



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 19 OF 2013

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

REGINAULD NGALA.....DEFENDANT/APPLICANT

CORAM: Hon. Justice R. Nyakundi

Githinji & Associates for the applicant

Munyao, Muthama & Kashindi Advocates for the respondent

RULING

Before me is a notice of motion dated 18.10.2018 filed in court on 19.10.2018 under Section 1A, 1B and 3A of the Civil Procedure Act, Section 9 (a), 22 (22), 40 and 51 rule 4 of the Civil Procedure Rules 2010 for orders.

- 1. That at the hearing thereof the applicant prays for summons as against the managing partner M/s. Sewe Habil & Co. Advocates to appear in court for cross-examination.***
- 2. That this Honorable court do set aside the consent Judgment herein as entered on the 16th October 2017.***
- 3. That this Honorable court be pleased to issue any further and appropriate orders as the court may deem just and expedite.***
- 4. That costs of this application be provided for.***

The notice of motion is hereby supported by an affidavit of **Reginauld Ngala**. The applicant avers that the purported consent is a fraud because the suit was still at the pretrial stage and discovery between the parties. That the amicable settlement was to be grounded upon the respondent bank supplying better particulars of the debt due and owing. The applicant further deposes that sometimes on 21.11.2016 he had a disagreement with his counsel and in accordance with the Law, he made an application to withdraw instructions. That since the withdrawal no such instructions have been issued to **Ms. Sewe Habil & Co. Advocates**.

Besides his own affidavit, the applicant annexed further affidavits sworn by legal counsel **Mr. Michira** who deponed that at one time or another during the pendency of this proceedings he acted for the applicant.

The gist of **Mr. Michira's** affidavit dated 21.11.2016 is to the effect that several discussions were held to mediate the dispute out of court to have an amicable settlement reached on the claim.

According to **Mr. Michira**, despite several attempts made to negotiate the claim at the end of it there was no settlement. It was averred by **Mr. Michira** that faced with that scenario he ceased acting for the applicant for lack of further instruction.

The applicant further annexed an affidavit sworn by **Ms. Rutttoh Advocate** dated 16.10.2018 with regard to the nature of instructions she received on the 16.10.2017 from the firm of **Ms. Sewe Habil & Company Advocates** to record a consent Judgment on behalf of the applicant in favor of the respondent bank.

In her affidavit, legal counsel states that the instructions apparently came through a clerk working with the aforesaid law firm. The applicant relying on these two affidavits, by **Mr. Michira** and **Ms. Rutttoh** contended that the consent Judgment was entered in error and

misrepresentation of material facts.

In reply the respondent filed grounds of opposition dated 15.10.2019. The central issue raised by the respondent is that the applicant has not satisfied the criteria or threshold for setting aside of the consent Judgment dated 16.10.2017.

Further to the affidavit evidence, both counsels agreed to put in brief written submissions. What **Mr. Githinji** arguments and submissions turned on eventually as regards the impugned consent order as set out in the affidavit by the applicant is that **Ms. Habil Sewe** counsel did not have instructions to enter into any negotiations on the claim which resulted into the consent Judgment of 16.10.2017.

On behalf of the respondents **Mr. Omondi** argued and submitted that its evident from the record that the applicant had retained **Ms. Habil Sewe** as his counsel to represent him in the dispute between him and the respondent bank.

Learned counsel also urged the court to take judicial notice that during the entry and adoption of the consent Judgment settling the entire suit **Ms. Habil Sewe** instructed counsel **Ms. Ruttoh** to hold his brief with instructions to record a consent to that effect.

Mr. Omondi, further contended that there is no evidence from the surrounding circumstances that **Ms. Habil Sewe** did not send his clerk to request any advocate in court to hold brief for purposes of recording a consent.

In considering whether the consent was valid in the sense portrayed by the applicant affidavit and submissions, counsel cited the following authorities **Board of Trustees National Security Fund v Michael Mwalo [2015] eKLR, SMN v ZMS & 3 Others [2017] eKLR**

Analysis

Bearing in mind the authorities that I have been referred to by counsel and the relevant facts the test to apply is whether the impugned consent Judgment is voidable for reason of fraud, collusion, mistake, misrepresentation or for any other reason which would enable the court to set it aside the consent to meet the ends of justice.

In re-appraising the affidavit evidence the application raises triable issue basically that the consent Judgment was entered in error since the applicant did not, participate in its formulation. The affidavit of **Reginauld Ngala** shows that he was actually not aware of the existence of the consent Judgment and the entire settlement of the dispute with the respondent bank.

Having considered the application and the affidavits together with submissions by both counsels, it is my observation that the applicant's contention is hinged on lack of instructions by his counsel **Habil Sewe** to enter into negotiations with the respondent bank so as to record a consent on the claim.

When this averment is considered in regard to the frontiers of Article 50 of the constitution on right to be heard and due process, it is clear that any fault or blunder or omission of counsel should be construed as a violation of the right to a fair hearing. The importance and inviolability of the consent order or Judgment is a perfect jurisdictional issue in this claim.

It is trite Law as opined by the court in **Makere University v St Mark Education Institute Ltd & others [1994] KALR 26** that:

“where certain facts are sworn in an affidavit, the burden to deny them is on the other party and if he does not do so, they are presumed be accepted as prima facie evidence in the matter.”

From the foregoing, it is quite clear that at the heart of the impugned consent Judgment is the validity of the instructions issued to legal counsel **Mr. Habil Sewe** acting for the applicant. This is more fundamental given the circumstances of this case that **Mr. Habil Sewe** did not personally attend the proceedings of 16.10.2017 whose outcome is the disputed consent order by the applicant.

I am persuaded that this court cannot review or affirm the aforesaid consent Judgment without the benefit of evidence from Legal counsel **Mr. Habil Sewe** who was constitutionally retained under Article 50 2 (G) by the applicant to act on his behalf in the present suit.

Having found so, I am compelled to rule that the applicant's prayer No. 3 for summons to issue against **Mr. Habil Sewe** an advocate of the High Court for purposes of cross-examination. That upon admitting such evidence the court be at liberty to conclusively determine the validity of the consent order on a priority basis and not later than 17.12.2019.

As of now, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF DECEMBER, 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Aoko for Omondi for plaintiff/respondent