



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Civil Case 148 of 1999

GERISHOM LIKECHI KITUNGULU

(Substituted with BARBARA ASEYO KITUNGULU)

.....PLAINTIFF /RESPONDENT

V E R S U S

**PATEL PRABHAKAR ISUER BHAI
DEFENDANT/APPLICANT**

RULING

The Notice of Motion dated 2-2-2004 came up for hearing before me on 26/4/05. The substantive order sought in it by the Defendant was review of the consent order recorded in court on 27.11.2003. The grounds for the application were that there was an error on the court record as the consent was recorded by counsel without authority because the firm of G. P. Wekulo & Co. Advocates which initially represented the Defendant had no instructions on 27.11.03 when they recorded the consent. The Defendant claimed that he had instructed the firm of Akwala & Co. Advocates to take over the conduct of the case from G. P. Wekulo & Co. Advocates. This is what the Defendant averred in the affidavit in support of the application.

The Plaintiff in opposition to the application filed grounds of opposition dated 21-2- 04 and an affidavit sworn on the same date by G. P. Wekulo, Advocate. In the said affidavit, the latter averred that the Defendant had not withdrawn instructions from him at the time the consent was recorded and that the Defendant had given him “*full mandate to handle the case and was aware of the consent.*”

Mr. Anziya who appeared for Defendant reiterated the contents of the affidavit in support of the application. He pointed out that on the same day the consent was recorded, a Notice of change of Advocates was filed by Akwala & Co. Advocates who went on record for the Defendant in place of G. P. Wekulo & Co.

On his part, Mr. Nyikuli, advocate, opposed the application and relied on the grounds of opposition and the replying affidavit sworn by G. P. Wekulo Esq.

I have perused the application and the replying affidavit and considered the submissions made by both counsel. It is common ground that at the time when the consent was recorded, G. P. Wekulo was the advocate on record for the Defendant. In his affidavit, G. P. Wekulo avers that he had full mandate to compromise the suit as he did. He averred that the consent order “*favoured*” the Defendant “*as costs were negotiated and reduced to the bear minimum.*” He also averred that even as at 23-2-2004, the Notice of change of Advocates filed by Akwala & Co. Advocates had not been served upon him.

The application was made on 2.2.2004 and the consent was recorded on 27.11.2003, two months earlier. The new advocates of the Applicant, Akwala & Co., came on record on 27.11.2003. In paragraph 4 of his affidavit in support of the application, the applicant stated that

“on 27.11.2003 when this case came up for hearing I had changed advocates and M/S Akwala & Co. Advocates filed their papers on the material day.” The applicant deponed further in paragraph 5 of his said affidavit that *“despite the foregoing, Mr. Wekulo purported to appear for me on 27.11.2003 and recorded a consent without my instructions and when he had been removed from record.”* The applicant was silent about the date when he knew that the consent order had been recorded. Although he was not obliged to do so, he did not state the reason why he changed his advocates from

G. P. Wekulo & Co. to Akwala & Co., but that was his prerogative and nothing turns on it. He did not more importantly state when he withdrew instructions from G. P. Wekulo from acting for him nor did he state how he did so, and whether he withdrew the instructions verbally or in writing. If he had instructed Akwala & Co. to act for him before 27.11.2003 and the latter went on record on 27.11.2003, albeit after the consent had been recorded, the applicant does not proffer any explanation why he took over two months to apply to set aside the consent order. In short, the applicant has been vague in his application. It is apparent that at the point in time when the consent order was made, G. P. Wekulo Advocate was the advocate on record for the applicant in the suit. If his instructions had been withdrawn, it was up to the applicant to adduce evidence to establish this. The applicant made a vague statement in his affidavit in which he failed to show when he withdrew the instructions and the form the withdrawal took, yet he was able to say that M/S Akwala & Co. filed their notice of change of Advocates on 27.11.2003. Mr. Wekulo averred that there was no notice of change of Advocates at the moment in time when he recorded the consent order. He had, he said, full mandate to do so. The burden of proving that instructions had been withdrawn from Mr. Wekulo as at 27.11.2003 reposed on the Applicant. It is my finding that the applicant did not discharge that burden by proving on the balance of probabilities that he had done so. And even if he had done so, I would add as an abiter dictum, that as long as G. P. Wekulo remained on record, he was to be taken to be the advocate for the Applicant and to have the necessary instructions and capacity to compromise the suit. A mere word of mouth that an advocate had no instructions to act, without more even if it be on oath, cannot in my view discharge the burden that an advocate on record had been disengaged and had no authority to act in litigation especially when such allegation comes much later. It is my finding that Mr. G. P. Wekulo had implied and ostensible authority to record the consent order.

It is now accepted as law that a consent order or a consent judgement can only be set aside on the same grounds as would justify the setting aside of a contract, for example, where there is a mistake, fraud or misrepresentation (see *Flora N. Wasike v Destino Waboko (1982 -88) I KAR 25. In Purcell V. F.C. Trigell Ltd. (1970) 3 All ER 671, Winn LJ. said that “if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside of rectification of this order looked at as a Contract.”* In **seton of Judgements and Orders, 7th Edition, Vol.I, page 124 reported in BrookBond Liebig (T) LTD. v. Mallya (1975) EA 266,**

“Prima facie, any order made in the presence and with 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 misapprehension or in ignorance of material facts, or in general for a reason which would

enable the court to set aside an agreement.”

It is my finding that the Applicant has not discharged on the balance of probabilities the burden of proving that there exists evidence on the basis of which the consent order can be discharged.

In the circumstances, I dismiss the applicant's application dated 2-2-2004 with costs to the Plaintiff/Respondent and I discharge forthwith the interim orders issued herein. It is so ordered.

Dated at Kakamega this 24th day of June, 2005.

G. B. M. KARIUKI

J U D G E