REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 21 of 2003

E.A.T.E. C …… APPELLANT

VERSUS

WILLIAM ODERA ……..…… RESPONDENT

(Being an appeal from the ruling and order in C.M.C.C. (Eld.) No. 1569/1995 delivered on 14th February 2003 by Solomon Wamwayi Esq. (C.M.))

JUDGMENT

This appeal raises an interesting issue, pertaining to the review or setting aside of a consent order.

Briefly, William Odera who was an employee of EATEC sued his employer in June 1995 in SPMCC (Eld.) 1569/1995, and claimed damages for injuries sustained as he carried out his duties at EATEC's tea estate on 15/3/1995. He attributed liability to his employer and alleged negligence.

The matter was adjourned on several occasions but on 12/8/2002, the court adopted a consent letter which the parties had filed in court the following terms:

"By consent, judgment be entered for the plaintiff against the defendant as follows:

General Damages K.Shs. 60,000/-

Less 20% contribution K.Shs. 12,000/-

K.Shs. 48,000/- Add party and party costs

inclusive of filing fees,

service and medical

report fees K.Shs. 12,000/-

K.Shs. 60,000/

There be a stay of execution for 45 days from the date of filing this consent".

The letter which was signed by the advocates for both parties had been filed in court on 8/8/2002.

EATEC moved the court two and a half months later, and sought for inter alia, an order to review or set aside that consent order on the following grounds:

"*(1) It had been obtained by fraud,*

(2) That new matters had arisen which would have been known before the said consent was entered into,

(3) That the case was res judicata and hence the consent ought not to have been entered into, and

(4) That the plaintiff had concealed material facts relating to the claim."

The learned Chief Magistrate found that the defendant had been represented by the same firm of advocates in both matters and also that the injuries for which he had instituted the two suits were different, and that they were sustained on two different dates. He then proceeded to dismiss the application with costs.

Being dissatisfied by that decision, EATEC has now preferred this appeal which is based on the grounds that:

"*1. The learned trial Magistrate erred in law and fact in refusing to review the consent judgment contrary to the evidence and the law.*

2. The learned trial Magistrate erred in law and fact in holding that the suit herein was not res judicata contrary to the evidence before him.

3. The learned trial Magistrate erred in law and fact in dismissing the Appellant's application for review.

4. The learned trial magistrate erred in arriving at a decision against the weight of the evidence before him."

Mr. Kuloba who appeared for EATEC which I shall now refer to as 'the company', urged the court to find that the injuries in both suits was the same, and that the suit was res judicata as it had been determined in an earlier suit. He was of the view that res judicata is an issue of law which can be raised at any time, whether or not it is pleaded.

Mr. Keter for the respondent was of a different view and he urged the court to find that not only was the consent entered into by advocates who had full knowledge of circumstances of the case, but that the earlier suit was well within the knowledge of company and its advocates, who acted in both matters. It was his submission that both suits were filed in 1995, and that the issue of res judicata which the company raises now should have been raised in the defence in the subsequent suit. He urged the court to disallow the appeal as the dates and injuries were different leading to two different causes of action.

Admittedly the court has powers to review consent orders but the guiding factors are now well settled, and was well laid down by the Court of Appeal in **Greenfield Investments Ltd. v. Baber Alibhai Mwawji CA (Nrb) 160/1997,** where the learned Judges reiterated that the circumstances under which a consent judgment may be interfered with. They took into account the decision in Hirani v. Kassam [1952], 19 E.A.C.A 131 where the following passage from Seton on Judgments and Orders, 7th Edn. Vol. 1, P. 124 was approved:

"*Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and or those doing under them …… and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court …… or if*

the consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

The court also considered with approval that the fact that "*it is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out*" **(Flora Wasike v. D. Wamboko [1982-88] 1 KAR 625)**.

It is for the appellant to satisfy this court that the consent order should have been reviewed or set aside.

It is trite that "*the subject matter in the subsequent suit must have been covered in the previous suit for res judicata to apply* "(Jadva Karsan v. Harnam Singh Boghal (1953) E.A.C.A. 20 74).

I have reviewed the proceedings in the lower court as well as the pleadings in the matters which were filed in the subordinate court and I am convinced that the respondent sustained on two separate occasions and that it was proper for him to file two different suits to recover damages for the same. That being the case then the company can not be heard to claim that the suit from which this appeal arises was res judicata as the issues had not been determined before in any court. There is no doubt that the company was represented by the same firm of advocates in both suits. No fraud or mistake was disclosed, and I am therefore not convinced that the parties were fully aware of the circumstances which necessitated the consent order and in my view there were no sufficient grounds to warrant the review or setting aside that consent order.

I do in the circumstances find that the learned trial Magistrate applied the right principles in the matter which was before him and he did not err at all when he refused to review the consent judgment, on the contrary, he was right in dismissing the company's application for review.

I do find that this appeal is lacking in merit and the same is dismissed with costs.

Dated and delivered at Eldoret this 25th day of May 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Keter for the respondent

No appearance for the appellant