



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 230 OF 1999

RELI SACCO SOCIETY LIMITEDAPPLICANT

VERSUS

KENYA RAILWAY CORPORATION LIMITED.....RESPONDENT

RULING

The applicants have moved this court by way of Notice of Motion brought under Section 3 A of the Civil Procedure Act and Order 53 of the Civil Procedure Rules.

The Applicant seeks an order that the consent order made on 21st May 2004 be set aside.

The applicants' counsel in support of the application argued the following grounds: -

(i) That the consent of 21st May 2004 was entered by mistake.

(ii) That the decretal amount owing to the applicants was kshs 1, 395, 779, 813. 50 and not kshs 447, 955, 916. 18 entered in by consent.

(iii) That the applicants will be highly prejudiced by the loss of kshs 947, 823, 897 being the difference between the decretal amount and the consent amount.

The application had raised one other ground was whether the firm of Oraro & company advocates were properly on record but counsel in argument did not advance this ground and the court will take it that the same was abandoned. Applicants counsel argued that the mistake that occurred on 21st May 2004 was arithmetical which was by influenced the computation from Oraro & company advocates; he said that it was a mistake, misapprehension of material facts.

The Respondents counsel argued that there was no mistake, because the applicants' counsel was the one who informed the court that there was a consent and then proceeded to dictate the figure. Respondent's counsel was of the view that the amount was so huge that it cannot be said to be a mistake. Counsel for the Respondent indicated that the replying affidavit clearly showed that a meeting had taken place between the applicants, their counsel and the respondents officer on 20th May 2004 whereby the figures recorded on 21st May 2004 were agreed and that information was communicated to the firm of Oraro & company advocates by a letter dated 21st May 2004; accordingly, he argued when Mr. Ogonji when he dictated the figure to the court he was not mistaken because it was the agreed amount.

I confirm that I have looked at the proceedings and I can confirm it was Mr. Ogonji who addressed the court by saying that the parties had a consent and then proceeded to dictate the amount to court.

The applicants by their application seek to set aside that order on the basis of mistake. I must say that

the applicants to my mind failed to address their mind and to specifically state what the mistake was that influenced the consent. The applicants' counsel was heard to argue that the consent ought to be set aside because it does not conform to the ruling of Justice Hewett dated 6th February 2001. Looking at the consent recorded before Justice Azangalala there is no mention that the amount related to that ruling indeed in this regard I am inclined to agree with the Respondents submission that the consent was to compromise the existing judgment.

Both parties agree and I am in agreement that the jurisprudence of setting aside a consent order is best captured in the case of *FLORA N. WASIKE – VS – DESTIMO WAMBOKO (1982 – 88) IKAR* page 625 and I quote:

“It is settled law that a consent judgment only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation.”

The applicants have invoked mistake as a basis of setting aside the consent hereof. I am of the view that the mistake that the applicants entertained, if at all, was unilateral mistake. The applicant has not shown that the respondent shared the mistake. On the question whether the mistake can be attributed to the action of the respondent, I am of the view that that cannot be. The respondent representative deponed in the replying affidavit of how the consent figure was arrived at after a meeting between the applicants' their counsel and the representatives of the respondent. A letter was exhibited on the aforesaid affidavit whereby the agreed figures were stated and which figures conform to the consent and the applicant did not controvert that evidence. It therefore follows that since the meeting was after the computation marked as 'pool', in applicants affidavit, it was the meeting that influenced the applicant to consent. The applicant did not tell the court what occurred in that said meeting which could have caused the mistake.

If indeed, therefore, the applicants made a mistake which was unknown to the respondent and was not attributable to the respondent's action to set aside the consent would be going against the accepted position of Law which depends on people being held to their bargain, and if the court was to be influenced by the colossal figure the applicants are losing to show sympathy in the applicant's favour would be venturing on the field of moral philosophy in which the court would find itself in difficult.

The applicant, accordingly, has not shown sufficient reasons why this court should interfere with the consent recorded on 21st May 2004.

The applicant's application dated 22nd July 2004 is dismissed with costs to the respondent.

Dated and delivered this 16th day of July 2004.

MARY KASANGO

JUDGE