REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL 557 OF 2002

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

VERSUS

JAMES ORENGO.....RESPONDENT

(An Appeal from an Order of Hon. N. A. Owino, SRM, in Milimani Commercial Courts

Civil Suit No. 5779 of 1994 delivered on 5th September, 2002).

JUDGMENT

By a Plaint dated 14th June, 1994, and filed in the lower court on 22nd June, 1994, the Appellant (Plaintiff in the lower court) claimed against the Respondent the sum of Kshs.201,543.75 being the amount owed and arising from the use of a credit card used by the Appellant to the Respondent. The Appellant also claimed late payment charges of 10% per month on overdue accounts as per the agreement entered into by the parties.

On 7th September, 1994, the Respondent filed his defence, denying the Appellant's claim.

This prompted the Appellant to file an application for summary Judgment, which eventually led to the parties entering into the following Consent Judgment on 14th May, 1996:

"Order: By Consent: Judgment be and is hereby entered for the Plaintiff as prayed in the Plaint plus costs and interest." Some six years later, on 15th August, 2002, the Respondent filed an application before the lower court for stay of execution and review of the aforesaid consent judgment on the grounds that it was contrary to statute and public policy, and that it was entered into by mistake. The Appellant opposed the application. By a Ruling given on 5th September, 2002, the lower court acknowledged that the application had been delayed but nevertheless allowed the same "purely in the interest of Justice", and proceeded to vary the terms of the Consent Order to provide that the interest shall be at "court rates" from the time of consent until payment in full.

It is against that Ruling of 5th September, 2002 that the Appellant has preferred this appeal on the following eight grounds outlined in the Memorandum of Appeal:

1. Having correctly directed herself that a consent judgment can only be reviewed or set aside on the same terms as warrant a review or setting aside of a contract, the Magistrate erred in proceeding to vary, review or set aside the consent judgment without having found any of the matters which would justify such action; namely fraud, mistake or misrepresentation.

2. There was no evidence before the Magistrate of fraud, mistake or misrepresentation.

3. The Magistrate erred in holding that the terms of the consent judgment were not clear.

4. The Magistrate erred in holding that she had jurisdiction to vary, review or set aside the consent judgment on the grounds that the interest in the consent judgment was unconscionable or punitive.

5. There was no evidence before the Magistrate to justify a finding that the interest in the consent judgment was either unconscionable or punitive.

6. The Magistrate should have held that the application had not been brought without unreasonable delay as required by Order 44 Rule 1 (I) of the Civil Procedure Rules.

7. On the matters before the Magistrate there was no jurisdiction to review the consent judgment. 8. The Magistrate erred in ordering the appellant to pay the costs of court or the application.

When this appeal came up for hearing on 16th May, 2005, Mr Koyoko, Counsel holding brief for Mr Wandabwa, for the Respondent, applied for an adjournment on the grounds that Mr Wandabwa had been held up at Milimani. In any event Mr Wandabwa had not complied with the provisions of Order 3 Rule 9 A of the Civil Procedure Rules and had not sought leave to come on record after Judgment. And this being an old 1994 case, the application for adjournment (which had been opposed by the Appellant) was disallowed.

Accordingly, the case proceeded to hearing without any representation on behalf of the Respondent.

Ms Kirimi, Counsel for the Appellant, argued that the parties having entered into a Consent Judgment, it was irregular for the Court to re-write or substitute the same by directing that the interest would be at "court rates"; that the lower court misapplied the law in allowing a review of the Consent Judgment; and that there had been an inordinate delay in filing the application for review before the lower court. She relied on several authorities to which I will make reference where appropriate.

Let me begin by addressing the issue of "delay" in bringing the application for review, which is the basis of the decision that gave rise to this appeal. That application was brought to the court on 15th August, 2002, more than six years after the Consent Judgment had been entered. Order 44 Rule 1 under which the application for review was preferred, requires the application to be brought "without unreasonable delay". The delay, in my view, was highly inordinate, and unexplained. Indeed, there was absolutely no attempt to explain the delay, and it appears to have been motivated by the Appellant's wish to execute the Judgment. Where an applicant comes to the Court late it is incumbent upon him to explain the delay – indeed, as the Court of Appeal held in the Standard Ltd vs Wilson K. Kalya (C. A. 306 of 2002 – Nairobi), some explanation of the delay must be given. In Peter Kungu Waweru vs Stephen Karanja Waweru (C. A. Nairobi 389 of 1996) Omolo J A said the same thing. In his view a delay of 3 months was inordinate and not deserving of Court's discretion. More recently, in Benson Mbuchu Gichuki vs Evans Kamende Munjua (C. A. 79 of 2004 Nairobi) Deverell, Ag. J A agreed with Ang'awa, J that the application for review filed more than four years after the Consent Judgment was recorded, was inordinate.

I am satisfied, therefore, that the application for review, brought before the lower court more than six years after the Consent Judgment was recorded, without any explanation as to the reasons for delay, was inordinately late, and accordingly ought to have been disallowed, on that ground alone, among others.

I now turn to the other grounds of appeal. The issue is simple: What are the circumstances in which a consent judgment may be interfered with, and were these present before the lower court to entitle it to set aside (or alter) the consent filed by the parties.

The application for review and setting aside of the consent judgment was based on the grounds that it was contrary to statute, public policy, and was entered into by mistake.

Essentially, the dispute arose around the rate of penalty interest that had been claimed by the Appellant – 10% per month. This was based on the written contract between the two parties, and this is the rate that was claimed in the Plaint. The Consent Judgment clearly, as I have indicated before, was entered "as prayed in the plaint". However, the Respondent alleged "mistake" before the lower court. In paragraph 5 of his supporting affidavit sworn on 15th August, 2002, he deponed:

"I was under the impression that the judgment was to be entered for the decretal amount together with interest as accrued to the date of judgment and thereafter the normal interest would apply, and not the penalty as prayed for in the Plaint".

Having looked at the Record of proceedings and the submissions made in the lower court, I cannot quite understand how the Respondent could have been "mistaken" about the nature of the consent he was entering into – it was as prayed in the Plaint, and the Plaint prayed for the "late payment charges at 10% per month from 28th May, 1994 and costs".

It is instructive to note that the Respondent is an advocate of the High Court, and was also represented by an Advocate who entered into this Consent on his behalf.

The extent of the authority of an advocate to compromise suits on behalf of clients is set out in a passage in The Supreme Court Practice 1976 (Vol. 2) paragraph 2013 page 620 as follows:-

"Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen, (1903) 1 Ch pp 817, 818; Little vs Spreadbury, (1910) 2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice – see Welsh vs Roe (1918 – (9) AII E. R. Rep 620."

In the case of Brooke Bond Liebig (T) Limited vs Mallya (1975) E. A. 266, Law J A, said as follows:-

"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 Judgments and Orders, 7th 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 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."

Now, there is nothing in this case to show that such circumstances existed. There is no claim of fraud or collusion. The consent was entered into freely, and it is unambiguous. There is nothing to show that there could have been mistake or misapprehension. As Windham, J, said, in the introduction to the passage quoted above from Hiranj'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."

In his judgment in the case of Flora Wasike vs Destimo Tamboko (1988) 1 KAR 625, Hancox J A (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."

These are the principles that the lower court should have applied in determining whether the Consent Judgment should have been interfered with. I find that there were no such circumstances – there was no suggestion of fraud, misrepresentation, or collusion, and as I have found, no possibility of mistake. No

specific statute or provision of law was cited to show that the consent judgment was contrary to such law, or public policy. The lower court had absolutely no jurisdiction to re-write the consent between the parties and order that interest “would be at court rates”. That was not even sought by the applicant before the lower court. In doing so, the lower court fell into great error.

Accordingly, and for reasons cited, I will allow this appeal; set aside the lower court’s Order of 5th September, 2002; and restore the consent judgment of 14th May, 1996. I will also allow the Appellant the costs of this appeal, and of the application in the lower court.

Dated and delivered at Nairobi this 29th day of June, 2005.

ALNASHIR VISRAM

JUDGE