REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 146 OF 1995

DIDACUS OMOKOLA & 2 OTHERS...PLAINTIFFS

VERSUS

1. MUNICIPAL COUNCIL OF MOMBASA (THE COUNCIL)

2. AHMED KARAMA SAID

3. ASSOCIATED ELECTRICAL HARDWARE SUPPLIES LIMITED (THE COMPANY)

4. KRUSS INVESTMENTS..DEFENDANTS

RULING

The Parents and Teachers Association (PTA) of Ronald Ngala Primary School in Mombasa came to this Court on 1.3.95 and sued four defendants:

1. Municipal Council of Mombasa (the Council)

2. Ahmed Karama Said (Karama)

3. Associated Electrical Hardware Supplies Limited (the Company)

4. Kruss Investments (Kruss).

They filed the suit through their advocates M/S Wasuna Kiamba & Co. In issue is a plot of land on which the school stands and is described as plot No 706. It would appear however that adjacent to that plot, is another plot described by the PTA variously as "road reserve" or "open space" which they claim was created when the new road to the Nyali Bridge was made.

The PTA claimed the land as part of the school land plot 706 which had been interfered with.

They learned about the interferance on 23.2.95 when a letter was addressed to the Headmaster of the school from the 4th defendant, Kruss giving notice that the adjacent plot which was delineated by Kruss would be fenced off. In the same week a perimeter wall was put up interfering with the school's playing grounds. The PTA then went to the Council which owns the school land and which was alleged to have given away the disputed space. They made no headway. That is when they came to Court and sought a temporary injunction which was granted on 24.10.95 pending the hearing of the main suit which sought a

declaration that the allocation of the land was illegal, unlawful and irregular and ought to be declared null and void; a permanent injunction restraining all the defendants from developing the plot; and an order demolishing the perimeter wall constructed thereon.

The Council through its advocate, Karisa Iha, responded to the allegations made and provided documents showing that the school which was constructed by the Council stood on plot No 706 which was delineated by beacons and was not trespassed on. The open space adjacent thereto was left after the new Nyali Bridge Road was diverted. The space left was not a road reserve but land which reverted to the Government under the Government Lands Act. The Council sought and was granted allocation of the plot by the President on 1.9.93 with further permission to alienate the land to its councillors and civil servants. The land was surveyed and the plot now known as Mombasa/Block XI/839 measuring approximately 0.0719 hectares was mapped out and registered in the name of the Council.

The Council then leased it out to Karama for a term of 99 years from 1.9.94 on 17.10.1994. With the consent of the Council the lease was transferred to the Company on 23.11.94 for a consideration of Shs 1.9 million and a certificate of lease was issued to the Company. The Company then drew up building plans and obtained other permits from the Council in readiness for construction of a Shs 20 million complex of shops and workshops. In its defence therefore the Company through its advocate M/S Aboo & Co (later PM Tutui & Co) pleaded that it was an innocent purchaser for value of the property from Karama and is the rightful owner of the plot which has nothing to do with the school. Karama himself, through his advocates M/S Swaleh & Co confirmed the sale to the Company and pleaded that he obtained a valid lease from the council on a plot which had nothing to do with the school.

Various issues were drawn and filed on 29.10.1996 in readiness for the hearing of Summons for Directions. Several hearing dates were taken but it transpired that Kruss was never served with any court papers. The suit against them was withdrawn on 23.10.98 and the Summons for Directions was stood over for hearing on 13.11.98. None of the parties attended Court that day and so it was marked SOG.

Nothing was heard further on the matter until 19.1.99 when a letter was addressed to the Deputy Registrar requesting that the entire suit be withdrawn with no order as to costs. The letter was signed by Wasunna Kiamba advocate for the plaintiffs (PTA), Karisa Iha for the Council, A A Swaleh for Karama and P M Tutui for the Company. It was dated 15.1.99.

The Deputy Registrar obliged and recorded the consent order on 21.1.99.

That would have been the end of the litigation.

Two months later however, on 8.3.99, the PTA instructed other advocates M/S Anjarwalla Abdulhussein & Co who filed a Notice of Change of Advocates dated 26.2.99 in place of Wasunna Kiamba & Co. They also filed a Notice of Motion seeking a review and setting aside of the consent, a reinstatement of the temporary injunction granted on 24.10.95 and pending the hearing of the application an interim injunction. That is the matter that was argued before me and the subject matter of this ruling.

The application is brought under order 44 rule 1; order 39 rules 1, 2, 3 Civil Procedure Rules and section 80 of the Act. The precise grounds stated for seeking the orders are that:

"(a)The consent executed herein and filed on 19.1.99 was entered into without the knowledge, authority or consent of the plaintiffs.

(b) The said consent was entered into through misrepresentation and collusion.

(c) The plaintiffs stand to suffer irreparable damage if the said consent is not set aside"

One of the three affidavits in support is sworn by Joseph Charo (Charo) who was the Headmaster of the school and Secretary to the PTA when the suit was filed in March 1995. He retired in April 1995. The Chairman of PTA at the time was Didacus Omokola (Omokola) and the Treasurer was Richard Kagema.

In the suit they pleaded that they were suing on their own behalf and on behalf of the PTA. They are the ones who called at the offices of M/S Wasuna Kiamba to give instructions on the matter. The term of office of Omokola expired or he was not returned in elections and his place was taken by Onesmus Nyambu Nyange (Nyange) at the beginning of the year 1999. It would appear that Kagema, the Treasurer was also not returned in office. That is because he did not swear any supporting affidavit leaving it to Charo the previous Headmaster, the current Headmaster Sammy Zoka Chilibasi (Chilibasi) and the current Chairman Nyange to swear supporting affidavits.

In essence the three of them say that they came to know about the withdrawal of the suit in February 1999 and then called a meeting of the PTA. It was decided to challenge the withdrawal since no authority was given to the advocate handling their case, Wasunna Kiamba, to enter into the consent for withdrawal.

The issue that arises is therefore whether the consent signed by the advocate which subsequently became an order of the Court and effectively terminated the litigation herein was binding on the instructing clients.

Although the matter under consideration was a Notice of Motion and therefore required no *viva voce* evidence, I did on application, and in the interests of justice allow the plaintiffs' previous advocate Mr Kiamba and also the deponents of the supporting affidavits to be summoned for cross examination. They were so cross examined by all counsel at length. Nyange, the current Chairman defended his affidavit and said there was no authority given to Mr Kiamba by the PTA although he was elected Chairman in February 1999 while the withdrawal was in January 1999.

He was aware that the school belonged to the Council but was not aware whether the PTA consulted with the Council before the suit was filed. He did not make attempts to meet or write to the advocate Mr Kiamba to seek explanation for the withdrawal. He gave up when he did not find him in his office. The new Committee did not obtain an explanation or affidavits from Omokola or Kagema either. He did not know if the school land has beacons but he accepted the Council's contention that the beacons delineating the school land were fixed in 1927. In the same breath he denied that they were. The new Committee was forced by parents who were angry to demolish the perimeter wall. One of the parents was Mr Okongo advocate who is not a Committee member. He denied that the application was brought maliciously, in bad taste or with a view to embarrassing the advocates who entered into the consent.

Charo, the retired Headmaster also defended his affidavit. He was the Secretary of the PTA upto April 1995 but was not informed before the case was withdrawn. He was one of those who went to instruct the advocate initially and remembered having gone to his offices severally thereafter with other members. They were not giving their instructions in writing but orally. He retired one month after the case was filed and went home.

He did not give the advocate his home address and did not think the incoming Headmaster/Secretary of the PTA should have taken over the case. When he was shown the consent letter he did not go to the advocates to find out why the case was withdrawn. The PTA did not send him. He did not know why the advocate withdrew the case. Soon after his retirement, other Headmasters, Lawrence Kole and David Masege took over as PTA Secretaries. It was the sitting Headmaster/PTA Secretary whom the advocate would communicate with if there was any complication in the case.

It was Chilibasi who was the Deputy Headmaster when instructions were given to the advocate in 1995. He was not the PTA Secretary then. Not until September 1998 when he became Headmaster. Between him and Charo were two Headmasters. When he took over as Headmaster, he went to see Mr Kiamba about the case and was told it had been withdrawn. He had not written to him since September 1998 or gone to see him about the case. He then summoned a PTA meeting to discuss the matter. In his view the instructions to institute proceedings were given by the school Committee and the PTA and there were minutes to that effect which he did not produce. He felt there was collusion between the advocates in withdrawing the case because they did not inform their clients.

As far as he was concerned the Council did not own the school which belonged to the parents, the

Council's role being only to inspect teachers who are Council employees. He admitted however that the school had no title to the land. The title was held by the Council. It was not the position that the managers of the school (PTA) were suing the owner.

He was not privy to the instructions given to the advocate and was not aware whether there were limitations as to what he could or could not do.

He was aware of a letter written to him by the chief valuer confirming that the school land was not interfered with. He also identified another letter establishing and confirming the beacons to the school land. They had not instructed any private surveyor to crosscheck that information or dispute it. He had no tangible evidence on collusion in withdrawing the suit but relied on his feelings.

Finally there was Mr Kiamba himself who testified that he was instructed by the Chairman, Secretary and Treasurer of the School's PTA and proceeded to file two suits HCCC 146/95 and 147/95. He sought and was granted a temporary injunction. The instructions given were not limited in any way save that he would act in the best interests of his clients. The PTA Secretaries whom he dealt with changed 4 times since the filing of the suit. His main concern was to establish whether the school land had been encroached on and who owned the school and the adjacent land. He confirmed that the school land beacons were fixed in 1927 and were still intact. He also confirmed that the school belonged to the Council as well as the land adjacent to it. He informed his clients so. He discussed the matter with Chilibasi who informed him in October/November 1998 that the 3rd defendant, the Company, had filed suit seeking damages of Shs 2 million from the school. He and the Headmaster went to meet the Company and were assured that if the suit was withdrawn, the Company would not pursue its costs and would assist the school in development. The Headmaster said he would inform the PTA and return with instructions which he did, authorizing Mr Kiamba to withdraw the suit. He did so in January 1999. There was no collusion as alleged and he acted in the best interests of his clients.

Cross examined by Mr Okongo, Mr Kiamba insisted that he was conducting investigations in the four years before the suit was withdrawn and established that the land did not belong to the school and there was no cause of action. He reiterated that discussions were held with the Headmaster before the suit was withdrawn. There was also the PTA Vice Chair who was a lady. According to him the PTA was simply changing its mind on the matter.

All counsel referred to various authorities filed and urged me to refer to them in considering the matter. I have done so.

The starting point is the law applicable in matters of review or setting aside of consent orders. I put it this way in HCCC 39/98 *Hans Johann Soth & anor –vs-Mary Peter*(UR)

"That being the factual matrix and abridged submissions of counsel, what then is the approach to this conundrum?

Firstly the law.

It is now trite law that a consent judgment can be challenged in one of the following ways:-

1. Either by filing an application for review under order 44 of the Civil Procedure Rules or

2. By filing a fresh suit to challenge the judgment.

If any authorities were required it is *Brooke Bond Liebig Ltd vs Mallya* [1975] EA 266 which was followed in *Flora Wasike –vs- Destimo Wamboko* [1982-88] 1KAR 625.

The applicant in this case chose the first option, that is review under order 44 rules 1, 2, 3, Civil Procedure Rules, and should therefore satisfy the requirements of law under those Rules.

Rule 1 of order 44 refers to various grounds upon which an application for review should be made. An applicant should ordinarily state which of such various grounds he relied on. Nevertheless the power of the Court to review its orders and judgments is all embracing and unfettered. It is granted under section 80 of the Civil Procedure Act and is not limited by order 44. Again if any authority was required for that proposition it is *Wangechi Kimita & another –vs- Mutahi Wakabiru* CA 80/85 (UR). That is not to say however that the provisions of order 44 should be ignored.

There is a requirement under rule 1 of that order that an application for review shall be made without unreasonable delay."

As in that case the applicant here chose review as the option. The application came about 50 days after the consent was filed. In the circumstances of this case I would not hold that delay as unreasonable.

I have also considered the law applicable on the main issue posed above which I have to decide. In HCCC 671/92 *Abdulrehman Zuberi –vs- Surjeet Basil & Anor* (UR), I relied on the Court of Appeal decision of *Flora Wasike –vs- Wamboko* [1982-88] 1 KAR 625 where it was held *inter alia*:

"1. It is 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.

2. An advocate would have ostensible authority to compromise a suit or consent to judgment so far as the opponent is concerned.

3. The Court would not readily assume that a judgment recorded by a judge as being by consent was not so unless it was demonstrably shown otherwise."

The *Wasike* case also considered and followed *Brook Bond Liebig Ltd – vs- Mallya* [1975] EA 266 and *Hirani –vs Kassam* (1952) 19 EACA 131.

There is no argument under the third holding that the consent being challenged was indeed signed by all advocates in the suit. That is not the applicants' case. Their case is that there was no authority given to Mr Kiamba to sign the consent. Mr Kiamba himself testified that he had such authority and the matter was discussed prior to the consent being filed.

His clients deny such allegations. None of the two have anything to show by way of establishing in what manner instructions and advice were being given. Ordinarily there would be correspondence exchanged but none of them produced any correspondence. The only common factor is the confirmation that Mr Kiamba was instructed as the advocate for the PTA and the PTA through their Chairman/Secretary/Treasurer were the instructing person. It must therefore be assumed that instructions from the client and advise by the advocate was oral. Why they chose that mode of communication which is clearly prone to abuse and says little about accountability, is a matter between the advocate and client. As regards the opponents or third parties the second holding in the *Wasike* case comes in handy. I am bound to hold that even if the express authority pleaded by the advocate is doubted, there was ostensible authority to compromise the suit by signing the consent as the advocate acting for the plaintiffs. He was the advocate on record.

The only way a consent may be interfered with is if the grounds stated in the first holding in the *Wasike* case are proved. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt.

The grounds laid for challenging the consent herein are set out above. No fraud is alleged or mistake. The ground relied on is "misrepresentation and collusion". The witnesses cross examined on "collusion" said they had no evidence of it but only "felt" there was one. An allegation made against an advocate of the High Court that he colluded with another advocate or person to subvert the cause of justice in a matter pending in Court is certainly one of utmost gravity. It destroys his honour and respect.

It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charge. In my view what transpires from the cross-examination is mere suspicion, unproved suspicion of collusion. And so it is too with the misrepresentation charge. The nature of the misrepresentation complained of was neither spelt out nor proved as required.

Granted the school as stated in the third ground of the application may suffer by failing to get the additional land which on the pleadings is not part of the registered school compound. But that is not the issue or one of the grounds for setting aside a consent order. Whatever the consequences of the consent if it was entered into with express or ostensible authority and without fraud, misrepresentation, mistake, illegality or other ground as would justify setting aside of a contract, it remains a valid order of the court. The remedy for the offended party perhaps lies in damages against the advocate if it is proved that he was in breach of his advocate/client relationship. Innocent third parties should not in all fairness suffer along.

I have said enough to satisfy myself that the application is for dismissal. I dismiss it. Costs will normally follow the event but I do not blame the parents of the school herein for feeling aggrieved at the manner their matter was handled. The burden of paying costs would fall on them when in all probability they only relied on the advice of their advocate which they are seeking to question. I will make no order as to costs.

Dated and Delivered at Mombasa this 11th day of May 2000.

P.N.WAKI

JUDGE