



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Appeal 6 of 2009

SWAN CENTRE LTD.....APPELLANT

VERSUS

PHELGONA SEDA T/A PHEBES JOY COMPUTER & OTHERS.....RESPONDENTS

R U L I N G

The Appellant in its Memorandum of Appeal dated on 27th January 2009 seeks the orders that:-

- (i) The ruling in Kisumu CMCC No. 517 of 2008 allowing the Respondents' application for adjournment be disallowed.**
- (ii) The Appellant be allowed to proceed with its application dated 9th January 2009 prior to any application in this suit.**
- (iii) Any such further and/or other relief the Honourable Court may deem fit to grant.**

The appeal is against the ruling of the learned Principal Magistrate at Kisumu delivered on the 27th January 2009 in Kisumu CMCC No. 517 of 2008.

The said ruling was in the following terms:-

“In the circumstances that respondents needed their applications to be heard first, matter is adjourned so that deponent of respondent's affidavit is examined on its contents. Leave to appeal against ruling on adjournment and cross-examination of deponent allowed.

Status quo be maintained”.

The ruling followed the Respondents (Applicants) application to have a deponent of the Appellants (Respondent) affidavit be cross-examined and in effect have the matter adjourned.

The Application was granted. The Appellant became aggrieved and filed this appeal which was accompanied by a Notice of Motion for the following orders:-

- (1) The application be heard ex-parte in the first instance.**
- (2) There be a stay of orders of the interim orders of injunction indefinitely extended by the subordinate court in Kisumu CMCC No. 518 of 2008 pending inter-parties hearing and**

determination of the application.

(3) There be a stay of orders of the interim orders of injunction indefinitely extended by the subordinate court in Kisumu CMCC No. 518 of 2008 pending the inter-parties hearing and determination of the appeal.

(4) The respondents be ordered to deposit the disputed rentals, service charge and any other dues for the months of January 2008 and February 2008 payable to the applicant pending the hearing and determination of the application.

(5) The respondents be ordered to deposit in court the disputed rentals, service charge and any other dues for the months of January 2008 and February 2008 payable to the applicant pending the hearing and determination of the appeal.

(6) The respondents be ordered to remit all the outstanding rentals due to the applicant in respect of the respondent's respective tenancies immediately pending the hearing and determination of this application.

(7) The respondents be ordered to remit all the outstanding rental dues to the applicant in respect of the respondents' respective tenancies immediately pending the hearing and determination of the appeal.

(8) The costs of the application be provided for.

The Notice of Motion was heard ex-parte in the first instance and interim orders were granted in terms of prayer (4) of the application i.e. the respondents be ordered to deposit the disputed rentals, service charge and any other dues for the months January 2008 and February 2008 payable to the applicant pending the hearing and determination of the application.

The deposit of the amount was to be made to the court. On 16th February 2009, the application came up for inter-partes hearing but did not proceed. It came up on the 9th March 2009 when the parties through their respective advocates recorded the following order:-

“By consent, the first, second, third, fourth and fifth Respondents to pay all the outstanding rentals and other dues to the Appellant for the months of January 2008 on a without prejudice basis within 30 days from this date hereof. Matter be mentioned on 23-3-2009 for purposes of recording further orders.

In default of payment within 30 days of the rent for the month of January 2008 execution to issue by way of distress for rent. Costs in the cause”.

The matter was mentioned on 23rd March 2009 for further orders on settlement but was stood over to 4th May 2009.

However, on the 7th April 2009, the Respondents filed a notice of change of advocates and appointed Messrs **Otieno, Ragot & Co. Advocates** to represent them instead of Messrs **Otieno, Yogo & Co. Advocates**.

The notice of appointment of advocate was accompanied by a notice of motion dated 7th April 2009.

The said Notice of Motion is for the basic orders that the orders made on the 9th March 2009 be reviewed and set aside on the grounds that:-

(a) **The Applicant's advocate then on record entered into the consent without the knowledge, consent or authority of the Applicants.**

- (b) **The orders sought to be set aside were recorded without jurisdiction.**
- (c) **The orders sought to be reviewed and set aside undermine the Applicants' case in the whole dispute.**
- (d) **There is an error apparent on the face of the record.**
- (e) **It is in the interest of justice that this application be allowed.**

The application is made under Order XLIV Rules 1 (i) of the Civil Procedure Rules and sections 63 and 3A of the Civil Procedure Act and is supported by the facts contained in the supporting affidavit dated 7th April 2009 deponed by the General Manager of the second Respondent on behalf of all the Respondents.

The Appellant opposes the application on the basis of the facts contained in the replying affidavit dated 20th April 2009 deponed by its manager.

Mr. David Otieno, learned counsel, argued the application on behalf of the Respondents while Mr. Amit Gadhia, learned counsel, argued on behalf of the Appellant.

On ground one of the application, it is contended that the Respondents' previous advocate on record recorded the consent order without the knowledge, consent or authority of the Respondents. However, there was nothing tangible to establish the fact other than mere allegations (**see paragraphs 11 and 15 of the supporting affidavit**).

In any event, an advocate duly instructed would have ostensible authority to enter into a consent on behalf of a client (**see Flora Wasike –VS- Destimo Wamboko [1982-88] 1 KAR 626**).

If the Respondents felt that their previous advocate made a mistake or acted contrary to instructions they were at liberty to substitute him, which they did for another.

If they thought that he acted unprofessionally, the right forum was the Advocates Complaints Commission and not this court.

On ground two of the application, the Respondents' contention is that the consent orders were recorded in the absence of jurisdiction (**ref. paragraph 18 of the supporting affidavit**).

Learned counsel for the Respondents, argued that there was no jurisdiction on the part of the court even at the instance of the parties to purport and deal with issues other than those on appeal. He said that it was not open for the Appellant to purport to introduce vide the appeal issues which had never arisen in the lower court.

Counsel further stated that the Appellant led the court into recording the consent order in an appeal which had not been paid for. He contended that the introduction of issues not part of the appeal was erroneous. He referred the court to the decisions in **Nairobi City Council –VS- Thabiti Enterprises Co. Ltd [1995-98] 2 EA 231, Owners of the Motor Vessel “Lilian S” –VS- Caltex Oil (K) Ltd [1989] KLR 1 and Omega Enterprises (K) Ltd –VS- Kenya Tourist Development Corporation & Others Civil Appeal No. 59 of 1993 (C/A)**.

On his part, learned Counsel for the Appellant argued that the appeal was filed together with the application dated 27th January 2009 and that it was paragraph (5) and (6) of the application which were granted in the consent order. He contended that the issues in the appeal are clear and need not be captured in the memorandum of appeal. He said that the application was made within the appeal. He referred the court to the decision in **specialized Engineering Co. Ltd –VS- Kenya Commercial Bank Ltd [1982-88] 1 KAR 626** where it was held that a consent order may be granted at the hearing of a suit or in an interlocutory application.

Counsel contended that the consent order made herein was within the jurisdiction of this court.

The issue of jurisdiction was considered and aptly dealt with in the famous case of the **Owners of the Motor Vessle "Lilian S" –VS- Caltex Oil (K) Ltd [Supra] and in Stanbic Bank (K) Ltd –VS- Jimmy R. Kavulu and 14 others NBI Civil Application 111 of 2008 (C/A).**

The bottom line is that a court which exercises a jurisdiction which it does not have, its decision amount to nothing.

Therefore, if this court had no prerequisite jurisdiction to enter the disputed consent order then the consent would be null and void and suitable for setting aside.

The memorandum of appeal shows that the prayers sought are essentially an invitation to the court to interfere with the discretionary orders made by the learned Principal Magistrate in allowing the Respondents' application for adjournment and disallowing the hearing of the Appellant's application prior to that of the Respondents.

Whether or not the discretion was rightly exercised is a matter for consideration in the appeal. However, any judicial discretion has to be exercised in accordance with rules of reason and justice not according to private opinion according to law not humuor.

It is to be, not arbitrary. Vague and fanciful but legal and regular. **(see Sharp –VS-[1891] AC 73 at pg 179).**

It is contended that this court lacked the necessary jurisdiction to record the disputed consent order simply because it related to matters not pleaded in the memorandum of appeal.

Undoubtedly, a judge would have no power or jurisdiction to decide on issue which had not been pleaded unless the pleadings were suitably amended **(see, Nairobi City Council –VS- Thabiti Enterprises (Supra).**

Herein, on the face of it, the prayers contained in the memorandum of appeal do not clearly relate to the substance of the consent order which deals with the issue pending to the rents for the months of January and February 2008. Further consent order was to have been recorded on the 23rd March 2009 but nothing seems to have happened on that day. Instead, the present application was filed on the 7th April 2009.

Although the prayers contained in the memorandum of appeal do not specifically ask for payment of rent, ground five (5) of the memorandum addresses the issue of outstanding rentals.

In addition prayer four (4) and five (5) of the interlocutory application by the Appellant filed herein on 27th January 2009 addressed the issue of rent and more specifically the disputed January and February 2008 rents.

The consent order was thus directed at resolving part of the prayers in the Appellant's application at least in the interim. It is instructive to note that the application is yet to be fully heard and determined.

The prayers in the application relating to rents are included in ground five (5) of the memorandum of appeal.

Consequently, it may not be said that this court did not have the necessary jurisdiction to record the material consent order.

A party may not be precluded from entering into a consent at an interlocutory stage if only to compromise the dispute or part thereof.

Prayer four (4) of the interlocutory application filed on the 27th January 2009 was in effect partly compromised by the material consent order in that the disputed rentals for the month of January 2008 and other dues were to be paid to the Appellant within 30 days and in default execution by way of distress does issue.

The same position applied to prayer five (5). The difference was that whereas prayer four (4) was to apply pending the hearing and determination of the application, prayer five (5) was to apply pending the hearing and determination of the appeal.

It is obvious that the drastic nature of the consent order compelled the Respondents to make the present application. In normal circumstances the court would not come to their aid unless there was fraud, mistake or misapprehension at the time the consent was recorded. This is not the case here as this application is essentially for the review of the consent order.

Viewed in the light of the said prayers 4 and 5 of the Appellant's application and in the light of grounds three, four and five of the present application, there arises a great need to review the consent order.

The reason is simple, prayers 4 and 5 of the Appellant's application were essential for interlocutory protective orders pending the hearing and determination of the application and the appeal yet the consent order had the effect of finally resolving the issue of the January 2008 rent which is an issue for determination in the main suit in the lower court.

Secondly, prayers 4 and 5 of the Appellant's application were for the deposit of the January 2008 and dues into the court and not for the immediate payment of the sums to the Appellant as indicated in the consent.

In the end result, the present application succeeds to the extent that instead of the payment of the January 2008 rents and dues being paid to the Appellant the same be deposited in court pending the hearing and determination of the appeal and within the next fourteen (14) days from the date hereof. In default, parties be at liberty to apply.

[Read and Signed at Kisumu this 26th day of May 2009].

(In the presence of Otieno for Respondents and M/S Sewe for Applicant).

Order – Leave to appeal granted to the Respondent as applied May typed copies of proceedings and ruling issue to the Respondent as applied.

J.R. Karanja

JUDGE

J.R.K/va