



IN THE COURT OF APPEAL

AT NAKURU

CRIMINAL APPEAL NO. 71 OF 2003

MRS CHARITY KEMAMA PLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY DEFENDANT

RULING

This is an application for review of this court's order of 23rd May, 2002 which was by consent. In the alternative the Plaintiff seeks leave to revoke the appointment of OWEN NJENGA KOIMBURI as her arbitrator and replace him with HEZEKIAH W GICHOHI. Prayer 3 of the Plaintiffs application is for the said HEZEKIAH W GICHOHI to scrutinize the mortgage account of the Plaintiff with the defendant and ascertain the balance outstanding and/or overpayment made taking into account the terms of contract as set out in the letter of offer and charge document within one month from the date of issue of an order to that effect. Prayer 4 is for the said Hezekiah W Gichohi and Harrilal Nathwani to prepare and provide detailed reports setting out their workings, findings and opinion for oral examination and the same be provided to all counsels for the parties before hearing of viva voce evidence of the arbitrators. There is also a prayer regarding costs.

The application is made by Notice of Motion under Order 44 Rule 1 (b), Order 45 Rule 1, Rule 15 (1) (a) and (b) of the Civil Procedure Rules. www.kenyalawreports.or.ke 2 Section 3A of the Civil Procedure Act is invoked. Sections 13 (3), 16 (1) and 19 of the Arbitration Act, No 4 of 1995 Laws of Kenya are also quoted. The Notice of Motion is based on the grounds in the body of the Notice of Motion and is supported by an affidavit of the Plaintiff sworn on 18th November, 2003.

The defendant filed a Replying affidavit of one RINA CHATRATH and Grounds of Opposition.

Mrs Wagiru argued the application for the Plaintiff and Mr McCourt opposed the application for the defendant. Mrs Wagiru relied on the grounds in the body of the said Notice of Motion and the said affidavit in support of the Plaintiff. In her oral submissions in court, Mrs Wagiru stated that the Plaintiff appointed OWEN NJENGA KOIMBURI as her arbitrator. He was supposed to scrutinize the Plaintiff's loan account with the defendant using statements or documents of accounts provided by the defendant. At the time she had no records at all. She made efforts to get the file kept by her late husband and on perusal of the same she came across receipts for 1987 and 1988. These receipts were not availed to the joint arbitrators. When the Plaintiff took the receipts to her arbitrator, he refused. She contends that these receipts provided evidence of payment of the mortgage account but were not reflected in the report prepared by her arbitrator. This according to the Plaintiff showed that the arbitrator was not acting in her

interest.

The Plaintiff sees mischief in the letter dated 2nd July, 2003 (“CK 3”) from the defendant’s advocates to her advocates complaining about further documents being introduced. The Plaintiff maintains that despite having taken the receipts of payments for 1987 and 1988 these receipts were not reflected in the Report made by her said arbitrator. The Plaintiff insisted that Mr Koimburi despite being her arbitrator acted against her interest. Counsel for the Plaintiff submitted that the Plaintiff had satisfied the requirements for setting aside of a consent order. She relied on the case of FLORA N WASIKE vs DESTIMO WAMBOKO (1982 – 1988) 1 KAR page 625 where the Court of Appeal held that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation. Mrs Wagiru counsel for the Plaintiff argued that the defendant’s letter of 2nd July, 2003 addressed to the Plaintiff’s former advocates influenced or affected the impartiality of the arbitrator. His report has therefore misrepresented the facts.

Mrs Wagiru also relied on the case of KIMATA & ANOTHER vs WAKIBIRU (1986) KLR 578 where it was held that a consent order can be reviewed under Order 44 Rule 1 (1) for any other sufficient cause. She concluded that Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya confers to a party unfettered right to apply for review for any other sufficient cause.

McCourt in his reply opposed the Plaintiff’s Notice of Motion and relied upon the Replying affidavit of Rina Chetrath sworn on 25th November, 2003 and the Grounds of Opposition of 24th November, 2003. In his oral submissions in court he referred to the Consent Order of 7th June, 2000 which varied another Consent Order of 17th February, 2000. This was further varied by the one of 23rd May, 2002.

In accordance with the consent order, the arbitrators filed reports. The arbitrators restricted themselves to the terms of the consent order. He submitted that the reports will be given by viva voce evidence and after presentation the court’s decision will be final. Mr Koimburi’s report is dated 2nd July, 2003. Mr McCourt denied that Mr Koimburi could be influenced by the Defendant’s advocates. He further submitted that as the Report was filed after the correspondence the Plaintiff complains about Mr Koimburi must have taken into account all documents that were necessary for his report. Mr McCourt further submitted that if Mr Koimburi made a mistake the Plaintiff has a chance when the report is presented in court to question him and correct the mistake if any. In his view the consent order cannot be reviewed as there is no fraud, mistake or misrepresentation.

Mr McCourt further submitted that the proposed arbitrator HEZEKIAH W GICHOHI is a debtor of the defendant and has previously acted for other parties against the defendant. He can therefore not be an impartial arbitrator. The defendant would therefore not consent to his appointment to replace OWEN NJENGA KOIMBURI. He urged that the Plaintiff’s application be dismissed with costs. The issue for me to decide is whether or not the consent order of 23rd May, 2002 may be reviewed on the material availed to me by the Plaintiff. The record is as follows:-

On 23rd May, 2002 the record reads:- “It is hereby ordered by consent: 1. That the consent order recorded on 7th June, 2000 be and is hereby set aside

2. That the suit and the chamber summons dated 6 th June, 1995 be heard and determined by viva voce evidence of the arbitrators appointed by the consent order of 7 th June, 2001 namely Owen Njenga Koimburi and Harilal Nathwani 3. That viva voce evidence to be restricted to the arbitrators’ scrutiny of the mortgage deed, charge letter of offer, statement of accounts and interests calculations namely their individual reports/adjudication

4. That each arbitrator to prepare and provide a detailed report setting out his workings, findings and opinion for oral examination. The same to be provided to all counsels for the parties at least one month prior to the hearing of the viva voce evidence.”

This consent order was pursuant to a consent letter dated 18th March, 2002 signed by the Advocates for the parties herein. The grounds on which the Plaintiff has sought review of the said consent order can be

summarized as follows:-

1. That one of the arbitrators namely Njenga Koimburi had previously scrutinized the accounts and found that the Plaintiff had over paid to the defendant Kshs.845,042.41 2. That pursuant to the consent order of 23rd May, 2002, the said Owen Njenga Koimburi re-scrutinized the accounts without the loan statements for the years 1987 and 1988.

3. That the Plaintiff took copies of receipts for payments made in 1987 and 1988 to Owen Njenga Koimburi but he refused or ignored to consider them. Therefore the report filed on behalf of Owen Njenga Koimburi does not reflect the true position of the loan account.

4. That the rejection of the said documents by Owen Njenga Koimburi is evidence that Owen Njenga Koimburi has been compromised by the defendant.

The Plaintiff further feels that a letter dated 2nd July, 2003 written by the defendant's advocates to the Plaintiff's former advocates directed Owen Njenga Koimburi to limit his report to documents they had agreed upon. Are the above grounds sufficient to review the consent order? The grounds to review a consent judgment should be such grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation. This is on the authority of FLORA N WASIKE VS DESTIMO WAMBOKO (1982 – 88) 1 KAR 625 . Quoting section on Judgments and Orders (7th edition) volume 1 page 124 which was quoted in HIRAN VS KASSAM (1952) 19 EACA 131, Hancox J A quoted –

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court ... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

The appointment of Owen Njenga Koimburi as an arbitrator is part of the consent judgment and his appointment may only be set aside if the Plaintiff were to furnish the reasons set out above. No fraud is alleged or established. The Plaintiff did not allege that the consent order was obtained by collusion or by an agreement contrary to the policy of the court. Her former advocates consented to the order. The order is therefore binding on the Plaintiff and those claiming under her. Was the consent obtained by an agreement contrary to the policy of the court? Far from it. Was the consent order given without sufficient material facts or misapprehension or in ignorance of material facts? The Plaintiff did not make this allegation. Indeed Owen Njenga Koimburi on her own admission was her preference. No mistake is alleged or established. There was no misrepresentation in obtaining the consent order.

The complaint made by the Plaintiff is in respect of Owen Njenga Koimburi's alleged failure to take into account receipts for payment made in the years 1987 and 1988. This has nothing to do with the consent order appointing him as an arbitrator. With all due respect the Plaintiff has completely misapprehended the role of Owen Njenga Koimburi and believes that he was to urge her cause during the scrutiny. Owen Njenga Koimburi assumed no such role.

In the result, I am not satisfied that reasons for reviewing the consent order of 23rd May, 2002 have been established. The Plaintiff's application by way of Notice of Motion dated 18th November, 2003 is dismissed with costs. It is so ordered.

Dated this 27th day of February, 2004.

F. AZANGALALA

JUDGE

27.2.2004

