REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 97 OF 1994

HASSAN SALIM AHMED NAUHY ….…… PLAINTIFF

VERSUS

ATHUMAN DADI SUWEDI ……..…….. DEFENDANT

RULING

Notice of Motion dated 5th July 2003 (?) and filed into the court on 21st January 2003 is seeking mainly one order which is in itself composite. That is an order that the order of 11th April 2002 requiring trial herein to commence de novo be set aside. It is also seeking an order for costs. The reasons given for seeking the same order are that the same order which was a consent order was recorded in error occasioned by a genuine misunderstanding of the instructions left to counsel holding brief for the applicant's counsel; that the said order is erroneous and would occasion undue waste of court's time and/or duplication of effort and that the applicant is aggrieved by the said order which may well occasion him prejudice. The application is supported by an affidavit and annextures to the same affidavit.

The Respondent opposed the application and filed a Replying Affidavit in which the counsel for the Respondent maintained that the consent order now set to be either reviewed and or set aside was properly entered and there were no mistakes at all in entering the same orders.

I have considered the application, the Affidavits, the annextures and the submissions by both learned counsels. In my humble opinion there are a number of factors that militate against the success of this application.

First the application is in itself confused. As I have stated the order it is seeking is composite and one is not certain as to which one it is really seeking. Is it seeking review and setting aside of the offending consent order or is it seeking setting setting aside the same order? One is not certain and as the parties have been heard, one will never know. It has been said time and again that an application must seek specific order and what it is seeking must be clear to avoid courts issuing orders that are not sought or that are ambiguous.

Secondly Order 44 Rules 1 and 2 under which this application is brought states clearly that such an application for review must be brought "without unreasonable delay." In this case the consent order sought to be reviewed was entered into and recorded on 11th April 2002. This application was dated 5th July 2003 according to the writings in the application, but even if I take that to be a mistake and accept that it was dated 5th July 2002, still there was a delay of over three months. That is clearly inordinate delay considering the nature of the application. Even worse, having been dated 5th July 2002, why was it not filed till 21.1.2003 - over nine months later. If I still accept as mistake the date 5.7.2002 and accept that probably it was 5.1.2003, still it was field exactly nine months later. So that looking as it in any way there was inordinate delay in bringing this application.

Thirdly, there is no extracted and certified order sought to be reviewed annexed. It is now trite law that the court can only be reviewing an order in cases of applications or a decree in cases of judgments. Such an order must be extracted and annexed to the application or at least must be in the record. In this matter I was referred to none and none does exist. Order 44 Rules 1(a) is clear that a party can only be aggrieved by an order or a decree and it is that order or decree as the case may be that he can seek to review. That order or decree must exist. If it is not as yet extracted or if already extracted, it is not annexed to the application or court's attention drawn to it then the court has no jurisdiction to review a non existent order or decree as the case may be. That is the position here.

Lastly, the applicant is alleging that his advocates instructions to Mr. Okongo who held their brief was misunderstood by Mr. Okongo and he entered a wrong order by consent. Surely such an issue cannot be conclusively decided without the in put of the same Mr. Okongo. He has not sworn any affidavit to confirm that he made a mistake. Note annexed as Exh. C is of no help to the court as it is indeed no more than hearsay and would not pass the test of Order 18 Rule 3 of the Civil Procedure Rules. One has to appreciate that the law requires that in order to set aside a consent order or judgment, there must exist such evidence as would vitiate a contract, i.e. the standard is very high and mere allegations will not do. One has again to appreciate that this application is brought so late in the day that one may very well be tempted to believe that the stories could be made up stories for if they existed at that time when letter dated 12th April 2002 was written to Deputy Registrar by Applicant then why did he not take this matter up on the spot. What I mean is that delay has some effect on whether or not a story of this nature would be believed without Mr. Okongo's affidavit on the matter. In my humble opinion I attach not much importance to seeking typing of proceedings at that can also be done for purposes of retaining the same for quick memory and not mainly for purposes of continuance of the hearing.

Mr. Mwakisha says, the plaintiff may have forgotten his evidence on account of time and this case is old. True the case is old and need to be disposed of urgently, but who is delaying it? In my mind, the applicant who instead of going to the Registry on 12th April 2002 or immediately thereafter to take a hearing date, delays until July 2002 only to file such an application as this one which has now taken upto March 2003 to be heard is the culprit. If he had fixed this case in April 2002, it could have probably been heard in latest August 2002 and we would now have either finalised it or been close to finalising it. As to the question of memory loss over time, Mr. Mwakisha should not forget that only PW.1 gave evidence. All other witnesses including the Defendant's witnesses have not given evidence. Will they not suffer the same fate?

Further, I have not been told what prejudice the applicant will suffer if consent order is not reviewed. He is not dead. He is not away from the jurisdiction so that coming back will be expensive. He is not claiming that any exhibit is lost. What prejudice will he suffer. None.

Before I conclude, I think there is a trend which must be discouraged and that isthe trend of filing frivolous applications of this nature which end up in nothing but delay of the case and increase of costs to the actual parties. Advocates have a duty to advise their clients against such applications. They also have a duty to ensure that their clients get justice at the lowest cost available and within minimum time available and not to accept such instructions as would clearly inflate costs for their clients and waste time both of the courts and of the parties as has happened here. This application has no merit. It is dismissed with costs to the respondent. Let an action be taken to fix this case for hearing. Orders accordingly.

Dated and delivered this 12th Day of March, 2003.

J.W. ONYANGO OTIENO

JUDGE