



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SHAH, O'KUBASU & KEIWUA, JJ.A

CIVIL APPEAL NO. 63 OF 2001

BETWEEN

1. JASBIR SINGH RAI

2. IQBAL SINGH RAI

3. DALJITI KAUR HANS

4. SARJIT KAUR RAIAPPELLANTS

AND

TARLOCHAN SINGH RAI1ST RESPONDENT

JASWANT SINGH RAI2ND RESPONDENT

SARBJIT SINGH RAI3RD RESPONDENT

RAI INVESTMENTS LIMITED4TH RESPONDENT

RAI PLYWOODS (KENYA) LIMITED5TH RESPONDENT

RAI PRODUCTS LIMITED6TH RESPONDENT

RAI HOLDINGS LIMITED7TH RESPONDENT

TULIP PROPERTIES LIMITED8TH RESPONDENT

THE RAI EXPO PARK LIMITED9TH RESPONDENT

TARLOCHAN SINGH RAI LIMITED10TH RESPONDENT

SATJIT SINGH & RAM SINGH (ESTATE OF)11TH RESPONDENT

PBM NOMINEES LIMITED12TH RESPONDENT

KABARAK LIMITED13TH RESPONDENT

SURESH KUMAR BECTOR14TH RESPONDENT

in

H C Winding Up Cause No 44 of 1999)

RULING OF THE COURT

Whilst Mr. Oraro was responding to the very lengthy and erudite submissions by Mr. Inamdar in support of this appeal, Mr. Nowrojee who appears for the 11th respondent objected to Mr. Oraro referring to two portions of the ruling appealed against, and asking this Court to accept one portion thereof as more correct than the other. We will set out what the learned Commissioner said in the two instances before proceeding further. On page 13 of his ruling the learned Commissioner said:

In the petition before me there are extensive and serious allegations of fraud on the part of the respondents and particularly Father and Jaswant which for the purposes of both application must be taken to be such that they are likely to succeed at the hearing."

At page 22 of his ruling learned Commissioner adopts as correct as passage in the English case of North Holdings Limited vs. Southern Tropics Limited and others , Case No. 98/1203 (unreported) (the Kasmare case). The passage reads:

"It is important to bear in mind that the appeal is against an order striking out the petition as an abuse of the court's procedure. Such an order should only be made in a clear case as there has been no trial, on the basis that bona fide conflicts of facts are resolved in favour of the petitioner."

Mr. Oraro attempted to argue that what the learned Commissioner said at page 13 of the Ruling (reproduced by us above) goes too far. Mr. Nowrojee at once took objection to that argument and stated that Mr. Oraro could not and should not pick and chose what suits him.

We are not ruling on the matter finally. We have yet to hear arguments. We have heard Mr. Inamdar. We have heard Mr. Nowrojee. It must be borne in mind that a statement or exposition of law or legal position made by the High Court is not binding on us. We may agree, or disagree. That is the function of this Court. We cannot and would not stop Mr. Oraro from dissertation of the ruling in question as indeed we did not stop Mr. Inamdar. We overrule Mr. Nowrojee on his objection taken by Nowrojee and which objection is a by-product of his earlier objection is that Mr. Oraro cannot refer to the affidavit in support of the petition or the responding affidavit or any further affidavit so as to say that the extensive and serious allegations of fraud on the part of the respondents are unassailable. We do not wish to make any express finding on this objection save to overrule it.

The record of appeal has been lodged by the appellants. No one can stop this Court from thoroughly reading and understanding that record. In fact it is the bounden duty of this Court to read and understand the record and for that purpose it is the bounden duty of this Court to hear all counsel when they refer to the contents of the record.

Whether we agree with what counsel says is a different matter. We will not stop any counsel from referring to and commenting on any part or portion of the record of appeal including all affidavits therein. In fact, we allowed Mr. Inamdar and Mr. Nowrojee to have their full say on the contents of the record of appeal.

Mr. Amoko adopted Mr. Nowrojee's submissions on his objection.

His objections are also overruled.

Having overruled Mr. Nowrojee on his objections we now invite Mr. Oraro to continue with his submissions. We want to conclude the hearing of this appeal in an orderly manner.

Dated and delivered at Nairobi on this 1st day of July, 2002.

A.B. SHAH

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL