REPUBLIC OF KENYA

Sire v Municipal Council of Mombasa

High Court, at Mombasa
November 27, 1991

Wambilyangah J

Civil Case No 433 of 1990

JUDGMENT

The applicant is the Mombasa Municipal Council. By the plaint dated 25th June 1990 the applicant was sued by the respondent for damages for personal injuries which the respondent alleged to have sustained when the employees of the Council "brutally assaulted the plaintiff and negligently pushed out the plaintiff of the defendant's fast moving motor vehicle Reg No KTD 890 in consequence whereof the plaintiff fell down". At the outset the Council through their advocate Mr RH Mwakiwiwi entered appearance and filed a defence when it denied that the defendant was pushed out of the vehicle. Instead, the Council contended in the defence that "the plaintiff had become violent and was forcefully resisting arrest to prove that he was smart he jumped from the moving vehicle and sustained the injuries". In the defence statement the particulars of the defendant's negligence as listed in the plaint are categorically denied. From the diametrical rival positions of the litigants the hearing of the case by the Court and the Court's judgment was the only possible solution.

But in the replying affidavit sworn in this application by Mr Mwakiwiwi he deponed in paragraph 6 that he and the plaintiff's counsel:

> "Had preliminary negotiations for settlement of the suit but such negotiations remained to be concluded".

It is a common ground herein that before "negotiations were concluded" Mr Mwakiwiwi by his letter dated 31st January 1991 forwarded his file on this case together with 8 others to Messrs Arum & Company instructing them "to handle (the case files) on my councils behalf." In the letter he did not specify or restrict the manner in which the new advocates were to handle the case files. Mr Bana on behalf of the M/S Arum and Company ended up concluding the negotiations with Mr Sereje and on 26th March 1991 they filed in court a letter indicating their compromise.

On the same day a judgment was entered by the Court on the terms of that letter. By this application brought under order III rule 6 and 8, order XLIV rule 1 (II) and order L rule 2 the Council basically seeks for a prayer that the judgment entered in this suit at the behest of the advocates for the plaintiff herein with concurrence of the advocates for the defendant be set aside.

Mr Obhrai who appeared on behalf of the Council in this application argued several points in support thereof.

Firstly, he argued that Mr Mwakiwiwi had no power to instruct M/S Arum and Company Advocates to

act in this file. For this argument he relies on the affidavit of Mr Mwai Solomon Githegi, the Town Clerk of the Council wherein he deponed, *inter alia*, as follows:-

> 7. "That I have not any time issued a letter of appointment to the said M/S Arum and Company Advocates to act for the defendant in the suit herein nor have I authorised any officer of the defendant to do so".

Mr Mwakiwiwi who instructed Messrs Arum and Company Advocates to handle this particular file on the Council's behalf has sworn his own (replying) affidavit. In it he does not at all admit that he lacked power or exceeded his powers when he asked Messrs Arum and Company Advocates to handle the files. In paragraph 5 of the affidavit he said:-

> 5. "That by letter FIN/8/3 dated January 1991 addressed to Messrs Arum and Company Advocates, annexed to the said affidavit and marked "JBO 1" I agreed to the request of the said firm of advocates to handle the cases specified therein on behalf of the defendant on the terms contained in the aforesaid letter".

Surely, if he had no powers or had exceeded his powers he should have been expected to admit it. After having carefully considered Mr Obhrai's submission in relation to these rather conflicting averments in the affidavits of the 2 council senior employees I find myself agreeing with Mr Sereje and Bana that Messrs Arun and Company Advocates had no means of knowing or discerning the limitations on Mr Mwakiwiwi's powers. I also find the Town Clerk's assertion that he, alone had the power to instruct outside advocates to act on behalf of the council to be purely his own inhouse matter which an outsider, like Messrs Arum and Company Advocates, was incapable of knowing. How would such knowledge really be imputed on the outsider?

The next point taken up by Mr Obhrai relates to the notice of change of advocates. He argued that it should have been signed by the party itself and not by Messrs Arums and Company. Instead, the notice of change of advocate herein dated 24th January 1990 was signed by M/S. Arum and Company Advocates. Mr Obhrai contends that this was not incompliance with order III rule 6 and 7 of the Civil Procedure Rules. The thrust of his argument on this aspect is that it is the party itself, in this case the municipality, which should have signed and filed the notice of change of advocates. It is clear that in the letter marked JOB 1 which Mr Mwakiwiwi wrote to Messrs Arum and Company Advocates, he clearly directed the new firm of advocates to file the notice of change of advocates. The Council can not seek to rely on an error (if indeed it is one) committed by its officer to the disadvantage of the other party. At all events, I see nothing in the rules to which I was referred which expressely renders invalid a notice of change of advocate which is signed by its own advocate instead of the party itself. Mr Obhrai further made out an issue out of the actual document (notice) when he submitted that it was a vague one. Obviously the notice was made on cyclostled copies which required appropriate deletions to be done where "plaintiff / defendant or him / her / them" appeared on it. As I see it, however, the fact that the document explicitly stated that M/S Arum & Company Advocates were to act in the place of M/S RH Mwakiwiwi Advocate, the mere omission to delete the irrelevant or inapplicable words on the document was entirely immaterial and did not at all blur or render as vague the intended meaning of the document.

The next issue raised by Mr Obhrai is one concerning the situations in which a consent judgment can be set aside by the Court. This aspect was adequately addressed by the Court of Appeal in the case of *Flora N Wasike v Destimo Wamboko* (1982-1988) KAR 625 where it was said that a consent judgment or order has the contractual effect and can only be set aside on those grounds which would justify the setting of a contract. Those grounds are such as fraud, mistake or misrepresentation. In the instant case the fact that Mr Mwakiwiwi who had been acting for the Council and had already embarked on the course to settle the case must been construed that he had the ostensible authority to take every step he took in the matter. It has not been alleged by the Town Clerk that in so doing he acted fraudulently. But it has been alleged in the affidavits of both the Town Clerk and Mr Mwakiwiwi that Messrs Arum and Company Advocates did not obtain their consent before he compromised the suit.

In *Flora N Wasike* case (ibid) it was said that:

> "Counsel would ordinarily have ostensible authority to compromise a suit as far as the opponent is concerned".

It thus follows that unless the conduct of the counsel in the case can be proved to have been fraudulent or mistaken or one which would be annulled on the ground of misrepresentation the compromise between him and the opponent must remain in place.

When all is said and done in this case I still fail to find, either in the affidavits filed in support of the application or in the submissions of Mr Obhrai, any feature which brings the application within the ambit of order XLIV rule 1 of the Civil Procedure Rules. There is no new and important matter or evidence which was not within the knowledge of Mr Mwakiwiwi or Messrs Arum and Company Advocates which has been presented to me to have warranted me to review the consent judgement.

These are the fundamental questions which must be posed in conclusion:-

(a) If the defendant had an arguable defence which they now seek to have this Court to hear why had their Mr Mwakiwiwi embarked on the negotiations for settlement of the case with Mr Sereje? I may say that their defence is one which is not plansible.

(b) If Mr Mwakiwiwi had not intended that Messrs Arum and Company Advocates should take over the case from where he had left it, could he not have overtly indicated so to them?

(c) If Mr Mwakiwiwi deemed that it was necessary for Mr Arun and Company Advocates to be confirmed by relevant council committee before they could act in the 9 files which were forwarded to them together with his letter (Exh JOB 1), would he not have expressly alerted them of that aspect and thereby restricted their actions on those files.

As I see or understand the letter, the authority which was to be sought was that which would enable Messrs Arum and Company Advocates to be retained as the Council's external advocates and this authority was not one which specifically needed for the cases mentioned in the letter itself.

For all the foregoing reasons I dismiss the application with costs.

Dated and delivered at Nairobi this 27th day of November 1991

Wambilyangah J

JUDGE