



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 101 OF 2007

JOSEPH KIBUBA KIOKO.....1ST PLAINTIFF

JUDAS MBILI NDAWA.....2ND PLAINTIFF

PATRIC PIUS MUTUNE KATUBI.....3RD PLAINTIFF

VERSUS

MANGU NGOLO.....1ST DEFENDANT

KYANZAVI FARMERS COMPANY LIMITED.....2ND DEFENDANT

RULING

The Defendant/Applicants have moved the court under a Notice of Motion dated 4th November, 2010, which was certified urgent by the Hon. Mr. Justice Muga Apondi on 9th November, 2010, and set down for inter partes hearing on 17th November, 2010. The Notice of Motion is said to have been brought under **Sections 3 and 3A** of the Civil Procedure Act, **Orders XLIV Rule 1 and XI Rule 1** of the Civil Procedure Rules, Inherent Powers of the High Court, the Rules of the Supreme Court and all enabling provisions of the law.

The application seeks, mainly, orders of this court to have the suit -H.C.C.C. No. 101 of 2007 reinstated ***“for the purposes of making an order for a review of this court’s order made on 21st May, 2007”*** and a review and/or setting aside of the order of 21st May, 2007, and to replace it with another order as set out in prayer 3 of the Notice of Motion. Additional orders are sought under prayers 4, 5, 6 and 7 of the Notice of Motion which I do not consider relevant for reasons to follow.

Although served, none of the Respondents attended court for reasons that are apparent on the affidavit of service filed on 17th November, 2010, and which were clearly understood by this court after perusing the record.

The applicants served the application on M/S Middle East Bank Limited, which was not a party to the proceedings forming the subject matter of this application but has been mentioned in the application, as a

party against whom the orders sought herein would operate. Not wishing to comment on the awkwardness of the process adopted by the applicants, the court none-the-less allowed the named party to file a Replying Affidavit and the application fixed for hearing on 22nd November, 2010. The court intimated that it might, at the hearing direct that parties do file written submissions.

On the 22nd November, 2010, Mr. Adala appeared for the applicant having filed written submission and a supplementary affidavit in response to the Replying Affidavit filed on behalf of Middle East Bank on 19th November, 2010. Mr. Esmail appeared for the named bank. The parties having submitted that the court could rule on the matter on the basis of the documentation filed directions were recorded that the courts' ruling would be delivered on 31st March, 2011, or earlier by Notice. Immediately after the Ruling was reserved, counsel for the applicant, Mr. Adala mentioned the matter before me, (with notice, he said, to the other side) whereupon he requested the court to consider delivering its ruling earlier than the 31st of March, 2011, preferably within the week. The request was favourably considered, hence the ruling being read today.

The applicants have very conveniently, avoided using the word "**consent**" when talking of the orders of 21st May, 2007 which they now seek to have aside or substituted as per prayers 2 and 3 of the application, where the same are, in fact referred to as "**this Court's Order made on 21st May, 2007**". In ground E of the application however, the applicants state that;

"This suit was on 21st May, 2007, settled by the parties hereto on the terms of an order issues (sic) on 28th May, 2007---- and the same order circulated to all banks and other institutions and companies with which the 2nd Defendant Company had dealings or business relationships".

In Ground K the applicants state that;

"It is also fair and just that the court order made herein on 21st May, 2007, be reviewed in the terms proposed in the attached (sic) application; and that consequential orders be made as prayed in the said application".

In view of the record, and considering the Ruling made by the Honourable Mr. Justice Warsame on 19th May, 2008, when counsel for the present applicant successfully opposed the Defendant's Notice of Motion dated 18th February, 2008, which was similar, in all material respects to the application now filed by them, under the Notice of Motion dated 4th November, 2010, I have no hesitation in speedily dismissing the present Notice of Motion as I hereby do. In doing so, I find it fitting that I draw counsel's attention to the following authorities.

1. **HIRANI –VS- KASSAM (1952) 19 E. A. CA 131**
2. **BROOKE BOND LIEBIG LTD –VS- MALLYA [1975] E. A. 266**
3. **MUNYIRI –VS- NDUNGUYA [1985] KLR 370**

There will be no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND day of DECEMBER, 2010

M. G. MUGO

JUDGE

In the presence of :
Mr. Adala
No appearance
Mr. Karanja

For the Applicant
For the Respondent
For named interested party