



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 29 OF 2003

1. MOHINDER SINGH SOHAL

2. JAGJIT PANDAL.....PLAINTIFFS

-VERSUS-

1. SURJIT SINGH SAGOO

2. JAEVINDER SINGH OBEROI

3. SUNDARSHAN SINGH DADYALLA.....DEFENDANTS

R U L I N G

On 29/10/03 Mr. Nowrojee with Mr. Obhrai for plaintiff and Mr. Mogaka for Defendants appeared in Court and said “we have consent to record. Mention on 30/10/03 for recording court” Court ordered accordingly. On the morning of 30/10/2003 Mr. O’Hare with Mr. Towrope appeared for plaintiffs. Mr. Mogaka appeared for Defendant. They addressed the court this:-

“We have made a consent in writing and signed by all parties. We undertake to file the letter of consent at the registry for record purposes. We ask for orders in terms of the consent” (showing the court the letter).

This court proceeded to make the orders sought in terms of the said consent. The letter of consent was entitled on same date after payment of court fees. The letter was signed by the advocates of both parties.

On 6th November 2003 an application by Notice of Motion was filed by the defendants seeking to set aside the said consent order on the grounds set out in the application and in the supporting affidavit thereof. The deponents of the affidavits on both sides were called for cross-examination by advocates. I have perused the application and the supporting affidavit and the annexures attached. The principles upon which a consent order or judgment may set aside are well known. See **BROOKE BOND LIEBIG V. MATHYA 1975 E.A. 566** a Court of Appeal decision it was held:-

“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”

In this case the Consent was reached the previous day and recorded on 30th October. There was sufficient time for consultation. In fact evidence indicates that before the consent was recorded there was a meeting between all advocates and one of the Defendants at which meeting the terms of consent was negotiated. I see no allegation of fraud in negotiating the consent. I see no collusion between the parties. The grounds and reasons now advanced do not amount to much. The two defendants presented themselves as capable of dealing with the suit on behalf of the society. At no stage did they say they had no authority. The authority to represent the society must have been obtained before when they entered appearance. The defendant's advocate is an experienced lawyer of many years standing. I do not think he could have entered into the consent under the misapprehensive as he says or mistaken of the provisions of the constitution provisions of the society. What is clear is that the consent order was reached first and both parties had time to comment or reconsider the terms overnight before attending to recording the same on 30/10/03. I find no allegations made against the plaintiffs, which would entitle the court to interfere with the consent. That the defendants are not happy with the terms is not one of the grounds to set aside the same.

The affidavits in support of application and eh evidence brought out in cross-examination of the deponent are not candid. They are everime.

The important factor is that between the parties entering consent one of them is guilty of fraud or collusion or coercion or any other matter that can enable the curt to open up a contract between them. I see no such allegations here. I find no reason to set aside the order.

Therefore I dismiss the application with costs to the Respondents.

Read on 19th day of December 2003

Before: the plaintiffs

Mr. Obhrai Nowrojee

and

Defendants

Mr. Mogaka.

JOYCE KHAMINWA

J U D G E

Mr. Mogaka:

I have instructions to apply for certified copies of proceedings,

Ruling and Order we shall pay costs. This will enable the

applicants to file an appeal against order.

In view of application one of the terms of consent that the election to held on 21/12/03 and in view of the court being on vacation we seek a stay of the consent order pending finding of Notice of

Appeal and formal filing of application under order 41 rule 4, subrule 3- court has power to order stay of execution pending hearing of formal application.

I invoke section 3A interest of justice if the elections are to proceed the applicant/Defendants shall be deprived their right of Appeal is as of right the court should not prevent a party to come to court. The election is to be held on 21/12/03.

This is the factor.

Mr. Nowrojee

If there is no stay appeal cannot become nugatory they can proceed to appeal and later declare the election invalid if the stay is granted it is court order shall be stayed. There cannot be stay this is to vary to vary the consent order. No power to vary date of election. He is asking for impossible Section 3A and interest powers cannot be invoked to vary contract court did not enter consent today but on 30/10/03.

Ruling require so that they know their position. They cannot now enforce the ruling. The same absence of consistence. Application for stay be denied.

Mr. Mogaka

We were not pressing. We were given the court order that Ruling will be on 19/12/03.

Our right of appeal is not affected. We are not acting

Appeal for the ruling rejecting review is as of right so that in exercise of inherent powers proper case. Grant temporary stay.

R U L I N G

The court has upheld the consent order entered between the parties of 30/10/03 to grant a stay of one order contained in the consent would result in the granting order set aside the consent this is illogical and contrary to the law. The right of appeal is not denied but the terms of the consent should be enforced by the parties as agreed. The court cannot exercise its inherent jurisdiction which is always reserved to curb to irregularities then court cannot interfere with the terms of agreement made between the parties, which I do not reject that their right of Appeal I do not grant any stay of the orders granted today.

I find no substantial loss that will be suffered by the Defendants if the stay is not granted.

Dated this 19th day of December 2004.

JOYCE KHAMINWA

JUDGE



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