



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 195 OF 2017**

**PREMIER FLOUR MILLS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**POLYPIPES LIMITED .....2<sup>ND</sup> PLAINTIFF**

**POLY SACK LIMITED .....3<sup>RD</sup> PLAINTIFF**

**LOWERHILL PARK LIMITED.....4<sup>TH</sup> PLAINTIFF**

**HIMSONS INVESTMENTS LIMITED.....5<sup>TH</sup> PLAINTIFF**

**ELSO ENTERPRISES LIMITED.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**ECOBANK KENYA LIMITED .....1<sup>ST</sup> DEFENDANT**

**EBI S.A. GROUPE ECOBANK.....2<sup>ND</sup> DEFENDANT**

**ECOBANK SOUTH SUDAN LIMITED...3<sup>RD</sup> DEFENDANT**

**RULING**

1. Through a plaint filed on 8<sup>th</sup> May 2017, the plaintiffs/applicants herein sued the respondents/defendants seeking following orders:

**1. A declaration that the defendants are in breach of its contractual obligations contained in the various facilities documents and that they cannot rely on the same contract, the contracts being the charges, Debentures, Letters of Guarantee and Indemnity and Facility Letter.**

**2. A permanent injunction do issue restraining the defendants, by themselves, servants, auctioneers, receivers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs' pieces or parcels of land known as:-**

**a. Land Reference Number No. 209/8377, in the name of Premier Flour Mills Ltd;**

**b. Land Reference Number No. 209/13703, in the name of Lowerhill Park Ltd;**

**c. Land Reference Number No. 214/517, in the name of Himsons Investments Ltd; and**

**d. Title Number Eldoret Municipality/Block 2/199, in the name of Eldo Enterprises Limited;**

Or otherwise howsoever dealing with the aforesaid parcels of land.

3. A permanent order of injunction do issue restraining the defendants, by themselves, their servants or agents, or advocates or any of them of otherwise from appointing a receiver manager, liquidator, or any other person whatsoever, to interfere with the status, management of operations of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs.

4. An order directing the defendants to specifically perform their obligations under the Syndicated Loan Agreements dated 24<sup>th</sup> July 2015 and the Collateral Management Agreement dated 22<sup>nd</sup> June 2016.

5. An order directing the defendants to refund all overcharged interest.

6. An order discharging the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants, as Guarantors, from the Debentures, Charges, Guarantees and any security offered to the defendants.

7. General damages.

8. Costs of this suit.

2. Concurrently with the plaint, the plaintiffs also filed an application dated 8<sup>th</sup> May 2017 in which they mainly sought orders of injunction to restrain the respondents from selling or in anyway alienating the suit properties known as:

a. Land Reference Number No. 209/8377, in the name of Premier Flour Mills Ltd;

b. Land Reference Number No. 209/13703, in the name of Lowerhill Park Ltd;

c. Land Reference Number No. 214/517, in the name of Himsons Investments Ltd; and

d. Title Number Eldoret Municipality/Block 2/199, in the name of Eldo Enterprises Limited;

Or otherwise howsoever dealing with the aforesaid parcels of land.

3. Upon service with the suit papers, the respondents' advocates, on 11<sup>th</sup> May 2017, filed a Notice of Appointment of Advocates but did not file any defence or replying affidavit to the application as shortly after filing the said notice, the parties on 12<sup>th</sup> May 2017 entered into a consent in which they compromised both the application and the suit in the following terms:

1. That application dated 8<sup>th</sup> May 2017 together with the entire suit be and is hereby marked as settled on the terms set out below.

2. That the intended public auction of property LR No. 209/8377 (in the name of the 1<sup>st</sup> plaintiff), L.R. No. 214/517 Muthaiga, Nairobi (in the name of the 5<sup>th</sup> plaintiff) and Title No. Eldoret Municipality/Block /2/199 (in the name of the 6<sup>th</sup> plaintiff) be and is hereby suspended.

3. That the parties agree to the sale of property L.R. NO. 209/13703 Nairobi (in the name of the 4<sup>th</sup> plaintiff) L.R. No. 214/517 Muthaiga, Nairobi (in the name of the 5<sup>th</sup> plaintiff), Title No. Eldoret Municipality/Block/2/199 (in the name of the 6<sup>th</sup> plaintiff), by way of private treaty with six (6) months from the date of this consent.

4. That fresh valuations to be done within fourteen (14) days from the date of filing this consent with regard to the properties referred in No. 2 above for purposes of sale by a valuer to be selected by the plaintiffs from the 1<sup>st</sup> defendants panel of Tier 1 Valuers.

5. That both parties agree to conduct joint marketing of the properties set out in No. 2 of this consent including engagement of property agents on commission basis with such commission to be agreed with the engaged agents capped at 2% of the purchase price up to the market value (market value hereby understood to mean the higher of the valuations between the valuation already conducted by the selected Valuer and the valuation to be conducted Valuer under No. 3 above ) and 3% of any amount realized above the marker value. Applicable taxes including Capital Gains Tax to be paid from the net proceeds of the sale.

6. That in the event that the 1<sup>st</sup> defendant receives an acceptable offer, it shall give a seven (7) days' notice to the plaintiff and the registered owner of the property in issue to procure a better offer failure to which, the 1<sup>st</sup> defendant shall be at liberty to progress the sale.

7. That in the event that the 1<sup>st</sup> plaintiff/and/or any of the registered owners of the charged properties receive and/or obtain an acceptable offer, it shall give a seven (7) days' notice to the 1<sup>st</sup> defendant to procure a better offer failure to which, the 1<sup>st</sup> defendant shall be obligated to progress the sale.

8. That the plaintiffs and particularly the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs shall within fourteen (14) days of signing of this consent issue a Power of Attorney to the 1<sup>st</sup> defendant with respect to the sale of the properties in No. 2 above by private treaty as contemplated in this consent.

9. That if the parties will not have secured suitable purchasers for the charged properties in No. 2 above by private treaty terms on or before the 7<sup>th</sup> November 2017, then the 1<sup>st</sup> defendant shall be at liberty to sell the charged properties through tender or any other means other than a public auction without recourse to the plaintiffs.

10. That the defendants hereby agree to suspend sale of LR No. 209/8377 on condition that the plaintiff procure a takeover of the outstanding balance by another financier on or before the 7<sup>th</sup> November 2017. In the event of piecemeal takeover against a particular security, such takeover shall be based on the market value for such security. For avoidance of doubt, the plaintiffs are at liberty to procure the takeover of all outstanding debt with the defendants at any time before the 7<sup>th</sup> November 2017 to facilitate discharge and release thereof.

11. That the defendants hereby agree to recapitalize any repayment due as at 11<sup>th</sup> May 2017 as set out in the table below (subject to verification as per No. 12 below) and thereafter the plaintiffs shall pay the outstanding amount by monthly installments of Kshs 20,000,000.00 the first of which shall be due on 31<sup>st</sup> July 2017 and thereafter on the last working day of the subsequent months until taken over by another financier or settled on or before 7<sup>th</sup> November 2017.

<i>Column A</i>	<i>Column B</i>	<i>Column C</i>	<i>Column D</i>	<i>Column E</i>	<i>Column F</i>	<i>Column G</i>
<i>Contract Ref No.</i>	<i>Currency</i>	<i>% rate per annum as provided in the Facility Agreements currently as below</i>	<i>Default interest rate per annum above the rate in Column C</i>	<i>Principal</i>	<i>Interest</i>	<i>Total outstanding amount.</i>
022NTIC1620001	KES	20.15	10%	591,864,781.82	106,090,545.98	697,955,327.80
022NTIC161410002	KES	21.12	10%	330,649,481.29	21,366,042.43	352,015,523.72
022NTIC161410010	USD	10.149	2%	2,000,000.00	306,907.67	2,306,907.67
022NTIC161410011	KES	15.86	10%	370,000,000.00	81,047,967.60	451,047,967.60
022NTIC16147001	KES	21.12	10%	55,750,971.87	11,328,750.23	67,079,722.10
0221015014536801	USD	20.15	2%	4,278,798.47	157,977.46	4,436,775.93
0220015014536801	KES	20.15	10%	277,939,217.51	14,653,595.31	292,592,812.82
EB1 S.A. GROUPE ECOBANK	USD	8.00	2%	10,000,000.00	32,222.22	10,032,222.22

12. That with respect to the interest which is disputed, the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant shall appoint PKF Kenya to verify the same and provide a recalculated amount within thirty (30) days of this consent.

13. That any outstanding monthly repayment not fully settled by the monthly repayment in No. 11 above shall be recapitalized on a monthly basis without prejudice to the plaintiffs' right to redeem the entire debt.

14. That upon signing of this consent, and in any event not later than close of business on 12<sup>th</sup> May 2017, the 1<sup>st</sup> plaintiff shall issue and also procure its associated company Atta Kenya Limited to issue a letter to Grain Bulk Handlers Limited confirming the following:-

a. That the wheat stocks amounting to 16,708.00 metric tonnes or thereabouts held by Grain Bulk Handlers Limited belong to the 1<sup>st</sup> plaintiff;

b. That the said wheat stocks are held to the order of the 1<sup>st</sup> defendant:

and further instructing Grain Bulk Handlers Limited to issue a confirmation letter to the 1<sup>st</sup> defendant with respect to a) and b) above.

15. That the plaintiffs shall procure a Letter of Credit (LC) through a bank acceptable to the 1<sup>st</sup> defendant to be issued to the 1<sup>st</sup> defendant within fourteen (14) days of the date of filing this consent to cover payment to the extent of US\$6,000,000.00 to be discounted by the 1<sup>st</sup> defendant in part satisfaction of the outstanding facilities.

16. That the terms of the Facility Letters dated 24<sup>th</sup> July 2016 and the First Addendum dated 3<sup>rd</sup> August 2016 to remain as issued between the parties save with respect to the variations agreed in this consent.

17. That the plaintiffs shall pay the legal costs to the defendants, together with costs of the valuations, marketing and Auctioneers Costs (to be agreed and in default to be assessed under the respective applicable scales) within thirty (30) days of this consent.

18. That in default of any of the terms agreed herein above, save as provided under No. 9 above, the defendants shall be at liberty to sell the charged properties and realize the securities provided by the defendants by any other means including public auction without recourse to the plaintiffs. For the avoidance of doubt, save for the event of default as provided in this paragraph, the defendants shall not call up the Guarantees and Debentures provided by the plaintiffs as further security.

4. The said consent order was thereafter on the same date, being 12<sup>th</sup> May 2017, adopted as an order of the court thereby compromising the entire suit and application.

5. On September 2017, 4 months after the recording of the above consent order, the applicants/plaintiffs filed the application dated 17<sup>th</sup> September 2017, that is the subject of this ruling, in which they seek the following orders:

1. Spent.

2. That this Honourable court do grant leave for the applicants' Notice of Motion application herein to be heard during the Honourable court's vacation.

3. That pending the hearing and determination of this application inter partes an injunction do issue restraining the defendants, by themselves, servants, auctioneers, receivers agents, or advocates or any of them or otherwise from advertising and selling by public auction the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs' business and pieces or parcels of land known as:-

a. Land Reference Number No. 209/8377, in the name of Premier Flour Mills Ltd;

b. Land Reference Number No. 209/13703, in the name of Lowerhill Park Ltd;

c. Land Reference Number No. 214/517, in the name of Himsons Investments Ltd; and

d. Title Number Eldoret Municipality/Block 2/199, in the name of Eldo Enterprises Limited;

Or otherwise howsoever dealing with the aforesaid parcels of land.

4. That pending the hearing and determination of this application inter partes an injunction do issue restraining the defendants, by themselves, their servants or agents, or advocates or any of them or otherwise from appointing a receiver manager, administrator, liquidator, or any other person whatsoever, to interfere with the status, management or operations of the plaintiffs herein.

5. That there be an order to review the Consent Order dated 11<sup>th</sup> May 2017 and filed herein on 12<sup>th</sup> May 2017.

6. That in the alternative to prayer 5 above, the Consent Order dated 11<sup>th</sup> May 2017 and filed herein on 12<sup>th</sup> May 2017 be set aside and the application and suit dated 8<sup>th</sup> May 2017 be set down for hearing on merits.

7. That the costs of this application be provided for.

6. The application is supported by the affidavit of the plaintiff's legal manager one **Bett Martin Cheruiyot** and is premised on the grounds that:

a. Because the defendants are in a stronger position, they have chosen to and are actively creating an untenable situation, by breaching the consent that is fast emasculating the plaintiffs' business interests. The defendants have, after the deliberate creation/instigation of circumstances that may lead to a default as far as Clause 15 of the Consent Order is concerned, now threatened to advertise the plaintiffs' properties anytime beginning Friday, 8<sup>th</sup> September 2017. The spiral effect of such advertisement will be debilitating on the plaintiffs relationships with other financiers and may spell death to the plaintiffs whose work force is approximately 2300 employees.

b. After adoption if the Consent as an Order of the court, the plaintiffs immediately began the process of fulfilling their obligations including by issuance of Powers of Attorney, obtaining confirmation letters from Grain Bulk Handlers Limited, making monthly payments Kshs 20 million, agreed on a valuer and re-valuation of properties, agreeing on ongoing interest

recalculations by PKF Consulting Limited and is jointly marketing the various properties mentioned in the consent. Indeed, one of the properties is in the process of being sold for Kshs 430 million.

c. In the meantime, the plaintiffs also approached various banks for purposes of obtaining Letters of Credit in fulfillment of the Clause 15 of the Consent Order. Unfortunately, the defendants have and continue to significantly hinder the fulfillment of this Order by refusing to settle storage charges as agreed, provide responses on time, introducing new conditions at every turn and out rightly rejecting a facility from Prime Bank Limited when the said bank was willing to provide. The cumulative effect of this stalling by the defendants has caused tremendous changes in the status of the wheat and is intentionally constraining the plaintiffs' ability to fulfill various conditions.

d. The defendants deliberate refusal to settle storage charges as agreed, stalling with regard to the Letter of Credit and thereafter insistence on selling the plaintiffs' properties by public auction is oppressive, intended to defeat the Consent Order and goes against the grain and all known principles of law. It intended to clog the plaintiffs' equity of redemption and also killing its business.

e. At present, the question of interest recalculation is yet to be determined. In addition, valuation of Land Reference Number No. 209/8377, in the name of Premier Flour Mills Ltd, is yet to be completed. The defendants, at a meeting held at their offices on 6<sup>th</sup> September 2017, insisted on advertising forthwith and selling the same by public auction in clear contravention of the consent which required re-valuation of properties and recalculation of interest.

f. If the defendants are not stopped from advertising the plaintiff's properties for sale by public auction or appointing a receiver and or in any other way interfering with the plaintiffs' businesses and operations, the plaintiffs will jointly and severally suffer irreparable loss to their business, goodwill and reputation.

7. The applicants' counsel filed written submissions on 28<sup>th</sup> January 2019 in which it is argue that soon after the filing of the impugned consent order, the applicants embarked on fulfilling their obligations under the said consent but that the defendants deliberately refused to settle the storage charges as agreed, stalled the Letter of Credit and insisted on selling the suit properties by way of public auction in a move calculated at defeating the terms under the consent order thereby clogging the applicants equity of redemption.

8. It was submitted that the consent order is equivalent to a binding agreement between the parties in which the parties had made reciprocal concessions in order resolve their differences and that having been adopted by the court, the consent became a determination of the dispute with the force and effect of a judgment.

9. It was submitted that it is completely against the terms of the consent for the defendants to instigate circumstances that will lead to a default by the plaintiffs by misusing their stronger position so as to sell the suit properties.

10. Counsel submitted that the impugned consent should not be sustained since the respondents continue to abuse their obligations under it by threatening the applicants with adverse action. For this argument, counsel cited the decision in the case of *Givan Okallo v Housing Finance Company of Kenya* [2007] eKLR wherein it was held that:

**“... a party in breach of the contractual document cannot be allowed to benefit from his own transgression, until there is a proper determination of the dispute. The court is empowered to hear the circumstances that made the defendant to behave in the way it acted against the plaintiffs. The question that the court would ultimately have to answer is the amount due and payable by the plaintiffs. And pending that determination, I think it is illegal to alienate, sell or dispose the central thread that joins the parties to this suit. The court must intervene to curb such prima acts of illegality committed by the defendant and which does not stem from the contractual document”.**

11. The applicants argued that the respondents are in breach of the terms of the consent order and should therefore not be allowed to benefit from it.

12. On the principles governing the setting aside the consent orders, it was submitted that the setting aside should be on grounds which would justify the setting aside of a contract. For this argument, counsel referred to the decision in the case of *Brooke Bond Leibig (T) Ltd v Mallya* [1975] EA 266 wherein it was held that:-

**“Prima facie, any order made in the presence and with the consent of counsel for 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 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.....It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.”**

13. It was also submitted that the applicants had made out a case for the granting of orders of injunction.

#### The respondents' case.

14. The respondents opposed the application through the Grounds of Opposition filed on 11<sup>th</sup> September 2017 in which they set out the following grounds of objection:

1. The application is misconceived, lacks merit and is an abuse of the court process in light of the clear orders issued by the court on 12<sup>th</sup> May 2017.

2. There is no evidence of imminent danger warranting the grant of the injunction order sought.

3. Whereas the defendant has fully complied with the Consent Order of 12<sup>th</sup> May 2017, the applicants have breached the terms of consent order and have not come to court with clean hands.

4. A substantial portion of the security to the tune of UDS 6 million offered to the defendant under Clause 14 & 15 of the Consent Order has been extinguished through a sale following the plaintiffs' default to the detriment of the defendant.

5. That no grounds of misrepresentation, fraud, mistake or other circumstances such as would warrant the review/setting aside the consent have been exhibited by the plaintiffs. This Honourable court cannot be called upon to rewrite the agreement of the parties which legally amounts to a contract between the parties.

15. The respondents also filed the replying affidavit of the 1<sup>st</sup> respondent's Relationship Manager one **John Nzau** in response to the application. He outlines the main grounds for opposing the application as follows:

a. That the parties willingly and freely executed the consent dated 11<sup>th</sup> May 2017 which compromised the suit and which consent was duly adopted by the court;

b. The plaintiffs' are in breach of the consent order thereby entitling the defendant's to invoke the default clause;

c. Due to the plaintiff's breach of the consent order, the defendants are now entitled to sell the charged properties to recover the money advanced to the plaintiffs; and

d. The plaintiffs are undeserving of the orders sought as they have come to court with unclean hands.

16. The respondents' counsel submitted that the applicants are not entitled to the setting aside or variation of the consent order as they have not sufficiently demonstrated the existence of vitiating factors such as fraud, misrepresentation or coercion as would invalidate a contract. For this argument counsel relied on the decision in *Flora Wasike v Desterio Wamboka* [1982- 1988] 1KAR 625 in which the principles governing the setting aside of consent orders were discussed.

17. On the prayer for injunction, counsel submitted that the court has a duty to enforce the consent judgment as agreed and cannot be called upon to re-write the terms of the consent. Counsel cited the decision in *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another* [2001]eKLR where the Court of Appeal held that:-

**"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."**

18. It was submitted that even though the respondents have a right to invoke the default clause in order to realize the charged property the defendants had not taken any steps towards such realization and that the application for injunction was therefore premature and unmerited. For this argument, counsel cited the decision in *A to Z Transporters Ltd & 5 Others v African Banking Corporation Ltd* [2013] eKLR where the court held:-

**" The application seeks a specific prayer of injunction.....I will for the time being restrict myself to the main prayer, which as I have already stated, seeks injunctive orders. In any application seeking an injunctive order the underlying presumption is always that the suit property is under some kind of immediate threat. In this case, the threat would be the possibility of the plaintiff selling the suit properties. However, from the pleadings, and the affidavits of the parties, and from the submissions of parties it is clear that there is no immediate threat to the suit property. At paragraph 4(b) of the replying affidavit of GREGORY OMUSOLO, the deponent states that the respondent bank has not sent a Statutory Notice under the registered Land Act. The applicant has not demonstrated that there is a threat to the suit property. If that is the case then filing this application."**

#### **Determination**

19. I have considered the application dated 7<sup>th</sup> September 2017, the replying affidavit and Grounds of Objection filed by the respondents together with the submissions and the authorities that were cited. I find that the main issues for determination are as follow;-

a. Whether the consent order should be varied and/or set aside.

b. Whether the plaintiffs have made out a case for the granting of orders of injunction.

20. It was not disputed that the applicants and the respondents filed a consent order that was subsequently adopted by the court as an order of the court on 12<sup>th</sup> May 2017 and that the said consent had the effect of compromising both the suit and the interlocutory application for injunction.

21. At the center of the dispute, however, is the applicants' contention that the respondents breached the terms of the consent thereby entitling them to seek a review or the setting aside of the said consent. On their part, the respondents contend that they are justified to move and realize the debt by selling the suit property by invoking the default clause of the impugned consent following the breach of its terms by the applicants. In effect therefore, both parties point accusing fingers at each other for breaching the terms of the consent. The pertinent question in this application therefore whether the applicants have made out a case for the review or setting aside of the consent order.

22. Courts have expressed themselves on the issue of variation of consent orders by equating a consent order to a contract and holding that consent judgment can only be varied on grounds that would allow a contract to be vitiated. The *locus classicus* on this matter is the judgment by Hancox JA (*as he then was*) in the case of *Flora Wasike v Desterio Wamboko* (supra) wherein it was held at page 626 that:

**"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."**

23. In *National Bank of Kenya Ltd v James Orengo* [2005] e KLR it was held:-

**"Now, there is nothing in this case to show that such circumstances existed. There is no claim of fraud or collusion. The consent was entered into freely, and it is unambiguous. There is nothing to show that there could have been mistake or misapprehension. As Windham, J, said, in the introduction to the passage quoted above from Hiranj's case, "a court cannot interfere with consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."**

**I find that there were such circumstances – there was no suggestion of fraud, misrepresentation, or collusion, and as I have found, no possibility of mistake. No specific statute or provision of law was cited to show that the consent judgment was contrary to such law, or public policy. The lower court had absolutely no jurisdiction to re-write the consent between the parties and order that interest "would be at court rates".**

24. In *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Ltd* [2015] eKLR it was held:

**"The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts."**

25. In *Board of Trustees National Social Security Fund v Michael Mwalo* [2015] eKLR the Court of Appeal held:-

**"The judgment arose from consent of the parties to the suit. The law clearly stated . A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the police of the court."**

26. The jurisprudence from the above cited authorities is that the circumstances under which a consent order can be set aside have been spelt out and that alleged breach of the terms of the consent is not one of the grounds for such setting aside. In other words, a party seeking the setting aside of a consent order must establish that there was fraud, misrepresentation, collusion, or mistake on the opponents part as at the time of the signing of the consent.

27. In the instant case, I find that none of the above mentioned circumstances have been established by the applicants so as to warrant the variation and or setting aside of the consent order recorded on 12<sup>th</sup> May 2017.

28. Turning to the prayer for an order of injunction, I note that the application for injunction is one of the prayers that were sought in the applicants' initial application dated 8<sup>th</sup> May 2017 that was compromised through the impugned consent order recorded on 12<sup>th</sup> May 2017. I find that the prayer for an injunction can therefore be said to be *res judicata* having been dealt with conclusively through the impugned consent order. In making a fresh application for injunction the applicant can be said to be reviving an application that was already compromised on certain agreed terms. I am guided by the decision in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others* Civil Appeal No. 36 of 1996 wherein the Court of Appeal stated as follows:

**"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature....That is to say, there must be end to applications of similar nature: that is to say further, wider principles of res judicata apply to applications within the suit."**

29. My findings on the subject of res judicata notwithstanding, I further note that the principles governing the granting of orders of injunction were set out in the celebrated case of *Giella v Cassman Brown Co. Ltd* (1971) EA 358 where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows:-

**"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."**

30. The above principles together with their mode of application were restated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, CA No. 77 OF 2012, as follows:

**“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**

- (a) establish his case only at a prima facie level,**
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and**
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.**

**These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.” (Emphasis added).**

31. In the present case, I note that the main ground for the prayer for an order of injunction is the claim that the respondents have breached the terms of the consent order and have threatened to auction the applicants’ properties by public auction. The respondents’ position, on the other hand, was that the application for injunction was prematurely made as they had not taken any steps towards the realization of the charged property.

32. I have perused the pleadings and the affidavits of the parties and I note that the applicant did not place any material before this court to demonstrate that the suit property is under imminent threat of being sold. During their submissions, the respondents’ counsel reiterated their position that the applicants’ property was not under any immediate threat of being sold. For the above reasons I am not persuaded that the instant application meets the threshold set in the *Giella case* (supra) for the granting of orders on injunction.

33. This court hastens to add that the parties herein, having voluntarily entered into a consent with a view to resolving their dispute, should in good faith make all efforts to fulfil the terms of the said consent and in the same spirit seek amicable means of resolving any misunderstandings that may arise therefrom without initiating court action that would be tantamount to inviting the court to rewrite the terms of their consent.

34. Having regard to my earlier findings that no vitiating factors had been established to warrant the invalidation/setting aside of the consent order coupled with my finding on the prayer for the order for injunction, I find that the instant application is not merited and I therefore dismiss it with orders that each party shall bear its own costs.

**Dated, signed and delivered in open court at Nairobi this 26<sup>th</sup> day of September 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Owino for the plaintiffs

Miss Mugenu for Munyi for defendants

Court Assistant - Otieno