



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 756 of 2008

FREDRICK NJORA MWANGI.....PLAINTIFF

VERSUS

NEW KIONA LTD.....1ST DEFENDANT

THIONG'O KIUNGA2ND DEFENDANT

RULING

1. The plaintiff filed this suit on 17th December 2008 seeking for a temporary and mandatory order of injunction against the defendants from holding any meeting of **New Kiona Ltd** until the plaintiff shares in the company were resolved. Simultaneously with the filing of the plaint, the plaintiff filed a chamber summons dated 17th December 2008 seeking for the same orders as well as another additional order for the accounts of the 1st defendant be provided. On 14th January 2009 the advocates for the plaintiff and respondents filed the following consent order in the following terms:-

“(1) that the plaintiffs’/applicants application dated 17th December 2008 be and is hereby allowed in terms of prayer w number three.

(2) That the disputed shareholding Mr. Mwangi Kimanga (deceased) be determined through an arbitral process.

(3) That Mr. Allan Gichuhi do conduct the arbitration and publish the award within 21 days from the 19th January 2009.

2. On 29th May 2009, the defendants filed a notice of motion which is brought under the provisions of **Order XLIV r.1 of the Civil Procedure Rules** seeking for orders that the order made on 28th January 2009 be reviewed or set aside and the application dated 17th December 2008 be heard on merit. This application is based on the grounds that when the defendants advocates Messrs E.K. Njagi recorded the consent order, they did so without instructions. Secondly there is also an error on the face of the record because the order made to refer the matter for arbitration was final.
3. The application is further supported by affidavit of **Thiongo Kiunga** and Lucy **Waithera Mwangi**. It is contended that the deponent did not give instructions to Mr. Njagi. Moreover, it is alleged that Mr. Njagi advised the 2nd defendant that the Chief Justice had ordered the matter to proceed for arbitration before Mr. Allan Gichuhi and requested for Ksh.250,000/- towards the arbitration fees. Counsel for the defendant further argued that the consent was obtained through misrepresentation of facts because the defendants were misled by Mr. Njagi that it was an order made by the Chief Justice.

4. This file was never placed before the Chief Justice and the name of the Chief Justice was invoked so that the defendants could not exercise their choice on whether or not to agree for the matter to go for arbitration. Moreover, the arbitration was to be done within 21 days and the days lapsed before the arbitration started. The parties did not obtain leave of the court to extend the period, thus the whole arbitration was a nullity. There were other issues raised in the application which were not referred to the arbitrator.
5. Counsel cited the case of **Mairi v Ngonyoro “B” & another (1986) KLR** where the Court of Appeal held that:-

“1. The term “any matter in difference between he parties to a suit” in rule 1 of Order XLV of the Civil Procedure Rules refers to all disputed matters in the pleadings. Therefore, an application to the court for an order of reference and the order of reference to arbitration should encompass all the matters in dispute and not only issues stated by the consent order.

2. To restrict a reference to arbitration by selecting a number of issues and thereby omitting or running the risk of omitting some matters in difference amounts to non-compliance with rule 3(1) of order XLV.

3. After a reference to arbitration by an order of the court, the court could not hear the matter or any part thereof during the currency or pendency or arbitration.”

Finally, counsel for the defendant argued that the issues raised in the plaint which touch on fraud and illegality on the party of the defendant cannot be arbitrated upon. There is also a claim that affects a third party who needs to be enjoined in these proceedings. He urged the court to grant the orders sought.

6. This application was opposed by the plaintiff; counsel relied on the replying affidavit sworn by the plaintiff on 2nd December 2009. It was submitted that the plaintiff came to court to stop a scheduled AGM which was called by the 2nd defendant. The defendants were represented by Messrs E.K. Njagi who deemed it fit to enter a consent order on behalf of his clients. The advocate must have had full instructions of the defendants as he represented them when the consent order dated 28th January 2009 was recorded.
7. It was further argued that it was counsel for the defendants who went ahead to suggest the name of Mr. Allan Gichuhi. Counsel for the plaintiff urged the court to find that there were no new matters to warrant the review. There was also no misrepresentation by the letter dated 8th March 2009. It was merely referring to a court order but due to a typing error, it read an order by Chief Justice. If there was fraud, the defendants sat on their rights because this application was filed on 29th May 2009, but was not served upon the plaintiff until 19th November 2009 which clearly shows there was inordinate delay in bringing this application which is a mere afterthought.
8. The applicants are in occupation of the suit premises and it is in their best interest to prolong these proceedings. The order to refer the matter for arbitration was duly sanctioned by the court when the consent order was adopted and made the order of the court. The only remedy for the applicant is to challenge the award. This is not an appropriate application for review.
9. This application seeks for review of a consent order entered into by the advocates for both parties. The Court of Appeal in the case of **Flora Wasika vs. Destimo Wamboko Civil Appeal No. 81 of 1984: (1982-88) I KAR 625 held that:**

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.
10. In this case it is alleged that the consent order was obtained through misrepresentation because counsel for the plaintiff purportedly wrote a letter to the defendants former counsel misrepresenting that there was an order made by the Chief Justice directing the matter to be referred for arbitration by Mr. Allan Gichuhi. This letter is dated 8th March 2009. However the consent order was made earlier on 14th January 2009 and it was issued by the courts on 15th January 2009 when the record shows it was entered in the

court records. A closer reading of the letter written by the plaintiffs advocate dated 8th March 2009 refers to the Chief Justice. It is argued by counsel for the plaintiff that the reference to the Chief Justice was a typing error, which may or may not have been a mistake. What is clear is that the consent order had been entered into earlier and had already been made an order of the court. Therefore it cannot be said that the consent order which had already been recorded was influenced by the provisions of this letter which erroneously invoked the name of the Chief Justice.

11. In this case the defendants chose their lawyer Mr. E.K. Njagi to represent them in this matter. A counsel who is appointed by a party is deemed to have full authority to represent his client and if there is misrepresentation the client can only pursue the counsel for professional negligent and damages. The other party cannot be held responsible for actions taken and be permitted to suffer prejudice because counsel acted without instructions, the other party cannot take charge of the running of the other advocates law firm.
12. I find no error on the face of this order and no new matters which were not within the knowledge of the defendants when the consent order was entered into have been disclosed. The matters which were referred for arbitration were specifically spelt out in the order. Regarding the contention that there are other parties to be joined and other issues raised in the plaint which are not adjudicated such as issues of fraud and illegality. I can only say those issues were raised by the plaintiff and when the consent was recorded he must have compromised them if the defendants want to pursue other matters, they are at liberty to file a counter claim to bring out any other matters because the suit is still pending and has not been determined. What is determined is what is contained in the consent order.
13. The upshot of the above analysis is that the application is lacking merit and it is hereby dismissed with costs to the respondents.

RULING READ AND SIGNED ON 1ST MARCH 2010 AT NAIROBI.

M.K. KOOME
JUDGE