

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 352 OF 2014

BRITISH AMERICAN ASSET MANAGERS LIMITED.....PLAINTIFF

VERSUS

ELIZABETH NAILANTEI NKUKUU.....1ST DEFENDANT

SHIV ARORA2ND DEFENDANT

ACORN GROUP LIMITED.....3RD DEFENDANT

RULING

This is an application by the 1st and 2nd defendants dated 17th and filed on 19th January, 2017 for the substantive order that this court corrects the error from the order extracted by the plaintiff on 23rd October, 2015. The reasons are set out on the face on the application alongside an affidavit sworn by the 1st defendant. The application is opposed by the plaintiff.

The plaintiff had filed this suit on 28th October, 2014 alongside other suits namely HCCC No. 352 OF 2014, HCCC No. 354 OF 2014, HCCCC no. 361 of 2014 and HCCC No. 362 of 2014.

The plaintiff subsequently moved to withdraw all the suits including the present one and recorded consent orders thereunder. It is the position of the 1st and 2nd defendants that there is an apparent error in the order extracted in this suit that is HCCC No. 352 of 2014 and in particular paragraph 1(ii) which refers to the 1st defendant instead of the 3rd defendant. That paragraph reads as follows,

“The properties acquired through the monies transferred from the plaintiffs have been retransferred to the plaintiff by the 1st defendant.”

The application now seeks to substitute the 1st defendant for the 3rd defendant for the reason that, it was the 3rd defendant which was charged with fulfilling the obligation with respect to properties acquired through the monies belonging to the plaintiff. It is submitted that the 1st defendant was never a party to the consent signed and further, in the other civil suits no obligation was imposed on the 1st defendant.

Parties have made oral submission in addition to written submission on record and cited some authorities. I have considered the material placed before me and related the same to the pleadings resting with the consent orders referred to. It has not been demonstrated by the plaintiff what prejudice could be visited upon it if the order sought is granted. It has been demonstrated by reference to the record itself that, at no time did Mr. Amoko who is on record for the 1st and 2nd defendants commit himself to the consent as set out.

The consent endorsed in HCCC No. 353 of 2014 which may be termed as the holding file, is instructive. Counsel for the plaintiff clearly stated that the plaintiff's claim had been compromised on the basis of restrictions effected by the 3rd defendant. The 1st and 2nd defendants were not party to any consent because that was between the plaintiff and the 3rd defendant. The formal order as extracted was not consistent with the settlement as regards paragraph 2. It is clear therefore that there is an apparent error on the face of the record.

A party may not be bound by an order in which they were not party to and therefore, when the totality of the facts is interrogated the order sought by the defendants should succeed.

Having looked at the authorities cited alongside the submissions by counsel, I am persuaded that the order sought should be allowed. Accordingly, the application by the 1st and 2nd defendants is allowed in terms of prayer No. 2 thereof. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 7th day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE