



KANAMPIU M'RIMBERIA.....
PLAINTIFF/APPLICANT

VERSUS

JULIUS KATHANJE.....
DEFENDANT/RESPONDENT

R U L I N G

1. The Application dated 25.4.2000 seeks the following orders:-

(a) The honourable court be pleased to review, vary and/or set aside the fraudulent consent orders of 12.4.2000.

(b) The honourable court be pleased to find that the full costs of this suit were satisfied vide the attachment and sale of the J/D's property by Flamingo Auctioneers on 5.7.1991.

2. The said Application is premised on Order XLIV Rules 1 and 2 of the Civil Procedure Rules and is reliant on the following grounds:-

(i) There is obvious fraud in the consent of 12.4.2000 between the two counsels on record.

(ii) Material facts were concealed to court which if disclosed then the court would have arrived at a different finding.

(iii) The Judgment Debtor properties worthy over Ksh.60,263/= were sold by the auctioneers.

3. In the Supporting Affidavit of Kanampiu Rimberia sworn on 25.4.2000 it is the Applicant's contention that he was misled by his former advocates, M/S Anampiu and Co Advocates into signing an affidavit in which he bound himself to be paying the sum of Ksh.29,105/- due and owing in this suit, by way of instalments. That he never made such a proposal nor was he willing to do so. That in fact the whole amount owing from him had long been paid when auctioneers attached his property sometime in 1992 and sold the same. It is his further contention that he was not party to a consent entered on 12.4.2000 that he would pay Ksh.10,000/= on or before 30.4.2000 and the balance thereof at the rate of Ksh.3,000/= per month until payment in full and in default of any one installment, execution would issue. He seeks that the said consent order be set aside as the same was fraudulently entered.

4. The Defendant filed a Replying Affidavit on 11.5.2000 and in it he depones that auctioneers indeed attached the Applicant's properties but recovered only Ksh.800/- while at that time the decretal sum was Ksh.30,010/-. That the consent order of 12.4.2000 was entered with the applicant properly represented and that the present Application is an abuse of court process and should be dismissed with costs.

5. I have heard both advocates appearing and I think that each correctly quoted the law as to the setting aside of consent orders. I agree that the law on the point was properly enunciated by the Court of Appeal in the case of Flora Wasike vs Destimo Wamboko [1982 –1988] KLR 625 and later in Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd and Another C.A. 276/97. In both these cases it was held 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. Where these grounds are properly shown to have existed at the time of recording the consent, then the court can set aside or review the order. This is what Ringera J. had to grapple with in an application for review of certain consent orders entered in Galot and 5 others vs Kenya National Capital Corporation [2002] I KLR 798. He declined to review the orders as both grounds in support were found wanting.

6. In Flora Wasike (supra) the judgment was entered by a judge in the presence of both advocates for the opposing parties and the Appellant appealed on the ground that she had not consented to it and that her advocate did so without her knowledge. It was held on appeal that an advocate would have ostensible authority to compromise a suit or consent to judgment so far as the opponent is concerned. The appeal was dismissed. The arguments in that case bear uncanny resemblance to those made in this case as the Applicant like the husband of Flora Wasike was in police custody prior to the consent order as part of the pressure exerted on him by the Defendant.

7. In Kenya Commercial Bank vs Benjoh Amalgamated Ltd (Supra) the Court reiterated the holdings in Brooke Bond Liebig (T) Ltd vs Mallya 1975 E.A. 266 and earlier in Hirani Vs Kassam [1952]19 EACA 131 and quoted from Seton on Judgments and Orders 7th ed. Vol 1 p.124 that;

“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 on those claiming 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 consent was given without sufficient material facts....or in general for a reason which would enable the court to set aside an agreement.”

8. Turning back to the Application before me and applying these clear principles, I should note as follows:

Firstly, the consent order was made pursuant to an Application by the Applicant under Order XX Rule II of the Civil Procedure Rules, dated 5.4.2000 in which he sought to be allowed to pay the decretal sum by instalments of an initial payment of Ksh.5,000/= and thereafter by monthly instalments of Ksh.1000/= until payment in full.

9. He swore an affidavit on 5.4.2000 and pleaded inter alia that he is a man of straw; that he has children in school; that he had been incarcerated on murder charges and the defendant was the complainant and instigator of those charges; that his business collapsed when the Defendant attached his property in execution of the decree and that he did not know how much was raised from the sale of those goods. He ended that affidavit with a firm prayer;

“That I humbly pray this count (*sic*) to allow the pay in instalments.”

10. It is instructive that two days prior to that Application, on 3.4.2000 the Applicant appeared before the Deputy Registrar of the court on an Application for Notice to show cause why he should not be committed to civil jail but the matter could not be reached and was adjourned to 4.4.2000 and on that day Mr. Anampiu Advocate sought an adjournment to enable him take instructions from the Applicant and to “advise” him. He sought a week to do so and the adjournment was granted in spite of opposition from counsel for the Defendant. The Notice to show cause was listed for hearing on 12.4.2000 and although the Application for payment by instalment is dated 5.4.2000 (a day after the court appearance) it was filed on 12.4.2000 when the Notice to show cause was due for hearing and on that day a consent earlier explained was recorded.

11. On 26.4.2000 the Applicant sought to set aside the consent order two (2) weeks after it was recorded and four (4) days before he was due to make the first payment. Has he convinced this court that the consent order should be set aside? Sadly no. No fraud has been shown although it is raised as the only ground. What actions on the part of the Advocate can be said to be fraudulent? The affidavit was signed by the Applicant leading to the consent order and the Application itself was dated two (2) days after m/s Anampiu and Company Advocates filed their notice of appointment and appeared in court the next day (14.4.2000) and sought time to take instructions. They appeared on 12.4.2000 and recorded the consent and the Applicant says he was in court but waited for two (2) weeks before disowning the consent. I see that the judgment in the case was delivered on 24.9.1990 and since then the Applicant sixteen (16) years down the line is still fighting to avoid payment of costs at that time amounting to Ksh.9,000/-. I think it is he and not any other person who is acting in bad faith and I do not believe that the Application for payment by instalments and the consent order were made without authority. I also believe as was the holding in Flora Wasike that in the absence of any evidence to the contrary, the advocate then acting had authority to compromise an application made by the Applicant seeking orders favourable to himself and which were granted.

12. I am convinced on the whole that the Application dated 25.4.2000 is brought in bad faith and is clearly intended to assist the Applicant in continuing his ploy not to pay the costs arising from this suit. He has been represented since the year 2000 and if the auctioneers recovered any money from sale of his good, he should have demanded accounts and paid the difference to the Defendant. He has not done so and he cannot be heard to be saying that he does not know how much was recovered and still claim that the whole decretal sum has been paid from that same sale.

13. Without saying more, the Application does not meet the conditions for setting aside of a consent order and is instead dismissed with costs to the Defendant/Respondent.

14. Orders accordingly.

Dated, signed and delivered in open court at Meru this 27th Day of September 2006

ISAAC LENAOLA

JUDGE

In the presence of

Mr. Kosgey holding brief for Mr. Kimathi Advocate for the Plaintiff/Applicant

Mr. Mwanzia Advocate for the Defendant/Respondent

ISAAC LENAOLA

JUDGE