REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 1803 OF 1985

ISAAC KAMAU NDIRANGU.....APPLICANT

VERSUS

COMMERCIAL BANK OF AFRICA.....DEFENDANT

RULING

The applicant/ plaintiff has moved this court under Order XLIV Rule 1, Order L Rule 1 and Section 3A of the Civil Procedure Act and Rules in which he is asking that this court do review its own Judgment/Decree given on the 28th of March, 2001 by making on order of payment of compensation by the respondent/defendant in respect of 11 sub-plots namely L. R. No. 12563/6; 8; 9; 11; 25; 30; 31; 44; 47 and 61 either at the value sold together with interest thereon from the date of sale, or at the current value of Kshs.4 million per plot. He also asks for the costs of this application.

It was the contention of the applicant that the issue of the 11 plots was not addressed in the consent Judgment of this court dated the 28th of March, 2001 and that even when the partial Judgment was given by Akiwumi J. (as he then was) on the 29th of June, 1987, in favour of the respondent/ defendant in the sum of Kshs.8,068,022/70, no credit was given for the sums realized from the sale of the said 11 plots. It is his contention that failure to address the issue of the 11 plots was due to an error mistake or inadvertence on the part of the court. The application was supported by the affidavit of the applicant sworn on the 25 of May, 2001 to which the consent order/decree was annexed. The application was opposed by learned counsel for the respondent who not only filed grounds of opposition dated the 30th of November, 2001 but also filed a Notice of Preliminary objection to the said application.

At the commencement of the hearing of this application it was agreed by consent of learned counsel for the parties that the Preliminary Objection raised by the respondent would not be argued separately but urged in reply to the main application. It was further agreed that counsel for the parties would make written submissions regarding this application bearing in mind the pleadings filed, the particulars of pleadings filed; the issues drawn separately by counsel for the parties and the replies filed in respect of this application. This was duly complied with before a hearing date was fixed for this application in which matters raised in the submissions were highlighted.

I have considered all the matters that were raised before me either in the written submissions or in the oral submissions by counsel. I have gone further and perused the pleadings and issues that were filed in this suit.

I must state at the outset that this suit has had the dubious distinction of having taken many many years running to slightly more than 14 years before it was finalized by the consent Judgment of the 28th of

March 2001. It was then settled upon terms as clearly stated therein which order was annexed to the present application.

It is not true that this court overlooked the issue of the 11 plots during the said consent judgment now sought to be reviewed or varied. The same was well captured in the submissions of learned counsel for the applicant before the consent order was recorded when he stated as follows:-

> ..."We have been talking between my firm and the defendant's advocates. Pursuant to those talks, the defendant did embody the same in a letter, which was received by me this afternoon, which settled most issues. I did discuss the same with my client and the main outstanding issue are the sub-division of some 11 plots which apparently in our discussions we had indicated that they were in the custody of the defendants but it turned out that those 11 sub-division were sold in 1986 and the attempt by the plaintiff to stop those transfers failed when Akiwumi J. (as he then was) dismissed his application and consequently conducted the sale of the said plots."

Learned counsel for the defendant had the following to say in reply before the consent Judgment was entered by this court:

> "The issue of the sub-plots no longer exists as they had been sold by court order and the compromise we have signed has come up with all the matters in dispute."

This court having perused the terms of the consent letter duly signed by counsel for the parties, and having heard the submission by learned counsel for the parties regarding the said consent, compromise/settlement, stated as follows:-

> I am satisfied that the said consent letter dated the 28th of March, 2001 fairly represents a reasonable settlement of all matters in dispute between the parties as per the pleadings filed and the Judgment that had been granted by Akiwumi, J. (as he then was). Accordingly, I now enter a Settlement of this suit as per the terms of the consent letter dated the 28th of March, 2001...".

It is now settled law that a consent Judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example, fraud, mistake or misrepresentation. (see *Flora N. Wasike –vs- Destimo Wansiko* (1982 – 88) 1 KAR 625). In *Purcell –vs- F. Trigell Ltd*. (1970) 3 All ER 671, Winin CJ said at page 676 as follows:-

> 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."

A similar position was taken by the Court of Appeal in the case of *Broke Bond Liebig Ltd. –vs- Methya* (1975) EA 266 and 269 in which Law Ag. P. said:

> "A court cannot interfere with a consent Judgment except in such circumstances as would afford a good ground for varying or rescinding a contract between the parties."

It is equally trite law that an application for review can succeed only if the applicant proves an error or mistake apparent on the face of the record, discovery of new evidence or any sufficient reason. (see *Shah –vs- Dhavamchi* (1981) KLR 561. For an application for review to succeed, the evidence must not only be new but the applicant must prove that he did not have them in his possession at the time and could not have obtained it despite due diligence.

In the instant case, I find that the issue of the eleven sub-divisions had not only featured in the pleadings and issues as drawn by counsel for the parties, but also in the judgment of Akiwumi, J. (as he then was). The same were again raised and brushed aside by counsel for the parties in settlement. I find no error or mistake on the face of the record. There is also no other sufficient reason to warrant the review sought or

the setting aside of the consent judgment. I am satisfied that as a result of the said consent judgment, the parties have drastically changed their position such that it would be impossible to restore the position in which they were prior to the said consent Judgment even if I were to allow this application. To my mind, this application is frivolous and is totally lacking in merit. The application is accordingly dismissed.

I have agonized over the issue of costs to which the respondent is undoubtedly entitled. However, given the long history of this case dating many years back, I have decided and do order that each party shall bear his own costs.

It is so ordered.

Dated and delivered at Nairobi this 8th day of October, 2002

S.O OGUK

JUDGE