



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 315 of 2005**

**M.K. & SONS LTD. .... 1<sup>ST</sup> PLAINTIFF**

**HYUNDAI MOTORS (K) LTD. .... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PAUL MUIRURI CHANG'ARE ..... 1<sup>ST</sup> DEFENDANT**

**KENYA COACH INDUSTRIES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

Notice of motion dated 16/6/2008 seeks orders to vary and/or set aside the consent order dated 22/9/2005 together with costs of the application. The grounds upon which the application was filed are stated on the application. It is stated that on 22/9/2005 the parties recorded a consent to the effect that the subject matter of this suit being chassis No. KMFGA 17CR209092 be disposed of either by public auction or private treaty and the proceeds be deposited in a joint account in the names of advocates for the parties.

That the said consent was entered with the knowledge that the plaintiffs and 2<sup>nd</sup> defendant who were motor vehicles manufacturers had a ready market for the chassis and the same would be sold within a few months. This was a misrepresentation by plaintiffs and the 2<sup>nd</sup> defendant to first defendant. This has frustrated the contract and it has become unenforceable.

The second defendant submits that he has received several offers which have been rejected by 1<sup>st</sup> defendant and it is clear the first applicant is the one who is putting obstruction to the performance of the consent agreement. It is clear the consent was reached after full discussions as shown on the record.

The affidavit in reply and sworn by Narain Singh Sokhi appears credible. It is shown that there was an offer for the purchase at Kshs.1,750,000/= but the first defendant rejected that offer claiming they could sell the chassis for Kshs.2.5 million but to-date has not been able to do so.

It is trite law that court has no jurisdiction to set aside or vary a consent freely entered into by the parties and recorded in court. **Civil Procedure Order 24 Rule 6** provides where a suit has been settled by any lawful agreement the court shall on the application on any party order such agreement be recorded and shall enter judgment in accordance therewith. In this case, the parties appeared before the court wherein the Judge entered their consent.

And generally, consent judgment is not interfered with unless it is proved that there are grounds that would cause the court to set aside a contract. There is no such ground and the ground of frustration put

forward by the applicant is not tenable.

The application is dismissed with costs.

It is so ordered.

**DATED** and **DELIVERED** this 8<sup>th</sup> day of June 2009.

**JOYCE N. KHAMINWA**

**JUDGE**