



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO. 5178 OF 1991**

**WALTER GITAU .....PLAINTIFF**

**versus**

**EAST AFRICAN BUILDING SOCIETY .....DEFENDANT**

**R U L I N G**

This is an application by way of Notice of Motion brought under Order XLIV r.1 of the Civil Procedure Rules in which the applicant Prof. Walter Gitau seeks the following orders:- "

- (a) THAT this Honourable Court be pleased to review its orders made on the 18th day of February, 1993.
- (b) THAT the costs of this application be provided for".

This application is supported by a sixteen page affidavit sworn by the applicant. The gist of this affidavit is that the applicant was not aware of the consent order recorded on 18th February, 1993 as he was told by his lawyer that what was required was the preparation of the accounts by an accountant of his own choice. The applicant engaged an accountant who then prepared the accounts. Hence, it was a surprise to the applicant when he came to learn of the consent order which was to the effect that he was to pay the disputed amount and in default his property would be auctioned. Hence this application now for the review of the consent order.

The application was opposed by Mr. Madara who chose to rely on his statement of opposition and a replying affidavit. It was emphasized that the order to be reviewed was a consent order and hence as there was no fraud or mistake there was no merit in this application.

The background to this matter appears quite simple. The applicant herein filed an application for an injunction pending determination of the main suit. That application came up for hearing before me on 18th February, 1993, when Mrs. Kiarie appeared for the applicant and Mr. McVicker appeared for the respondent. Mrs. Kiarie made long submissions in a bid to save the applicant's property from being auctioned as pointed out that this was a matrimonial property located in Karen. Mr. McVicker for the respondent pointed out that the applicant was in breach as he had not paid anything to the respondent.

What led to consent order was the offer by Mr. McVicker to allow the applicant time in which to make arrangements to pay. In the course of his submissions, Mr. McVicker stated:-

"The defendant would be happy to allow the plaintiff sell another property in order to redeem the property in dispute. We can give them even three months to do this otherwise I ask the court to dismiss the application". Then Mrs. Kiarie stated: "My clients are pleased with the offer by Mr. McVicker".

As stated in the replying affidavit of Mr. McVicker, the applicant was present in court and he held some discussion with his counsel before the consent order was recorded. The consent order to be reviewed stated as follows:-

"By consent the plaintiff to redeem the suit property in full within six (6) months of today's date. If the plaintiff fails to redeem the property the defendant to be at liberty to exercise its statutory power of sale. Costs to the respondent."

The above is very clear. The plaintiff was given six months in which to redeem the suit property. The order was made on 18th February, 1993. Six months period expired on 18th August, 1993. It is interesting to note that the applicant filed this application after the expiry of the six months period in which he was allowed to redeem the suit property.

In *Flora N. Wasike v. Destino Wamboko* (1982-88) 1 KAR 625 this Court held that it was 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. In the present application, we have not been shown that there was fraud, mistake or misrepresentation. It would appear that at the expiry of six months period granted to the applicant in which to redeem the suit property, nothing had happened and hence the applicant sought a way of wriggling out of the consent order. In this matter the court has always sympathised with the applicant but now that there was a consent order which was recorded in the presence of counsel for both parties, it is too late in the day to change the situation. Mr. McVicker's replying affidavit shows that the applicant was indeed present when the consent order was recorded. It should be noted that the applicant is not an illiterate rural old man but a University Professor. Clearly, he understood what the consent order was all about. The issue of accounts was never part of that order.

In view of the foregoing, I find no merit in this application for review and the same is dismissed with costs to the respondent.

**Delivered at Nairobi this 7th day of July, 2000.**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**