



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 2848 of 1998

LIFELINE PHOENIX LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

MWALIMU CENTRE INVESTMENT CO-OP SOCIETY SAVINGS AND CREDIT

SOCIETY LIMITED.....1ST DEFENDANT/RESPONDENT

KAKAMEGA TEACHERS COOPERATIVE SAVINGS AND

CREDIT SOCIETY LIMITED.....2ND DEFENDANT/APPLICANT

RULING

This is a Ruling in respect of application dated 29th August, 2005, by way of Notice of Motion seeking an order for the Review and setting aside of a consent letter dated 26th July 2005, and **“adopted by the court”**.

The application was supported by the affidavit of Gabriel Fwaya, an advocate acting for the second defendant, **“Kakamega Teachers Co-operative Savings & Credit Society Ltd”**. The lengthy affidavit was filed in court on 5th October, 2005. It is dated 29th August, 2005.

Mr. Fwaya denied having instructed any advocate, to enter into consent on his behalf, in respect of the 2nd defendant.

There was as further affidavit sworn by the Chairman of the second defendant, a Mr. Joseph Sagala, who denied that any compromise was ever reached in this matter to warrant the parties to enter into a consent. He also denied having given instructions to an advocate, a Mr. Anziya, to enter into any consent on behalf of the second defendant; and further denied being a party to the consent dated 26th July 2005.

A replying affidavit was sworn by Mr. Fredrick Ngatia, counsel for the plaintiff. It is dated 9th December, 2005, filed in court the same day. He explained the process and indeed circumstances which the advocates went through before the consent letter was written and signed on 26th July 2005.

Attached to this affidavit were several annextures including letters written to Mr. Ngatia, advocate, forwarding various cheques for payment on account by the Manager of Kakamega Teachers Co-operative

Savings and Credit Society Ltd, the second defendant herein. Some of the payments were made after the recording of the consent order aforesaid.

In court during the hearing of the application, Mr. Namada, appearing for Mr. Fwaya for the 2nd defendant asked for adjournment of the application on the ground that Mr. Fwaya was appearing before a High Court Judge in Kakamega. Mr. Ngatia opposed the application as he said the reasons given were “**grossly insufficient**”.

I agreed with Mr. Ngatia’s submissions and refused to grant the adjournment requested and I proceeded with the hearing of the application.

Mr. Namada then asked the court to set aside the contents of the consent letter as he argued that the lawyer for the second defendant never signed it as alleged, and the signature appearing for and on behalf of the 2nd defendant is not his.

On the payments made by the 2nd defendant, Mr. Namada said the same have been done to assist the 1st defendant and not as a judgment debtor.

Mr. Ngatia, submitted in reply that there is a consent entered into by 3 advocates pursuant to which the second defendant effected payment of Kshs.400,000/= on 14.9.2005.

That the present application was filed on 5.10.2005, and the second defendant continued to effect payments on account, such payments being sent to his firm.

According to him, in further submissions, he said the consent entered into by the advocates has been perfected by the parties.

He referred to the decision of **FLORA WASIKE**, on the circumstances under which a consent order can be set aside, and submitted that those circumstances do not exist in this case, and payments are being made pursuant to the consent.

Mr. Namada contended that there was a clear misrepresentation to the effect that the consent had been signed by the second defendant’s council, yet it was not. He contended further that the 2nd defendant is making payments to the plaintiff in pursuant of its obligation to pay rent on behalf of the 1st defendant.

With the above submissions, I scrutinized the consent letter recorded and signed by the advocates representing the 3 parties herein, and adopted by the court.

Though it was averred in Gabriel Fwaya’s affidavit that, “**the signature appearing at the 2nd defendant’s/applicant’s space, is similar to that of the person who signed for the 1st defendant,**” an averment which was repeated by Mr. Namada in his submissions in court, I found no evidence of this upon my scrutiny of the consent. I considered that a comparison of signatures is a matter on which expert evidence should have been called. It is not enough in my view to simply allege that 2 signatures look similar, or are made by one person, and leave it at that. I refuse to accept this evidence, as I do not consider it sufficient.

Secondly is the evidence of the conduct of the 2nd defendant soon after the signing of the consent letter by the advocates on 26.7.2005. It made a payment of Kshs.400,000/= to the plaintiff’s counsel on 4.9.2005. This I find was in pursuance of the consent letter.

The 2nd defendant then filed the present application on 5.10.2005, and on 28.11.2005, made a further payment of Kshs.400,000/=.

Thereafter, the annexures show further payments of Kshs.200,000/= by the second defendant.

Though Mr. Namada submitted that these payments made by the 2nd defendants were to “**assist the 1st defendant and not as a judgment debtor**”, I have not found evidence to this effect in the two affidavits filed in support of this application. It is a statement made from the bar, by an advocate and in my considered opinion, lacks merit as it has no legal basis.

I have considered the application as a whole, and I find no mistake on the face of the record to warrant a review of the consent order, which the 2nd defendant acted upon thereby perfecting the same.

I find further that the circumstances for the setting aside of a consent judgment, as set out in the Court of Appeal decision of **FLORA N. WASIKE v DESTIMO WAMBOKO**, i.e. fraud, mistake or misrepresentation, do not exist in this case, and in the circumstances, I proceed to dismiss the application by the 2nd defendant, dated 29.8.2005, filed in court on 5.10.2005, with costs to the plaintiff.

Dated at Nairobi this 16th day of November, 2006.

JOYCE ALUOCH

JUDGE