be relied on.

8). Infact the said Joyce Mwaura swore an affidavit on 26-11-2012 in respect to the garnishee proceedings herein. On 5th March 2013 the applicant did file a notice of motion seeking to set aside the judgment that was entered on 12-11-2012. Although the said application was abandoned in favour of the current application what is relevant is that the supporting affidavit was sworn by Livingstone Sane on 28-2-2013.

9). Turning now to the court's proceedings is clear that on 30-10-2012 one Jaleny Advocates acted on behalf of the applicant and recorded consent. Again on 13-11-2012 the same Jaleny advocate attended court on behalf of the appellant. Before the Deputy Registrar Mr. Obutu on 19-11-2012 Mr. Orengo again appeared on behalf of Sane for the applicant and the same applied on 27-11-2012.

10). On 5-3-2013 Mr. Anyumba appeared before this court representing Mr. Sane who was acting for the defendant. On 28-3-2013 Mr. Anyumba appeared for the applicant before my brother Justice Muchelule.

11). On 10-4-2013 Mr. Nyanga appeared on behalf of Mr. Anyumba whom I suppose was acting on behalf of the defendant/applicant. On 18-4-2013 Mr. Anyumba appeared on behalf of Sane for the defendant where he sought adjournment but the same was denied.

12). From the chronology of the events herein what is not in dispute is that the applicant has been in the picture either through Lilian Nchogu advocate, Sane & Co. Advocates Mr. Jaleny, Mr. Anyumba and Mr. Orengo advocates. None of these advocates have sworn any affidavits to deny that they had not been instructed. If Mr. Perez Odero did not have a practicing certificates then that can be excused but the consent was signed by Jaleny Advocates who has not sworn any affidavit to the contrary. Equally Mr. Sane has not denied that he was given instructions to enter appearance and represent the applicant.

13). With all these information on representation it is the duty of the applicant to seek redress if any against the counsels who have "acted" without instructions. In the absence of any explanation from them I do find that indeed they acted with full instructions of the defendant.

14). Neither can the defendant deny that she was not in the picture of the entire proceedings. The pleadings especially the numerous affidavits including the statements clearly demonstrates that the defendant was aware of what was taking place.

Was there fraud or collusion on the parts of the advocates? I do not find any. Such consent judgment could only be set aside on account of demonstrable fraud and collusion. See **Brook Bond Liebig (7) LR -VS- Mallya Civil Suit No. 18 of 1975 [1975] E.A.**

15). Musinga -J (as he then was) in **Republic -VS- District Land Registrar Nandi & Another ex-parte Tegerei & Another [2005]1 KLR 520 at 526** clearly outlined circumstances under which a consent can be set aside if entered into by an advocate on behalf of the client. He said:

**“Although an advocate has ostensible authority to compromise his clients case, employment of such authority cannot be upheld where counsels consents to orders which are diametrically opposed to the express instructions which have been give by a client in a matter. It is easy to prove that there was fraud or collusion in recording of any consent orders between advocates in the absence of their instructing clients but where such orders completely negate the interest of an instructing client and it is shown to the satisfaction of the court that the client was not even aware of the application that gave rise to those consent orders leave alone having consented the recording of the orders in the absence of any**

**satisfactory explanation by the counsel who is accused of entering into the consent orders in question, a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent orders issued”.**

**16).** As alluded above the applicant states that it did not instruct any advocate to enter into a consent on his behalf. It states further that it only learnt of the consent recently when its current advocate obtained proceedings in the matter and realised that there was a consent order directing it to deposit the sum in court.

**17).** But is it true that Diamond Shield did not know of such an order? From the records it is clear that on 6-11-2012 it filed an application seeking to set aside the order issued on 23-10-2012 directing it to deposit the money in court. The application was supported by the affidavit of Joyce Mwaura who deponed that the company was unable to comply with the court orders due to the fact that it could not access its bank account. It is evident that the applicant was aware of the consent order.

**18).** Why then wait that long before raising the issue that it had not instructed any advocate to enter into consent on its behalf? I do not think this points to any good faith on the part of the applicant.

**19).** Whether Jaleny had material particulars at the time of entering the consent was within his knowledge. As observed Mr. Jaleny has not filed any affidavit denying it and to this end the only irresistible conclusion is that he was seized of the matter .

**20).** In regard to the interlocutory judgment, I am of the opinion that the defendant has a strong and arguable defence which should be heard. It would be unfair not to allow the defence as there appears to have been many intervening factors.

**21).** In regard to the orders of 26-4-2013 lifting the corporate veil I shall decline to rescind the same. The record clearly shows that the applicant's director was given reasonable time and Mr. Anyumba advocate represented them. This court is *funtus officio* and the recourse is only to appeal against it or at least a review.

For the foregoing reasons the court hereby makes the following orders:

- 1. The prayer seeking to set aside the consent order dated 30-10-2012 is disallowed.**
- 2. The prayer seeking to lift the corporate veil in respect to Joyce Wanyiri Mwaura is disallowed.**
- 3. The interlocutory judgment entered against the defendant on 12-11-2012 is set aside and the defendant is ordered to file its defence within 14 days from the date hereof.**
- 4. Costs of this application to the respondent.**

**Dated, signed and delivered at Kisumu this 21st day of January, 2014.**

**H.K.  
JUDGE**

**CHEMITEI**

*HKC/va*