



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 260 OF 2013

A. I. RECORDS KENYA LTD.....APPELLANT/RESPONDENT

VERSUS

LAVINGTON SECURITYRESPONDENT/APPLICANT

RULING

1) Learned counsels appearing in this appeal executed the consent order dated 27th June 2018. The aforesaid consent read in part as follows:

“By consent

i. That the appeal be allowed in terms of prayer (b) of the Memorandum of Appeal dated 21st may 2013.

ii. That the Appellant does bear the costs of the Respondent to be agreed failing of which the same to be assessed by the Deputy Registrar.”

2) On 12th July 2018, the Appellant’s advocate appeared before this court and in the absence of the Respondent’s advocate successfully applied to this court to adopt the consent order as the order of this court.

3) The Respondent has now taken out the motion dated 13th July 2018 in which it sought for inter alia the consent order to be set aside. The Respondent filed a supporting and a further affidavit both sworn by Sheila Michira to buttress the motion.

4) When served, the Appellant filed grounds of opposition and a replying affidavit sworn by Steve Luseno to resist the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.

5) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have also considered the grounds of opposition plus the rival submissions together with the authorities cited. It is the submission of the Respondent/ Applicant’s advocate that at all material times leading to the recording of the consent that she was under the honest but mistaken belief that the Appellant/Respondent intended to withdraw the appeal with costs being paid to the Respondent/Applicant. She referred to various correspondences which she exchanged with the Appellant’s/ Respondent’s advocate before executing the consent as proof of her mistaken belief.

6) The Appellant/Respondent strenuously opposed the application arguing that it has acted upon the consent by having the suit fixed for hearing.

7) The Appellant further stated that the application offends the Respondent’s duty to the court under Section 1B of the Civil Procedure Act and also that the same is an abuse of the court process.

8) It was further argued by the appellant that at all times, it was clear to both parties that the Appellant sought to have the appeal allowed with the only bone of contention being the issue of quantum. The Appellant further pointed out that the application lacks merit.

9) Having considered the material placed before this court and the rival submissions, the main issue which commends itself for consideration is whether the Respondent/Applicant has met the requisite threshold for setting aside consent judgment/order. In the case of **Brook Bond Le big Ltd =vs= Mallya (1975) E.A 266 Law A.G President at page 269 stated *inter alia*:**

“A court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for varying or rescinding a contract between the parties.”

10) The Respondent/Applicant’s advocate has expressly stated that she executed the consent order with a honest but mistaken belief that the Appellant/Respondent intended to withdraw the appeal. The assertion has not been seriously controverted by the Appellant/Respondent. A careful consideration of the correspondences exchanged by learned advocates reveals that the Respondent/ Applicant’s advocate believed that the appeal was being withdrawn.

11) The consent was therefore executed based on a mistaken belief and or on a misapprehension of material facts. In the circumstances, this court is entitled in law to intervene by setting aside the consent order.

12) In the end, the motion dated 13th July 2018 is allowed.

Consequently, the consent order adopted as the order of this court on 12th July 2018 is set aside and the appeal is reinstated to be heard on its merits.

13) In the circumstances of this appeal, a fair order on costs is that each party should meet its own costs.

Dated, Signed and Delivered at Nairobi this 24th day of May, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

.....for the 2nd Respondent