



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**Civil Case 272 of 2001**

**GRANDWAYS VENTURES LIMITED .....PLAINTIFF**

**VERSUS**

**RELIANCE BANK LIMITED (IN LIQUIDATION).....1<sup>ST</sup> DEFENDANT**

**SOUTHERN CREDIT FINANCE BANK LIMITED .....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

By a notice of motion dated 6<sup>th</sup> May, 2005 **M/S Grandways Ventures Limited**, the plaintiff, seeks an order for a review of a part of the order made by consent on 16<sup>th</sup> March, 2005 on the ground that there is a mutual mistake or error apparent on the face of the record. The application is supported by grounds set out on the body of motion, affidavits of Mitesh F. Shah a Director of the plaintiff and of Francis E. Wasuna the advocate who is in conduct of the case on behalf of the plaintiff. The 1<sup>st</sup> defendant filed grounds of opposition to the application.

Mr. Wasuna for the plaintiff submitted that the central issue in this application is the agreed issues recorded by consent on 16<sup>th</sup> March, 2005 which had adopted for determination by the court the issues concretized by Commissioner Birech in his ruling of 14<sup>th</sup> September, 2001. He added that subsequently an amended plaint was filed on 14/02/03 which introduced new matters of law and fact which naturally had not been canvassed before Commissioner Birech before he delivered his ruling. He contended that if the consent order of 16<sup>th</sup> March, 2005 is left to stand then the plaintiff will be precluded from ventilating the new and additional factual and legal issues raised in the amended plaint. He went on to state that under Order 14 rule 3 of Civil Procedure Rules, the court may frame issues even after the close of the case and that Order 14 rule 3(3) 5(1) and (2) give the court power to amend issues before judgment, and that the court may decide to invite parties to adduce additional evidence or make submissions or frame further issues before amending or introducing new issues. He added that it is not too late in the day to vary the consent order of 16<sup>th</sup> March 2005 for it does not take into account additional issues raised in the amended plaint. He relied on the case of **MUNYIRI VRS NDUGWAYA (1985) KLR 370** where it is was held that an aggrieved party in a consent order has to come to court by way of application for review. He also cited the case of **MWANASOKONI VERSUS KENYA BUS SERVICES LINTIED (1985) KLR 931** whose holding was that a Judge has power under Order XIV rule 5 to frame additional issues on such terms as he deems fit at any time before passing the decree. The third authority was that of **HAJI MOHAMED DIRVESH VERSUS VILLIAN AND FASCIO (1957) EA 91** where the issues were framed but after the plaintiff had given evidence and after the defendant's counsel submitted "no case" and the case was adjourned for judgment but the Judge who found that the onus of proof had wrongly been placed on wrong party, called for additional submissions. He called for additional submissions. According to Mr. Wasuna the parties had agreed on the issues which had arisen in 2001 at the close of pleadings but had ignored to take into account those issues which arose in the year 2003 after the amendment of plaint and that the plaintiff's prayer is for an amendment of issue 6. He relied on the case of **HASSAN ISSA AND COMPANY VERSUS JARAJ PRODUCE STORE (1967) EA 447** where it was held that the issues should not be inconsistent with the pleadings. He contended that to the

extent that the consent of 16<sup>th</sup> March, 2005 restricts the parties to the issues concretized by Commissioner Birech on 14<sup>th</sup> September, 2001 the issues will be inconsistent with the pleadings due to the exclusion of the amended of plaintiff of 2003.

On his part Dr. Kiplagat contended that the defendants have filed their submissions and that the plaintiff which was expected to reply has not done so. He claimed that the parties having agreed to proceed in the manner they have done it would be prejudicial to the defendants if they are to be asked to stipulate a case they do not intend to do especially as they have admitted all the facts of the amended of the plaintiff. He added that there is no error apparent on the face of the record and that fraud, misrepresentation, illegality etc which are grounds of setting aside consent orders do not exist in this case. He claimed that with the expressed words of Order 17 rule 1 there is no room for framing of issues under Order 14 rule 3. Dr. Kiplagat claimed that an issue arises when one party alleges and another denies it but once one party admits all the facts of the other party there are no issues to frame. It was Dr. Kiplagat's further contention that if this application is allowed when all the facts pleaded by the plaintiff have been admitted it would amount to allowing the plaintiff to agitate the said omitted facts. It was also contended that it was fallacious for the plaintiff whose facts have been admitted to seek to argue additional matters as those are not the matters the defendants' case turns on. It was claimed that if the plaintiff's application succeeds the additional issues will have to be determined and the burden of proof will shift back to the plaintiff and the case will have to start afresh and that if this application succeeds the consequences would be re-opening of the case when the plaintiff has already closed its case. Dr. Kiplagat further submitted that the burden of proof has shifted to the defendants who are to choose the grounds on which to base their case. Dr. Kiplagat also urged me to look at paragraphs 10,16,17,18 and 20 of Mr. Wasuna's affidavit on the ground that they contained contentious facts and they should be struck out. Dr. Kiplagat distinguished all the authorities relied on by the plaintiff.

Mr. Otieno for Murui, Mungai and company advocates for the 2<sup>nd</sup> defendant contended that if the plaintiff's application is allowed its effect would be to refuse the defendants to admit the facts and that once facts are admitted by a party there are no issues to frame. He also contended that the 2<sup>nd</sup> defendant was not mistaken on anything consequently there was therefore no mutual mistake. According to Mr. Otieno the claim that the existence of an amended plaintiff was not taken into consideration is not correct. It was Mr. Otieno's further contention that as there is no mistake the application has no basis and that to allow the application would amount to allowing the plaintiff to agitate new issues.

I note that the defendants have admitted all the facts pleaded by the plaintiff including those contained in the amended plaintiff filed on 14<sup>th</sup> February, 2003 as claimed. It is also common ground that on 16<sup>th</sup> March 2005 parties to this suit recorded by consent agreed issues for determination of the suit by the court; which are limited to those which were spelt out and identified by Commissioner Birech in his ruling of 14<sup>th</sup> September, 2001. It is clear to me that the effect of that consent is that amended plaintiff filed on 14<sup>th</sup> February, 2003 were not taken into consideration. That fact appears to have prompted the plaintiff to file this application seeking a review of the consent order of 16<sup>th</sup> March, 2005 on the ground of mutual mistake apparent on the face of record. It was submitted that the plaintiff's advocate was not available on 16<sup>th</sup> March, 2005 and Mr. Yogo of Otieno Yogo and Company advocates was requested to hold his brief when that consent which did not take into account the amended plaintiff was on that date recorded. It is claimed that if the consent order is not reviewed the plaintiff will be restricted to agitate issues for the plaintiff which is no longer in existence and that it will be prejudiced as new legal issues brought out by the amended plaintiff filed on 14<sup>th</sup> February, 2003 which were not contained in the original plaintiff will not be addressed. The application is strenuously opposed by both defendants who contend that as all the facts pleaded by the plaintiff have been admitted there are no issues which ought to be framed. They also claim that if the application is allowed that will negate the admission of the facts by the defendants. I do not think that it was the intention of the defendants in recording by consent agreed issues on 16<sup>th</sup> March, 2005 to exclude the issues raised by the amended plaintiff. The question is whether the court has jurisdiction to review a consent order, such as the present one. It appears to me that Order XIV rule 5 of the Civil Procedure Rules has placed the framing of issues on a different category from other consent orders. Under that rule the court is empowered to amend or frame additional issues or strike them

out at any time before passing decree as prelude to preparation of judgment. The consent order of 16<sup>th</sup> March, 2005 could not be said to contain final issues as the court could in the course of the hearing and preparing judgment add or delete other issues if it found it necessary. That view appears to be what the Court of Appeal stated in the case of **MWANASOKONI VERSUS KENYA BUS SERVICES (1985) KLR 931** where it held that the Judge is empowered by order XIV rule 5 of the Civil procedure Rules to frame additional issues on such terms as he thinks fit at any time before the passing of the decree. In that case there were 4 agreed issues for the decision of the Judge but the court added a fifth issue in the course of writing judgment. On appeal against the Judge's decision to add a fifth issue the ground was dismissed. It is clear that if this application is not allowed the effect of it would be that the issues recorded by consent on 16<sup>th</sup> March, 2005 would not be consistent with pleading in that the issues raised in the amended plaint filed on 14<sup>th</sup> February, 2003 were not taken into account. It was also contended that the review procedure is not appropriate as fraud, illegality misrepresentation etc which are conditions for setting aside consents do not exist in this case. Having looked up authorities on this issue, I am satisfied that I am bound by the decision of the Court of Appeal in **MUNYIRI VERSUS NDUNGUYA (1985) KLR 370** where it was held that a remedy open to an aggrieved party to a consent order is an application for review which the plaintiff has adopted in this case.

The fact that the said consent order of 16<sup>th</sup> March, 2005 specified the issues for determination in this case as exclusively those identified and concretized by Commissioner Birech in his ruling of 14<sup>th</sup> September, 2001 and the failure to incorporate the issues which were raised by the amended plaint of 14<sup>th</sup> February, 2003 some of which were included in the issues framed and filed by M/S Wasuna and Company Advocates on 22<sup>nd</sup> October, 2003 convince me that there was a mutual mistake apparent on the face of the record. The plaintiff was therefore justified in bringing this application for a review of the consent order. As indicated above I am convinced that a consent on the issues for determination of the court is not final order in that the court is empowered under Order XIV r 5 to amend the same before drawing decree. The claim that once the defendant admits all the facts pleaded by the plaintiff's there are no longer issues to be framed is not correct. We all know that there two types of issues i.e. factual and legal. Where facts are admitted as was done in this case legal issues may still exist, and they have to be framed.

I have looked at paragraphs 10,16,17,18 and 20 of the affidavit of Mr. Wasuna with a view to ascertaining whether they were contentious. If the defendants and/ or Mr. Yogo had filed replying affidavits denying the allegations made in the said paragraphs they would be contentious but in the absence of any challenge the paragraphs remain uncontroverted. They cannot therefore be struck out.

In the result I allow the application with costs against the defendants and grant prayers 1 and 2 of the notice of motion dated 6<sup>th</sup> May, 2005. The plaintiff is given 15 days to file its submissions.

**Dated and delivered this 23<sup>rd</sup> day of November, 2005.**

**B. K. TANUI**

**J U D G E**

**In the presence of: Mr. Wasuna for the plaintiff**

**N/A for defendant.**

**B. K. TANUI**

**J U D G E**