



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

Civil Suit 3022 of 1990

VERONICAH MUMBI NGUGI..... PLAINTIFF/APPLICANT

-VERSUS-

JOMO NJOROGE..... DEFENDANT/APPLICANT

WAHOME MUTEROI..... THIRD PARTY

RULING

1. The Application, Background, Prayers and Depositions.

The Defendant/Applicant's Chamber application dated 26th May, 2004 was filed on the same date. It was brought under Order IX Rule 8 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21), Laws of Kenya

re setting out the content of the application, I should like to set out the background, which is to be found in an earlier hearing at which the Defendant was not represented, on 30th April, 2004. The earlier hearing was of the Plaintiff's application by Notice of Motion, dated 5th March, 2004 and brought under Order XXIV rule 6 of the Civil Procedure Rules. The Plaintiff had prayed that judgement on liability be entered as between the Defendant and the Third Party on an equal contributory basis of 50% - 50%. Although there was an affidavit of service, dated 30th April, 2004 and showing that both counsel on record for the Defendant and the Third Party had been served, those parties were not represented at the hearing. Upon a consideration of the application and its grounds as set out on the face of the Notice of Motion, and as detailed in the supporting depositions, and upon hearing the submissions of Mrs. Kambuni who represented the Plaintiff, I ruled as follows:

"In all the circumstances, I consider it right to grant the prayer in the Notice of Motion application of 5th March, 2004 filed on 26th March, 2004. I would make the following Orders:

1. Judgement on liability is hereby entered, on the basis of 50% - 50% proportioning as between the Defendant and the Third Party.
2. The case may now proceed to the stage of assessment of damages.
3. Costs to be in the cause."

Now it is precisely the above Ruling which forms the gravamen of the instant Chamber Summons

application by the Defendant. He is praying for Orders -

(a) that, the Court be pleased to set aside and/or review its orders made on 23rd [sic!] April, 2004 and all the consequential orders arising there from;

(b) That, the Defendant be allowed to defend against the Plaintiff's Notice of Motion dated 5th March, 2004;

(c) that the costs of this application be provided for.

What grounds does the Defendant state? These are as follows:

(i) That, the Notice of Motion dated 5th March, 2004 was heard as a Friday Judge matter in the absence of counsel for the Defendant and was allowed;

(ii) that, the non-attendance of the Defendant or his Advocates to oppose the application was neither intentional nor deliberate;

(iii) that, the Defendant had a good defence on record which raises triable issues;

(iv) That, the Defendant stands to suffer irreparable loss and damage, unless the Orders sought herein are granted;

(v) That, the Defendant had no intention of consenting on liability or quantum and is desirous to have the matter heard and determined by the Court;

(vi) That, the Court has power and discretion to grant the Orders sought.

There are two affidavits in support of the Defendant's application, both sworn and filed on 26th May, 2004. One is by Ms. Jane Nyamuringa Ruigu of Mbigi Njuguna & Co. Advocates, the Advocates having the conduct of this matter on behalf of the Defendant. The other is by Jomo Njoroge, the Defendant himself.

The Defendant deposes that he had visited the offices of his Advocates on 6th May, 2004 and "gave full instructions to my Advocate to defend [against] the application and inform me of the progress later." He states: "the Orders obtained on 23rd April, 2004 are highly prejudicial to my interests as I have a good defence against both the Plaintiff and the Third Party and I do not wish to enter into any consent on both liability and quantum." He refutes the claim that any consent at all had ever been entered into. He states that those alleged to have executed the consent, M/s. Shah & Parekh Advocates, had been acting on the instructions of an insurance company which later repudiated liability against him, before the alleged consent was filed in Court. The deponent says he believes the information from his Advocates, that the consent in question was never filed in Court.

Ms. Jane Nyamuringa Ruigu acknowledges that the Notice of Motion dated 5th March, 2004 had been served upon her firm on 30th March, 2004. But she deposes that the service was received by a clerk who left the employment of her firm almost immediately thereafter and without diarizing the hearing date. She deposes that the relevant file got misplaced, and was only retrieved towards the end of April; and she adds: "it was clearly too late as the said Notice of Motion had already been heard and prayers therein granted." She deposes that her firm had instructions to defend against the Notice of Motion, "and our failure to attend the hearing on the scheduled date or to file a replying affidavit or grounds of opposition was not deliberate.

Counsel for the Plaintiff, on 29th June, 2004 filed grounds of opposition to the Defendant's Chamber Summons, under Order L rule 16 of the Civil Procedure Rules. The grounds are as follows:

- (i) That, the application is misconceived and devoid of merit;
- (ii) that, the application is an abuse of Court process as the Defendant's Counsel had not opposed the Plaintiff's Notice of Motion application of 5th March, 2004;
- (iii) that, the Applicant is guilty of *laches*,
- (iv) That, the Plaintiff will be prejudiced if this old litigation is not brought to a conclusion.

2. Submissions for the Defendant/Applicant

On the basis of the foregoing prayers, the stated grounds and depositions, Ms. L.A. Machio and Mrs. Kambuni came to make their submissions on 14th July, 2004. Ms. Machio began by acknowledging that the Orders against which her client's application had been made, were issued on 30th and not 23rd April, 2004. She sought leave by virtue of Order VIA to make the amendment and, as Mrs. Kambuni raised no objection leave was granted.

Ms. Machio presented the Defendant's case for the setting aside of the Orders of 30th April, 2004 and prayed that the Defendant be allowed to defend against the Plaintiff's Notice of Motion of 5th March, 2004. Counsel presented the evidence contained in the affidavits of Jomo Njoroge and Jane Nyamuringa Ruigu, but did not clarify one curious point which touches on the veracity of the depositions.

Paragraph 4 of the affidavit of Jane Nyamuringa Ruigu reads as follows:

"THAT, to our great misfortune, our file got misplaced and after a desperate search in our registry we managed to trace it *towards the end of April* but it was clearly too late as the said Notice of Motion had already been heard and prayers therein granted."

First, it should be regarded as not true, that *towards the end of April* the Plaintiff's Notice of Motion had "already been heard"; the hearing did take place on the very last day of April, i.e. 30th April, 2004. And on this basis, it cannot also be true that the Defendant could not have put in a response to the said Notice of Motion. Once the depositions, in the two respects, are proved to have been untrue, then the entire account about the file being misplaced, becomes tainted and takes on the colour of gimmick rather than fact. In this context, there would be no justification in counsel not filing replies to the Notice of Motion and its supporting affidavits, especially in the light of the averment that they had clear instructions from the Defendant to defend against the Notice of Motion. On this line of analysis, it must follow that only a feeble case is being made for an opportunity to defend against the Notice of Motion.

3. Submissions for the Plaintiff/Respondent Mrs. Kambuni relied on her grounds of opposition filed on 29th June, 2004 to challenge the submissions made for the Defendant. She also reviewed the affidavits in support of the Defendant's case, observing, and quite convincingly, with respect, that the averment at paragraphs 3 and 4 of Jane Nyamuringa Ruigu's affidavit, that clerical improprieties led to failures of response on behalf of the Defendant, was a bald claim wanting in credibility. She remarked that hardly any particulars were given in respect of the alleged clerical failings: no names, no dates, no efforts to trace the clerk in question. And yet it was urged in paragraph 8 of the same affidavit:

"THAT in the circumstances, I verily believe that mistakes and omissions committed by ourselves as Advocates and our said employee should not be visited upon the Defendant/Applicant."

Mrs. Kambuni submitted, in the premises, that the Defendant's application was lacking in *bona fides*. She submitted that this same conclusion should be drawn from the fact that hardly any particulars had been set out regarding the misplacement of the file: when exactly did it get misplaced? When exactly was it recovered? If it was recovered towards the end of April, why was there no appearance in Court on 30th April 2004? Counsel disputed the contention made for the Defendant, that a setting aside of the Orders of 30th April, 2004 would not prejudice the Plaintiff. On the contrary, Mrs. Kambuni submitted,

considerable prejudice to the Plaintiff would ensue, as the dates 16th and 17th November, 2004 have already been set for formal proof following the making of the Orders of 30th April, 2004.

Mrs. Kambuni submitted that the Defendant had no basis for denying that a consent had already been reached on liability, as between the Defendant and the Third Party. She noted that the Defendant's attempts to amend his Defence had been refused earlier, on 7th November, 2003 in an application before the Deputy Registrar, and the reason for the refusal had been that already a consent between the parties existed. Regarding paragraph 7 of Jomo Njoroge's affidavit, wherein he says that no consent between the parties had been filed in Court, counsel submitted that it was immaterial whether or not the consent had been filed. She contended that the consent should be regarded as an established fact, considering the copious correspondence demonstrating that position, and the fact that the Deputy Registrar had addressed this point and formally recognized the existence of a consent. She noted that this consent had been signed by Mr. K.J. Kinyanjui Advocate for the Plaintiff, M/s. Shah & Parekh Advocates for the Defendant, but M/s Mungai & Gakuru Advocates for the Third Party did not sign. There had been, however, a letter of confirmation from M/s. Mungai & Gakuru Advocates, dated 21st July, 1998. Counsel further noted that M/s. Mungai & Gakuru though served with hearing notice for the Plaintiff's Notice of Motion of 5th March, 2004 did not turn up in court; and that this should lead to the inference that they are not disputing the apportionment of liability as had been arrived at by consent. Counsel remarked that the letter of consent was properly signed and is a valid record of agreement between the parties. Counsel submitted that the significance of the consent letter was not related so much to the fact of its being filed in Court, as to the fact that it settled the position *as between the parties*.

Mrs. Kambuni made a noteworthy submission regarding paragraph 7 of the affidavit of Jomo Njoroge. This paragraph reads:

"THAT I am not aware and have not been aware of the existence of any consent as claimed in the Notice of Motion aforesaid as the alleged executors M/s. Shah & Parekh Advocates were acting on the instructions of my then insurers Kenindia Assurance Company Limited which later repudiated liability against me before the alleged consent was filed in Court."

Counsel for the Plaintiff has submitted that the attempt to disown M/s. Shah & Parekh Advocates will not avail the Defendant, as they had properly acted on behalf of the Defendant in giving approval to the consent on apportioning of liability. It will not be possible to repudiate the consent duly given by M/s. Shah & Parekh Advocates because they were ostensibly performing their proper professional function, and there was no responsibility placed under the law on third parties to know how the Defendant was, in point of fact, communicating with and relating to M/s. Shah & Parekh Advocates. I think counsel's submission in this respect is a convincing one. I, moreover, have my own doubts about the candour of the Defendant's position in this matter. He has laid emphasis on the fact that M/s. Shah & Parekh Advocates were also representing the insurer, "which later repudiated liability against me *before the alleged consent was filed in Court.*" Suppose then that there repudiation had taken place "after the ... consent was filed in Court.", would the Defendant now be ready to acknowledge that, indeed, there was consent? From the overall tenor of his affidavit, I think the Defendant would still be arguing that there was only alleged consent but no true consent. On this basis I must hold that the fact of the consent having been filed or not filed in Court has no materiality; and I am in agreement with counsel for the Plaintiff that the significance of the consent is that it represents a formally-recorded consensual position between the parties. And once I take this position as I have done, I must then specify the implication of such consent. The implication is that, in determining the relationship between the parties, it must be held that there indeed was *consent* on the apportioning of liability. The question of *form*, that the said consent was or was not filed in Court is immaterial. This Court is guided in a proper case by principles of equity; and *equity looks to the intent rather than the form*.

4. Evidence of Consent on Apportionment of Liability Annexed to Lucy Muthoni Kambuni's affidavit of 9th March, 2004 in support of the Plaintiff's Notice of Motion aforesaid, is the following correspondence expressing the consent to a 50% - 50% apportionment of liability as between the Defendant and the Third Party:

(a) a joint letter of counsel written on the letter head of M/s. Shah & Parekh Advocates and dated 23rd November, 1994. This letter, captioned "HCCC No. 3022 of 1990, VERONICAMUMBI NGUGI v. JOMO NJOROGI" is addressed to the Deputy Registrar, High Court of Kenya, and it is duly signed by M/s. K.J. Kinyanjui & Co. Advocates for the Plaintiff and M/s. Shah & Parekh Advocates, on behalf of the Defendant. The content of the letter thus reads:

"We refer to the above matter and shall be obliged if you will kindly record by consent judgement for the Plaintiff against the Defendant liability at 50% and against the Third Party the remaining 50%."

(b) a letter by M/s. Shah & Parekh Advocates dated 16th April, 1999, addressed to M/s. Kambuni & Githae Advocates, and copied to M/s. Mungai Gakuru & Co. Advocates as the Advocates on record of the Third Party. The relevant paragraphs in this letter read as follows:

"Your predecessor had agreed to accept 50% [liability] from us and the remaining 50% from M/s. Mungai & Gakuru's client..."

"Kindly also quantify, keeping in mind that your client's claim is not covered by the contract of insurance, Defendant personally is liable."

(c) a letter from the Advocates for the Third Party, M/s. Mungai & Gakuru Advocates, dated 21st July, 1998 and addressed to M/s. Kambuni & Githae Advocates for the Plaintiff. The relevant part of this letter shows the Third Party's consent; it reads:

"As regards liability, the same has previously been apportioned on a 50:50 basis."

(d) a letter dated 19th October, 1993 from M/s. Shah & Parekh Advocates, addressed to M/s. K.J. Kinyanjui & Co. Advocates and copied to M/s. Mungai & Gakuru Advocates. The relevant portions of this letter thus reads:

"The liability between the Defendant and the Third Party herein has been apportioned in HCCC No. 1908 of 1988 wherein 3rd Party is a second Defendant."

"By copy of this letter we are requesting M/s. Mungai Gakuru & Co. Advocates for the 3rd Party to confirm the position."

From all the correspondence cited above, I think it cannot be doubted that there was a real consent that liability was to be shared between the Defendant and the Third Party, on a 50% - 50% basis. I would not allow the Defendant to resile from this consent, as the alternative would be to sanction duplicity and harmful dilatoriness in the conduct of Court business.

5. The Legal Status of Consent reached by Advocates On the legal status of a consent reached between Advocates, Mrs. Kambuni brought to my attention certain passages in the Court of Appeal case, *Kenya Commercial Bank Ltd. v. Benjoh Amalgamated Ltd. & Another* Civil Appeal No. 276 of 1997. The following passage, at page 8, may be quoted:

"The respondents' case is that they did not instruct Mr. Meenye. We cannot see how he could have intruded into the suit without being asked to do so... The extent of authority of a solicitor to compromise is set out in a passage in *The Supreme Court Practice 1976* (Vol. 2), paragraph 2013, page 620 as follows:

'Authority of Solicitor: *a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction...* No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice...?'"

Counsel urged this principle to safeguard the position of the Advocates, such as M/s. Shah & Parekh Advocates, who had executed a consent.

In her right of reply, Ms. Machio for the Defendant still maintained that there was no proper consent before the Court, as it was not filed in Court and one signature was missing. She also contended that the 50%- 50% apportionment of liability was prejudicial to the Defendant who had a good defence and so ought to be given a chance to be heard.

6. Consent Order on Two Cognate Cases - HCCC No. 3022 of 1990 and HCCC No. 3021 of 1990

At the end of the hearing both counsel agreed that there is pending before this Court another Chamber Summons application dated 26th May, 2004 which is based on similar facts and which is subject to similar grounds of opposition as those filed in relation to the present application. Counsel recorded their consent that the decision in this application, in Civil Case No. 3022 of 1990 shall apply in the same way to the other application which falls under Civil Case No. 3021 of 1990. I will, in this respect, record a *consent Order*, which will be governed by the principle enunciated by the Court of Appeal in *Flora Wasike v. Destimo Wamboko* (1988) 1 KAR 625, P. 626 (per Hancox, JA)

"It is now settled law that a consent judgement or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

I do record this consent Order, subject to a mention and due recording in the Court file for Civil Case No. 3021 of 1990; and the parties shall take a date at the Registry for such a recording of consent.

7. Analysis and Final Orders

What are the merits of the Defendant's application? In spite of certain serious shortcomings which I have analysed, in the Defendant's case, he has maintained that he deserves an opportunity to be heard, because he believes he has a triable Defence. While the triability of pleadings is a fundamental factor in their proceeding to trial, there are certain limiting factors which may stop a set of pleadings *in limine*. One of these is where parties through their counsel are held to have reached a consent on certain lines of disposal of the suit. As already remarked, any such consents acquire the force of contract and, except for good cause, parties will not be allowed to resile therefrom. Contractual undertakings represent sacrosanct undertakings which the judicial process will invariably uphold, and when they have been reached, it is not permissible for a party to depart from the obligations so created, by relying on purely morally-based criteria.

It is quite clear to me that counsel having the conduct of the main suit for the individual parties had reached a consent, to the effect that liability would be borne on a 50% - 50% basis by the Defendant and the Third Party. The Defendant's various pleas now, that he had always wanted to defend against the suit, and that he has a triable Defence, are not at this stage permissible, and it is of no materiality in this respect that the Advocates who executed the consent on his behalf were not entirely to his liking.

Besides, the Defendant has not shown good cause for having failed to appear in Court and to contest the Plaintiff's Notice of Motion of 5th March, 2004 which led to the Orders now being impugned by the Defendant. As I have already shown, the depositions relied on by the Defendant to justify the present application are not in all respects truthful. I must conclude, in these circumstances, that no basis exists for granting the application by Chamber Summons dated 26th May, 2004.

Accordingly I will make the following Orders which, by consent, will apply in both Civil Suit No. 3022 of 1990 and Civil Suit No. 3021 of 1990, subject to a proper record of the same being made in the Court file for Civil Suit No. 3021 of 1990:

1. *The prayer that this Court do set aside and/or review its Orders made on 30th April, 2004 and all consequential Orders arising there from, is refused.*
2. *The prayer that the Defendant be allowed to file and prosecute a defence against the Plaintiff's Notice*

of Motion dated 5th March,2004 is refused.

3. *The Defendant shall bear the costs of this application.*

DATED and DELIVERED at Nairobi this 17th day of September, 2004.

J. B. OJWANG Ag. JUDGE

Coram: Ojwang, Ag. J.,

Court Clerk: Mwangi

For the Defendant/Applicant: Ms. L.A. Machio, instructed by M/s.

Mbigi Njuguna & Co. Advocates

For the Plaintiff/Respondent: Mrs. L.M. Kambuni, instructed by M/s.

Kambuni & Githae Advocates.

Third Party unrepresented.