

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1457 OF 1977

NORMAN NGUREPLAINTIFF

VERSUS

GACHOKI GATHAGA.....DEFENDANT

JUDGMENT

On 1st November 1978 the parties' advocates appeared before me in chambers and recorded the following order, "By consent case marked as settled". Nothing happened for more than six months. Now the defendant has applied under order XLIV, rule 2, of the Civil Procedure Rules for the Court to (a) set aside, and (b) review the consent order of 1st November 1978. The affidavit of Mr Kariithi in support of the application depones (paragraph 2) that a Mr Francis Kabui (who is not a party in the suit) deposited with Mr Kibicho for the plaintiff a sum of Shs 13,773 in this case. In paragraph 3, Mr Kariithi depones that when the case came up on 1st November 1978 it was not settled, as there was no admission of the agreement for sale and the person who deposited the money claimed was not a party to the suit. I think that paragraph 3 is a gross abuse of the process of the court, in that Mr Kariithi, who is an advocate of this Court, forgets that he appeared before me with Mr Kibicho when he agreed that the case be marked as settled by consent; so there cannot be any question of Mr Kibicho having told the Court that the case was settled when it was not. There is no question of the information given to the Court on 1st November 1978 being a mistake of fact, as Mr Kibicho was not acting for the defendant, but his own advocate (who now swears an affidavit to support the application) was present. I believe that when Mr Kariithi appeared before me on 1st November 1978 he had his client's full instructions.

As to a third party paying the money claimed by the plaintiff, it is really immaterial to the plaintiff how he gets his claim paid. If the third party paid to a wrong person, he will claim his money back from the payee; and that would be another case altogether. If the third party paid on no instructions or request, he would not claim the money from the defendant, and the defendant would then be a lucky man.

The most important point about this application is that Mr Kariithi asks the Court to set aside a consent order. There is no provision in the Civil Procedure Act nor is there any in the rules for an application of this nature. I can find no authority and no precedent has been cited for me to set aside an order made by the parties' consent in their presence. As to review powers, order XLIV, rule 1 (1), provides as follows:

1(1) Any person considering himself aggrieved - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order.

In the first instance, a party cannot consider itself to be aggrieved by an order it requested the Court to make by consent; so the defendant is in this application not an aggrieved party in the sense of order XLIV, rule 1.

There is, in the second place no important new matter or evidence which was not within the knowledge of the defendant at the time the order was made, for I am told by Mr Kibicho from the bar that the basis of

the consent order of 1st November 1978 was that the money had already been paid to him, and this was known to the defendant. There is no error or mistake apparent on the face of the record in the third instance; and, fourthly, there is no other sufficient reason for a review. The application does not, in my view, fall under the provisions of order XLIV, rule 1(1). No appeal lies from a consent order, I accept; but then it is not every order from which no appeal lies that can be reviewed. The review powers are strictly exercised in terms of order XLIV, rule 1 (1) that is when:

- (a) a new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by the applicant, at the time the order was made; or
- (b) there is a mistake or error apparent on the face of the record; or
- (c) there is any other sufficient reason for the Court to review the order. As to what is a “sufficient reason” is determined by the Court at the time of hearing the application.

This application, although the point was not raised by Mr Kariithi, cannot be considered under section 3A of the Civil Procedure Act (dealing with inherent jurisdiction of the Court), for where parties both consent to an order being made by the court justice has been met and the inherent jurisdiction cannot be exercised to reverse the order which the parties treated as meeting the ends of justice in the case.

For the reasons I have given I agree with Mr Kibicho for the plaintiff that the application is incompetent. The application is dismissed with costs to the plaintiff.

Application dismissed with costs.

Dated and delivered at Nairobi this 14th day of May 1979.

Z.R CHESONI

JUDGE