



**Chase Bank Kenya Limited (in Liquidation) v Khan & 19 others (Civil Case 159 of 2017) [2023] KEHC 17559 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17559 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 159 OF 2017**

**A MABEYA, J**

**MAY 19, 2023**

**BETWEEN**

**CHASE BANK KENYA LIMITED (IN LIQUIDATION) ..... PLAINTIFF**

**AND**

**ZAFRULLAH KHAN ..... 1<sup>ST</sup> RESPONDENT**  
**DUNCAN KABUI ..... 2<sup>ND</sup> RESPONDENT**  
**MAKARIOS AGUMBI ..... 3<sup>RD</sup> RESPONDENT**  
**JAMES MWAURA ..... 4<sup>TH</sup> RESPONDENT**  
**RIVERSIDE MEWS INVESTMENTS LTD ..... 5<sup>TH</sup> RESPONDENT**  
**RINASCIMENTO GLOBAL LIMITED ..... 6<sup>TH</sup> RESPONDENT**  
**GENGHIS CAPITAL LIMITED ..... 7<sup>TH</sup> RESPONDENT**  
**KEN OBIMBO ..... 8<sup>TH</sup> RESPONDENT**  
**DANIEL MAVINDU ..... 9<sup>TH</sup> RESPONDENT**  
**ALI CHEEMA ..... 10<sup>TH</sup> RESPONDENT**  
**RINASCIMENTO PROPERTIES LTD ..... 11<sup>TH</sup> RESPONDENT**  
**NINE FIFTY LIMITED ..... 12<sup>TH</sup> RESPONDENT**  
**RIVERSIDE MEWS LIMITED ..... 13<sup>TH</sup> RESPONDENT**  
**MATHATANI LIMITED ..... 14<sup>TH</sup> RESPONDENT**  
**THE LIGHTHOUSE PROPERTY COMPANY LIMITED ..... 15<sup>TH</sup> RESPONDENT**  
**BOULEVARD PROPERTIES LIMITED ..... 16<sup>TH</sup> RESPONDENT**



FRIENDS PROPERTY HOLDINGS LTD .....	17 <sup>TH</sup> RESPONDENT
SEVEN FORTY INVESTMENTS LTD .....	18 <sup>TH</sup> RESPONDENT
ANTHONY F. GROSS .....	19 <sup>TH</sup> RESPONDENT
RUTH MUTHONI .....	20 <sup>TH</sup> RESPONDENT

## RULING

1. Before Court is an application dated 18/2/2022. It is by the 1<sup>st</sup>-6<sup>th</sup>, 10<sup>th</sup>-15<sup>th</sup> and 17<sup>th</sup> defendants (hereinafter the applicants). It was brought under sections 1A, 1B, 63(e), 3, 3A and 80 of the *Civil Procedure Act*, order 40 rule 1, 2 and 3, order 45 rules 1, 2 and 3, and order 51 rule (1) of the *Civil Procedure Rules*.
2. The application sought that the orders issued on April 13, 2017 and confirmed on December 13, 2018 and varied by consent on January 22, 2020 be reviewed, varied, vacated or set aside.
3. The grounds for the application were set out on the body of the Motion and in the supporting affidavit of Zafrullah Khan sworn on 18/2/2022. It was contended that following the plaintiff's injunction application dated April 12, 2017, the Court granted temporary status quo orders on April 13, 2017 which were later confirmed on December 13, 2018 by consent. The same were extended until further orders were issued.
4. That on November 12, 2019, the plaintiff filed an application to vary those to allow Kenya Deposit Insurance Corporation ("KDIC") to negotiate extension of leases over the 5<sup>th</sup> applicant's property and to renegotiate and restructure the 5<sup>th</sup> applicant's loan facility with Equity Bank. By a consent dated January 22, 2020, the parties agreed to the variation of the orders on condition that KDIC keep the 5<sup>th</sup> applicant informed of the progress of negotiations and restructure.
5. It was contended that the 5<sup>th</sup> applicant did not own any property as alleged thus the order was erroneous. That no order allowed the plaintiffs to manage the applicant's properties as the orders were meant to preserve those properties during the pendency of the suit. That the plaintiff had sold the suit properties to SBM Holdings and the cause of action they were pursuing in this suit had dissipated due to the sale of the properties to a third party.
6. That KDCI had withheld information regarding the sale, and the current tenants of the property declined to pay rent to the applicants and were instead paying to the 13<sup>th</sup> applicant's account with Equity at the behest of KDCI. That the consent orders did not bar the applicants from managing the suit properties and that KDCI had mismanaged and left the properties go to waste and failed to collect rent on the occupied properties.
7. It was therefore contended that the consent orders were obtained without the applicants having all the material information relevant to the matter. That the applicants' directors were coerced and under duress to enter into the consents on account of criminal cases instituted by the respondent. It was further contended that the consents were aiding the respondent to commit injustices against the applicants and the orders were ambiguous, unequivocal and susceptible to various interpretations which the respondent used to deprive the applicants their right to property.



8. The respondent opposed the application vide the replying affidavit sworn by David Irungu, the manager of KDIC, on September 22, 2022. It was contended that the respondent bank was put under liquidation and KDIC was appointed as the liquidator.
9. That the 3<sup>rd</sup>-4<sup>th</sup> defendant authorized payments from the respondent of Kshs. 7.5 billion which was used to purchase the properties registered in the 5<sup>th</sup>-6<sup>th</sup> and 11-15<sup>th</sup> defendants (the special purpose vehicles hereinafter “the SPV’s”). That the respondent’s main claim in the suit was to compel the 1<sup>st</sup>-6<sup>th</sup>, 10<sup>th</sup>-15<sup>th</sup> and 17<sup>th</sup> defendant to transfer to the respondent all assets acquired using the respondent’s monies.
10. That in their defence, the defendants had admitted that the 11<sup>th</sup>-15<sup>th</sup> and 17<sup>th</sup> defendants were incorporated as SPVs to be used by the respondent for investment. That the 1<sup>st</sup> and 2<sup>nd</sup> defendant offered to transfer their shareholding in the SPVs to the respondent and deposited the title documents to 12 of the properties with the respondent on April 16,2016. That the respondent filed a mareva application dated April 12,2017 restraining the defendants/applicants from dealing in any way with the properties.
11. That when the application came up for hearing on December 13, 2018, the applicants themselves opted to compromise the application by conceding to the extension of the orders issued on April 13, 2017 which restrained them from dealing in any way with the properties. That the respondent filed another application dated November 12, 2019 seeking to vary those orders to enable it to negotiate leases over the property belonging to the 13<sup>th</sup> defendant and restructure the facility it had taken from Equity Bank.
12. That when the application came up for hearing on November 27, 2019, the defendants/applicants again compromised the same vide a consent dated January 22, 2020 and the respondent was allowed to negotiate new leases and renegotiate the loan facility. Therefore, it was not true that the applicants were coerced into signing the consents. Mismanagement of the properties was denied.
13. That the varied consent order of January 22, 2020 mistakenly referred to the 5<sup>th</sup> defendant as opposed to the 13<sup>th</sup> defendant due to the close similarity of names and the error was only an oversight. That when signing the consent, all parties understood that they were dealing with the 13<sup>th</sup> defendant and not the 5<sup>th</sup>, and the applicants had ample opportunity to raise the issue in 2020 and only did it 2 years later as an afterthought and to delay the hearing of the matter.
14. That though the respondent had sold the SPV properties to SBM Bank Kenya, the sale did not affect the respondent’s claim against the defendants as transfer of the properties to SBM was only possible through registration of title yet the defendants had failed to transfer the properties to the respondent. That SBM’s right to the SPV properties would only crystallize upon determination of the instant suit on ownership of the SPV properties.
15. The application was disposed of by way of written submissions. The applicants were dated November 18, 2022 whereas those of the respondent were dated October 7, 2022. This Court has considered those submissions as well as the rival pleadings and evidence before it. The main task for this Court is to determine whether the consent orders ought to be varied, reviewed and set aside.
16. In *Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd* [1982] KLR 485, Harris, J held that: -  

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without



sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

17. In *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR, the Court of Appeal stated as follows: -

“A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

18. Finally, in *Setton on Judgments and Orders* (7<sup>th</sup> Edn), Vol 1 pg 124 the author states that: -

“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... it cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

19. It then follows that for a consent order to be set aside, the applicant must establish that the consent was obtained fraudulently or by collusion, or the same was entered into without sufficient material facts, or there exists any of the conditions which would lead to setting aside a contract. Unless the foregoing is established, a consent order remains binding upon the parties.

20. In the present case, the applicants contended that they entered into the consent without having all the material information relevant to the matter. That their directors were coerced and were under duress to enter into the consents on account of criminal cases instituted by the respondent.

21. From the affidavits, the applicants did not demonstrate which material information was concealed from them at the time the consent was entered into. They also did not disclose the particulars of the criminal cases alleged to and how the same was directly related to the subject consent. Neither was the allegation of coercion proved.

22. To the contrary, the record shows that the consents were entered at the suggestion of the applicants' counsel. It is the applicants who agreed to compromise the respondent's *mareva* injunction by allowing the interim restraining orders against them to be extended. They also conceded to varying those orders to allow the respondent to negotiate new leases on the suit properties and renegotiate the facility obtained by the 13<sup>th</sup> defendant from Equity Bank. There is nothing to show that the consent was obtained by fraud, collusion, or under duress and coercion.

23. The applicants having compromised both the *mareva* application dated April 12, 2017 and the variation application dated November 12, 2019, this Court finds that the allegation of fraud and coercion to be farfetched and an afterthought.

24. The only error on the face of it is that the varied consent order of January 22, 2020 refers to the 5<sup>th</sup> defendant as opposed to the 13<sup>th</sup> defendant. The respondent's explanation was that the same was an oversight due to the similarity of names. The 5<sup>th</sup> defendant is Riverside Mews Investment Limited while the 13<sup>th</sup> defendant is Riverside Mews Limited.

25. This explanation is acceptable. In any case, the applicants waited for more than 2 years to raise the error. This demonstrates that the error was genuine and does not go to the merit of the consent orders. This Court is inclined to agree with the respondent's submission that the raising of the error at this stage



was an afterthought on the applicants' part. A reading of the consent orders reveals that the parties intention was geared towards the 13<sup>th</sup> defendant and not the 5<sup>th</sup>.

26. As regards the allegations raised concerning the conduct of the respondent and KDIC in the management of the properties, these grievances can only be best addressed by an application under the [Companies Act 2015](#) before the insolvency court. The jurisdiction of this Court is limited to the issues raised in the plaint and defence before it, the main issue being determination of the ownership of the suit properties.
27. However, as regard the issue raised by the applicants on whether the claim by the respondent as against the defendants is extinguished by virtue of the respondent's sale of the suit properties to SBM Bank, the answer to this is in the negative.
28. Despite that the suit properties having been sold to SBM Bank, which is in possession of some of the properties as a tenant, the claim against the applicants is still valid. The respondent cannot pass good title of the suit properties to a third party until after the rightful owner thereof is determined.
29. In the end, this Court hereby makes the following orders;
  1. The application dated 18/2/2022 is partially successful.
  2. The varied consent order of January 22, 2020 is hereby varied to read "the 13<sup>th</sup> defendant" in place of "the 5<sup>th</sup> defendant"
  3. The plaintiff/respondent is hereby restricted from any further sale or transfer of the suit properties until the full and final determination of the instant suit.
  4. Since the application was partially successful, each party shall bear own costs.
  5. The parties do immediately take steps to prosecute the suit.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

