



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 563 of 1994

JOSHUA KIARIE MWANGI

PLAINTIFF

- V E R S U S -

1. MARTIAS ODOYO

2. AGA KHAN EDUCATION SERVICES

3. SEHEM BIN ABEID

4. ABDULHALIM ATHMAN OMAR DEFENDANTS

R U L I N G

The remaining application in this Motion is prayer numbered 4 in application dated 2.10.2003, namely

“that court be pleased to review and set aside the consent judgment on liability recorded here on 26.9.1997 apportioning liability as to 50% against 1st and 2nd defendants and 50% against 3rd and 4th defendants.”

The application is made by 3rd defendant. The reasons advanced are that the 3rd defendant was not aware of the consent and it was entered into without his consent and there is no decree on record capable of execution. The plaintiff has not complied with Order XX1 rule 18 since the decree is more than one year old. Also it is complained that the insurance company covering the 3rd defendant compromised the suit to the detriment of the applicant. Since then the insurance company, Stallion Insurance Co. Ltd, has entered into liquidation.

In affidavit in support filed on behalf of applicant it is shown that the applicant passed the summons to his insurance company to whom he entrusted with the defence of the suit. It is the insurer who appointed advocate Gikandi to defend the suit. The applicant only came to know the outcome of the suit when auctioneers served him with a proclamation in execution of decree amounting to shs. 374,834/- plus costs. He then learned that his insurer had been wound up. It is at this time he quickly took another lawyer and discovered the true position on record.

I have perused the record. The consent on liability as between the defendants is not disputed. The only reason of complaint is that the liability to pay up now falls upon the applicant since his insurers have

collapsed. The applicant received summons to enter appearance and he handed the same to his insurer with instructions to defend the suit. The insurer appointed an advocate to conduct its defence. It is to be said that the applicant delegated full powers of conducting the suit to this advocate and he cannot now be heard to say instructions to compromise suit was not given.

In the case of Didacus O. Omkola and others –vs- Municipal Council of Mombasa and others HCC. NO. 140 of 1995 on page 11 the court quoting Flora Wasike case at page 11 – a Court of Appeal decision saying:-

1. *“It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example, fraud, mistake or misrepresentation.*
2. *An advocate would have ostensible authority to compromise a suit or consent to judgment so far as the opponent is concerned.*
3. *The court would not readily assume that a judgment recorded By a Judge as being by consent was not so unless it was demonstrably shown otherwise.”*

I have considered the grounds advanced in this case. The recording of the consent is admitted and I am convinced that this is not a case where the consent as to judgment as to liability should be set aside. There is the other grounds put forward that Order 21 CPC was not complied with and that there is no judgment on record. It appears to me that these are not matters of substance to enable the court to set aside the execution. It is not fair to keep the plaintiff from enjoying the fruits of his judgment in the circumstance of the case.

I, therefore, do not find merit in the application, the same is dismissed. The interim stay is hereby discharged. Costs to the respondent.

Dated this 27th October, 2004.

J. KHAMINWA

JUDGE

Mr.Njoroge – I have instructions to apply for proceedings and Ruling. I also apply for stay for 14 days to enable me to file forma application.

Mr. Gichana – I do not object but goods attached continue being attached in situ.

Order granted stays for 14 days ordered.

J. KHAMINWA

JUDGE