



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 354 OF 2009

PRIORITY DEVELOPMENT COMPANY LTDPLAINTIFF

-V E R S U S-

HACIENDA DEVELOPMENT HOLDINGS LIMITEDDEFENDANT

AND

HACIENDA DEVELOPMENT LIMITED OBJECTOR

RULING

1. On 17th May 2010 this Court recorded the following consent in the presence of Counsel for the Plaintiff and the Defendant. The Court's proceedings of 17th May 2010 are as follows-

“CONSENT

By consent, judgment be entered for the Plaintiff against the Defendant, in the sum of Kshs. 5,205,123/- plus costs and interest, interest to commence as from today 17th May, 2010 at Court Rates. The decretal sum to be liquidated in monthly instalments of Kshs. 225,000/-with effect from 17th June; and in default of any one single instalment on its due date, the entire decretal sum then outstanding is to become immediately due and payable; and the Plaintiff shall be at liberty to execute. By further consent, the counterclaim filed on 27th November, 2009 be and is hereby withdrawn, with no order as to costs. MR. GAKUO

That is correct.

MR. NJOROGE MWANGI

We are satisfied with that consent.

COURT

Consent order made in the terms read out by learned Counsel Mr. Njoroge Mwangi, and approved by learned Counsel Mr. Gakuo. Orders accordingly.

J. B. OJWANG – J”

Mr. Gakuo, Advocate appeared in Court on 17th May 2010 on behalf of the Defendant.

2. There are two applications before me for consideration.
3. Notice of Motion dated 15th July 2013 filed by **HACIENDA DEVELOPMENT LIMITED** the Objector. The Objector prays for the following orders-

“2. THAT temporary stay of execution be granted pending hearing and determination of this application;

3. THAT the Plaintiff and the Auctioneer, Hamza Jeneby be stopped from advertising sale, transfer, interfering, alienation of L.R. No. MN/11/10279, Mwakirunge, Mombasa pending hearing and determination of this application;

4. THAT the execution against Hacienda Development Limited and its property, L.R. No. MN/II/10279, Mwakirunge, Mombasa be and is hereby lifted for being a wrongful attachment;

5. THAT this Honourable Court do order any further or other relief as it may deem fit and just in the interest of justice;”

4. The second Notice of Motion is dated 7th August 2013 filed by Defendant. Defendant prays for orders-

“2. That this Honourable Court be pleased to review and or set aside the

Consent recorded on 17th May 2010.

3. **That there be a Stay of Execution of the Consent Judgment recorded on**

17th May 2010 pending the hearing of this application inter partes.”

For obvious reasons I will start by considering the second Notice of Motion because if consent judgment is set aside as sought the execution of the decree will terminate and so will also the application to attach property alleged to belong to the Objector. In such an event Objector's Notice of Motion would be overtaken by events.

Notice of Motion dated 7th August 2013

5. At the top of this Ruling is a reproduction of the consent order recorded by the Court, entering judgment for the Plaintiff while withdrawing Defendant's defence and counter claim.
6. Defendant seeks to have that consent set aside on the following grounds set out in the affidavit of Adam George Tuller, Director of the Defendant's Company of 7th August 2013-
4. **That I inquired from my Advocate then acting for the Defendant, Mr. Gakuo who informed me that indeed he had recorded a consent on 17th May 2010 with the Plaintiff in which judgment was entered against the Company in the sum of Kshs. 5,205,123/-. (Annexed hereto is a copy of the Decree marked AGT 2).**
5. **That I was surprised at the said judgment as I had never instructed our Advocate to record a consent in the said terms.**
6. **That as far as I can remember during the time I was unwell and suffering from depression and stress related problems as a result of problems associated with the Company and I had**

been advised to take a complete rest. (Annexed hereto is a copy of the letter from the Doctor marked AGT 3).

7. That on the 17th May 2010 I remember receiving a telephone call from Mr. Gakuo who indicated to me that the Application for summary judgment was coming up for hearing that morning.
 8. That I indicated to him that he should proceed with the Hearing as the Defendant had a good defence to the Plaintiff's claim.
 9. That from that time I never heard from time I never heard (sic) from the said Advocate until I withdrew instructions when I became aware of the judgment.
 10. That during the period 2008 to 2011 some of my then Co-Directors and Jerome Shlomo the main Director in Priority Development Company Limited the Plaintiff herein had colluded to defraud me of my money and the Defendant Company altogether. (Annexed hereto are affidavits and a forensic Audit Report marked AGT 4).
 11. That this Consent Judgment must be viewed in the light of these fraudulent activities of the former Co-Directors and Jerome Shlomo.
 15. That the Defendant had a counter-claim against the Plaintiff in the sum of Kshs. 23,805,495/- and I cannot understand why my Advocate then acting for me recorded a consent judgment.”
7. Plaintiff by its replying affidavit has opposed the application and I reproduce some paragraphs of that affidavit as follows-

7. THAT, in the said consent judgment recorded by the Court on 17th

May, 2010, the Defendant's company undertook to liquidate the said sum of Kshs. 5,205,123.00 by monthly instalment of Kshs. 225,000/- with effect from 17th June, 2013 and every 17th of each succeeding month until payment in full. A certified copy of the said consent judgment is annexed hereto and marked 'SJ-1'.

8. THAT, sometime on 17th June, 2010 the Defendant through its

former Advocate M/s Njoroge Mwangi and Company Advocates by their letter dated the same date (17/06/2010) paid the sum of Kshs. 235,000/- by cheque Number 2598 being the first installment to my said former Advocate. A certified copy of the forwarding letter of the said cheque is annexed hereto and marked 'SJ-2'.

Court's Analysis

8. What the Defendant seeks is to set aside the consent judgment of 17th May 2010. Defendant seems to rely on three grounds to set aside that judgment.
9. Firstly is that his then learned Counsel Mr. Gakuo had no authority to enter into the consent. He did not clarify why he did not obtain an affidavit from his then Counsel for him to confirm that he did not have authority to enter into that consent. The Court of Appeal in the case **KENYA COMMERCIAL BANK LTD -Vs- BENJOH AMALGAMATED LTD & ANOTHER (1998)eKLR** had that similar circumstance. In that case it was also deponed by the Respondent in the Appeal that the consent recorded before Court by their Counsel Mr. Meenye was without their consent. The Court stated in that case-

“The easiest thing would have been for the Respondent to ask him (Mr. Meenye Advocate) to clarify the matter by way of an affidavit. They chose not to do so, and the only inference we can draw from that is that Mr. Meenye’s response would have been adverse to their case.”

I would too echo those words. That the reason Mr. Gakuo has not been asked to comment on whether on 17th May 2010 he acted with Defendant’s instructions is because his response might be adverse to the Defendant. There is nothing before me to show that Mr. Gakuo was acting without instructions. Not even the medical report showing that the Defendant’s Director was suffering with depression when he went to see the Doctor in November, 2010. There is nothing in the medical report which shows that Defendant Director was incapable of giving instructions to the Defendant’s Advocate. The Defendant in any case is a limited liability company, which presumably has officers and also other co-directors. What do they have to say about the consent judgment? Their voice is not before Court.

10. The available authorities shows that when an Advocate appears in a

matter he is presumed to be properly instructed. The following cases so state. **MOHAMED V SITIENEI [1992] KLR 614** the Court stated-

1. An Advocate who appears for a client is presumed to be properly instructed by such client unless the contrary is proved.

(2) 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.

(4) A solicitor or counsel would ordinarily have ostensible authority to compromise a suit so far as the opponent is concerned.

KENYA COMMERCIAL BANK –Vs- BENJOH AMALGAMATED LTD & ANOTHER
(supra) stated-

“Authority of Solicitor – a Solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen, [1903] 1 Ch pp 817, 818; Little Vs Spreadbury, [1910] 2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice – see Welsh vs Roe [1918 – (9)] ALL E.R Rep 620.”

In the case of **BROOKE LIEBIG (T) LIMITED Vs MALLYA [1975] E.A. 266**, Law JA, stated the law at p. 269 in these terms:-

The circumstances in which a consent judgment may be interfered with were considered by this Court in Hirani Vs Kassam (1952), 19 EACA 131, where the following 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 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.’

On the first ground the Defendant fails. He also fails on that ground because he does not explain how the Defendant paid the first instalment of that Consent Order, if indeed the Defendant had not given its Learned Counsel instructions to record a Consent.

11. The second ground was that Plaintiff deposed that Jerome Shlomo,

who from the affidavits before Court seems to be Plaintiff's Director, had blocked attempts to prosecute him for fraud of theft of Adam George Tuller's equipment. What does that have to do with the parties before Court, parties who are limited liability companies? The document Defendant relied upon to prove Plaintiff's Directors fraud is Defendant's own generated document written by Defendant's site agent who without evidence stated-

“There was unfortunately theft of all companies equipment from site by S. Jerome, as witnessed and recorded by the site security staff.”

How that has a bearing to the consent recorded in Court is absolutely unclear. It follows that the Defendant even on this second ground fails. And it so fails bearing in mind the decision of Court of Appeal for Eastern Africa in the **Civil Appeal Case No. 11 of 1952 ISMAIL SUNDERJI HIRANI –Vs- NOORALI ESMAIL KASSAM** that-

“Where a compromise is recorded ... the decree is passed upon a new contract between the parties superseding the original cause of action.”

The Defendant cannot argue that the consent should be set aside because he had an arguable counter-claim. That Counter Claim was superseded by the new contract whose terms are the Consent recorded before Court.

12. In the end the Notice of Motion dated 7th August 2013 is misconceived and without merit. It is dismissed with costs to the Plaintiff.

Notice of Motion dated 15th July 2013

13. That is the application brought by the Objector HACIENDA

DEVELOPMENT LTD. The Objector objects to the execution of the decree by attachment of immovable property L.R. No. MN/11/10279, MWAKIRUNGE Mombasa. Objector attached to the application its Certificate of Incorporation as a limited liability company dated 29th November 2005. It also annexed its Memorandum and Articles of Association. The property L.R. No. MN/11/10279 was initially registered in Defendant's name but from the title before Court the Defendant transferred it to the Objector on 16th July 2010. It therefore does not belong to the Defendant.

14. Plaintiff's response to that application was that the Objector is a

shareholder of 93% shares of the Defendant and therefore both companies are one and the same.

15. The Defendant in my view is a separate and distinct entity to the

Objector and what belongs to the Objector does not belong to the Defendant even if the Defendant is a holder of 93% shares of the Objector. That is rudimentary. In this regard I am assisted by the Court of Appeal decision at **Kisumu Civil Appeal No. 105 of 2009 MOHAMED ADAN MOLLY AND LINKSOFT (K) LTD AND LINKSOFT COMMUNICATION SYSTEMS LTD.** The Court state thus-

“It is trite law that a limited liability company is a legal entity separate even from its shareholders and directors. It has full capacity and ability to sue and be sued. It is a legal person. This position was restated as long ago as 1897 by Lord Macnaghten in the celebrated corporate case of Salomon v Salomon & Co Limited [1897]A.C. 22 at 51 as follows-

‘The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.’

It could not therefore be said as was maintained by the appellant all along from the trial court to this court that the 1st and 2nd Respondents were one and the same. They are different legal entities. The 2nd Respondent was not sued and could not in law be responsible for the acts or omissions of another legal entity, the 1st Respondent.”

16. On basis of the above discussion Objector does and must succeed as

follows-

- a. **The Plaintiff and Hamza Jeneby are hereby restrained from advertising, selling or transferring L.R. No. MN/11/10279 MWAKIRUNGE, MOMBASA.**
- b. **The execution against HACIENDA DEVELOPMENT LTD and against its property L.R. No. MN/11/10279 MWAKIRUNGE MOMBASA is hereby lifted and set aside.**
- c. **The Objector’s costs of Notice of Motion dated 15th July 2013 shall be paid by the Plaintiff.**

DATED and DELIVERED at MOMBASA this 19TH day of JUNE, 2014.

MARY KASANGO

JUDGE