



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

**Civil Case 640 of 2004**

**RATILAL GOVA SUMARIA .....  
.....PLAINTIFF**

**-V E R S U S-**

**FINA BANK LIMITED.....1<sup>ST</sup>  
DEFENDANT**

**JOSEPH M. GIKONYO T/A GARAM INVESTMENT AUCTIONEERS.....2<sup>ND</sup>  
DEFENDANT**

**H.M. MANEK.....3<sup>RD</sup>  
DEFENDANT**

**R U L I N G**

This suit was commenced by a plaint dated and filed in court on 24<sup>th</sup> November, 2004. The plaintiff was the registered proprietor of the suit property, L.R. No.209/2151/2. At an auction sale conducted on 11<sup>th</sup> November, 2004 by the second defendant, the suit property was sold to the third defendant as the highest bidder. The plaintiff's main prayer in the suit is that judgment be entered against the defendants, jointly and severally, in the form of a permanent injunction restraining the defendants from transferring L.R. No.209/2151/2 from the plaintiff to the 3<sup>rd</sup> defendant or any other party. The plaintiff further seeks a declaration that the auction sale conducted on 11<sup>th</sup> November, 2004 was null and void and of no effect in law. He also claims general damages and costs of the suit together with interest thereon.

By a chamber summons application filed contemporaneously with the plaint on 24<sup>th</sup> November, 2004, the plaintiff applicant sought a similar restraining injunction on an interim basis pending the hearing and determination of the suit. When the chamber summons came for hearing before the Hon. Lady Justice M. Kasango on 16<sup>th</sup> December 2004, the court made the following order by consent of all the parties-

"1. That the application dated 24<sup>th</sup> November, 2004 be and is hereby settled on the following conditions:

(a) The auction sale conducted on 11<sup>th</sup> November, 2004 by the 2<sup>nd</sup> defendant at which the 3<sup>rd</sup> defendant was declared the purchaser be and is hereby confirmed as lawful and complete. The 1<sup>st</sup> defendant do execute the transfer and return it to the 3<sup>rd</sup> defendant's advocates.

(b) The plaintiff do purchase the property L.R.209/2151/2 from the 3<sup>rd</sup> defendant and pay to the 3<sup>rd</sup> defendant's advocate within 14 days the purchase price of Ksh.11.2 million plus receipted disbursements and legal costs relating to the sale.

(c) In consideration of the payment set out in (b) above, the 3<sup>rd</sup> defendant shall cause the transfer executed by the 1<sup>st</sup> defendant to be endorsed to the plaintiff or his nominee.

(d) In the event the payment set out in (b) above together with all receipted costs are not paid on or before 31<sup>st</sup> December, 2004, the offer to transfer the property to the plaintiff shall lapse and the 3<sup>rd</sup> defendant shall be at liberty to register the transfer in his or his nominee's name.

2. That this suit be and is hereby marked as settled with costs to the defendants which costs are to be agreed or taxed."

Whereas this ought to have been the last of this matter in court, subsequent events proved otherwise. By a Notice of Motion dated and filed in court on 28<sup>th</sup> December, 2004, under a certificate of urgency, the plaintiff sought the following orders from the court-

1. That this application be heard ex-parte in the first instance due to the urgency.

2. That the time set for compliance with the consent order given on 16<sup>th</sup> December, 2004 in terms of Order 1 (b) and (d) be enlarged by 45 days.

3. That the consent order No.1 (c) be varied/reviewed to allow the 3<sup>rd</sup> defendant to transfer the property L.R. No. 209/2151/2 to himself and then execute a transfer to the plaintiff or his nominee for the agreed consideration .

4. That costs be provided for in any event.

The application is expressed to be brought under O.XLIX Rules 5 and 3A, Order XLIV Rule 2 and Order L. Rule 1 of the Civil Procedure Rules, and sections 80 and 3A of the Civil procedure Act, Cap. 21 of the Laws of Kenya. It is based on the following grounds-

(a) The time set out in the consent order of 16<sup>th</sup> December, 2004, has proved too short after time was lost in approval of the order.

(b) The order was only approved by all parties on 21<sup>st</sup> December, 2004, and collected from the court on 22<sup>nd</sup> December, 2004, and taking into consideration the Christmas weekend, the plaintiff was left with only 5 days to comply.

(c) Based on the further expenses over Ksh.11million, the plaintiff only managed to re-negotiate the financing upwards to Ksh.11.6.million on 22<sup>nd</sup> December which was confirmed by the Bank on 23<sup>rd</sup> December, 2004.

(d) Since the auction sale was Ksh.9.6million to the 3<sup>rd</sup> defendant and the plaintiff is re-purchasing the property from the 3<sup>rd</sup> defendant at Ksh.11.2million, it is only fair and imperative that the property be transferred to the 3<sup>rd</sup> defendant and he sells it under a fresh transfer to the plaintiff or his nominee hence endorsement of the transfer is unworkable.

(e) The financing bank cannot pay Ksh.11.2million against an endorsed transfer of Ksh.9.6million from the chargee's (M/s Fina Bank – the 1<sup>st</sup> defendant).

(f) The extension/enlargement of time sought will enable the consent order to be legally executed and the proposed review/variation will ensure that the process is legal or else it stands to be challenged for being illegal and unprocedural.

(g) This application will not interfere with the substratum of the consent order of 16<sup>th</sup> December and will only make it legal and workable in the circumstances.

The application is also supported by the annexed affidavit of RATILAL GOVA SUMARIA, the plaintiff herein.

In opposition to the application, the first defendant has filed the following grounds of opposition-

- (i) There are no grounds for reviewing or varying the consent recorded on 16<sup>th</sup> December, 2004.
- (ii) Any order made in the presence and with the consent of counsel is binding on all parties and cannot be varied or discharged unless under special circumstances, and this is not one such case.
- (iii) The plaintiff had knowledge of the implications of the terms of the consent recorded on the 16<sup>th</sup> December, 2004.
- (iv) The terms of the consent are lawful and clear.
- (v) Time was to be of the essence in complying with the terms of the consent.
- (vi) The 1<sup>st</sup> and 2<sup>nd</sup> defendants' advocates amended and approved the draft order extracted by the plaintiff's advocates on 17<sup>th</sup> December, 2004.
- (vii) The application is an abuse of the court process.

On his part, the third defendant swore a replying affidavit on 31<sup>st</sup> December, 2004 and filed it in court on 3<sup>rd</sup> January, 2004. He avers in that affidavit inter alia, that the consent entered into herein was made with the full knowledge of the parties after negotiations which were entered into at the instance of the plaintiff/applicant. He also contends that the applicant has not shown that there was a mistake that he was misled by some fraud or collusion on the part of the respondents into entering into the consent recorded in court on 16<sup>th</sup> December, 2004. He further states that the applicant knew that time was of the essence of the consent order and was also fully aware that it was Christmas time before entering into the consent.

At the oral canvassing of this application, Mr. Kopere appeared for the plaintiff/applicant while Ms. Mugaa appeared for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, and Mr. Tiego appeared for the 3<sup>rd</sup> defendant. In summary, Mr. Kopere stressed that this was not an application to set aside a consent order, and therefore the basic rule that a consent order cannot be varied or set aside does not apply. As recorded, the consent order cannot be actualised at law, he argued. He also contended that O.XLIX rule 3A was applicable as the parties had not alerted the judge to give reasons for dispensing with it, and that the parties also overlooked that the approval came on 21<sup>st</sup> December, 2004 and the order extracted on 22<sup>nd</sup> December, 2004. Mr. Kopere then submitted that by stating in clause 1 (a) that the sale be deemed complete, the plaintiff can only repurchase at a higher price, and therefore clause 1 (c) should be varied so that the 3<sup>rd</sup> defendant acquires the property and then resells to the plaintiff. If this is not done, the parties will be involved in an illegality whereby stamp duty will be paid on Ksh.9.6million on a consideration of Ksh.11.2million. The technicalities involved require that time be enlarged so that the 3<sup>rd</sup> defendant can transfer the property to himself before passing on title. The consent should also be varied to conform to law, otherwise it is currently contrary to law, which is illegal.

In opposing the application, Ms. Mugaa for the 1<sup>st</sup> and 2<sup>nd</sup> defendants relied on the grounds of opposition. She submitted that the parties agreed on a time frame within which to comply with the order, and the plaintiff/applicant cannot rely on the provisions of the Civil procedure Rules to get out that consent order. She further submitted that the reasons advanced by Mr. Kopere were not sufficient to vary a consent order. She then referred the court to **KENYA COMMERCIAL BANK LTD. v BENJOH AMALGAMATED LTD. & ANOR.**, Civil Appeal No. 276 of 1997, and also to **FLORA N. WASIKE v. DESTIMO WAMBOKO**, (1982-88) I KAR 625. She also referred to **KENYA COMMERCIAL BANK LTD. v. SPECIALIZED ENGINEERING LTD.**, [1982]KLR. 485 and submitted that it was only fair for the 3<sup>rd</sup> defendant to be allowed to get the title to the property, and she thereupon urged the court to dismiss the application.

On his part, Mr. Tiego for the 3<sup>rd</sup> defendant submitted that if the bank truly wanted a court order, it was competent for the court to issue a certified handwritten copy. Consequently, the delay brought about by extradition of the order was unjustified. Counsel also said that paragraphs (b) and (d) of the consent showed clearly that time was of the essence, and this was a contractual provision. Everything had to be completed by 31<sup>st</sup> December, 2004, and that was an agreed time frame. If there was any mistake, it was unilateral on the part of the plaintiff, and it cannot be visited to the other parties. Counsel then cited **RELI SACCO SOCIETY LTD v KENYA RAILWAY CORPORATION LTD.**, Milimani HCCC No.230 of 1999. He urged the court to dismiss the application.

In his reply, Mr. Kopere sought to distinguish the authorities. He said that in **RELI SACCO'S Case (supra)**, the applicants were seeking to set aside a consent order which was not the case here. He then referred to **KCB v. BENJOH AMALGAMATED (supra)** and submitted that it involved an appeal against a consent order which was different from this application. He finally asked the court to grant the orders as prayed as this will not prejudice or cause loss to anyone except some delay.

I have considered the above submissions of the respective counsel, and the applicable case law. Having done so, I am of the view that the law governing consent orders is clearly articulated in that case law, and need not be belaboured. Suffice it to say that, in principle, a consent order acts as an estoppel. However, it can be set aside on any ground which would invalidate an agreement such as misrepresentation, fraud or mistake. Otherwise a consent order cannot be set aside by an appeal or a review. In **BROOKE BOND LIEBIG (T) LTD. v MALLYA**, [1975] E.A. 266, Law JA observed at page 269-

**“The circumstances in which a consent judgment may be interfered with were considered by this court in HIRANI v. KASSAM (1952) 19 E.A.C.A. 131 where the following passage from Seton on Judgments and Orders, 7<sup>th</sup> edition, Vol. 1 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 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 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 mis-apprehension. As Windham J. said, in the introduction to the passage quoted above from Hirani's case, a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”**

I would observe that this passage was cited its entirety with approval by the Court of Appeal in **KENYA COMMERCIAL BANK LTD. v. BENJOH AMALGAMATED LTD.**, Civil Appeal No.276 of 1997. It was further cited and approved in **FLORA WASIKE v. DESTIMO WAMOKO** (1982-88) I 625 in which Hancox JA, as he then was, reiterated at p.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 certain conditions remain to be fulfilled, which are not carried out.”**

In English the case of PURCELL v. F.C. TRIGELL LTD., [1970]3 ALL E.R. 671, WINN L.J. said at p.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.”**

Finally, in KENYA COMMERCIAL BANK LTD., v. SPECIALISED ENGINEERING CO. LTD., [1982]KLR, 485, Harris J. is on record as having said, at p. 493-

**“The marking by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and, when made, such an order is not lightly to be set aside or varied save by consent or on one or other of the recognized grounds.”**

Applying the above principles to the facts of this case, there is no gainsaying that the consent order which is the subject matter of this application was entered by the consent of three experienced and seasoned advocates – Mr. Kopere for the plaintiff, Mr. Khawaja for the first and second defendants, and Mr. Tiego for the third defendant. The order was entered on 16<sup>th</sup> December, 2004, which was only slightly over a week to the Christmas weekend. The intervening holidays were therefore foreseeable, and no one could have been taken by surprise. This fact was or ought to have been in the minds of all counsel as they agreed upon a time frame. They agreed that the plaintiff would pay certain moneys to the 3<sup>rd</sup> defendant’s advocates not only within 14 days, but they went further and set up a deadline of 31<sup>st</sup> December, 2004, and even proceeded to detail what would happen if the deadline of 31<sup>st</sup> December, 2004 was not met. They all knew, or ought to have known, that O.XLIX Rule 3A was still alive. But that notwithstanding, they still made a pact that would expire on 31<sup>st</sup> December, 2004. Rule 3A aforesaid notwithstanding. The plaintiff can’t blame anyone for the delay in the acquisition of the necessary funds. He contributed to the delay by waiting to extract an order while he would have moved faster by asking for a certified handwritten copy.

The plaintiff, upon smelling the expiry of the agreed time frame, came rushing to court three days to the deadline, and seeking an extension by 45 days. Seeing that the initial period agreed upon was only 14 days, and by seeking an extension of more than three times that initial period, it seems to me that the plaintiff/applicant must have realized that the period of 14 days first upon agreed upon was too ambitious, and that he made a bad bargain. Consequently, in the context of the principles of law enshrined in the authorities herein above, I think it would be very unfair to interfere with that consent order at the instance of one of the parties and against the will of the others. I accordingly dismiss the application for variation of that order with costs to the three defendants.

Dated and delivered at Nairobi this 20<sup>th</sup> day of January, 2005

**L.NJAGI**

**JUDGE**