



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 158 OF 2003

BHUPINDER SINGH DOGRA PLAINTIFF

V E R S U S

COAST DEVELOPMENT AUTHORITY DEFENDANT

RULING

1. The plaintiff's application which is the subject of this ruling is dated 27th June, 2013. The only prayer outstanding for consideration in this ruling is prayer No. 4. It is in the following terms:-

“The consent order recorded on 11th March 2004 and the resultant court order of 11th March 2004 be set aside and the Plaintiff be allowed to defend the defendants application dated 28th January 2004.”

The Defendant although served did not attend Court on 11th July 2013

when the application was heard.

2. The Plaintiff filed this case on 9th July 2003 seeking judgement against the defendant for Kshs. 117,017,070/-. That amount was in respect of architectural services to one of the defendant's projects. The fact that the plaintiff rendered those services and the fact that the stated amount is due to the Plaintiff is not denied by the Defendant. The Defendant in its defence alleges that the amount was only payable to the plaintiff once the donor funds were availed.
3. The Consent sought to be set aside arose following the determination of the defendants application by Chamber Summons dated 28th January 2004. By that application the defendant sought the striking out of the Plaintiff's suit. The Defendant sought the striking out of the Plaintiffs suit on the ground that the Plaintiff did not comply with the provisions of Order VII rule 3 Sub rule (2) of the Civil Procedure Rules (now amended).

That application came up for hearing on a few occasions but was adjourned at the instance of the Plaintiff who sought opportunity to file a replying affidavit. When it finally came up for hearing before court on 11th March 2004 the proceedings show the following:-

“Gathuku for Gikandi for Plaintiff

Buti for Defendant/Applicant

Court clerk – Sango

28-1-04

COURT – served. Opposed?

BUTI

Our application is not opposed

To strike out plaint and award costs of application and suit.

GATHUKU – We agree

MR. GIKANDI – I oppose that Mr. Buti (walks in) gets his orders.

COURT

Both Counsels application allowed. Orders granted as prayed.

MWERA J.

11-3-2004.”

4. It is that order that the Plaintiff now seeks to set aside. The ground upon which the Plaintiff seeks to set aside the order is that he neither instructed his counsel nor was he aware that the Consent was entered into. He further deponed in his supporting affidavit that his then counsel failed to keep him informed of the true position of his case and that it was not until he instructed his present counsel that he became aware of the striking out of his suit.
5. The Courts have had occasion to consider when a consent order can be set aside. I can do no better than refer to the case of **FLORA N. WASIKE –Vs- DESTIMO WAMBOKO (1982-88) I KAR**. The Court of Appeal in considering whether a consent order can be set aside had this to say:-

“It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation.”

6. The Defendant's application clearly shows that there was a mistake in entering the consent by his advocate. Such a mistake would be essentially vitiate the consent recorded before Court. The learned author of the book “***Chitty on Contracts***” had this to say in respect of mistake in a contract; he stated:-

“Mistake in the Law of Contract may have several different effects. At common law, it is usually said to operate so as to negative, or in some cases to nullify, consent. The contract will then be void ab initio. In equity it may be a defence in an action for specific performance ...”

7. Looking at the order of 28th January 2004 I have formed the view that there was no consent by the Plaintiff's advocate to the Defendant's application for striking out. Looking at the proceedings reproduced here above it is clear that the Defendant's advocate stated that his application was unopposed because the Plaintiff had not filed a replying affidavit. The Advocate who was holding brief for the Plaintiff's advocate simply stated ‘***we agreed***’. The proceedings then reflect that the Advocate for the Plaintiff walked to the Court at that moment and stated ‘***I oppose***’. It is after that exchange that the Court recorded that both counsels application were allowed.
8. As the record stands it is not clear which application the Court granted. From perusal of the Court records there was only one application before court. The Judge however ordered that both

- counsels application be allowed. It is for that reason that I conclude that there was no consent to the application for striking out and why I am of the view that the Defendant's application for the consent order to be set aside should be granted. I find that the Plaintiff's application is merited.
9. Before granting the final orders I wish to refer to the Court filing fee paid by the Plaintiff when filing this action. The Plaintiff's claim is for the recovery of Kshs. 117,017,070/-. The plaint was filed on 9th July 2003. The Plaintiff paid Kshs. 1,700/- as the Court fees. The correct Court fee that the Plaintiff should have paid was **Kshs. 70,000/-**. It follows that the Plaintiff underpaid the Court fees. It is for that reason that an order will be made staying this suit up and until the difference in the Court fees is paid by the Plaintiff.
10. I grant the following orders:-

1. *The Consent order of 11th March 2004 and the resultant order is hereby set aside.*
2. *The Plaintiff is hereby granted leave to defend the Defendant's application dated 28th January 2004.*
3. *The cost of the Notice of Motion dated 27th June 2003 shall be in cause.*
4. *This suit is hereby stayed until the Plaintiff pays Kshs. 68,300/- the balance fees for the plaint.*

Dated and delivered at Mombasa this 2nd day of August, 2013.

MARY KASANGO

JUDGE