



CREDIT & COMMERCE FINANCE LTD. PLAINTIFF

VERSUS

LAVINGTON HOLDINGS LTD. 1ST DEFENDANT

DR. SHASHI PATEL 2ND DEFENDANT

ABBA LTD. 3RD DEFENDANT

RULING

Notice of Motion dated 21/1/2009 is brought under **Section 3A of Civil Procedure Act, Cap. 21.**

The applicant seeks orders to set aside consent judgment entered in this case on 13/10/2008 as against the 2nd defendant and execution be stayed. It is based on 2 grounds namely; the consent was obtained by fraud and/or misrepresentation by the 2nd defendant's former advocate who did not have instructions to enter the same.

The application is supported by affidavit of Doctor Shashikant Chhotabhai Patel, the 2nd defendant. He swears that he purchased 1/3 shares in the company called Lavington Holdings Ltd. the 1st defendant which was opened by a Mr. Kuldeep Singh Chawla, his friend. He paid Kshs.750,000/= for the shares.

Later the applicant who was a close friend of one P. Gidoomal was requested by the said Chawla to introduce him to the said Gidoomal for purpose of negotiating a loan facility in the sum of Kshs.2.5 million in favour of the 1st defendant. The applicant executed guarantee in favour of the first defendant a copy was exhibited "SCP1". The cheque was drawn in the name of the said Chawla's law firm. It became clear and the applicant protested that the cheque was received in the account of Chawla's law firm account.

The applicant swears that he is not liable to pay since guarantee was in favour of the first defendant (Lavington Holdings Ltd.) not for Chawla or Chawla & Co. Advocates where the money was paid. And that the guarantee form was defective. On 10/10/2008 the advocate Pramod Patel requested applicant not to attend court on 13/10/08 unless he was called.

On the morning of 13/10/2008 Mr. Hira, advocate called the applicant and informed him that the debt payable was 6 million not 12 million as demanded. Mr. Hira was plaintiff's lawyer. Applicant's lawyer, Pramod Patel said to accept the offer otherwise outcome of trial might mean he has to pay the whole amount. He vehemently protested and told advocate he did not accept liability and the proposed settlement.

Nevertheless, his advocate proceeded to enter consent judgment in his absence. Thereafter he engaged present advocate with instructions to file this application. With reference to replying affidavit filed by Mr. Rustam Hira, advocate for the plaintiffs, it is clear the applicant signed guarantee in favour of the plaintiff. The plaintiff was willing to accept Kshs.6 million from the applicant in full final settlement

of the claim of Kshs.3,571,954/35 with compound interest at the rate of 48% p.a.

I have perused the affidavit of the applicant it is clear he was in company of people who were well known to him and he was in full understanding of what they were discussing. He paid Kshs.750,000/= to purchase shares in the first defendant company and he agreed to guarantee to the plaintiff the indebtedness of the first defendant. He is not questioning how the indebtedness arose to Kshs.6 million.

He is questioning how consent judgment was entered. He admits that his own advocate spoke to him about the consent before it was entered. There is no evidence that he informed the advocate not to enter. However, it is trite law that once an advocate is engaged to conduct a suit he has full instructions to the end of suit. For applicant, the authority of **Peter G.N. Nganga & another vs. Deposit Protection Fund Board (in liquidation) & others** in that case the consent letter was filed in court by an advocate who had no authority to act having been dismissed on 22/11/2001. The consent was therefore set aside.

Both parties rely on the authority of **Flora Wasike vs. Destimo Wamboko** where the Court of Appeal held that:-

“It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud mistake or misrepresentation.”

Further, it was held that an advocate would have ostensible authority to compromise a suit or consent to judgment. The authority of **Civil Appeal No.126 of 2005 – Samson Muruka Advocate vs. Wedube Estates Ltd.** where the Court of Appeal, after examining the background of the matter was unable to say that the consent was freely entered into.

In this case the applicant was speaking to his advocate and there is no evidence of fraud or mistake or misrepresentation. It is noteworthy that the applicant did not obtain an affidavit or otherwise involve his said advocate in this application. No element of misrepresentation or fraud indicated either on the part of the applicants, their advocate or Mr. Hira, acting for the plaintiff. An advocate has authority to conduct, co..... the suit until he is dismissed by the client.

For the above reasons I find the application to be without merit and the same is dismissed with costs.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 16th day of October 2009.

JOYCE N. KHAMINWA

JUDGE