



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC. CIVIL APPLICATION NO. 38 OF 2016

P. MBOGO KARANJA.....1ST APPLICANT

SIMON N. KIRUGURA.....2ND APPLICANT

NJURA NJERU.....3RD APPLICANT

VERSUS

JOSEPH KARIUKI NJOKA.....RESPONDENT

RULING

1. The applicant in this application dated 16/03/2016 seeks for orders that this court be pleased to review and or set aside the orders of the learned magistrate Mr. S. K. Mutai made on 1/03/2016.
2. The grounds in support are contained in the face of the application and in the replying affidavit of Simon Njiru Kirugura sworn on 16/03/2016. It is stated that the three applicants were officials of a Constituency Development Fund (CDF) committee in charge of a project known as Mufu/Rukuriri Water Project. The respondent was allocated a tender to do the works on the water project but was not fully paid. He filed a suit Embu CMCC No. 53 of 2007 for breach of contract.
3. A consent for partial settlement was recorded by the parties to pay the respondent Kshs.214,228/=. The applicants were still officials in the CDF office at the time the consent was recorded but vacated in August 2008.
4. The counsel for the applicants pursued the issue of settlement of the decree but passed on before the court gave directions on whether the applicants in their individual capacities or the CDF office was to pay the decretal amount.
5. It is argued that since the project was one for the government, the applicants who have been served with notice to show cause are not liable to pay the debt. This is the basis of the orders sought in this application.
6. The application was opposed by the respondent. He deponed in his replying affidavit that the applicants have never been officials of the CDF Runyenjes but were officials of the project known as Mufu/Rukuriri Water Project registered with the Ministry of Social Services to initiate projects on behalf of the public by soliciting funds from donors.
7. The said project was later disbanded due to the mismanagement of the applicants. There is a consent judgment between the parties and the applicants have an obligation to settle the amount of Kshs.214,228/= which was retention funds being 10% of the cost.

8. The facts leading to this application are that the Senior Resident Magistrate Mr. S. K. Mutai on 14/04/2016, in CMCC No. 53 of 2007 ordered that the applicants pay Shs.30,000/= to the respondent. Although it is not indicated in the supporting affidavit, it appears that the payment was part of the partial settlement of Shs.214,228/= arising from the consent judgment.

9. The applicants for a reason not known to the court did not annex the proceedings of the learned magistrate which would have shed more light in this application. The applicants now seeks for review or setting aside of the orders made in CMCC No. 53 of 2007 on 1/03/2016.

10. It is not in dispute that consent judgment was recorded by the parties for partial settlement of Shs.214,228/=. The applicants had been sued in their personal capacities and entered into the consent orders in the same capacity. The judgment is still in force and has not been overturned.

11. There is no evidence of any pending appeal or any application pending before the court in CMCC No. 53 of 2007 to set aside the consent orders.

12. This is a matter where the applicants are represented by a counsel. The law is very clear on where applications for review should be made. Order 45 Rule 1 states that such applications shall be made to the court which passed the decree or made the order without reasonable delay.

13. It is surprising that the applicants came to the wrong court for they may have received wrong advice. Review should have been sought in the magistrate's court. The applicants must exhaust all the remedies available before going to the superior court.

14. This application is not properly before the court and is therefore incompetent.

15. I dismiss it with costs to the respondent.

DATED, DELIVERED AND SIGNED THIS 8TH DAY OF FEBRUARY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Andande for Applicants

Applicants present