



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
WINDING –UP CAUSE NO. 15 OF 2012
IN THE MATTER OF UFANISI CAPITAL AND CREDIT LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT
R U L I N G

1. The Application for consideration is a Motion on Notice dated 25th February, 2013 and filed on 11th March, 2013. The Company (“hereinafter the Applicant”) has sought an order to review and set aside the Consent Order recorded on 15th November, 2012. The order was recorded before the Honourable Havelock J but on 22nd January, 2013 the said Judge directed that since the matter is intertwined with a matter I had handled, HCCC 877 of 2010, I should deal with this application. The Application is based on the grounds that the said Consent was recorded by mistake and error. The Motion is supported by the Affidavits of Nelson Havi, Advocate, Melissa Ngania, Advocate and William Lusweti Wekesa, advocate all sworn on 25th February, 2013, respectively.
2. The circumstances leading to the application are that the Applicant’s Advocate filed an application seeking the striking out and dismissal of the Petition dated 9th July, 2012. That Petition was filed on 12th July, 2012 in execution of a judgment and decree for Kshs.7,369,250/= in **HCCC No. 877 of 2010 Dasahe Investment Ltd and Anor –vs- Ufanisi Capital & Credit Limited** passed on 16th September, 2011. However, that Judgment and decree was subsequently set aside by a Ruling dated 5th October, 2012 (hereinafter “the said Ruling”). Attempts by the Applicant’s Advocate to have the Petitioner’s advocates withdraw the Petition in light of the aforesaid Ruling, were in vain as the Petitioner’s Advocate indicated that the Petitioner intended to appeal against the said Ruling. The Applicant’s Advocate therefore made a formal application dated 10th December, 2012 seeking to strike out and dismiss the Petition. However, when the said application came up for hearing on 22nd January, 2013 before the Hon. Havelock J, the Court noted that the Petition had been stayed on 15th November, 2012 pending the outcome of the intended appeal of the Petitioner of the Ruling of the Court in **HCCC No. 877 of 2010 (supra)**. It is then that my brother directed that the said application be heard before me.
3. It was the contention of the Applicant that the Consent of 15th November, 2012 was made by mistake or error, that the Petition was listed for mention on 15th November, 2012. That on the said date, Mr. Havi, counsel for the Applicant was engaged before the Judges and Magistrate’s Vetting Board whereby he instructed Ms. Melissa Ngania, an Associate at his Firm to attend court and the application over generally. Unable to attend the hearing, Ms. Ng’ania instructed a Mr. William

Lusweti Wekesa, to hold her brief. It was contended that such instructions to Mr. Lusweti, both oral and written, were to the effect that the Petition should be Stood Over Generally to enable the Mr. Havi make a formal application for striking out and dismissal of the Petition. The hand written instructions to Mr. Lusweti were annexed to the Supporting Affidavit of Ms. Ng'ania as "NN2". It was averred that Mr. Lusweti mistakenly and erroneously informed the Court that the parties had agreed that the Petition be stayed pending the outcome of the intended appeal from the Ruling in **HCCC No. 877 of 2010 (supra)**. That in the foregoing, the Consent Order made on 15th November, 2012 was made on the basis of a misapprehension of the material facts or misrepresentation and was therefore recorded in error and by mistake and should therefore be set aside.

4. The Petitioner opposed the application through Grounds of Opposition dated 4th April, 2013. The Petitioner contended that the application by the Company was an afterthought and an abuse of the Court process. That the application was brought in bad faith, lacked merit and ought to be dismissed with costs.
5. I have carefully considered the Affidavits on record and submissions of Counsel. Undoubtedly the court has jurisdiction to review consent orders, but on known principles. In the case of **Greenfield Investments Ltd. v. Baber Alibhai Mwawji CA (Nrb) 160/1997**, the Court of Appeal held that the circumstances under which a consent judgment may be interfered with are akin to those where a contract can be interfered with. The court referred to the decision of **Hirani v. Kassam [1952], 19 E.A.C.A 131** where the following passage from **Seton on Judgments and Orders, 7th Edn. 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 or those doing 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 misapprehension or ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

The thereupon held 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. See **Flora Wasike v. D. Wamboko [1982-88] 1 KAR 625**.

6. The issue before me is whether the Applicant has satisfied the above conditions to warrant a review and the setting aside of the Consent Order made on 15th November 2012. The said order according to the Court record read as follows:-

“By Consent of the Parties this matter is marked S.O.G pending the outcome of the Appeal against the Ruling of Mabeya J in HCCC. No. 877 of 2010. Orders accordingly”

7. I have considered the genesis of the dispute between the parties. These proceedings were triggered by a Judgment and Decree for Kshs.7,369,250/= made on 16th September, 2011 in **HCCC No. 877 of 2010 (Supra)**. As indicated above, that Judgment and decree were however set aside vide a Ruling delivered on 5th October, 2012. It would appear that the Applicant's main complaint was that the consent order was entered by the Court based on a misinformation by Mr. Lusweti who was holding brief for Ms. Ng'ania. In a bid to prove the foregoing, Mr. Lusweti, advocate swore an affidavit wherein he stated that:-

“4. I mistakenly and erroneously informed the Court that it had been agreed between the parties' Advocates that the petition be stayed pending the outcome of the intended appeal from the Ruling of 5th October, 2012 in HCCC no. 877 of 2010.

5. I apologize to the Court and the petitioners' Advocates for the misrepresentation on my part that lead to the making of the Order of 15th

November, 2012”

8. From the foregoing, it would appear that Mr. Lusweti admitted to misrepresenting the position that was held by the Applicant’s Advocate when instructing him to hold his brief. A handwritten note from Ms. Ng’ania dated 15th November, 2012 was also produced before this Court. Although it is not clear to whom that note was addressed, but based on the admissions by Mr. Lusweti, it would appear that the same was addressed to him. From the instructions therein, it is clear that Counsel for the Applicant intended to have the Petition stood over generally for the purpose of counsel making a formal application to have the Petition Struck out. This is buttressed by a letter dated 22nd October, 2012 by Havi and Company, Advocates addressed to the Petitioner’s Advocates intimating the intention to apply to strike out the Petition as the latter had refused to withdraw the same. This is in stark contrast with what transpired in Court on 15th November, 2012. From the proceedings, the Court was not informed that the purpose of staying the proceedings was to enable the Applicant to lodge a formal application for striking out and dismissal of the Petition.
9. From the foregoing, it is manifestly clear that there had been misrepresentation of the Applicant Counsel’s position with regard to the stay of the Petition. Mr. Lusweti has conceded to the mistake and has apologized. The Petitioner is however of the view that Mr. Lusweti cannot have acted in error as he was seized of the full implication of the consent. That may be so. But considering the background to this matter and especially the Affidavit of Mr. Lusweti and Ms. Ng’ania together with the annexures therein, I am satisfied that the Consent dated 15th November, 2012 may have been entered in error.
10. Accordingly, I find that the Notice of Motion dated 25th February, 2013 has merit and is hereby allowed. The Consent Order made on 15th November, 2012 is hereby reviewed and set aside. However, in view of the circumstances of this matter the Applicant should bear the Costs of the Motion.

DATED and DELIVERED at Nairobi this 7th day of **June**, 2013.

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A. MABEYA

JUDGE