REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT 74 OF 2007

AGRAFIN MANAGEMENT SERVICES LIMITED……..…..…….. PLAINTIFF

VERSUS

1. **AGRICULTURAL FINANCE CORPORATION……1ST DEFENDANT**
2. **NTIKYA ENTERPRISES LIMITED……. 2ND DEFENDANT**
3. **EQUITY BUUILDING SOCIETY……...3RD DEFENDANT**
4. **THE HON. ATTORNEY GENERAL…….…..4TH DEFENDANT**
5. **THE COMMISSIONER OF LANDS ……..……5TH DEFENDANT**
6. **GIDEON K. TOROITICH……..……6TH DEFENDANT**

RULING

By its application dated 17th February, 2012 brought under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, the 1st Defendant has applied to set aside the consent order dated 23rd February, 2011 and all consequential orders related thereto.

That application was supported by the Affidavit of Rose Ochanda sworn on 13th February, 2011. The 1st Defendant contended that the Plaintiff had filed an application dated 9th February, 2011 to amend its Plaint, that on discovering the existence of that application the 1st Defendant instructed its previous Advocates on record Ms Kipsang & Mutai to oppose the said application as the orders sought were thought to be prejudicial to the 1st Defendant, that contrary to its strict instructions aforesaid, the said Advocates recorded a consent dated 23rd February, 2011 allowing the application and that the said consent was endorsed as an order of this court on 13th July, 2011.

Mr. Maritim, Counsel for the 1st Defendant submitted that the order was prejudicial to the 1st Defendant in that the amended pleading departed from the original claim, that the 1st Defendant wanted to disassociate itself with the said consent as it amounted to a misrepresentation which was voidable. Counsel concluded that the application had been brought promptly upon discovery of its existence.

The application was opposed by the Plaintiff as well as the other Defendant's. The Plaintiff filed a Replying Affidavit of Samuel Kinyanjui and Grounds of Opposition dated 5th March, 2012 which were ably argued by its Counsel Mr. Kinyanjui. It was submitted for the Plaintiff that the application was defective, that a consent order can only be set aside by way of review or fresh suit, that there were no valid grounds urged for setting aside the consent order, that the application was supported by a defective Affidavit. The Plaintiff urged that the application be dismissed.

The 2nd Defendant filed Grounds of Opposition dated 7th March, 2012 that were argued by Mrs. Guserwa. Counsel supported the position taken by the Plaintiff's counsel and further submitted that the application was misconceived and an abuse of the court process in that it was intended to scuttle the hearing and determination of the suit. She noted the 1st Defendant seemed to have issues with its own counsel which was not a ground for review or setting aside a consent order.

In reply, Mr. Maritim for the Plaintiff did clarify that the consent sought to be set aside was dated 13th February, 2011 signed on 9th June, 2011, and filed in court on 13th June, 2011. He reiterated that since there was misrepresentation the order should be set aside. Counsel however never sought to amend the Motion to change the date of the order sought to be set aside.

I have considered the Affidavits on record, Grounds of Opposition, submissions of counsel as well as the authorities relied on.

I have thoroughly perused the entire record but could not trace any order made by consent or otherwise on 23rd February, 2011. The record would show that on 4th February, 2011, the 1st Defendant's application dated 29th November, 2010 to amend its Defence came up for hearing before Hon. Kariuki J (as he then was). However, because that application had not been served, it was adjourned to 17th February, 2011. On that day when the suit came up for hearing before Hon. Mugo J, there were on record two (2) applications, the 1st Defendant's summons dated 29th November, 2010 and the Plaintiff's summons dated 9th February, 2011. Both applications were seeking leave to amend the respective parties' pleadings. The court directed that the matter be mentioned on 10th March 2011 for directions as to the hearing of the said applications.

On 10th March, 2011 when the parties appeared before Mugo J, they indicated that a consent had been signed by all the parties allowing both applications except the Attorney General. The court stood over the matter generally to allow the Attorney General to sign the consent.

The next entry is on 13th July, 2011 minuting the contents of a consent letter dated 23rd February, 2011. However, that minute was never endorsed by the court. Accordingly, as matters stand, there is no formal order on record dated 23rd February, 2011 in respect of which an order to set aside can be made.

I take that view because the date of an order is the date on which it is made or endorsed by the court. Order 21 Rule 8 provides:-

"8.(1) A decree shall bear the date of the day on which judgment was delivered.

……

(6) An order whether in the High Court or Subordinate Court, which is required to be drawn up shall be prepared and signed in like manner as a decree."

A consent order becomes an order of the court upon being endorsed by the Court. In this case, the consent of the parties set out in a letter dated 23rd February, 2011 was never endorsed by the court. In my view therefore, there being no order on record dated 23rd February, 2011 capable of being set aside, the 1st Defendant's application as made fails.

The second issue that falls for consideration is the efficacy of the application. The same is expressed to be brought under Order 51 rule 1, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act.

None of the said provisions give the court jurisdiction to grant he Orders sought. Sections 1A and 1B provide how the overriding objective of the Act is to be realized. Section 3 is a provision saving the special jurisdiction and powers conferred on a court. Whilst Section 3A is the provision saving the inherent power of the court. Mr. Kinyanjui, Counsel for the Plaintiff submitted that the application to set aside a consent order can only be made by way of review or a separate suit. He cited the case of **Kenya Commercial Bank Ltd –vs Benjon Amalgamated Ltd & Anor CA No. 276 of 1997 (UR)** wherein at page 9 the Court of Appeal held:-

"In the case of Brooke Bond Liebig (T) Limited Vs Mallya (1975) E.A. 266, Law JA, stated the law at P. 269 in these terms:-" "The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19EACA 131, where the following passage from Seton on Judgment and order, 7th edition, Vol. 1 page 125 was approved;

'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 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.'

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties, who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham, J, said, in the introduction to the passage quoted above from Hirani's case, a court cannot interfere with a consent judgment expect in such circumstances as would afford good ground for varying or rescinding a contract between the parties.

In his judgment in the case of Flora Wasike vs Destimo Wamboko (1988) 1 KAR 625, Hancox JA (as he then was) said in his judgment at page 626-

' 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.'

Those, in essence, are the principles which the learned Judge should have applied to determine the application before him"

From the foregoing, it is quite clear that once a consent order or judgment has been entered into by the parties, the procedure available to challenge or set aside or vary the same is by way of an application for review or by a different suit.

In the present application, the 1st Defendant chose not to apply for review or by separate suit but to approach the court under Order 51 Rule 1 Sections 1A, 1B, 3 and 3A of the Civil Procedure Act. I have already held that Section 1A, 1B and 3 of the Civil Procedure Act do not give this Court jurisdiction to grant the prayers sought. Similarly Order 50 rule 1 is only a provision on how to approach Court. It does not help the 1st Defendant's case.

As regards Section 3A, my view is also that the same does not assist the applicant. In the case of **Mumias Outgrowers Company (1998) Ltd –vs- Mumias Sugar Company Ltd NRB HCCC No. 414 of 2008** when considering an application to set aside and/or vary a consent decree, I held that:-

"The applicant has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed.

Bosire J (as he then was) in the case of Muchiri –vs- Attorney General & 3 others (1991) KLR 516 stated at page 530 that:-

"Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice."

Also in Halburys Laws of England 5th edition Vol. II, 2009 paragraph 15, it is observed that:-

"… a claim should be dealt with in accordance with the rules of the court and not by exercising the court's inherent jurisdiction….. and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary. Where it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexations or oppression to do justice between the parties and to secure a fair trial between them."

In my view therefore, this was not a proper case to invoke the inherent powers of the court."

I still hold the same view and I fully apply the same to the application before me.

Even assuming that the applicant had properly invoked the inherent powers of the Court and there was a proper order on record, I hold the view that the application does not satisfy the threshold for setting aside a consent order. A consent order is akin to a contract between the parties and the principles for setting aside a contract are well known. The Court, in my view, will exercise its jurisdiction to review, vary or set aside a consent order if it is shown that such an order has been obtained by fraud or collusion, by agreement contrary to the policy of the Court, or the consent was given without sufficient material fact, or misapprehension or ignorance of material facts or for a reason which would enable a court to set aside an agreement or by the consent of the parties themselves. See the Court of Appeal decision in **Munyiri –vs- Ndungunya (1985) KLR 370.**

None of the foregoing grounds were advanced by the 1st Defendant in the present application. The only grounds that were advanced was that the 1st Defendant's former advocates had acted contrary to the express instructions of the 1st Defendant and that there was misrepresentation. On the issue of the 1st Defendant's Advocates acting contrary to instructions, that is no ground to upset a consent order. A party to a litigation is bound by the actions of its advocate in proceedings where an advocate has been instructed to act.

As regards the issue of misrepresentation, although the same can be a ground for setting aside a consent order, it was not clear which misrepresentation the 1st Defendant was referring to. If it is the misrepresentation by its former Advocates in the correspondence exhibited as RAO2, I am afraid the other parties to the consent had nothing to do with it and cannot therefore be a basis of upsetting the contract between the parties. If however, it is misrepresentation by the other parties to the consent, the same was not properly or clearly pleaded or expressed in the Affidavit or proved to exist. On my part, I have not seen anything on record amounting to misrepresentation on the part of the other parties that will entitle me to revisit the parties consent wherein they had allowed the 1st Defendant's chamber summons dated 29th November, 2010 and the Plaintiff's Chamber summons dated 9th February, 2011.

For the foregoing reasons, the 1st Defendant's Notice of Motion dated 17th February, 2012 is without basis and is hereby dismissed with costs to the Plaintiff and the 2nd Defendant.

Before concluding this Ruling, as I have noted above there is a consent letter on record referenced JMG/AMS/CIV/30/04 on the letterhead paper of Ms. Mwaniki Gitau and Company, Advocates. It is dated 23rd February, 2011. The same is shown to have been signed on 9th June, 2011 and filed in Court on 13th June, 2011. The same is signed by all the parties. Since the same was never endorsed by the Court, it is imperative that the parties take steps to have the same endorsed and adopted as an order of the Court before any further proceedings are taken in this matter.

I make these observations well knowing that this suit is listed for trial in less than a month away, the suit is of 2007, that it will be illogical to proceed to trial without first settling the issue of what pleadings will be applicable. More importantly, the observations are made in the exercise of the jurisdiction given under Section 1A of the Civil Procedure Act to meeting the overriding objective of the Civil Procedure Act which enjoins this court to effect the facilitation of the just, expeditious and proportionate resolution of Civil disputes, of which this is one.

Orders accordingly.

DATED and delivered at Nairobi this 28th day of March, 2012.

……..
A MABEYA
JUDGE