

AL JALAL ENTREPRISES LTD.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....1ST DEFENDANT

CHEGE WAIGANJO.....2ND DEFENDANT

RULING

On 24th November 2009, the then advocate of the plaintiff, Messrs Gichuki King'ara & Company advocates, presented to the court a consent dated 19th November 2009 duly executed by the said firm of advocates on behalf of the plaintiff, Mohamed Muigai & Company advocates on behalf of the 1st defendant and Kimondo Gachoka Company advocates on behalf of the 2nd defendant. The consent was in the following terms:

“That the plaintiff’s notices of motion applications dated the 16th December 2008 and 12th February 2009 be marked as settled in the following terms;

By Consent

1. That Chege Waiganjo and Nduati Warui be appointed as joint receivers of the suit properties. That Nduati Warui represents the interest of Al Jalal Enterprises Ltd and Chege Waiganjo represents the interest of NIC Bank Ltd.
2. That either party be at liberty, with sanction of the court, and for cause shown, to replace any of its appointed receiver.
3. That the joint receivers shall exercise equal but joint powers over the assets of the plaintiff. All decisions by the receivers will be by consensus and in default be referred to court for directions.
4. That the joint receivers do perfect the title over the suit properties and the new title be deposited with the joint receivers.
5. That the joint receivers do take possession of the suit property forthwith.
6. That the joint receivers shall have power to open, operate and have access to all the company and receivership accounts in any bank.
7. That in exercise of their powers, the joint receivers shall be guided by the various instruments of debentures, the Companies Act and any other orders of court.
8. That costs, legal fees and such outgoings be met from the receivership account.
9. That out of the monies collected by the receivers, Kshs500,000 per month be released to Al Jalal Enterprises Limited, less any amount owed to the receivers by Al Jalal Enterprises Limited as rent over part of the building by the company or its associates. The balance of collections be released to NIC Bank Ltd.
10. That accounts be settled before trial.
11. That each party’s costs of the suit and the two applications be paid by the joint receivers out of the receivership account.”

The consent of the parties was adopted as an order of this court on 24th November 2009.

On 17th December 2009, the plaintiff moved the court by notice of motion purportedly under the provisions of Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking various orders of the court. The plaintiff sought the setting aside, varying or discharge of the above consent order. Pending the hearing and determination of the application, the plaintiff sought that the court “stay the operations of the receivers, their taking office, remaining thereon and/or in any other manner taking control and charge of the affairs of the plaintiff company”. The plaintiff further prayed for the court to terminate the appointment of the receivers which in its view was unlawful. It further sought orders for the receivers to cease their operation in the suit premises and give vacant possession thereof to enable the directors of the plaintiff company take back full control of the plaintiff company.

The grounds in support of the application are stated in the face of the application. The application is supported by the annexed affidavit of Hassan Mohammed Abdi, a director of the plaintiff. The application is opposed. Henry Maina, the manager legal services of the 1st defendant swore a replying affidavit in opposition to the application. The 2nd defendant filed grounds in opposition to the application. At the hearing of the application, I heard rival arguments made by Mr. Gachie for the plaintiff, Mr. Imende for the 1st defendant and Mr. Kimondo for the 2nd defendant. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have carefully considered the submissions made by the above counsel. The issue for determination by this court is whether the plaintiff established sufficient grounds to enable this court set aside the consent order. The principles to be considered by this court in determining whether or not to set aside a consent order or judgment are well settled. In Flora N.

Wasike v. Destimo Wamboko [1982-88] 1 KAR 625 Hancox JA held as follows:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which could justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Ltd Civ Apps 29 of 1982 and 69 of 1983. In Purcell v F C Trigell Ltd [1970] 3 All ER 971, Winn LJ said at 676: ‘It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.’”

At page 627 the learned judge of appeal quoted cited with approval the decision in Hirani v Kassam (1952) 19 EACA 131, at page 134:

“The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Seton on Judgments and Orders (7th edn.), vol 1, p 124, as follows:

“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.”

In the present application, it was the plaintiff’s claim that its former advocates entered into the consent without its authority. The plaintiff states that it never gave instructions to its former advocates to enter into the said consent and was therefore taken by surprise by the turn of events. It is the plaintiff’s case that its former advocate compromised the suit to its disadvantage without its say so. In response to the plaintiff’s case, it was the defendants’ case that the said consent was entered into after protracted negotiations between the plaintiff’s former counsel and the defendants’ counsel who are still on record. The defendants were of the view that the plaintiff had filed the present application to frustrate the receivers from performing their legal mandate.

I have carefully considered the facts of this application. The plaintiff did not place any material before this court to persuade it to set aside the consent order. It is clear that the claim by the plaintiff that the consent order was signed on its behalf by its former advocates without its instruction is without foundation. The said consent was drafted by the plaintiff’s said advocates. Some of the clauses in the consent are in favour of the plaintiff. It cannot therefore be said that the said consent was wholly in favour of the defendants. The plaintiff did not place any evidence before the court that there was fraud or collusion between its former advocates and the defendants. Neither did the plaintiff establish that the consent was entered by mistake or in ignorance or misapprehension of material facts. The defendants were entitled to take in good faith the representations made by the plaintiff’s former advocates as constituting instructions from the plaintiff. In all the circumstances of the case, the former advocate was the agent of the plaintiff and is deemed to have full instructions of such plaintiff. For a client to disown the acts of its advocates, it must place sufficient materials that will establish cogent grounds upon which the court can set aside a contract.

In the premises therefore, I find no merit with the plaintiff’s application filed in court on 17th December, 2009. The same is dismissed with costs. The interim orders which were granted on 17th December, 2009 are hereby set aside.

DATED AT NAIROBI THIS 22ND DAY OF JANUARY 2010.

L. KIMARU

JUDGE