



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

Civil Case 1964 of 2001

RAZA PROPERTIES LIMITED.....APPLICANT

AND

FRANCIS M. MUTUA T/A MUTUA MBOYA AND

NZISSI ADVOCATE.....RESPONDENT

RULING

In this court's, ruling dated 18th day of December 2008, this court struck out the application that had been presented to this court dated 21/6/07 but with leave to present a proper one for the reasons given in the said ruling.

It is on the basis of the leave granted a fore said, that the applicant has once again presented to this court, an application by way of notice of motion dated 19th day of December 2008 and filed on the 23rd day of December 2008. It is brought under order XLIV Rules 1, 2, and 6 and order L rule 1 of the CPR. It seeks 2 prayers namely:-

1. *That this Honourable court, be pleased to review the consent orders given on 17th November 2006 allowing the defendants application dated 4th July 2006 and set aside the said orders and rehear the application or vary the said consent orders by amending prayers as to read “ Costs of the application and withdrawn counterclaim to the Respondent”*
2. That the costs of this application be provided for.

The grounds in support are in the body of the application and supporting affidavit. A perusal of the same reveals that they are the same grounds on which the struck out application had been anchored. These are already set out on the record, in the counsels oral submissions in court, made on the 27th day of November 2008. These have also been reflected in the mentioned ruling of 18th December 2008. These were adopted by the counsels in their oral high lights made on the 25th day of March 2009. Those for the applicant are summarized at page 4 of the ruling. A summary of the same are that, indeed the applicant agreed to enter into the said consent.

- His quarrel with the said consent is that the same is not clear as regards the issue of costs.
- It is their stand that costs should have been ordered to operate for the application as well as the

withdrawn counterclaim.

- By reason of what has been stated above the court, is invited to interfere with the said order and rectify the error.
- It is contended that the said error is genuine and it should be rectified by this court.

The application was objected to on the basis of grounds of objection dated 20th day of March 2009 and filed on the 23rd March 2009 namely that:-

(a) "The application is frivolous as the basis advanced for the grant of the orders sought do not support the application."

In his oral highlights, counsel for the respondent stressed the following:-

- No costs were awardable for the withdrawn counterclaim as the same had only sought general damages and had been withdrawn even before the applicant/plaintiff responded to the same.
- Maintain that since the counsel now currently seized of the matter was not in court, when the consent orders were made, and as such he cannot blame the judge and the counsel who held the brief for him for making a mistake.
- That the order was read back to the parties before it was signed.
- They contend there is no justification for setting aside.

In reply the applicants counsel, submitted that the court, never made any mistake. All they are saying is that they have satisfied the principles for setting aside a consent order.

- The reason for setting aside advanced which is to the effect that the order given is not clear is sufficient justification for setting aside.
- Further reason is that costs should have followed the event.

Case law that had been referred to in the struck out ruling are set out from page 11-16 of the said ruling. These are **CRESTED SEA AGENCIES LIMITED VERSUS MURANGA COUNTY COUNCIL NAIROBI HCCC NO. 2714/1997, GITAU AND 2 OTHERS VERSUS WANDAI AND 5 OTHERS (1989) KLR 23, MUNYIR 1 VERSUS NDINGUYA (1985) KLR 370, FLORA WASIKE VERSUS DESTINO WAMBOKO (1988) KLR 429, the case of ISMAEL SUNDERJI HIRANI VERSUS NOOR ALI ESMAIL KASSAM (1952) EACA 131, BROOK BOND LIEBIG LIMITED VERSUS MALLYA (1975) EA 268.** All this case law both from the superior courts' and the CA have established the following principles:-

1. A consent judgement can be interfered with if given without sufficient material facts.
2. The consent judgement could be challenged in the suit itself but that did not rule out bring a separate suit.
3. A court, can only interfere with a consent order in circumstances as would afford a good ground for varying or rescinding a contract between parties.
4. A consent judgement or order has a contractual effect and can only be set aside on grounds which would justify setting aside of a contract or if certain conditions remains to be fulfilled which are not carried out.

These principles have to be applied to the consent complained of. This was set out at page 2 of the struck

out ruling. It reads:-

“By consent prayer (1) of the application dated 4/7/2006 is granted, costs to the respondent”

The prayer (1) that was granted was the one for the defendant’s application dated 4th July 2006. It reads:-

“That the defendant herein be granted leave to amend his defence in terms of the draft amended defence annexed here to and marked “FMMI”. This court has perused the same and finds that apart from a few changes in the defence, the entire counterclaim was deleted.”

A further perusal of the court, record, reveals that the defence and the counterclaim was dated 10th day of January 2002 and filed on 14th January 2002. By deleting the enter counterclaim in an amendment, the counter claim was effectively withdrawn.

Indeed the court, has not traced a reply to defence and defence to counterclaim, but this fact does not rule out the existence of the deleted pleadings.

The applicant quarrels’ with the consent order is that the way the order reads, it does not say that costs were to go for the application as well as the deleted counter claim. That costs should have followed the event.

The question is whether on the face of the consent order entered herein, when considered in the light of the rival arguments herein, it can be said to be tainted with fraud, mistake or misrepresentation so as to invite interference from this court. Due consideration has been made by this court, and it makes findings that there is no tainting with fraud and misrepresentation. But certainly there is no doubt that there is a mistake or error apparent on the face of the record. The error and or mistake being that the order on costs should have read that costs of the application as well as the withdrawn, deleted or struck out counter claim. It matters not that it has not been responded to by the plaintiff. The reason being that it is trite law, that where a litigant has not responded to a pleading, he or she is deemed to have joined issue with the party who had presented it.

For the reasons given in the assessment, this courts’ consent order made on 17/11/06 by Aluoch J as she then was formally, JA, and now Her Highness be, and is hereby varied in so far as it relates to the order on costs to read:-

“Costs of the application and the withdrawn deleted and or struck out counterclaim to the respondent/plaintiff”

(2) The plaintiff application had a genuine complaint and so he will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE 2009

R.N. NAMBUYE

JUDGE