REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2714 of 1997

CRESTED SEA AGENCIES LIMITED ..... PLAINTIFF

VERSUS

MURANGA COUNTY COUNCIL..... DEFENDANT

RULING

A perusal of the record reveals that on 10th June 2002 Counsels for both parties namely Mr. Kibatia for the Plaintiff and Mr. Wamae for the defendant appeared before Githinji J. as he then was (now JA). Mr. Wamae is recorded as having informed the court that they had reached a settlement, information which was confirmed by Mr. Kibatia also on record.

Based on that information the following orders were made by the Court.

"*By consent*

(i) Judgment is entered for the plaintiff against the defendant for shillings 2,472,095.

(ii) Execution stayed for 60 days."

On 17th May 2006 Counsel for the defendant respondent presented to court an application by way of Notice of Motion under order XLIV rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It prayed for 3 orders namely:-

(1) The consent judgment entered on 10th June 2002 be reviewed.

(2) The said consent judgement be set aside.

(3) Costs of the application be provided for

The grounds in support are set out in the body of the application, supporting affidavit and annextures, written skeleton arguments and case law. The major ones are:-

(1) That the said consent judgement was entered into by mistake because it was made under a mistaken belief that the defendant as on that date owed the plaintiff/respondent a sum of Kshs 2,332,095,00 being the aggregate sum of two cheques drawn by the defendant applicant in favour of the plaintiff/respondent.

(2) That after the said judgment was recorded and while the said applicants advocates was still under the said mistaken belief a sum of Kshs 600,000.00 was paid to the plaintiff respondent as part payment of the said decretal sum.

(3) It is their stand that the two cheques which were issue to the plaintiff/respondent and which form or constitute the plaintiffs cause of action were drawn and issued fraudulently by the concerned employees of the council who were then about to leave the employment of the applicant and who in fact did leave the said employment.

(4) There is annexed to the applicants supporting affidavit annexture AL3 & 4 which show existence of a statement of a running account maintained by the parties during the period in question.

(ii) AL5 is a bundle of documents which include letters demanding insurance premiums addressed by the plaintiff/applicant as aforesaid.

(iii) The document also include a statement of a running account maintained by both parties showing that all the said insurance premiums were duly paid.

(iv) Also annexed are the applicant's bank statements showing that all their cheques issued for the payment of the said premiums were honoured.

(5) That the evidence contained in AL5 was not available to the defendant applicant when the aid consent was recorded.

(6) Their assertion that they did not owe any money to the plaintiff respondent as at the time the said consent was entered into has not been denied in the replying affidavit.

(ii) they contend the Plaintiff/respondent does not deny demanding payment and receiving payment for the premiums as per annexture AL5.

(iii) Failure to deny demand and receipt of the said amount as in No.(ii) above and failure to deny the authenticity of the receipts issued for the receipts of the said payments on the letter heads of the plaintiff respondent is a clear demonstration of an acknowledgement of the receipt of the same and proof that no money was owed to the plaintiff/respondent as at the time the said consent was entered into.

(7) The respondent's assertion in the replying affidavit that the indebtedness, existed as at the time of the entry of the said consent judgment without any proof has been ousted by annexture AL5 and the respondents failure to controvert the same.

(ii) It does not oust their assertion that the said officers wrote the said cheques while acting fraudulently and in conclusion with the plaintiff/applicant.

(9) They rely on Section 47 of the evidence Act in their attempt to prove that although the court was competent to enter the said consent judgment, the same was obtained by fraud and collusion and so it cannot stand as they have demonstrated that the cheques could only have been issued either by mistake, fraud and or collusion.

(10). They concede that an application for review is required to be filed without undue delay.

(ii) They agree that the application subject of these proceedings was presented 4 years later after entry of the said consent judgement. However the reasonableness or the unreasonableness of the delay depends on the circumstances of each case.

(ii) Herein the court is invited to note that the affairs of a local council are run by various officers. Some are of questionable integrity, hence the possibility of such malpractices being discovered late in years as the possibility of such officers of dishonest and questionable character trying to conceal

documents in a bid to cover up their tracks cannot be ruled out.

(iii) This is proved by the fact that the malpractices were uncovered by the deponent many years later after he had taken over the office and scrutinized the documents exhibited.

(iv) It is also deponed that investigations took years to complete. Thereafter there were correspondences exchanged between Counsels of both parties in a bid to settle the matter outside the court and it is after these efforts failed that the applicant presented the application for setting aside.

(11). They contend that they invoke the inherent powers of the court enshrined in Section 3A of the Civil Procedure Act, which powers they contend can not be over ridden by the rules in order 44 rule (1) Civil Procedure Rules.

(ii) It is also their stand that unreasonable delay cannot stand in the face of the inherent powers of the court.

(iii) Further that the inherent powers of the court will be called into play to disallow a judgement in favour of a party who is not owed any money.

(12). They are strangers to the respondent's allegations that proof of none payment of the premiums is proved by the demand of the said money by the insurance company, because the possibility that the money was paid to the plaintiff respondent who failed to remit the same cannot be ruled out.

(13). For the reasons given they maintain they have earned the relief sought and that the same should be granted the them.

On case law reliance was placed on the case of GITAU AND 2 OTHERS VERSUS WANDAI AND 5 OTHERS [1989] KLR 231 where it was held inter alia by Tanui J. that "*a consent judgment can be interfered with if given without sufficient material facts or in misapprehension or in ignorance of material facts. The consent judgment could be challenged in the suit itself but that did not rule out the bringing of a separate suit.*"

The case of MUNYIRI VERSUS NDUNGU YA [1985] KLR 370 where it was held inter alia by the court of appeal that "*the parties had entered into what amounted to a consent order from which no appeal is allowed by Section 67(2) of the Civil Procedure Act Cap.21.*

(2) The remedy that was open to the parties was to set aside the consent order either by review or by the bringing of a fresh suit as a court can only interfere with a consent judgment in such circumstances as would afford a good ground for varying or rescinding a contract between parties.

(3) It would be wiser to obtain the signatures of the advocates or the parties to the consent judgment and orders.

Both these two cited case cited with approval, the decision by the Court of Appeal of FLORA WASIKE VERSUS DESTIMO WAMBOKO [1988] KLR 429. In this landmark case, the brief facts were that a consent judgment was entered between the counsels of the parties to the effect that parties were to enter into a fresh sale agreement, the respondent was to transfer the land to the appellant who would pay the new agreed price and if she failed to pay, she would vacate the land. The appellant appealed against the consent judgment among others that she had not consented to it. The C.A. held inter alia that:-

(1) A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out.

(2) The Civil Procedure Act Cap.21 Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid abinitio and

should be rescinded or that there exists circumstances to varying the decree.

(3) In this case there were no grounds which would justify the setting aside of the consent judgment.".

In the said WASIKE VERSUS DESTIMO CASE (SURPA) the Court of Appeal cited the case of ISMAIL SUNDERJI HIRANI VERSUS NOORALI ESMAIL KASSAM [1952]] 19 E.A.C.A.131, where it was held inter alia that:-

"*(i) where a compromise is recorded under order 24, rule 6, the decree is passed upon a new contract between the parties super seeding the original cause of action.*

(ii) The compromise of a disputed claim made bona fide is a good consideration and the court can only interfere with it in circumstances which would afford good ground for varying or rescinding a contract between the parties".

The case of BROOKE BOND LIEBIG (T) LTD VERSUS MALLYA [1975] E.A. 266 where the Court of Appeal held inter alia that:-

(i) a disputed compromise may be challenged in the suit itself.

(ii) A consent judgment may only be set aside for fraud, collusion or for any reason which would enable a court to set aside an agreement.

The Plaintiff Respondent on the other hand has opposed the application on the basis of the grounds set out in the replying affidavit sworn by ANNE W. MUNENE. On 27th October, 2006 written skeleton arguments and case law. The major grounds relied upon by the respondent are:

(1). It is not true that the amount claimed by the Plaintiff respondent which formed the basis of the consent judgment had been fully paid as the receipts relied upon by the defendant/applicant total Kshs 2,138,273.50 where as the respondents claims was Kshs 2,322,095.00.

(ii) The said receipts were issued between March l994 and 31st March l995 during which time the applicant was enjoying the services of the Plaintiff before paying for the arrears.

(iii) The letter annexed as AL3 confirms that the respondent was paying the premiums first and then claim them from the applicant.

(2). The alleged over payment has not been substantiated by an audited report.

(3). The Court is urged to take note that the respondents averments in the replying affidavit that the applicant defendant had its accounts audited annually and both harmonized all its books, and that it was only after a thorough scrutiny of its books of account that applicant agreed to record a consent judgment on 10th June 2002.

(4). It is their stand that having taken 4 years to make the application, the applicant is guilty of lanches and so the application cannot stand.

(5). They urge the court to go by their view that the audit done in the years between l992 and 2002 when a consent was recorded between the parties was proper and reflected the applicants indebtedness to the respondent.

(6). It is also their stand that by pleading mistake, the applicant ought to have told the court where the mistake occurred in their books and how and why the entries were made which showed that the applicant owed the respondent the monies in question.

(7). The information contained in annexture AL4 concerns entries for policies for the year l995 – l997 and not l992-l993. What they should have annexed is audited books for policies for the year l992-l993.

(8). They still maintain that the applicant has not clearly explained what the mistake is, that which has made the applicant come to court to seek review. In the absence of an explanation of how the mistake occurred, the application does not hold and the same should fail.

(9). The authorities relied upon by the applicant have no relevance to this application as the case of GITAU AND 2 OTHERS VERSUS WANDAI & 5 OTHERS (supra) related to a consent entered into by parties who had no capacity and as such the same was void but the Court did not set it aside where as the case of MUNYIRI VERSUS NDUNGUYA (supra) the Court of Appeal noted that the parties had not signed the consent but made no orders in respect of the same as parties could not appeal against a consent judgment.

On their own they rely on the case of WASIKE VERSUS WAMBOKO [1988] KLR 429 whose holding already set out herein is to the effect that "*a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out".*

The case of SURE VERSUS MUNICIPAL COUNCIL OF MOMBASA [1991] KLR 587 in which Wambilianga J. as he then was (nor rtd) held inter that:-

(1) A consent judgment or order has a contractual effect and can only be set aside on those grounds which would justify the setting aside of a contract.

(2) Unless the conduct of the Counsel in the case can be proved to have been fraudulent or mistaken or one which would be annulled on the ground of misrepresentation, the compromise between him and the opponent must remain in place.

(3) The Town Clerk assertion that he alone had the power to instruct outside advocates to act on behalf of the council was purely his own in house matter which an outsider was incapable of knowing.

The case of NDIRANGU VERSUS COMMERCIAL BANK OF AFRICA [2002] 2 KLR 603 where it was held inter alia that "*an application for review can only succeed if the applicant proves an error or mistake apparent on the face of the record, discovery of new evidence or any sufficient reason.*

(2) An application for review on the ground of new evidence will succeed only if the applicant proves that he did not have it in his possession at the time and could not have obtained it despite due diligence.

Having set out the rival arguments of both parties on the application subject of this ruling, the duty of this court is to determine whether:-

(1) The applicant has demonstrated grounds satisfying the ingredients required for the granting of the relief sought or

(2) Whether the respondent to the application has on the facts displayed and demonstrated, has shown that the applicant is not within the ambit of the ingredients necessary for the granting of the said relief.

The application is presented under Order XLIV rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. These read:-

"*Section 3A Civil Procedure Act – Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

Order XLIV rule 1(1). Any person considering himself aggrieved:-

(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred: or

(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay".

From a reading of the above provisions of law the ingredients that the applicant needs to demonstrate, in order for the applicant to avail itself of the inherent powers of the court enshrined in Section 3A of the Civil Procedure are that:-

(1) There is no other provision of law covering the relief sought or alternatively that the available provisions are in adequate.

(2) The said invocation is for purposes of ensuring that ends of justice is done to both litigants.

(3) The said invocation is for purposes of preventing abuse of the due process of Court.

While those under order XLIV rule 1(1) are that the applicant has to demonstrate that:-

(i) The applicant is aggrieved by a decree or order from which an appeal is allowed but none has been preferred or one in which no appeal is allowed.

(ii) There is discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or made.

(iv) That there is some mistake or error apparent on the face of the record.

(v) Or for any other sufficient reason.

(vi) The application for review must have been presented without undue delay.

These ingredients have been applied to the rival arguments presented herein and considered them in the light of the facts demonstrated herein. The Court therefore proceeds to make the following findings:

(i) As regards the first ingredient, the court is satisfied and there is no dispute as it is common ground that there exists on record a consent judgment entered into by counsels of both parties on 10.6.2002. It is also common ground that no appeal was ever filed against the said consent by either side. Guidance from the decisions of case law emanating both from the superior courts as well as the Court of Appeal is in agreement to the effect that a consent order or decree is not appealable. Any party to any proceedings where a consent order or decree is subject, and who has become aggrieved by such an order or decree and wishes to challenge, the same for whatever reasons has only one avenue to challenge that order, or decree, and this is by why of review. The applicant is therefore properly before this court seeking review.

The second ingredient which deals with discovery of new and important matter, or evidence, which could not be accessed even with due diligence, on their part as at the time the order, or decree was passed, is not being relied upon, despite the applicants assertion that as at the time the consent order, was made, and decree, passed, they were not aware that the said amounts had been previously paid and that the said cheques forming the consent order and subsequent decree had been made fraudulently by applicants' employees who were about to leave employment of the applicant with the collusion of the respondent.

The 3rd ingredient deals with the existence of a mistake or error apparent on the face of the record. The

stand of the applicant is that this has been demonstrated by production of annextures AL 3 and AL 4.

(ii) That the said payments were made on account of insurances polices taken on behalf of the applicant by the respondent.

(iii) That the respondent has not denied receipt of the said payments.

(iv) That the respondent has not displayed documents to the contrary to the effect that payment were not made as asserted by the applicants.

(v) That the officers who colluded to defraud the applicant with the collusion of the respondent did every thing possible to cover their tracks.

(vi) That the error was discovered in 2004 when a new Town Clerk took office and started scrutinizing documents to find out why the indebtedness had not been satisfied and that is when it was discovered that the payments had been made earlier on.

(vii) That after discovering the error, attempts were made for an out of court settlement, and when it failed to materialize is when they came to court.

The respondent's response to this assertion is that:-

(i) There is no audited accounts for the year's l992 – l993 as the one attached is for the years l995-l997 in AL 4.

(ii) The applicants used to do Audits of payments to the respondents, and the said cheques forming the claim had been issued after such audits had been carried out and the amount found to be due to the respondent and so the same is payable.

The Court has considered these two arguments in the light of the documentation relied upon by the applicants namely annextures AL3 and AL4. It is noted that there is no denial of these documents by the respondent save that they do not represent the amount in the consent. AL3 contains the following documents.

(a) A correspondence from the respondents to the applicants dated 15.4.94 acknowledging receipt of Kshs 994,132.25 and demanding the balance of Kshs 994,138.25.

The receipts annexed are:

(i) Dated 25.3.94 for 994,135.25

(ii) Dated 10.5.94 for 994,138.25 – 10701

(iii) 31.l.95 for Kshs 250.000.00 – 10890

These receipts total Kshs 2,138,273.50. They all read that they were payment for various polices, for insurance and insurance premiums. It is to be noted that there is a short fall of Kshs 333,821.50. to add up to the decree.

AL 4 on the other hand has the following details.

(i) 11520 dated 23.2.96 – 396,062.45

(ii) 11519 – 19.2.90 – 376,062/45.

(iii) 11521 – 23.2.96 - 396,062.45

(iv) 10905 - 13.2.95 – 150,000.00

(v) 11109 – 15.9.95 - 394,046.80

(vi) 11110 – 18.9.l995 - 397,046.85

(vii) 10856 – 1.12.94 - 200,000.00

(viii) 10798 - 7.10.94 - 250,000.00

(ix) 10742 – 2.8.94 - 500,000.00

(x) 10742 – 5.7.94 - 1,057,784.00

Totaling Kshs 4,137,065.00

In this Courts opinion, in order to oust the applicants assertion that AL3 and AL4 represent the amount subject of the consent, the respondent was required to display records showing what the said payments were for i.e. provide an audit of the insurance policies issued to the applicant from 1992 – l997, totalize their value and indicate the same, marry the payments made as per annextures AL3 and AL4 and then determine whether there was a short fall in the payments for those polices the tune of the amount subject of the consent.

In the absence of such a demonstration, there is nothing displayed by the respondent to oust the applicant's assertion that the consent was entered into by mistake. The mistake being that both parties were under a misapprehension that the said amount was owing and outstanding at the time the consent was entered into.

Further it would be difficult for the respondent to oust the applicant's assertion that the cheques were made out by their officers fraudulently and in collusion with the respondent's officers.

Assertion had been made by the respondents to the effect that, had the said money been paid as alleged, then the insurance company on whose behalf they respondents, as brokers were transacting business with the applicants, would not have demanded payments from them for the said insurance policies. The applicants countered this by submitting that such a demand is not surprising. It is inevitable if the respondent did not pay over to the insurance company money received from the applicant. More so when nothing has been displayed by the Respondent to show that money paid to them by the applicant as per annextures AL3 and AL 4 was paid over to the insurance company concerned. In this Courts opinion, the net result of the foregoing assessment on the ingredient of demonstration of existence of a mistake or error apparent on the face of the record, the mistake or error being that, a belief, that the money forming the consent was outstanding when in fact documents exist which tends to negative the existence of the indebtedness subject to proof of course.

As for the ingredient of existence of other reason or sufficient course, the court, is satisfied that the arguments presented by both sides on account of the ingredient of showing the existence of a mistake or error apparent on the face of the record surfice for the disposal of this ingredient as well. In this Courts opinion there is sufficient material as explained above to enable this court draw a conclusion that there is sufficient reason or cause for the applicant to complain in the manner they have done. The last ingredient is proof that the application has been presented to court with undue delay. It is common ground that the application subject of this ruling has been presented to court 4 years after the consent judgment was entered into. Indeed it is agreed on both sides that there has been an unreasonable delay in presenting the application. The respondent has urged the court to disallow the application on account of laches, on the part of the applicant. The Applicant countered this by saying that indeed they took 4 years to seek review. There is a delay but the court should look at the reasons behind the delay.

(ii) The reason for seeking review.

(iii) Public policy that frauds and collusion should not be allowed to stand.

(iv) The court should also tap on its inherent powers to excuse the delay.

(V) The court has a discretion in circumstances displayed herein to excuse the same.

The Court has given due consideration to the oral arguments on the question as to whether the delay in presenting the application should be penalized or whether it should be excused. This court has judicial notice of, the fact that case law that it has judicial notice of emanating from both the Court of Appeal/and the superior courts have construed this provision order 44 rule 1 and determined without undue delay" to mean almost immediately. It would appear that 4 years is definitely outside that ambit. The applicant wishes to avail itself of the court's discretion and the inherent powers of the court.

In the case of ELITE EARTH MOVERS LTD VERSUS KRISHNA BEHAL & SONS [2005] 1 KLR Emukule J. ruled that "*The discretion of the Court to set aside an exparte judgment is wide and flexible and it is exercised upon terms that are just. The discretion is intended to avoid injustice or hardship resulting from accident, in advertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct the course of justice*"

The judges reasoning on discretion is drawn from the landmark case on the subject namely the case of SHAH VERSUS MBOGO [1967] E.A. 116. Holding (IV) states:-

"*Applying the principle that the courts discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence or excusable mistake or error but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the course of justice*".

In the case of CMC HOLDINGS LIMITED VERSUS NZIOKI [2004] 1 KLR 173 the Court of Appeal laid down the following guidelines on the exercise of the courts discretion:-

(i) discretion must be exercised upon reason and judiciously.

(ii) It should not be exercised wrongly in principle neither should the court act perversely on the facts.

(iii) It should be exercised to ensure that a litigant does not suffer injustice or hardship as a result of among other things, an excusable mistake or error.

(iv) It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.

(v) The Court must consider not only the reasons why the defence was not filed or why the appellant did not turn up for hearing but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or a draft defence is annexed raises triable issues.

Turning to the exercise of the inherent powers of the court, there is now a wealth of case law emanating both from the superior courts as well as the Court of Appeal construing the said section and laying down guide lines as to the circumstances under which the said inherent powers of the court can be availed to a litigant.

In the case of WANJAU VERSUS MURAYA [1983] KIR 276 Kneller JA as he then was held inter alia that "*Section 3A of the Civil Procedure Act Cap.21 although saving the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse the power of the court should not be cited where there is an appropriate section or order and rule to cover the relief sought.*"

The case of MEDITERRANEAN SHIPPING CO. S.A. VERSUS INTERNATIONAL AGRICULTURAL ENTEPRISES LTD ETCO (MSA) LTD [1990] KLR 183 where Bosire J. as he then was (now JA) held inter alia that:

'*it is now trite law that the inherent jurisdiction of the court should not be invoked where there is specific statutory provision which would meet the necessities of the case.*

(2) Section 3A of the Civil Procedure Act ought not to be called into the aid of the litigant in all situations not specifically legislated for. It all depends on the circumstances of the case".

The case of the DEPOSIT PROTECTION FUND BOARD VERSUS KAMAU AND ANOTHER [1999] 2 E.A.(CAK 67) where it was held inter alia that "*the inherent jurisdiction of the Court may only be called into aid within the confines of the jurisdiction by statute on the administration of justice, but not the authority upon which to move the court for a remedy"*.

The court has applied the afore set out principles of case law on the exercise of the courts discretion in favour of a litigant and the invocation of the inherent jurisdiction and makes the following findings.

(1) On the exercise of the courts discretion in favour of a litigant, the court, makes findings that it is only available to the applicant if it can be shown that the said applicant through inadvertence, accident or excusable mistake failed to take action leading to orders complained of being made against them. This ingredient has been applied to the facts demonstrated here in and the court, finds that, had a thorough scrutiny and investigations, in terms of annexture AL3 and AL4 been done, the said consent judgment would not have been entered into. At the most the applicant would have resisted the claim. The matter would then have gone on to trial so that the respondent would have been called upon to prove its claim. While the applicant would have been called upon to disprove their claims.

(ii) The applicant would have become disentitled to the relief had the respondent controverted their claim with audited accounts in response to annexture AL3 and 4. In the absence of such evidence, the applicant's assertion that the cheques forming the aggregate sum forming the consent judgment sought to be upset were made by mistake, fraudulently and with collusion.

(iii) Since the case law, cited, states clearly that the courts', discretion has to be exercised Judiciously and with reason, it is the finding of this court that reason has been shown to warrant the exercise of the courts discretion in favour of the applicant namely that there is a mistake apparent on the face of the record in that subject to proof, which proof if not called for, the respondent stands to benefit twice from services rendered to applicant which should not be allowed to happen.

(3) As for the invocation of the courts inherent powers, it is trite law that, these are exercisable where no other prevision exist to cover the relief sought to be catered for. Herein there is provision covering review, one of which requires that such an application be presented without undue delay. Herein, as submitted by the respondents, there is undue delay. However as submitted by the applicant, this provision cannot operate to oust the inherent powers in Section 3a of the Civil Procedure Act. Each case depends on its own circumstances. As submitted the court ,has to look at the reason given and determine whether the same is excusable or not.

The reason given has to be considered in the light of the central theme of Section 3A of the Civil Procedure Act which is to the effect that its exercise should be solely for ends of justice to be met to the litigants and to prevent abuse of the due process of the court process. When applied to the reason advanced by the applicant ,for seeking the reliefs sought, the court, is satisfied that in view of the allegations made by the applicant as regards the two cheques, and in view of the respondents failure to exhibit documents to controvert applicant's annexture AL3 and AL4, failure to upset the said consent judgment will lead to an injustice being meted out to the applicant, as the applicant would have been made to meet its contractual obligations to the respondent twice in the first instance. In the second instance it would most likely lead to a situation of an unjust enrichment to the respondent. While in the 3rd instance, it would be condoning allegations of fraud and collusion and allowing the perpetrators to get

away with it which will amount to an abuse of the due process of the court.

Lastly the re-opening of the matter will not leave the respondent remediless, as the matter will now proceed for trial and each side will be given an opportunity to prove and or disprove the claim on a balance of probability.

For the reasons given above, the applicant's application dated 15th May 2006 and filed on 17th May 2006 be and is hereby allowed as prayed for in prayer 1. The consent order entered herein between the parties on 10.6.02 be and is hereby set aside.

(2) Costs of the application will be in the cause.

(3). In view of the age of the dispute the applicant is ordered to prepare documents for discovery from issues and ready the suit for disposal within 90 days from the date of the reading of the ruling.

(4). In default of number 3 above, the orders, set aside in number 1 above shall revert and the respondent will be at liberty to execute.

(5). There will be liberty to apply by either party.

DATED, READ AND DELIVERED AT NAIROBI THIS 18th DAY OF JULY, 2008.

R.N. NAMBUYE

JUDGE