REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 710 OF 2009

WILLIAMS & KENNEDY LIMITED.....PLAINTIFF

- VERSUS -

POST BANK CREDIT LIMTIED (IN-LIQUIDATION) Through DEPOSIT PROTECTION FUND BOARD-LIQUIDATOR.....1ST DEFENDANT
JUMCHEM HEALTH CARE LIMITED.....2ND DEFENDANT
JUMA MUCHEMI.....3RD DEFENDANT

RULING

1. I have before me a chamber summons application by the plaintiff dated 27th January 2010 praying for orders:-

a) That the Statement of Defence dated 29th October 2009 and the replying affidavit of Juma Muchemi sworn on the 29th October 2009 and stated to have been filed on behalf of the 2nd Defendant be struck out.

b) That Jumchem Healthcare Limited, the 2nd Defendant herein be allowed to file its pleadings in this matter within such time as this Honourable Court shall allocate.

c) That the proceedings of 10th day of December, 2009 grounded on the fact that the 2nd Defendant had due representation be set aside and Application dated 24th September, 2009 be heard *de novo*.

The plaintiff also prays for costs of the application. The application is expressed to be brought under order V1 Rule 13(1) (c) and (d) of the former Civil Procure Rules as well as section 3A of the Civil Procedure Act and supported by the affidavit of Peter Mburu Burugu sworn on even date together with the annextures thereto.

2. It is material that the application was partly heard by the Honourable Mr. Justice Muga Apondi on diverse dates between 26th July 2010 and 6th October 2011. At some point, and on the 26th January 2011 and 30th March 2011, the deponent of the said supporting affidavit was examined orally on oath on the said chamber summons and his affidavit. On 1st November 2011, the parties appeared before me and agreed, by consent, to proceed with the reply by the 2nd defendant applicant to the submissions made by the plaintiff being the point at which my predecessor had left the matter. The 3rd defendant did not appear while the 1st defendant indicated it was not affected by the application and was excused.

3. The principal grounds of the application and as buttressed both by the affidavit in support and the oral examination of the deponent is that the 3rd defendant, at the time he was served with the summons, plaint and application dated 24th September 2009 was not and had ceased being a director of the said 2nd defendant company. This fact the 3rd defendant concedes in his replying affidavit sworn on 26th February 2010 and filed in court on 1st March 2010. And it is also conceded therein that he gave the pleadings to the firm of RM Mutiso advocates in a hurry as he, the 3rd defendant, was ailing and required to travel urgently to India for medical assistance and that, he did not give much thought to the pleadings or the parties. It is also common ground that the 3rd defendant was, at some point, a director of the 2nd defendant company. The 2nd defendant thus avers that it has never been served or at any rate properly served with the summons, plaint and application therein dated 24th September 2009 and that it has never instructed the firm of RM Mutiso advocates to act for it. Given those circumstances, the 2nd defendant submits it was not properly heard on the 10th December 2009 and could not then have given the consent that was entered therein or be said to have entered the appearance dated 12th October 2009, the joint defence of the 2nd and 3rd defendants dated 29th October 2009 or be party to the replying affidavit sworn by the 3rd defendant on its behalf of 29th October 2009. This is the basis of its application in terms of the prayers set out earlier.

4. The 2nd defendant, now represented by the firm of Muthoga Gaturu & Company advocates by virtue of a notice of appointment dated 27th January 2010 filed together with the present application, relied on a number of authorities in support of its arguments including

Halsbury's Law of England Vol. 36 (3th Edition) Paragraph 107 at Page 76-77, *Kafuma Vs. Kimbowa Builders and Contractors* [1974] EA 91, *John Shaw & Sons (Salford) Ltd Vs. Shaw* [1935] All ER 456, *Samson Munikah t/a Munikah & Company Advocates Vs. Wedube Estates Limited* [2007] Eklr Civil Appeal 126 of 2005 (unreported), and *In the Matter of Desbro Engineering Limited* [2006] Eklr Winding up Cause 13 of 2005 (Unreported).

5. The application is contested by the plaintiff. The plaintiff relied on the cross-examination of the said Peter Burugu aforesaid and the grounds of opposition dated 5th February 2010 and filed in court on even date. Those grounds as expounded by its counsel are primarily that the 2nd defendant cannot resile from the pleadings filed on its behalf by R.M. Mutiso. It is also submitted that the said advocate had full or austensible authority to enter into the consent of 10th December 2009. It was further submitted that the firm of Muthoga Gaturu & Company Advocates are improperly on record as the firm of R.M. Mutiso has not even withdrawn from the suit.

From a legal standpoint, the plaintiff submitted that the application is frivolous and vexatious and should be struck out for a number of reasons. First, the plaintiff averred that an affidavit is not a pleading but evidence and is incapable of being struck out as that would amount to substituting evidence. Secondly,

the consent entered into on 10th December 2009 can only be set aside by way of an application for review. Counsel then submitted that procedurally, the order to strike out the defence would be improper because it is a joint defence of the 2nd and 3rd defendant. It was submitted that since the firm of Muthoga Gaturu & Company is not acting for the 3rd defendant, and the Memorandum of Appearance by R.M. Mutiso is still on record, the procedural conflict is glaring. On the facts, counsel for the plaintiff took issue with the effective dates for the resignation of the 3rd defendant as a director of the 2nd defendant. While the suit was filed on 24th September 2009, the changes in the directorship were not notified to the Registrar of Companies until 13th January 2010. It was submitted that no evidence has been presented to show who the material directors were at the point the joint statement of defence was filed. Counsel for the plaintiff, on that point, placed reliance on section 201 (5) of the Companies Act which requires notification of change of directors to be given to the Registrar within 14 days. He submitted further that although a letter authored by the 3rd defendant dated 14th August 2009 resigning as director was exhibited in court, it was of little or no probative value as on 29th October 2009, the same deponent was stating, in his affidavit, that he was still a director of the 2nd defendant.

6. The plaintiff's counsel finally referred to various authorities and decided cases. The plaintiff relied on;

Flora N Wasike Vs Destimo Wamboko K.A. R (1982/88) page 625, Kenya Commercial Bank Limited Vs Benjoh Amalgamated Limited & another C.A 276 of 1997 (unreported), Greenhills Investments Limited Vs China National Complete Plaint Export Corporation (Complant) T/A Covec (2002) I KLR 384, Bugurere Coffee Growers Ltd Vs Sevbaduka and another (1970) E.A. 147, Kiwanuka & Company Vs Walugembe (1969) E.A. 660, and Mode 1996 Security Limited Vs Mode Security Services Limited & another Milimani High Court Civil Case No.422 of 2004 (unreported).

7. I am grateful to both counsels for their submissions. I have carefully studied all the pleadings on record and the depositions as well as the cases referred to me. I have formed the following view of the matter.

8. The firm of R.M. Mutiso filed a joint memorandum of appearance and defence on 12th October 2009 and 29th October 2009 respectively. That firm has not sworn, through its proprietor, any affidavit in this matter. Those two pleadings remain on record. There is thus a procedural quagmire created by the notice of appointment dated 27th January 2010 by the firm of Muthoga Gaturu & Company simultaneously with the present application to strike out the joint defence. The latter firm is not acting for the 3rd defendant.

I have no doubt that the latter notice of appointment, in those circumstances offends Order 6 of the Civil Procedure Rules. Strictly speaking, we now have on record two law firms for the 2nd defendant acting at cross purposes.

9. In all this, the court is alive to the fact that the 2nd defendant is a limited liability company, an inanimate legal persona that can only act through the mind and will of its directors. It is the rights of that company that are now at play. I have reached the conclusion that R.M. Mutiso, in those circumstances, was not authorized by the 2nd defendant to enter the memorandum of appearance or the joint statement of defence. His silence in this contested litigation itself speaks volumes. I have support for that finding in the decisions in *Shaw & Sons Vs Shaw [1935]* ALL ER 456

10. That brings me to the contested proceedings of 10th December 2009. It is now settled that an advocate

on record for a party has austensible authority to compromise a suit or enter into a consent therein. It is also well settled that a consent judgment can only be set aside by either another consent or by demonstrating grounds that would justify the setting aside of a contract such as fraud, mistake or misrepresentation. Support for this proposition may be found *in Flora N. Wasike Vs Destimo Wambuko* [1982-88] 1 KAR 625, *Hirani Vs Kassam* [1952] EACA 131 and *Kiwanuka & Co Vs Walugembe* [1969] EA 660, and *Brooke Bond Liebig (T) Ltd Vs Mallya* [1975] E.A. 266.
11. In the *Brooke Bond* case (Supra) at Page 269 the following passage appears

"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 [1918 – [9] ALL E.*R. Rep 620."

"The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani vs Kassam* (1952), 19EACA 131, where the following passage from Section 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."

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties, who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham, J, said, in the introduction to the passages quoted above from Hirani's case, a court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

12. The proceedings of 10th December 2009 are sought to be impugned for lack of authority of R.M. Mutiso. I have already held that the latter had no authority of the 2nd defendant. *Halsburys Laws of England Vol* 36 Paragraph 107 deals with effect of solicitors acting without instructions and states;

"The fact that a solicitor was not authorized to institute proceedings is not a defence to those proceedings and, though in special circumstances the correct course may be for the court to strike out proceedings instituted without, the proper method of raising the question of want of authority usually by an application to stay the proceeding. Accordingly, if a solicitor takes, defends, or continues proceedings without the authority of the litigant whom he purports to represent, those proceedings will be summarily stayed if the proceedings are instituted without authority, or the defence will be stuck out if they are defended without authority, on the application of a party by motion or summons. Moreover, if proceedings were originally commenced or defended with authority, but that authority is revoked"

Given those circumstances, I find there were procedural irregularities leading up to the proceedings on that date and the consent therein for want of authority of the 2nd defendant company. Since R.M Mutiso did not have authority to act for the 2nd defendant, it must follow, logically, that the 2nd defendant would be unfairly bound by those proceedings. The court has inherent jurisdiction in such circumstances to set aside the order or proceedings, *ex debito justitiae* onanapplication such as the one before me. And the principal reasoning is that the "court ought not to ignore evidence of lack of authority either to bring an action or to defend it and give judgment in favour of or against a party who, *ex hypothesi*, is not in court" *John Shaw & Sons Ltd Vs Shaw* [1935] ALL ER 456. See also *Samson Munikah t/a Munikah & Company Advocates Vs Wedube Estates Limited* [2007] eKLR

13. I am in agreement that the duty of the Registrar of Companies under section 201 of the Companies Act on receipt of a proper form for notification of directors is, on receipt of a fee, to register it. In *mode 1996 Security Ltd vs Mode Security Services Limited and another* [2004] eKLR Anyara Emukule J was emphatic that the "Registrar of Companies does not effect any such change in the directorate of any company". In the affidavit of the 3rd defendant sworn on 26th February 2010 at paragraph 3, the 3rd defendant expressly states he resigned from the board of the 2nd defendant on 14th August 2009. From the cross-examination of the 2nd defendant's director Peter Burugu, it is clear however that the notification of change of directors was not lodged with the Registrar until 13th January 2010. As at 19th January 2010 the directors of the 2nd defendant, as at the companies registry, were Peter Burugu, Mary Wanjiku Burugu and Pemco Agencies. At the material time when the defence was filed dated 29th October 2009, it seems clear to the court that the 3rd defendant was not a director of the company. If the court were to tie its hands to the returns of 13th January 2010 at the registry, as I have said, the court would be blind to the overriding objective to do justice to the parties, and to do substantial justice in a land matter. The true loser would be in the inanimate legal persona known as the 2nd defendant whose mind and will in the directors is being contested.

14. Finally, it is true that an affidavit is not a pleading in the general sense of the word but evidence. That is why, as evidence, it is incapable of amendment. See *Greenhills Investments Limited Vs China National Complete Plant Export Corporation* [2002] 1 KLR 384. It is also true that the defence dated 29th October 2009 is a joint statement defence. But if that evidence in the replying affidavit of Juma Muchemi sworn on 29th October 2009 and the said defence are void of legal authority of the 2nd defendant, the court cannot blindly take them to be the legal defence or reply of the 2nd defendant who *ex hypothesi* was not speaking through the 3rd defendant and who accordingly was not in court on 10th December 2009. Given the courts inherent jurisdiction, the overriding objective of the court at section 1A and 1B of the Civil Procedure Rules and article 159 of the constitution, I would not hesitate to say that the court has unfettered power to vary, set aside, strike out or expunge the offending pleadings or affidavit.

15. So much so that if this matter were to turn entirely on the technicalities of law and procedure posited by the plaintiff, it would stand on shaky ground. But this court is now expressly enjoined by article 159 of the constitution, sections 1A and 1B of the Civil Procedure Rules and the inherent jurisdiction of the court to do substantial justice to the parties.

In a land dispute as the one that is at the heart of the matter herein, it is in the interests of justice and the overriding objective of the court not to cloud the issues further but to dig deep into the root of the dispute between the parties on the basis of tested evidence at the trial. That cannot be achieved when, as now, the 3rd defendant, by his own affidavit sworn on 26th February 2010 avers clearly at paragraph 2 that at the time he accepted service of summons in the matter, he was not a director of the 2nd defendant and that he gave instructions in haste and when he was sick and in a rush to get treatment abroad to RM Mutiso advocate who entered appearance for all the parties.

16. So when the 2nd defendant is emphatic that the affidavits and the defence by the 3rd defendant are not its pith and marrow of its intended reply or defence and that it wishes to pursue its independent and rightful defence at the seat of justice, this court, in those circumstances, in the interests of justice, and for the overriding objective above stated must accede to that request. Rules of procedure are useful and should be followed but they are, it has often been said, only handmaidens of justice. They should not, where appropriate, transplant the substantive law and the rights of the parties. And they cannot tie the courts hands at its back and become a fetter on the court's inherent powers and discretion.

17. For all the above deliberations and reasons, I find merit in the 2nd defendant's chamber summons dated 27th January 2010. I accordingly order as follows in the interests of justice;

a) THAT the statement of defence dated 29th October 2009 is struck out and the Replying affidavit of Juma Muchemi sworn on even date be and is hereby expunged from the record.

b) THAT since the said statement of defence dated 29th October 2009 was a joint defence for the 2nd and 3rd defendants, I, extend the time for the 3rd defendant by 15 days of today's date to file his defence if any in this matter. The 3rd defendant is also granted leave to file a fresh replying affidavit within the same period.

c) THAT the 2nd defendant, Jumchem Healthcare Limited, is granted leave to enter an appearance within 15 days of today's date and to file its defence thereafter within the prescribed time.

d) THAT in view of the orders above, all the proceedings of 10th December 2009 are vacated and the application by the plaintiff dated 24th September 2009 shall be heard *de novo*. The 2nd defendant is in the circumstances granted leave to file any replying affidavit or grounds of opposition thereto within the next 15 days. Corresponding leave is granted to the plaintiff applicant to file any further affidavit or supplementary in reply.

e) THAT since the plaintiff is not at fault, the costs of this application are awarded to the 2nd defendant and to the plaintiff to be paid by the 3rd defendant. As the 1st defendant did not participate in this application, it is not entitled to costs.
It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 10th day of November 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Njuguna for the Plaintiff.
No appearance for the 1st Defendant.
Mr. Mwiti for the 2nd Defendant.
No appearance for the 3rd Defendant.