REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 119 of 2001

CHEBARA FARMERS CO. LTD…..……...…….PLAINTIFF

VERSUS

KIROBON FARMERS CO. LTD…..…….DEFENDANT

RULING

The main prayer in the defendant's Notice of Motion dated 25th June 2008 and brought under Section 3A of the Civil Procedure Act as well as under Order 50 Rules 1, 2 and 12 of the Civil Procedure Rules is for the review and setting aside of the consent orders recorded on 22nd September 2005 and subsequent decree dated 11th November 2005. The application is based on the ground that counsel who recorded or who entered into it on behalf of the defendant did not have the defendant's instruction to do so.

The application is strongly opposed on the grounds that it is bad in law for failure to invoke the correct provision of the law under which it is brought; that it has been brought after inordinate delay and that counsel had ostensible authority of the defendant to record it.

On the first ground of opposition it is contended for the plaintiff that Section 3A of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules under which this application is brought can only be invoked when there is no provision covering a particular matter. This being an application for review, counsel further contended, it should have been brought under Section 80 of the Civil Procedure Act and/or Order 44 of the Civil Procedure Rules which provide for it. They concluded that the application should therefore be struck out.

Section 3A of the Civil Procedure Act is not a panacea for all manner of defective applications. As was stated by Omolo J (as he then was) in Miruka Vs Abok & Another [1990] KLR 541, the court only invokes its inherent jurisdiction under Section 3A of the Civil Procedure Act in order to do justice where the rules of procedure are silent. I agree with counsel for the Respondent that the application for review in this case is provided for under Section 80 and Order 44 of the Civil Procedure Rules.

However, failure to cite those provisions does not render the application incompetent. Order 50 Rule 12 of the Civil Procedure Rules saves it. It states that:-

"Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."

In the circumstances failure to cite Section 80 of the Civil Procedure Act and/or Order 44 of the Civil Procedure Rules is not fatal and I therefore find that this application is competent.

The second ground of opposition that the application has been brought after inordinate delay and the third one that counsel had ostensible authority of the defendant to record it can be dealt with together. I again agree with counsel for the plaintiff 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 – Flora N. Wasike Vs Destimo Wamboko [1982-88] 1 KAR 625 and Brook Bond Liebig Ltd Vs Mallya [1975] EA 266. But those are not the only grounds upon which a consent order can be set aside. In my view it can also be set aside if it is for any other reason illegal.

In this case the consent orders sought to be set aside do not exist. The consent letter allegedly signed by the parties' advocates is not in the court file. As the Deputy Registrar correctly pointed out in his undated ruling annexed to the further affidavit of Joseph Kimutai Rono, besides the absence of the consent letter from the court file, the consent itself has not been endorsed in the court file. There is therefore no consent order to be set aside.

Even if the consent letter were available and the consent itself had been endorsed I think I would still have set it aside for illegality. As at the time counsel for the parties signed the alleged consent letter, that is on 22nd September 2005, Mr. Ntabo who allegedly signed it on behalf of the defendant was not on record for the defendant as he had not filed a notice of change of advocate. He filed it on 17th November 2005. An advocate who is not properly on record cannot record a consent or do anything on behalf of his client.

For these reasons, although this application has been brought after inordinate delay, I exercise my discretion and allow it and set aside the decree dated 11th November 2005 purportedly based upon the non-existent consent. Given the history of this matter I order that each party shall bear its own costs of this application.

DATED and delivered at Nakuru this 26th day of November, 2008.

D. K. MARAGA

JUDGE.