REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS)

Civil Case 1743 of 2001

REKHAVANTI PANKAJ SHAH …….....…… 1ST PLAINTIFF

SUSAN JANE SHAH …….....…….. 2ND PLAINTIFF

VERSUS

CO-OPERATIVE MERCHANT BANK LTD. ....……1ST DEFENDANT

UNIGATE INDUSTRIES LTD …….....……. 2ND DEFENDANT

RASHAMIIKANT SHAH …….....……. 3RD DEFENDANT

JAMES GACOKA …….....…….4TH DEFENDANT

RULING

On 13th February 2002, Mr. Ngunjiri, the advocate for the plaintiffs, Mr. Kimondo, the advocate for the 1st defendant and Mr. Ngatia, the advocate for the 4th defendant appeared before Ringera J (as he was then) and recorded the following consent order:

"*1. That this suit and chamber summons application dated 16th November 2001 be and is hereby marked as settled under the following terms:*

(a) *The plaintiffs do redeem the charge over LR. No.1870/VIII/15 Spring Valley, Nairobi within ninety (90) days.*

(b) *In default of such redemption, the 1st defendant be at liberty to realize the security.*

2. The plaintiffs do pay the cost of the suit and costs of the application to the 1st and 4th defendants."

On 6th June 2008, the 2nd plaintiff filed a notice of motion pursuant to the provisions of sections 3A and 80 of the Civil Procedure Act, Order I Rule 10 and order XLIV of the Civil Procedure Rules, seeking to review and set aside the said consent order recorded purportedly on her behalf by the firm of A. N. Ngunjiri & Co. Advocates by the court on 13th February 2002. The plaintiff further prayed for an order

of the court formally enjoining the 2nd defendant as a party to the suit with the necessary amendments to be made in the plaint as the 2nd plaintiff may deem fit.

The grounds in support of the motion are on the face of the application. The 2nd plaintiff states that she had never instructed the firm of A. N. Ngunjiri to file the present suit on her behalf. She further states that she had never sworn nor filed a verifying affidavit to verify the correctness of the averments made in the plaint. She states that she had never read nor approved the averments in the plaint before it was filed in court. She states that she had not given the 1st plaintiff the power of attorney to represent her in this suit nor to swear any affidavit or to offer any testimony on her behalf in the suit. She denies having met or given instructions to the proprietor of A. N. Ngunjiri & Co. Advocates nor give them instructions nor pay them any legal fees to file or compromise the suit. She contends that the consent order recorded on 13th February 2002 was therefore entered without her consent or authority. She was therefore justifiably aggrieved that her ownership rights in the suit premises were affected without her authority. The application is supported by two (2) affidavits sworn by Susan Jane Shah, the 2nd plaintiff.

The application is opposed. Antony Nahashon Ngunjiri, the advocate mentioned in the application swore two (2) replying affidavits in opposition to the application. He also filed grounds in opposition to the application. In the said grounds of opposition, he stated that the application was bad in law, misconceived, frivolous, vexatious and an abuse of the due process of the court. He complained that the purported counsel for the 2nd plaintiff had interposed between the plaintiffs in the original suit and was therefore misleading the court as to who the 1st and the 2nd plaintiffs were. He took issue with the fact that the 2nd defendant had not disclosed the fact that the 3rd defendant, her husband, was deceased and further that the said deceased was a joint owner of the suit property with the 2nd plaintiff. He stated that the firm of O. P. Ngoge & Associates Advocates was not properly on record on behalf of the 2nd plaintiff as they had not sought leave to come on record on behalf of the said 2nd plaintiff before they could be allowed to file an application to review the consent order of 13th February 2002. Regina K. Anyika, a senior legal officer with the 1st defendant, swore a replying affidavit in opposition to the application. In essence, she deponed that the plaintiffs had filed several suits seeking to restrain the bank from exercising its statutory power of sale. She deponed that after the suit was filed, the same was compromised and the plaintiffs given time to redeem their property. The plaintiffs failed to redeem the property resulting in the 1st defendant realizing its security. It sold the suit property to Seasons Restaurant & Hotels Ltd. She was of the view that the application had been filed mischievously with the aim of attempting to reverse what had already transpired. She urged the court to put into consideration the fact that the plaintiff had failed to mention the existence of other suits against the 1st plaintiff.

The parties to this application agreed to file written submissions before the hearing of the application. The said submissions were duly filed. The written submissions were highlighted by Mr. Muthomi for the 1st plaintiff, Mr. Ngoge for the 2nd plaintiff, Mr. Kimondo for the firm of A. N. Ngunjiri & Co. Advocates, and Mr. Ngatia for the 4th defendant. I have carefully considered the rival arguments presented to the court by the respective counsel for the parties to this application. I have also read the pleadings filed by the parties herein. The issue for determination by this court is firstly, whether the 2nd plaintiff established the allegation that she had not instructed the firm of A. N. Ngunjiri & Co. Advocates and therefore, the said firm lacked the requisite instructions to compromise the suit in the manner that it did. The second issue for determination is whether the 2nd plaintiff established sufficient grounds to enable this court review its decision adopting the consent of the parties as the order of the court.

As regard the first issue, having carefully evaluated the facts of this case, including the letter of the 2nd plaintiff dated the 9th of November 2001, it was clear that the 2nd plaintiff authorized the firm of A. N. Ngunjiri & Co. Advocates to act on her behalf in the present suit. Although the 2nd plaintiff made allegation that the said letter was forged by her late husband, upon perusal of the same, I find the allegation not made out. Nothing would have been easier than for the 2nd plaintiff to instruct a document examiner to peruse the document and present a report to the court on the authenticity of the same. The

2nd plaintiff would like the court to take her word that she had indeed not instructed the said firm of advocates, yet evidence on record points to the contrary. This court was not persuaded that the 2nd plaintiff had for a period of more than six (6) years not known that such a consent had been recorded in the present suit by her late husband. From the affidavit evidence of Regina K. Anyika, it was evident that the 2nd plaintiff had filed several suits in a bid to frustrate the 1st defendant from realizing the security in question. It is this court's view that the present application is yet another attempt by the 2nd plaintiff to seek reversal of a consent that was legally entered into by the parties before a court of competent jurisdiction. I therefore hold that the firm of A. N. Ngunjiri & Co. Advocates had full instructions of the 2nd plaintiff at the time the suit was compromised.

Can this court review the adoption by the court of the consent order entered by the parties on 13th February 2002? I do not think so. As was held by Hancox J.A (*as he was then*) in Flora N. Wasike vs. Destimo Wamboko (1982-1988) 1 KAR 625 at page 626:

"*It is now settled law that a consent judgment or order has contractual effect and can only be set aside on ground which justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J M Mwakio v Kenya Commercial Bank Ltd Civ Apps 28 of 1982 and 69 of 1983. In Percell v F C Trigell Ltd [1979] 3 All ER 671, Winn LJ said at 676:*

'*It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked as a contract.'*"

In Hirani vs Kassam (1952) 19 EACA 131 at page 134, the court held as follows:

"*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 these 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 the 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.*"

In the present application, it was clear that the firm of A. N. Ngunjiri & Co. Advocates had full authority of the plaintiffs to compromise the suit in the manner that he did on 13th February 2002. Although the 2nd plaintiff made allegations bordering on fraud on the part of the said firm of advocates, upon evaluating the facts of this case and the conduct of the 2nd plaintiff subsequent to the compromise of the suit, it was apparent to this court that the said firm of advocates, in entering into the said consent order, gave effect to the instructions of the plaintiffs.

It is fortuitous that the 2nd plaintiff is filing the present application seeking to set aside the consent order after the death of her husband. From affidavit evidence on record, it was clear that it was the late husband of the 2nd plaintiff who was seized with the day to day conduct of the suit. The 2nd plaintiff appears to have been resident out of the country at the material period. It appears that the 2nd plaintiff is taking advantage of the death of her husband to seek the reversal of the consent which had been entered on his instructions. Further, even if this court were inclined to find merit with the 2nd plaintiff's application, the fact that it took a period of over six years before the 2nd plaintiff filed the present application disentitles her to the exercise of discretion in her favour by this court. The law requires that any application for review must be expeditiously presented to the court. In the present application, it was clear the 2nd plaintiff has been indolent.

Before concluding this ruling, I wish to comment on the fact that the firm of O. P. Ngoge & Associates appears to have come on record on behalf of the 2nd plaintiff before seeking leave of this court. Order III rule 9A of the Civil Procedure Rules requires an advocate who wishes to come on record for a party in a suit where judgment has been entered, to seek the leave of the court before he can be

placed on record. In the present application, the consent order filed on 13th February 2002 compromised the suit by terminating the proceedings. If the said firm of advocates wished to come on record on behalf of the 2nd plaintiff, it was required to seek appropriate leave of this court. It seems that the thrust of the 2nd plaintiff's application was the complete denial of the fact that the firm of A. N. Ngunjiri & Co. Advocates had previously appeared on record for the said 2nd plaintiff. Even if that was the position, the firm seeking to advance such a litigant's case must first properly come on record. In the present application, it was clear that the said firm of O. P. Ngoge & Associates is improperly on record for the 2nd plaintiff. The application filed herein purportedly on behalf of the 2nd plaintiff is therefore incompetent.

Taking into consideration the totality of the facts of this case, and the reasons stated above, it is clear that the application dated the 6th June 2008 made purportedly on behalf of the 2nd plaintiff is for dismissal. It is hereby dismissed with costs to the respondents.

It is so ordered.

DATED at NAIROBI this 27th day of MAY, 2009

L. KIMARU

JUDGE