



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CAUSE NO 4 OF 2009

IN THE MATTER OF: COAST CLAY WORKS LTD

AND

IN THE MATTER OF: THE COMPANIES ACT, CAP 486

AND

IN THE MATTER OF: AN APPLICATION BY GOSRANI HOLDINGS

LIMITED AND ARVIND VELJI SHAH FOR THE APPOINTMENT OF

AN INSPECTOR UNDER SECTION 165 OF THE COMPANIES ACT

RULING

History and outline of facts

1. On the 27th September 2005, Coast Clayworks limited, henceforth called **the company**, was incorporated with **the applicant**, Gosrani Holdings Ltd, one Mr. Arvind Velji Shah and Zaverchand Sojpal Jetha Holdings Ltd as the only contributories.

2. It would appear that there then emerged differences between the directors leading to a multiplicity of litigation over the affairs, assets and management of the company and others with shared shareholding. The consequences of such corporate differences was the institution of some seven suits. All the seven suits were on the 26th July 2012 ordered to be consolidated. The overriding term of the consolidation order was that HCC No. 9 of 2011 would be prosecuted and that all the other six suits would be held in abeyance to await the hearing and outcome of the suit no. 9 of 2011. It was equally ordered that parties be at liberty to amend their respective pleadings which order was complied with. The amendment by the defendant introduces a counter-claim which prayed that this suit be allowed as prayed. Pursuant to the said consolidation order that suit was heard and a judgment dated 22. 12.2017 delivered. In that judgment, the court specifically granted an order for audit of the books of the company. It is now agreed by both sides that that judgment has attracted appeals from both parties which are yet to be determined by the court of Appeal.

3. In its endeavour to deal with backlog, the high court in Mombasa arranged service weeks during the month of September and some six judges were deployed by the Chief Justice to help with the task of backlog clearance. This matter was one of the cases that were listed during the period and was listed before Olga Sewe j on 4th September 2018. It is apparent parties were duly served with a Notice to Show Cause Why the Matter Could Not Be Dismissed because the record reveal that both parties were represented by counsel. The two counsel submitted to court that the matter was settled by the judgment in HCC no. 9 of 2011 and prevailed upon the judge to mark it as so settled which request the judge acceded to and made the following order:-

“in the foregoing premises , this matter is hereby marked settled and the file closed”

4. It is that order that has provoked the application the court is called upon to determine.

The application

5. On the 11.10 2018, the applicant filed the Notice Of Motion dated 10.10.2018 and prayed in the main that the *orders of 4.9.2018 be reviewed and set aside in their entirety as a matter of right*. the application is expressed to be brought pursuant to the provisions on the overriding objectives of the court, the inherent powers of the court, section 99 on the power of the court to correct errors and order 45 Rule 1

providing for review.

6. The reasons advance to ground the application are that this suit and its prayers were actively litigated and determined in HCC No. 9 of 2011 and therefore was not ripe for listing for dismissal for want of prosecution; that both parties were dissatisfied with the judgment of the court and have each filed an appeal hence the matter cannot be deemed to have been fully settled and that the same order was extracted *ex parte* and used in the court of appeal to the detriment of the applicant in an application for stay. It is also contended that there is a pending application for contempt of court pending in the file and to let the orders of 4.9.2018 to stand would be to leave that application unheard. To bring the application within the ambit of review it was asserted that there was a mistake and error on both the court and Miss Muyaa who gave instructions to Mr Adhoch in failing to appreciate the relation between this file and HCC 9 of 2011. In summary the applicant maintains that the impugned order have the potential to embarrass this court and the court of appeal in justly determining pending litigation between the parties. Those grounds were reiterated in the affidavit Kinyua Kamundi which in addition exhibited the order for consolidation, counter-claim incorporating the prayers in this suit in HCCC 9 of 2011, agreed issues in the decided suit, notices of appeal by both parties, an order of stay in the court of appeal, the decree extracted by both parties, memorandum of appeal and record of appeal filed in the court of appeal and the part of the proceedings in HCC 9 of 2011.

7. The respondent opposed the application on the foot of the statement of grounds of opposition dated and filed in court on 17.10.2018. the thrust of that opposition was that:- there was no urgency demonstrated; this court had taken a position in the matter as to whether the court had become *functus officio* hence justice would not be done or seen to be done if the same judge heard the matter; there is no mistake or error or sufficient ground demonstrated as the order of 4.9.2018 reflects the accurate position of the proceedings in the file that the matter is indeed settled; the order having been by consent cannot be reviewed; there is no evidence that Mr. Adhoch advocate was given contrary instruction or that he committed any error because neither Mr. Adhoch nor Miss Muyaa sworn any affidavit on what they intended to tell the court.

8. Having studied the application and the materials offered in opposition, I do consider the application as seeking from court an order that the proceedings in this file be opened for it to pursue the pending application for contempt and also to secure its arguments in the court of appeal. Having invoked the inherent powers as well the overriding objectives of the court, the application calls for review and appreciation in a wider perspective over and above the established principles for review. I consider the application to be asking the court that the order made on the 4.9.2018 has the effect of curtailing its right to effectively pursue its rights in court on the basis that the court has been led to mark a matter settled when the terms of such settlement have not been revealed and when in fact the judgment said to have settled the matter is itself actively and vigorously challenged on appeal. The only issue for determination is whether it is in the interests of justice to review the consent order or to leave it undisturbed.

9. I have had the chance to read my judgment in HCC 9 of 2011 and the various orders issues in that file furthering the order for consolidation and it is to me plain that this matter was kept in abeyance to await the determination of HCC 9 of 2011. The neater and proper way the court and parties to have secured the observance of that order in all the files the order affected was to have it endorsed in each of such files. It is evident that was not done hence it was not easily possible for the court and even counsel who had no history and facts to establish that the matter was hibernating courtesy of a court order and to what extent the judgment in HCC 9 of 2011 affected the pendency of this suit. In those circumstances a fertile ground was prepared for mistakes to be made and errors committed. That mistake must be attributed to both the court staff and the advocates on record when the consolidation was made. I am thus persuaded and convinced that the order of 4.9.2018 was made pursuant to an error of appreciation of the historical facts attendant to the litigation between the parties and that it has the potential of not only shielding an application for contempt from being heard but also makes it impossible for the judgment in HCC 9 of 2011 from being enforced, if it shall be upheld on appeal, as far as it concerns the dispute initially pleaded in this matter. I have in mind the portions of judgment captured as rendition of the judgment on the counter-claim numbered (f) and (g).

10. That being my finding on the effect of the order, I do consider it not capable of serving and meeting the ends of justice and for that reason it cannot be left to stand but ought to be reviewed and set aside.

11. Before I conclude, there are issues raised by the respondent that deserve my comment. The first issue is that this matter ought not to have been heard and determined by me because I had not dealt with this particular file and on the flip side that this court had taken a position in its ruling of 20.7.2018 hence justice may not be done by the same court. That may as well be a good and legitimate concern which this court fully appreciated when on 18.10.2018 it ordered that the file be placed before judge Sewe who was expected to serve Mombasa between the periods of 10th to 20th December 2018. However, it turned out that the judge was committed in her station and did not come to Mombasa and the file was thus listed before me. Would that still be prejudicial to the respondents? I think not because of two reasons. The ruling in which I am said to have taken a position has not been challenged to my mind and when parties appeared before me for the hearing of the application no reservations were made to court

12. It was also contended that there is no error or mistake demonstrated to justify review of a consent order. The answer to that question is to be found in my decision to review. I may only wish to add that mistake and error, particularly an error that stares at the court, is one of the most obvious grounds for review. To this court it matters not that the order was out of consensus provided it has been demonstrated to me that not all fact were availed to court. I do find that failure by court to endorse orders made in HCC 9 of 2011 which affected this file and failure by counsel to fully appreciate the facts and relay same to court is a matter that vitiates the order made pursuant to such mistake. When viewed from the prerequisites of review as a remedy, I do find it a sufficient reason.

13. The upshot is that the application is allowed, the orders of 4.9.2018 are hereby reviewed and set aside and the matter reinstated to be handled as the parties shall appropriately move the court.

14. On costs, even though the applicant has succeeded, I take the view that its counsel set the ball rolling towards the order being made and it cannot benefit from the inevitable consequences of its actions. It is not enough that Mr. Karina should have told the court otherwise. Mr Adhoch as an officer of the court had a brief to hold which mandate he discharged. I therefore order that each party shall bear own costs.

Dated, signed and delivered at Mombasa this 21st day of January 2019.

P J O OTIENO

JUDGE