



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 411 of 1998**

NAJU INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

SHIVALI HOLDINGS LIMITED.....1ST DEFENDANT

RAJU SANGHANI2ND DEFENDANT

GULDERS INTERNATIONAL BANK.....3RD DEFENDANT

NIVA PROPERTIES LIMITED.....4TH DEFENDANT

R U L I N G

An application brought by the 1st, 2nd, 3rd and 4th defendant seeks the following orders: -

1. That this Honourable court be pleased to set aside and or vary the temporary injunction order dated 2nd November 1998.
2. That this Honourable court be pleased to order that the rent proceeds and profits from L.R. No. 205.81 (Original No. 67/1) Riverside Drive, Nairobi, the suit property herein be deposited in court until the hearing and final determination of this suit.

The plaintiff when it filed this suit also filed an injunction application which came up for inter partes hearing on 2nd November 1998, before the Hon. Justice Ole Keiwua. The orders granted by consent of the parties were:

- “1. That a temporary injunction be and is hereby issued restraining the defendant/respondents by themselves their agents, servants, or any of them whatsoever from alienating, selling, disposing and or dealing with the property known as L.R. NO. 205/81 (original 67/1) Nairobi. (the “premises”) until further orders of this court**
- 2. That the defendant/respondent be and is hereby restrained from collecting and or receiving rent from the tenants of the premises.**
- 3. That the tenant of the premises be and hereby ordered to pay rent to the plaintiff/applicant in accordance with the current lease of the premises.”**

It is the above order, which the defendants seek to set aside or vary.

The defendant's application is brought under Order XXXIX Rule 4 Civil Procedure Rules and section 3A of the Civil Procedure Act.

Looking at the order which the defendants wish to set aside one will notice that the same was made by consent. The defendant's then advocate has sworn an affidavit in support of the present application and deponed:

“That I never consented to the said prayers and therefore the consent order was entered irregularly.....”

The defence counsel to say that he never consented to an order recorded in the proceedings and dated 2nd November 1998 and to make that statement in April 2006 begs an answer. It was necessary, in the court's mind, for the defence to explain why it took them eight years to challenge that order.

Even if the defendants application is not defeated by that delay, which to me does defeat it, the order of Justice Ole Keiwua was made by consent of the parties advocate. In the absence of the parties, again consenting to the setting aside that order, the defendants needs to lay a basis for setting aside. The jurisprudence of setting aside consent is found in the case FLORA N. WASIKE – VS – DESTIMO WAMBOKO [1982 – 88] I KAR, which held that:

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

The defendants counsel states that the order was not by consent but fails to state whether it was entered by mistake or fraud.

I have considered the supporting affidavit of Rajendra Ratilal Sanghani and the application and I find that the application, in view of the reasons given herein before cannot succeed.

The application fails and therefore, that application dated 27th April 2005 is dismissed with no orders as to costs.

MARY KASANGO

JUDGE

Dated and delivered this 25th May 2006.

MARY KASANGO

JUDGE