



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MISC. CIVIL APPLI. NO. 525 OF 2002

1. AWADH OSHAN
2. SOUD ABDALLA
3. JAMES TOLE
4. MOHAMED ZEIN
5. ALI MBARAK ALI
6. VALENTINE MATSAKI
7. ALYAN MOHAMED
8. RACHEL KAZUNGU
9. SWALEH KHAMIS
10. SULEIMAN S. SUMRA APPLICANTS

- VERSUS -

1. MRS. CATHERINE KASWII NYIHA
2. HUSSEIN SWALEH
3. KHALID HANTOOSH
4. MOHAMED M. HATIMY
5. AL-HAD MUHIDIN RESPONDENTS

RULING

Before the Court is a Notice of Motion brought under the Provisions of Order 9 (b) rules 3 and 8 of the Civil Procedure Rules. It seeks an order to set aside consent orders of the 17th December, 2002. It is brought by the 2nd, 3rd, 4th and 5th Respondents who at the hearing were not present nor was their

Counsel in court.

The basis of the application is that counsel for the applicant Mr. Khatib and the first Respondent who appeared in person should have disclosed that Gikandi & Company were on record for the 2nd, 3rd, 4th and 5th Respondents. The consent order reads as follows:-

“1 By consent, the application be adjourned to enable the Respondent’s file the Replying Affidavit and grounds of opposition.

2. The applicants to have leave to amend the Notice of Motion and statement and enjoin the Registrar of Societies.

3. Pending the hearing of the application, the order of cancellation of the Registration of KFF coast Branch and New Registration of North and South KFF Coast Branches is hereby suspended pending further orders of the Court. Costs be in the cause”

On the 17.12.02 the Application by Motion brought under the Provisions of Section 5 (1) of the Judicature Act, order 52 rules 2 and 3 of the Supreme Court of England Practice Rules, Section 3A, 63 © and (e) of the Civil Procedure Act was for hearing. It sought the following orders:

“1. The Respondents herein be cited for contempt of this Honourable Court and be committed to Civil Jail for a term that the court thinks fit and or that his property to the extent and value that the court thinks fit be attached for defying in flagrant and contemptuous breach of the Courts Order issued on 6 th February, 2002.

2. That the costs of this Application be provided for”

When the matter was called out at 9.45 a.m. there was no appearance of either of the parties or their Counsels and at 9.50 a.m. Mr. Kithi who had been sitting in the Court suddenly shot up to say that he had been instructed to hold brief for Mr. Khatib for the plaintiffs but had not been attentive when matter was called out.

At the same time M/s. Wanyanga a State Counsel appeared and confirmed she had been outside the court holding some discussions with Mr. Khatib and that they had arrived at a consent order. It is the said consent order which has given rise to the current application.

Mr. Gikandi submitted that, the said consent order should be set aside for reasons that he was on record but the other Counsels never disclosed the same to the court and that the consent affected the 2nd, 3rd, 4th and 5th Respondents. He relied on two affidavits in support sworn by himself and a Mr. Nicholas Rono and have deponed that they had been informed by a third party that the matter was not listed. I have confirmed with a copy of the Court’s cause list for the day that the matter was indeed on the said list and Mr. Gikandi’s response was that he had been misled.

On the issue as to the effect the Consent has upon the 2nd, 3rd, 4th and 5th defendants, this has not been disclosed. Mr. Khatib and M/s. Wanyanga strongly objected to the setting aside of the orders on the basis that the consent was only binding as between the plaintiffs and the 1st Respondent. However on close scrutinizing of the said order, I note that the same will have the effect of reversing the existing registration in respect of the 2nd, 3rd, 4th and 5th Respondents and in place registering the applicants as the officials of K.F.F. Coast Branches. The question to consider in my opinion then is whether the 2nd, 3rd, 4th and 5th Respondents were unfairly locked out of his matter.

On record, is a Notice of appointment of Advocates filed by Messrs Gikandi & Company for the 2nd, 3rd, 4th and 5th Respondents. On appointed date of hearing of the application Mr. Gikandi did concede he never attended court due for reason that he relied on a third party to check the daily cause list for him and the said party did not see the matter on the list. Can the court in prevailing circumstances set aside a consent order? Circumstances under which this can be done were set out in the case of FLORA

WASIKE –VSDESTIMO WAMBOKA (1982-1988) K.A.R. 625 where it was said that a consent judgement or order has a contractual effect. This being so, a contract can only be set aside on grounds of fraud, mistake, or more presentation. In this present case, Mr. Gikandi has not shown that the conduct of Counsels were either fraudulent, mistaken or misrepresented. The Court record is clear that Mr. Gikandi was on record as representing the said respondents but no available in court at the material time. In the circumstances, the application must fail with costs. However, to ensure the parties do not go to sleep after the said order, I direct that the Notice of Motion dated 25.11.02 be set down for hearing within 2 months.

Dated and Delivered at Mombasa this 13th day of March, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE