



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

Civil Case 1219 of 1992

BENJOH AMALGAMATED LTD. & ANOTHER..... PLAINTIFFS

VERSUS

KENYA COMMERCIAL BANK LTD..... DEFENDANT

RULING

I have been assigned for the month of June 1999, to hear Civil Appeal cases. This is not my file but had been dealt with by Hon. Justice Githinji.

Hon. Justice Githinji has been assigned running down cases for the month of June 1999. I am made to understand by the Duty Judge that I am also to hear application that do not concern appeal cases.

The application listed before me is dated the 23rd of December, 1997 and filed on the 24th December 1997 seeking for orders that:-

"(1) The Plaintiff/applicant be allowed a further amendment of their Plaint filed in the court on the 14th of November, 1997.

(2) The costs of this application be in the cause.

(3) Such other relief or relief's as this Honourable Court may deem just and expedient to grant.

The respondent, defendant then raise a Preliminary Objection before the hearing of that application was heard, it is the Preliminary Objection which is the subject of this Ruling. Advocate for the defendant, Mr. Ougo stated that the parties had entered into a CONSENT JUDGMENT

The said counsel "inter alia" stated that the "suit [was] marked as settled on the following terms.....".

The Plaintiff/applicant then filed a suit Hccc No.285/93 where they sort for an injunction identical to the current suit. There were points of Law raised by the defendants as to res judicata. The said court agreed and dismissed the application.

Five years later the parties appeared before Hon. Justice Githinji who then set aside the court orders of the 4th of May 1992 that had been recorded before him.

The defendant appealed to the Court of Appeal in case number 276/97.

The Court of Appeal reinstated the consent order stating that the Hon. Judge could not set aside the consent order. They then dismissed the application to review and or set aside the consent order.

Meanwhile, as the appeal to the Court of Appeal took time, the defendant was forced to file a Memorandum of Appearance and Defence on 2.12.97

The Plaintiff then filed the application dated 23.12.97 and filed on the 24.12.97 fixed for hearing on the 10.6.99 when the Preliminary Objection was then raised by the advocate for the defendant and which is the subject of this ruling.

In reply the advocate for the Plaintiff Mr. E.K. Mutua stated that various orders were made in Hccc No.285/93 to determine issue of fraud by Hon. Justice Mbogholi Msagha.

[The court noted that no orders had been made in this file by Hon. Justice Mbogholi Msagha] That thereafter Hon. Justice Githinji made orders on this file.

I then made a ruling that this file be remitted to Hon. Justice Githinji to rehear the Preliminary Objection as most of the orders said to be made was by him, namely that the application of 23.12.99 filed on 24.12.99 for hearing was so ordered to be heard by Justice Githinji.

Hon. Justice Githinji sent communication to me that the last he ever dealt with the matter was on 31.10.97 and long before the application dated 23.12.97 was filed.

He stated that he left it to me to make such orders as deemed appropriate.

I was under the impression that the Hon. Judge left it to me to decide on the Preliminary Objection. The parties are in agreement to this especially due to the delay it may cause to them.

I was also to peruse file Hccc No.285/93 that had been reconstructed which will be dealt below.

My findings in this matter is that the defendant appealed against orders of Hon. Justice Githinji to the Court of Appeal. They seem not to have applied for any stay of the said orders. Thus, whilst the appeal was awaiting hearing the plaintiff proceeded with the pre-trial of the case on the aspect of defence and hearing of the suit, it is only after the defence was filed that the plaintiffs filed an application to amend the Plaintiff.

The effect of the Court of Appeal setting aside Hon. Justice Githinji's orders meant that the consent orders remained the judgement of the court and that the suit was thus settled. The application of 23.12.97 would thus become of no *effect as it* was filed after the orders were set aside.

As to the Hccc 285/93 whereby the advocate for the plaintiff purports to state that the Hon. Judges Githinji and Mbogholi Msagha made orders in this file and the said above file, i have perused the same with the consent of the parties.

The plaintiff, who is also the plaintiff in this case in file Hccc 285/93, had prayed that the said file be reconstituted. The advocate for the defendant objected to this. This was on 19.8.98. The file came before Hon. Justice Mbogholi on 23.6.97 who then ordered investigations on allegations that the document presented to court reconstructing the files were fake.

The Principal Deputy registrar was instructed by Hon. Justice Githinji to investigate the allegations.

The Principal Deputy Registrars findings was that-

"the documents exhibited by the Plaintiffs and which they seek to rely on to reconstruct the record are not genuine to use them to make an order that a file be reconstructed would be to perpetrate a fraud

The application for reconstructing that file was dismissed.

As Hccc 285/93 had been investigated by the police and the Principal Deputy Registrar I make no comments on the same.

I would hold in this present file that the Preliminary Objection be and is hereby upheld. I hold that the Court of Appeal decision reinstating the consent judgement order entered into on the 4th of May 1992 (when the defendants had not filed a defence) meant that any proceedings action filed after the 4th of May 1992 is null and void. I would hereby struck out the application of 23.12.97 with costs to the defendants.

The position of this file is that consent judgement Order dated 4th May 1992 duly recorded by Hon. Justice Githinji stands. The Court of Appeal decision 276/97 applies.

Dated this 15th day of June, 1999 at Nairobi.

M.A. ANG'AWA