



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Suit 35 of 1995**

**HASSANALI HOLDINGS ..... PLAINTIFF**

**VERSUS**

**CITIZEN CINEMA CORPORATION LIMITED ..... DEFENDANT**

**Coram: Before Hon. Justice Mwera**

**Njiru for applicant / defendant**

**Amoko for Respondent / plaintiff**

**Court clerk – Kazungu**

**RULING**

The defendant corporation filed a notice of motion dated 16<sup>th</sup> May 2005 seeking prayers under Section 3A Civil Procedure Act and O48 rr. 3, 4, 5 Civil Procedure Rules. The court was told that O48 was invoked because the notice was initially listed for determination by the deputy registrar and down the line it came before this court. Tarrying here for a moment to get the import of the cited O48 rr. 3, 4, 5, the court garnered something to the effect that a consent judgement under review in this application was entered / endorsed by a registrar (see O48 rules 2, 2A, 3). In entering that judgement the registrar was exercising the special powers conferred on him under O48 Civil Procedure Rules in that he can do such a ministerial act on behalf of this court. So in essence the consent judgment herein is a judgment of this court. Thus when the defendant came to this court invoking Section 3A Civil Procedure Act he was pleading that:

1. *The consent order entered by the deputy registrar for and on behalf of this court pursuant to the letter dated 1<sup>st</sup> September 2004, be set aside.*

The import of Section 3A is well known to be that the court exercises its residual and inherent jurisdiction to do justice in the matter before it or to prevent the abuse of its process. Mr. Njiru arguing the defendants motion herein laid stress on the former object of Section 3A Civil Procedure Act. Focus was directed at Clause 1 (f) of the consent letter dated 1<sup>st</sup> September 2004 which was signed by Mr. K. Nanji on behalf of the plaintiff and Mr. Njiru for the defendant / applicant, to settle this case.

The relevant part read:

*“(f) Contemporaneously with the execution of this consent letter:*

*(i) The defendant shall hand over to Messrs Inamdar & Inamdar Advocates of Mombasa a three – party transfer of the said plot (between the defendant, the plaintiff or its nominee and the Commissioner of Lands) in favour of the plaintiff or its nominee duly executed by the defendant and signed by the Commissioner of Lands in acknowledgement of his consent to the said transfer together with the original Title Deeds relating to the said plot, which shall be held by Inamdar & Inamdar in trust on their professional undertaking not to deal with the same in any manner save for the purposes of registering the Transfer in favour of the plaintiff or its nominees.”*

In part (ii) of this clause M/S Inamdar & Inamdar Advocates were to give their professional undertaking to pay to Mr. Njiru on behalf of the defendant Kshs. 12,056,821/- within 7 days. The registrar entered the consent judgement on 10<sup>th</sup> May 2005.

When Mr. Njiru filed this application and arguments started before the deputy registrar on 16<sup>th</sup> May 2005, it was directed that those arguments proceed before a judge and that is what took place on 24<sup>th</sup> August 2005 before this court. While Mr. Njiru continued to represent the defendant / applicant Mr. Amoko appeared for the plaintiff / respondent.

To give a brief recap of the history of the case itself, it was filed on 19<sup>th</sup> January 1995. Therein the plaintiff pleaded that by an agreement of 8<sup>th</sup> August 1994 the defendant agreed to sell and the plaintiff to buy that parcel of land known as MOMBASA ISLAND / PARCEL 521/ BLOCK XXI for Kshs. 20m. While the plaintiff was always ready and willing to perform its part of the agreement, such enthusiasm was lacking on the part of the defendant – hence this suit. The plaintiff sought orders of specific performance of the sale agreement besides other orders. Since the filing of the suit, time passed until the compromise of 1<sup>st</sup> September 2004 by a consent order / judgement.

Mr. Njiru pleads that the said consent judgement be set aside because a condition precedent to the execution of the consent letter had not been fulfilled. And if the grounds on which the whole application was based, albeit having been argued for long, be the precise focus of this cause, Mr. Njiru’s main plank was that the Commissioner of Lands refused to sign the three party transfer and that frustrated the intention of the parties as incorporated in the consent letter of 1<sup>st</sup> September 2004. It was added, but the court did not seem to be convinced, that that letter was signed by the advocates of the parties not for the purpose of filing in court but for facilitating the execution of the transfer by the Commissioner of Lands. The court was not convinced with this idea because the letter of 1<sup>st</sup> September 2004 was addressed to the deputy registrar of this court, regarding the suit herein. It told the deputy registrar:

*“The parties hereto have agreed to settle the above case on the following terms which we shall be grateful if you will record on the court file:-*

*By consent:- “*

The parties duly signed the letter, transmitted it to the registrar who made the entry in the case file as stated above. So it cannot be in Mr. Njiru’s mouth to state in the grounds in the body of this application that it was not intended for filing in court. If it was not then it should not have been sent to court at all. It should have gone to the Commissioner of Lands or remained with the authors.

In his supporting affidavit Mr. Njiru deponed that the said letter of 1<sup>st</sup> September 2004 ought not have found its way to the court and that its filing it was an act of bad faith because the negotiations between the parties had broken down. Even with the fact that nothing in that letter made it subject to on-going negotiations, if any indeed were on, Mr. Njiru repeated that the Commissioners refusal to sign the three – party transfer frusted the execution of the consent judgement (now to be treated as an agreement between the parties). He added that correspondence between the parties before the consent was reached and recorded showed that both were not sure that the Commissioner would sign the said transfer. During arguments Mr. Njiru placed before the court Legal Notice No. 111 of 10<sup>th</sup> June 2003 by which the Commissioner of Lands had been barred from signing tripartite transfers (*involving undeveloped government land*). That with the changed regime Mr. Njiru instead got the Mombasa District Land

Registrar to sign the desired transfer, which signing turned out to be of no value in the transaction.

So it can right away be seen that Mr. Njiru is pleading both frustration of a contract (*resulting from the consent judgement / order*) and mistake as to the effect of the LN NO. 111 of 2003. We shall revert to the two principles presently.

Mr. Amoko could not agree with Mr. Njiru and he relied on the replying affidavit of M/S Inamdar filed hereon 20<sup>th</sup> May 2005 and a document simply called an affidavit sworn by Mr. K. Nanji and filed on the same day. He told the court that following long negotiations over the dispute herein, a compromise was arrived at and the same was reduced into writing and signing the letter of 1<sup>st</sup> September 2004. That complying with the contents of that letter was never subject to any condition – precedent, save that the defendant had undertaken to procure the signing of the three – party transfer by the Commissioner of Land – as a term of the agreement. The court heard that if the defendant had a problem in interpreting the full meaning and impact of LN NO. 111 of 2003, which in any case preceded the letter of 1<sup>st</sup> September 2004, it nonetheless impressed it on the plaintiff at every stage that it could get the Commissioner of Lands to sign the tripartite transfer and thereby enable the consent judgment to be effected. That with this firm promise and assurance by the defendant the plaintiff even gave it Kshs. 100,000/- to be applied in paying the expenses / duties involved in getting the transfer signed.

So, Mr. Amoko, added if the defendant failed to deliver the anticipated tripartite transfer that was a breach on its part of the agreement to settle the case and that was no frustration of the agreement at all. He also discounted the claim that both parties were acting under a mistake as to the effect of L. N. No. 111. That the mistake that ends a contract must be mutual, and the plaintiff did not sign the letter of 1<sup>st</sup> September 2004 with such state of things.

The plaintiff / respondent placed before the court a list of authorities which both sides referred to. They included the now well-known case of FLORA WASIKE VS DESTIMON WAMBOKO (1982 – 88) / KAR 625 (C.A), on the principles governing setting aside consent orders; HARAMBEE COOPERATIVE SAVINGS & CREDIT SOCIETY LTD [1983] KLR 611 (C.A) and ALIBHAI GULAM VS MOHAMED YUSUF (1946) 13 EACA 25 (C.A). Also brought in for further reference was the English case of J. LAURITZEN A. S. VS WILJSMULLER [1990] / Lloyd’s Rep. 1 (CA) and Treitel on The Law of Contract, 12<sup>th</sup> Edition. The court considered these authorities and now it pens the following decision based on these lines:-

- (i) Was there a condition – precedent to the effecting of the agreement of 1<sup>st</sup> September 2004 that compromised this suit?
- (ii) Was the agreement frustrated or entered into by mistake of both parties?
- (iii) Are the orders sought to issue?

**ISSUE 1.** A condition – precedent : This court does not agree that delivering a tripartite transfer in the transaction in question duly signed by the Commissioner of Lands, was a condition precedent to the agreement. Such execution of the consent letter of 1<sup>st</sup> September 2004 was contemporaneous with the defendant handing over the said transfer duly signed. The Concise Oxford Dictionary defines contemporaneous thus:

“1. existing or occurring at the same time

2. of the same period”

Accordingly on 1<sup>st</sup> September 2004 when the defendant executed the consent letter it ought to have handed over the signed tripartite transfer at the same time. It looks like that was not done and so it breached the agreement right from the start (*see the Alibhai case*). That agreement did not allude to any condition to precede its execution and this court noted none.

It is therefore in error for the defendant now to argue that a condition- precedent that never came to pass has made it impossible to implement the agreement. There was none (*see the Harambee case above*).

**ISSUE 2:** Did frustration or mistake feature in the circumstance of the agreement of 1<sup>st</sup> September 2004? The answer must also be in the negative.

(i) **Frustration:** Are there extraneous supervening events subsequent to the contract that occurred rendering it inoperative or giving it a totally different character from what was initially intended? Does L N 111 of 2003 as such constitute that event? Not at all. Nothing occurred which gave the agreement a significant change as to render it inoperable and so to afford the defendant the plea:

*“It was not this that I promised to do .....*”

*(See J. Lauritzen’s Case )*

In any case L N No. 111 long preceded the contract and so its effect was known to all long before the agreement. In fact Mr. Amoko said that despite knowing what L N 111 entailed the defendant nonetheless insisted that it would deliver a tripartite transfer signed by the Commissioner of Lands. It did not do so instead it availed one signed by the district land registrar which cannot effectuate the desired transfer. Halsbury’s Laws of England 4<sup>th</sup> Edition Vol 9 says at paragraph 452 of frustration in contracts as we have here:-

*“In cases of contracts for the sale of land the doctrine may operate in some circumstances, but does not normally do so.”*

Well. The present case does not seem to fall in the category where the doctrine of frustration would operate. There was no frustration anyway.

(ii) **MISTAKE:** The defendant seemed to allege that from correspondences exchanged before and even after 1<sup>st</sup> September 2004 the parties acted under a mistake that the Commissioner of Lands would sign the three - party transfer.

For mistake to bring a contract to a halt, it must be mutual. And a mistake like fraud or misrepresentation can warrant setting aside a consent judgement / order - as it would in an ordinary contract because the pact following a consent order / judgement assumes all characters of a contract.

That mistake should however be common to both parties to a pact. It is the element of mutuality that says that the parties were not acting with the meeting of the minds ie ad idem. But in this case it is not shown that the parties acted under a mistake and common to both at that, regarding the effect of LN No. 111 of 2003. The plaintiff denies it and the defendant has not established such common mistake before and up to signing the letter on 1<sup>st</sup> September 2004. Proven frustration or mistake can end a contract – not hurdles or mere difficulties.

**ISSUE 3:** Orders sought: They do not issue. This application is dismissed with costs. It was argued under Section 3A Civil Procedure Act but this court sees nothing to exercise its inherent power under that provision of law for the sake of justice.

Orders accordingly.

Delivered on 8<sup>th</sup> September 2005.

**J.W. MWERA**

**JUDGE**