



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 138 of 2000

ALBERTO CANAVALE PLAINTIFF

- Versus -

GIOVANNI GREMMO DEFENDANT

R U L I N G

This is an application for review of the consent order recorded in this case on the 3rd May 2000. The application was fully argued before P. Tutui, Commissioner of Assize, whose commission has since been terminated, and I am called upon to give a ruling under the provisions of Order 17 Rule 10 of the Civil Procedure Rules.

The Application is brought under sections 3A and 80 of the Civil Procedure Act and Order 44 Rule 2 and Order 50 Rule 1 of the Civil Procedure Rules. It seeks the review or setting aside of the consent order recorded herein on the 3rd May 2000 on the ground that the defendant breached the agreement which was the basis of that order. The application is supported by the affidavit of one Sheikh Antanas Okongo, the duly appointed attorney of the plaintiff, and a supplementary affidavit by the plaintiff himself.

In the supporting affidavit Mr. Okongo deponed that by an agreement dated the 1st May 1996 the defendant leased to the plaintiff certain premises in Malindi; that it was a term of that agreement that in event the defendant breached it he would pay to the plaintiff a sum of 300,000,000 Italian lire; that in breach of that agreement the defendant forcibly took over the premises from the plaintiff; that the parties resolved the matter by reaching another agreement that the defendant would pay to the plaintiff Ksh. 2.4 million; that the defendant issued to the plaintiff post-dated cheques covering that sum and the parties instructed their respective advocates to have this case marked as settled hence the consent order of 3rd May 2000. However, Mr. Okongo further deponed, after the consent had been recorded and the first cheque had been paid the defendant stopped payment of the other cheques for the balance of Sh. 2 million. He annexed to the affidavit copies of the said agreement and the unpaid cheques.

The plaintiff in the supplementary affidavit supported the averments in the supporting of his attorney Mr. Okongo and confirmed that he had indeed agreed to settle this case by the defendant paying to him Ksh. 2.4 million and that the parties had entered into the agreement to that effect a copy of which is annexed to Mr. Okongo's affidavit.

In opposition to the application the defendants advocates filed grounds of opposition in which they challenged the competence of the application on four grounds. First, that M/s Ben Ochieng & Co. Advocates who filed it had no capacity to act in the matter and secondly that the supporting affidavit by Mr. Sheikh Antanas Okongo who is not a party to this suit is "both defective and ineffective" rendering

the application a total nullity in law. The other grounds were that the judgment and decree passed by the court by the consent of the parties is unassailable and this court has no jurisdiction to review or alter it and that the entire application is gross abuse of the process of court and introduces matter totally extraneous to the consent judgment.

Counsel for the plaintiff and the defendant argued the application along the lines of the supporting and supplementary affidavits and the grounds of opposition respectively. Mr. Machuka, counsel for the plaintiff, basing himself on the Court of Appeal decision in **Brooke Bond Liebig (T) Ltd. Vs Mallya [1975] E.A. 266** argued that the breach by the defendant of the said settlement agreement was a fraud on the plaintiff entitling him to have the consent order set aside. He further argued that the advocates who recorded the consent order failed to spell out in that order the terms of the settlement reached. On the challenge to his firm's capacity to act in this matter, Mr. Machuka argued that they had filed a consent with the firm of M/s Lujanje & Co. Advocates which was instructed to wind up the firm of M/s Zablun Atuti & Co. Advocates and that they were therefore properly on record.

On his part Mr. Asige for the defendant submitted that this application is in effect a disguised effort to execute or enforce the consent judgment and that failure to honour the judgment does not warrant it being set aside or reviewed. With respect I do not understand this argument. The plaintiff is not in any way seeking to enforce the consent order. To the contrary he is seeking to set it aside. That cannot be said to be an effort in executing it.

Mr. Asige also argued that this application is hopelessly incompetent having been filed by M/s Ben Ochieng & Co. Advocates who came to the picture after judgment had been entered. He said that M/s Lujanje & Co. Advocates who consented to M/s Ben Ochieng & Co. Advocates coming on record were themselves not on record. He did not answer Mr. Machuka's submission that M/s Lujanje & Co. Advocates had been instructed to wind up the firm of M/s Zablun Atuti & Co. Advocates who were on record.

I have considered this submission and perused this file. The record shows that by a chamber summons dated 19th December 2002, M/s Ben Ochieng & Co. Advocates applied under Order 3 Rule 9A to come on record in place of the defendant's erstwhile Advocates. By a letter dated 20th January 2003 and filed in this matter on 22nd January 2003 signed by M/s Ben Ochieng & Co. Advocates and K. Lujanje "Advocate duly appointed to wind up the firm of Zablun Atuti & Company Advocates (Deceased)" M/s Ben Ochieng & Co. Advocates were allowed to come on record for the plaintiff. The Deputy Registrar of this court duly endorsed that consent. Mr. Atuti of Zablun Atuti & Co. Advocates having died there was nobody to be served with the application or to give consent except Mr. Lujanje who had been instructed to wind up that firm. In the circumstances I find Mr. Asige's argument that M/s Ben Ochieng & Co. Advocates are not properly on record to be incorrect. I hold that M/s Ben Ochieng are properly on record and that this application is competent.

Mr. Asige's other argument was that a consent judgment is a contract which the court has no jurisdiction to set aside except with the consent of the parties and that a review can only be granted if an Applicant can bring himself within the purview of Order 44 which the Applicant in this case has not done. Also relying on the case of **Brooke Bond Liebig (supra)** he concluded that no fraud has been shown in this matter and this application is therefore for dismissing.

This argument is also not correct. The defendant did not bother to file a replying affidavit. So the averments in the supporting affidavit and the contents of the settlement agreement annexed thereto stand uncontroverted. Paragraph 2 of that agreement stated:-

"That Zablun Atuti & Company Advocate (sic) for the plaintiff and Aboo & Co. Advocates for the defendant do sign the consent in court in HCCC No. 138/2000 (sic) immediately in terms of the contents hereof. If possible on the 3rd May 2000 when the matter comes up for mention in court." (Emphasis supplied)

Clause 3 thereof provided for the payment of the sum of Ksh. 2.4 million by monthly instalments. The

first instalment of Sh. 400,000/= was on 30th April 2000. The record shows that on 3rd May 2000 Messrs Atuti and Aboo for the plaintiff and defendant respectively appeared before Hon. Lady Khaminwa Commissioner of Assize (as she then was) and recorded the following consent:-

“By consent the case be marked as settled with no order as to costs.”

This consent did not embody the settlement terms agreed upon by the parties. Judgment should have been entered for the plaintiff in the sum of Ksh. 2.400,000/= and the instalments spelt out with the usual default clause. That to me appears to be what the parties desired and instructed their advocates to do. If counsel for the plaintiff had been diligent enough and had a proper consent recorded this application could have been obviated.

As soon as the consent order was recorded as stated above the defendant stopped payment of the subsequent cheques which he had given to the plaintiff. What further evidence of fraud does one require than this? Fraud is one of the grounds upon which a contract or consent order can be set aside and in my view it is “any other sufficient reason” of Order 44 Rule 1 for reviewing a consent order or judgment.

I am satisfied that the plaintiff is entitled to have the consent judgment of 3rd May 2000 reviewed. If he had prayed that it be reviewed and judgment be entered in his favour for the balance of Sh. 2 million I would not have hesitated to grant that. But our rules require us to give the people what they want. The plaintiff prayed that the consent judgment entered herein on 3rd May 2000 be reviewed and set aside and that I hereby grant him. The plaintiff shall also have the costs of the Application.

DATED and delivered this 27th day of May 2005.

D.K. MARAGA

JUDGE