



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 383 of 2007

**GEOLOY INVESTMENTS LIMITED
GEOFFREY K. KINYUA**

LOIS W. KINYUA

JAMES C. KINYUA

KENNETH M. KINYUA.....PLAINTIFFS

- VERSUS -

CONSOLIDATED BANK OF KENYA LTD.....DEFENDANT

R U L I N G

On 5th March, 2008, the parties to this suit entered into a consent agreement by which part of the matter in dispute was compromised. The plaintiffs agreed to pay the defendant the then admitted sum of Kshs.12,927,161/19 within ninety (90) days of the date of the consent. The parties agreed that in the event that the plaintiff defaulted in paying the said agreed amount, the defendant would be at liberty to proceed with the intended auction of the suit properties. The parties further agreed that the disputed sum would be determined by the court in a full trial.

On 10th June, 2008 the plaintiffs filed a notice of motion pursuant to the provisions of Section 3A of the Civil Procedure Act and Order XLIX Rule 5 of the Civil Procedure Rules seeking two orders from the court: they sought the amendment and variation of the amount that the plaintiffs had admitted owing to the defendant. The plaintiffs sought to pay the sum of Kshs.8,857,161/90 instead of the earlier agreed sum of Kshs.12,927,161/90. The plaintiffs further sought an extension of time for a further period of ninety (90) days to enable them pay the undisputed amount. The grounds in support of the application are on the face of the application. The plaintiffs claim that at the time they recorded the consent in court, by inadvertent mistake, they forgot to indicate that the plaintiffs had already paid the sum of Kshs.4,010,000/= to the defendant towards reduction of the outstanding debt. They therefore requested the court to give credit to the plaintiffs for the sum already paid to the defendant. They pleaded with the court to extend the time in which they would be required to settle the admitted sum by a further period of six (6) months. This was on account of the fact that there had been a delay in the completion of the sale agreement whose proceeds the plaintiffs intended to utilize to settle the undisputed sum. The application is supported by the annexed affidavit of Geoffrey Kanu Kinyua, the 2nd plaintiff.

In the said affidavit, the 2nd defendant swore that the plaintiffs had already paid to the defendant the

sums of Kshs.3,000,000/= on 4th September, 2006 and a further sum of Kshs.1,027,750/= on 27th April, 2006. He deponed that instead of crediting the plaintiff's account with the said amounts, the defendant had deposited the amount on a suspense account pending clarification of certain outstanding issues. He swore that at the time their advocate recorded the consent in court, they had by inadvertent mistake failed to mention to their said advocate that they had already settled part of the admitted sum. He therefore pleaded with the court to take into account the said amount that had already been paid to the defendant and accordingly give credit in respect of the same. He further deponed that the plaintiffs intended to settle the admitted sum through the sale of a portion of their property known as LR. 192/18. He swore that the completion of the said sale transaction had been delayed by documentation relating to the approval of the sub-division scheme by the City Council of Nairobi. He therefore requested the court to extend the period by which the plaintiffs would be required to pay the said admitted amount by a further period of ninety (90) days.

The application is opposed. The defendant filed grounds of opposition to the application. The defendant stated that the issues raised in the plaintiffs' application were *res judicata* since the subject matter had already been compromised by a consent order. The defendant objected to the plaintiffs' application on the grounds that it had no legal or factual basis and further that the same was misconceived. The defendant stated that the application was an abuse of the due process of the court.

At the hearing of the application, I heard the rival argument made by Mr. Kyalo for the plaintiffs and Mr. Sagana for the defendant. I have carefully considered the said submissions. The issues for determination by this court are twofold; whether the consent order entered by the parties on 5th March, 2008 can be varied on account of the plaintiffs' alleged inadvertence or mistake. The second issue for determination by this court is whether the plaintiffs established sufficient ground to enable this court extend time by which they will be required to comply with the said consent order. On the first issue, it is trite law that a consent order can only be set aside on the grounds which would justify the setting aside of a contract. In Brooke Bond Liebig (T) Ltd. vs Mallya [1975] EA 266 at page 269, Law, the then Ag President of the East Africa Court of Appeal held as follows:

“The compromise was signed by him and his advocate and by a judge as well as by the other party and his advocate, and was made an order of the court, and was thus a consent judgment. The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19 E.A. C.A.131, where the following passage from Seton of Judgments and Orders, 7th Edn, Vol. I, p.124 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.”

In Flora N. Wasike vs Destino Wamboko [1982-88] KAR, 625 at page 626, Hancox JA held that:

“It is now settled law that a consent judgment or order has a contractual effect and cannot be set aside except on grounds which would justify setting aside of a contract, or which if certain conditions remain to be fulfilled, which are not carried out. (J. M. Mwakio vs Kenya Commercial Bank Ltd, Civil Appeal No.28 of 1982, and 69 of 1983).”

In the present application, it is the plaintiffs' plea that the said consent order be varied so that the plaintiffs may be given credit for the sum of Kshs.4,070,000/= which they claim to have already paid to the defendant. I have carefully perused the documents in support of the plaintiffs' application. It is clear to this court that the defendant does not deny being paid the said sum by the plaintiffs. Indeed, the defendant did not file a replying affidavit to clarify or deny the averments made by the 2nd defendant in the affidavit in support of the application. It was apparent that upon the said amount being paid to the defendant, the same was not credited to the plaintiffs' account but rather deposited in a suspense account. It was the plaintiffs' case that when they admitted owing the defendant the sum of Kshs.12,927,161/19, it

included the said sum of Kshs.4,070,000/= which they had already paid to the defendant. In response to the plaintiffs' application, the defendant submitted that the plaintiffs had failed to establish sufficient grounds to enable this court set aside or vary a consent order that was legally entered into.

Having considered the rival argument made by the parties on this point, it was clear to this court that what the plaintiffs are seeking is not the variation of the admitted sum but rather that the court should take into account the amount that the plaintiffs had already paid prior to the entry of the said consent judgment. I think the plaintiffs have established sufficient grounds to enable this court set aside part of the said consent order which stated the admitted sum as Kshs.12,917,161/19. The plaintiffs established that they had indeed paid to the defendant the sum of Kshs.4,070,000/=. The said amount was not credited to the plaintiffs' account due to some internal management issues by the defendant.

I will therefore allow the plaintiffs' application. The amount stated in the consent order dated 5th March, 2008 is hereby varied to read the sum of Kshs.8,857,161/19. Since there is a substantial part of the amount that the defendant claims from the plaintiffs that is disputed (*and which amount will be determined in a full trial as agreed by the parties to this suit*), the defendant will not be prejudiced. It would still be able to establish the said outstanding amount in a full trial.

As regard the second issue for determination, the plaintiffs established that they had been prevented from paying the consented amount due to the delay in the documentation in respect of the land sale transaction from which they expected to obtain the amount to pay to the defendant. I am satisfied by the reason put forward by the plaintiffs in seeking extension of time to comply with the said consent order. The plaintiffs are not refusing to pay the said admitted amount but rather are requesting to be granted more time to conclude the sale transaction to enable them pay the said admitted sum. In the premises therefore, I do extend the period by which the plaintiffs will pay the said admitted sum of Kshs. 8,857,161/19 by a further period of ninety (90) days with effect from today's date. The defendant shall in the circumstances have the costs of this application.

DATED at NAIROBI this 16th day of July, 2008.

L. KIMARU

JUDGE