



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC. NO. 32 OF 2010

UTALII TRANSPORT COMPANY LIMITED.....1ST PLAINTIFF

VERONICA NDINDI MUSYIMI AND JUSTUS

KIMAU MUSYIMI AS ADMINISTRATOR OF THE ESTATE OF:-

STEPHEN MUSYIMI KIMOLO2ND PLAINTIFF

VERONICA NDINDI MUSYIMI3RD PLAINTIFF

JUSTUS KIMAU MUSYIMI4TH PLAINTIFF

VERSUS

NIC BANK LIMITED.....1ST DEFENDANT

KANINI HARAKA ENTERPRISES LIMITED2ND DEFENDANT

JUDGMENT

1. As will be apparent shortly, the prospects of a very substantial part of the Plaintiffs' claim is predicated on the successful impeachment of the consent order filed on 12th June 2009 in Milimani HCCC No. 97 of 2009 Utalii Transport Company Limited, Veronica Ndindi Musyimi and Justus Kimau Musyimi as administrators of the Estate of Stephen Musyimi Kimolo, Veronica Ndindi Musyimi, Justus Kimau Musyimi vs NIC Bank Limited, Westminster Commercial Traders (HCCC No. 97 of 2009). Indeed, the Plaintiffs appreciate the centrality of that consent to their claim and in closing submissions observe:-

“At the core of the Plaintiffs complaints in this suit is the impugned “consent judgment” filed in Milimani HCCC No. 97 of 2007.”

2. Utalii Transport Company Limited (Utalii or the 1st Plaintiff) was at all material times a customer of NIC Bank Limited (NIC Bank or the 1st Defendant). The Bank granted the Utalii several facilities in form of loans, overdrafts, insurance premium and hire purchase. It is the case of the Plaintiffs that some of those facilities were secured by legal charges over Nairobi/Block 106/12 and LR No. 12661/66. These properties were registered in the name of Stephen Musyimi Kimolo (Stephen) who passed away on 26th February 2006. Stephen was a director of Utalii and upon his death, letters of administration to his estate were, on 21st March 2007, issued to Veronica Ndindi Musyimi (Veronica or the 3rd Plaintiff) and Justus Kimau Musyimi (Justus or the 4th Plaintiff). The two also, in their personal capacities, took out individual guarantees as part security of some of the facilities.

3. In the Plaint dated 26th January 2010 and presented to Court on the same day, the Plaintiffs aver that Utalii has settled certain facilities in full. They complain that there was a restructure of the facilities without the consent of the 3rd and 4th Plaintiffs as guarantors and that the two did not execute fresh guarantees.

4. When the Bank attempted to repossess some vehicles, the Plaintiffs filed HCCC No. 97 of 2009 challenging the action. It is in those

proceedings that the impugned consent was filed and recorded. Following that consent, property described as LR 12661/66 was sold by private treaty to Kanini Haraka Enterprises Ltd (Kanini Haraka or the 2nd Defendant). The Plaintiffs allege that the purported sale and transfer was null and void.

5. The Plaintiffs seeks the following prayers:-

a) A declaration that the Compromise by way of a Consent Order filed in Court in MILIMANI HCCC No. 97 of 2009 on 12th June 2009 is null and void and that all steps taken to enforce the said compromise are unlawful and void ab initio.

b) An order setting aside the Consent Order dated 12th June 2009 filed in MILIMANI HCCC No. 97 of 2009.

c) The 1st Defendant be ordered and compelled to refund the sum of Kshs.1,143,830.40 unlawfully debited to the 1st Plaintiff's account as Advocates' fees and Kshs.569,320.00 to Garam Investments Limited together with interest thereon at Court rates from the date of filing of suit until payment in full.

d) A declaration that the 3rd and 4th Plaintiffs were discharged as Guarantors to the 1st Plaintiff when the 1st Defendant restructured the facilities granted to the 1st Plaintiff in March and December 2008.

e) A declaration that the 1st Defendants' repossession of motor vehicle KAT 833S with Trailer Number ZC 1226 loaded with Total Kenya's LPG Cylinders and KAV 392B with Trailer Number ZC 1127 is unlawful and void.

f) A declaration that the 1st Defendant's continued detention of the logbooks for motor vehicles registration numbers KAP 922A, KAN 998C, KAR 924P, KAR 872M, KAQ 223J, KAQ 921R, KAS 117R, ZC 1226 and KAU 633A is unlawful and void.

g) A permanent injunction restraining the 1st Defendant whether by itself, its agents, servants or otherwise howsoever from repossessing, advertising, offering for sale, auctioning, selling, transferring or otherwise parting with the title of motor vehicles registration numbers ZC 1548, KAT 475S, KAU 983J, ZC 2971, KAU 246J, ZC 3697, KAV 392B, KAT 833/TR and KAV 784R.

h) A permanent injunction restraining the 1st Defendant whether by itself, its agents, servants or otherwise howsoever from repossessing, advertising, offering for sale, auctioning, selling, transferring or otherwise parting with the title of motor vehicles registration numbers KAP 922A, KAN 998C, KAR 924P, KAR 872M, KAQ 223J, KAQ 921R, KAS 117R, ZC 1226 and KAU 633A.

i) A permanent mandatory injunction compelling the 1st Defendant whether by itself, agents, servants or otherwise howsoever to deliver up to the Plaintiffs the original logbooks for motor vehicles registration numbers KAP 922A, KAN 998C, KAR 924P, KAR 872M, KAQ 223J, KAQ 921R, KAS 117R, ZC 1226 and KAU 633A.

j) A permanent mandatory injunction compelling the 1st Defendant whether by itself, agents, servants or otherwise howsoever to unconditionally release the 1st Plaintiffs motor vehicles registration numbers KAT 833S with Trailer Number ZC 1226 loaded with Total Kenya's LPG Cylinders and KAV 392B with Trailer Number ZC 1127.

k) A declaration that the 1st Defendant has no Statutory Power of Sale over the properties Title Number NAIROBI/BLOCK 106/12 AND LR NO. 12661/66

l) A declaration that the purported sale and transfer of the property LR. No. 12661/66 between the 1st Defendant as Chargee and the 2nd Defendant as Purchaser is null and void.

m) An Order cancelling the transfer of the property LR. No. 12661/66 to the 2nd Defendant.

n) A permanent injunction restraining the 1st Defendant whether by itself, its agents, servants and/or employees from selling or offering for sale whether by Public Auction or Private Treaty, charging, pledging or in any way alienating or disposing of the property Title Number NAIROBI/BLOCK 106/12.

o) An Order of Permanent Mandatory Injunction directed to the 2nd Defendant to vacate and forthwith give vacant possession to the 3rd and 4th Plaintiffs to the property LR. No. 12661/66.

p) The 1st and 2nd Defendants be ordered to pay the Plaintiffs cost of this suit jointly and severally together with interest thereon at Court rates from the date of filing of suit until payment in full.

q) Any such other or further relief as this Honourable Court may deem appropriate.

6. The Bank resists the claim and a plank of its Statement of Defence dated 14th June 2012 is that all issues raised here are *res judicata* having been compromised by the consent in Milimani HCCC No. 97 of 2009. As for Kanini Haraka it pleads that it bought the premises for valuable consideration without "any notice of fraud."

7. In paragraph 40 of the Complaint, the Plaintiffs say as follows of the consent:-

“[40] The Plaintiffs avers that the purported compromise or consent was null and void in law as it was fraudulent, illegal and premised on misrepresentations by the 1st Defendant. The purported Compromise was therefore vitiated by fraud and mistakes on the part of the 1st Defendant.

PARTICULARS OF FRAUD, ILLEGALITY AND MISREPRESENTATIONS:

i. The consent letter dated 10th June 2009 as filed in Court on 12th June 2009 by HAVI & COMPANY ADVOCATES and WALKER KONTOS ADVOCATES without the consent or authority of the Plaintiffs.

ii. The firm of HAVI & COMPANY ADVOCATES posted the letters purporting to seek instructions from the Plaintiffs on 15th January 2010. The correspondence has not been previously forwarded to the Plaintiffs.

iii. The 1st Defendant colluded with the Plaintiffs' Advocate on record to reverse the Ruling and Order of this Honourable Court of 25th March 2008 and deprive the Plaintiffs of the benefit of the injunctive orders.

iv. The Compromise recorded in Court was patently fraudulent as it did not confer on the Plaintiffs any benefits and saddled with them with an unconscionable and unlawful debt.

v. The 1st Defendant through its Advocates WALKER KONTOS ADVOCATES misrepresented to the Plaintiffs' Advocate that the outstanding sum on the Plaintiffs account was Kshs.49,912,775.32 when the defective Statutory Notice issued on 2nd February 2009 issued on behalf of the 1st Defendant had demanded payment of Kshs.18,585,234.78.

vi. The consent Order of Compromise fraudulently purported to give the 1st Defendant the right to exercise Statutory Power of Sale when no valid Statutory Notice had ever been issued.

vii. The firm of WALKER KONTOS colluded with the firm of HAVI & COMPANY ADVOCATES to have their costs of Kshs.320,509.00 and Kshs.650,000.00 paid upfront and charged to the Plaintiffs Current Account CA2-1-200-00469 for the purported sale of LR No. 12661/66 without any approval or knowledge of the Plaintiffs.

viii. The Consent Order or Compromise filed in Court on 12th June 2009 fraudulently provided that the Plaintiffs owed the 1st Defendant the sum of Kshs.8,970,000.00 on account of the Guarantee Facility. The 1st Defendant has not paid out or honoured any of the Guarantees issued in favour of the 1st Plaintiff and therefore no monies were owed to the 1st Defendant.

ix. A reconciliation of the Hire Purchase Facilities has confirmed that the outstanding amount on the Hire Purchase Facilities was Kshs.15,387,750.00 as at 30th April 2009. The 1st Defendant had unlawfully inflated the 1st Plaintiffs account and wrongly debited the sum of Kshs.5,902,187.37.

x. The Compromise was against all notions of justice and contrary to Public Policy as it sought to legalize the recovery of money contrary to the *in duplum rule* as proved for Under Section 44A of the Banking Act.

xi. The Compromise by way of the Consent Order was in any event vitiated by mistake as the 1st Defendant was under the mistaken belief that the 3rd and 4th Defendants were still Guarantors to the 1st Plaintiff.

xii. The 3rd and 4th Plaintiffs were discharged as Guarantors as a matter of law when the 1st Plaintiff's facilities were restructured without their consent in February and December 2008.

xiii. The Consent Order recorded by was unlawful as the Honourable Justice Khaminwa had prima facie established:-

a. The 1st Plaintiff has performed its obligations under the facilities, the further facility and the law.

b. 1st Plaintiff has repaid over two-thirds of the H.P facility in so far as it relates to the 11 motor vehicles in the total sum of Kshs.39,943,900.00 and the 1st Defendant cannot recover the claimed outstanding amount other than by a suit. The 1st Defendant had not filed any Counterclaim or Suit and there was no basis for the Compromise to be recorded.

c. The Hire Purchase agreements for the H.P facility in so far as they relate to the 11 motor vehicles are not registered.”

8. But before interrogating the assertions and contentions by the Plaintiffs, it may be useful to set out the law on the manner and grounds upon which a consent judgment can be successfully challenged.

9. I agree with counsel for the Plaintiffs that one procedure for challenge is by way of a fresh suit. In Flora N. Wasike v Destimo

“There are alternative procedures of how a party objecting to a judgement or order, recorded as having been passed with the consent of the parties or their respective advocates, is to go about setting aside or varying the consent judgement or order, namely, by a separate action brought to do so, or it may be challenged in the same suit itself by an application for review under the order relating to that procedure, or by an appeal; any of these methods is possible, and which procedure is adopted must depend very much on the circumstances of the case and on the manner by which the aggrieved party wishes to present his case, as to what witnesses have to be called, the nature of the grounds relied on for seeking to set aside or vary the judgement or order, the nature of the order sought, and so on; the burden in either case would be on the party seeking to set aside or vary the judgement or order.”

10. A challenge by way of a fresh suit is attractive, if not necessary, where the party seeking the setting aside is required to muster a high threshold. For instance, where the ground for challenge is fraud, it will only succeed if evidence surpasses a balance of probabilities although it need not be as high as beyond reasonable doubt.

11. The Court of Appeal decision of Brooke Bond Liebig (T) Ltd v Mallya [1975] EA 266 remains a reference point on when a Court may interfere with a consent order. Law J. A held:-

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19 EACA 131, where the following passage from Seton on Judgments and Orders, 7th edition, Vol. 1 p. 124 was approved:

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

12. Quoting a passage from the decision of Nyarangi J in Kasmir Wesonga Ongoma & Another v Wanga [1987] eKLR, Counsel Issa for the Plaintiffs proposes that it is trite that in a situation where an advocate enters a consent without authority to do so, then the consent will be a nullity. There, the Honourable Judge held:-

“A consent judgment is a judgment, the terms of which are settled and agreed to by the parties to the action. Where is the evidence that the terms were settled? How am I to tell if the parties agreed? It would have made all the difference if each party had signed or thumb printed. This court has already suggested the adoption of such practice.”

13. There is a view, however, that when examining the authority of counsel to bind his client the position of the law is that stated by Harris J in Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd [1982] eKLR 485 :-

“The 7th Edition of Seton was published in the year 1912, that is, more than sixty five years ago. It does not take into account the decision of McCardie J in Welsh v Roe (1918), 87 LJ KB 520, where the earlier authorities were carefully considered and it was held that after the commencement of an action, the solicitor for a party has an implied general authority to compromise and settle the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the notice of the other side. This decision is accepted as authoritative by the editors of the Supreme Court Practice (1979), vol 2 para 2013, where it is stated that a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction.”

14. That statement by Harris j has been endorsed as a correct statement of law by the Court of Appeal in Kuwindu Rurinja Co. Limited v Andkuwinda Holdings Limited & 13 others [2019] eKLR. Indeed, even earlier in Flora Wasike (Supra), Hancox J. A had observed:-

“Furthermore Waugh v H B Clifford & Sons [1982] Ch 374, is persuasive authority that a solicitor or counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned, and Mr Dhanjal would seem to have had such authority in this case.”

15. In view of these Court of Appeal decisions, this Court prefers to view the law as being that counsel for a party has an implied authority to compromise his/her clients action unless there is an express direction limiting his/her authority and that limitation has been brought to the notice of the other side.

16. With these in mind I turn to scrutinize the manner and circumstances in which the firm of Havi & Co. Advocates purported to compromise HCCC No. 97 of 2009 through the consent dated 10th June 2009 and filed in Court on 12th June 2009.

17. For its importance, the Court reproduces the terms of that consent:-

“Havi & Co. Advocates

10th June 2009

The Deputy Registrar

High Court of Kenya

Milimani Commercial Court

NAIROBI

We would be grateful if you would kindly record the following consent:

1. The 1st to 4th Plaintiffs hereunder referred to as Principal Debtor and/or the administrators of the estate of the deceased Guarantor agree that they are jointly and severally indebted to NIC Bank as enumerated in paragraph 5 of this consent.

2. NIC bank in compliance with the Court order of 25th March 2009 has renewed the following guarantees set out in the order:-

1. GTE02-070334 dated the 24th day of April 2008 for Kshs.1,500,000.00;

2. GTE02-070538 dated the 15th day of May 2008 for Kshs.470,000.00;

3. GTE02-070421 dated the 15th day of May 2008 for Kshs.1,500,000.00 and;

4. GTE02-060596 dated the 13th day of January 2009 for Kshs.4,000,000.00 to Chevron Kenya Limited.

3. NIC Bank confirms that it has renewed the guarantee GTE02-070227 which was not captured in the Court order and shall renew any existing securities as and when they fall due.

4. NIC Bank shall within 7 days of filing the consent release to the Plaintiffs' Advocates the original Grant for property L.R No. 1160/566 without any condition.

5. That total debt outstanding is made up as follows:-

H.P Accounts accruing interest at the rate of 30% per annum

HP2-5-200-001767 as at 30th April 2009 Kshs.156,619.46

HP2-5-200-001859 as at 30th April 2009 Kshs.110,123.49

HP2-5-200-002193 as at 30th April 2009 Kshs.9,095,755.21

HP2-5-200-002250 as at 30th April 2009 Kshs.430,059.38

HP2-5-200-002290 as at 30th April 2009 Kshs.117,491.22

HP2-5-200-002403 as at 30th April 2009 Kshs.1,954,154.53

HP2-5-200-002404 as at 30th April 2009 Kshs.859,959.76

HP2-5-200-002660 as at 30th April 2009 Kshs.4,604,093.28

HP2-5-200-002661 as at 30th April 2009 Kshs.251,151.01

HP2-5-200-002680 as at 30th April 2009 Kshs.687,484,920

HP2-5-200-000629 as at 30th April 2009 Kshs.869,713.32

HP2-5-200-000136 as at 30th April 2009 Kshs.8,970,000.00

HP2-5-250-005621 as at 30th April 2009 Kshs.2,019,672

(Insurance Premium) Amalgamated Current A/C accruing interest at the excess rate of 27.5% CA2 1 200-000469 as at 30th April 2009 kshs.18,786,497.74

Total outstanding debt as at 30th April 2009 is Kshs.48,912,775.32.

6. The Principal debtor and/or Guarantors shall settle all outstanding legal fees and collection charges from the sale proceeds of LR. No. 12661/66 amounts are set out as follows:-

a) legal costs	Kshs.173,321.40
K. Mwaura & Co. Advocates	Kshs.320,509.00
Walker Kontos & Co. advocates	Kshs.650,000.00

b) Should the plaintiffs not settle the legal fees as agreed in this consent, the fees be debited from the first plaintiffs account at NIC Bank No. CA2-1-200-000469 and the same be accrued as an outstanding amount due to NIC BANK.

c) That the total arrears as at 30th April 2009 in the Hire Purchase Accounts standing at kshs.8,376,423.89 and the total outstanding amount in the insurance premium account be debited in the amalgamated current account to make a total of Kshs.29,182,593.63 plus total legal fees as set out in paragraph 6(a).

7. That the total amalgamated amount be set aside into a new loan account as at terms and conditions that shall be expressly indicated and agreed in a letter of offer.

8. That the existing current account be operated by the Plaintiff strictly on credit.

9. The plaintiffs and/or the administrator of the estate of the deceased guarantor together with NIC Bank have agreed that within 30 days from the date of filing this consent, to mutually cooperate and identify various interested buyers for the purchase of L. R No. 12661/66 on the following conditions:-

a) LR No. 12661/66 shall remain charged in favour of NIC Bank pending the conclusion of the sale of the said property to the person offering the best price offered to the mutual satisfaction on both parties.

b) Once a buyer has been found, the property shall be sold by private treaty by NIC BANK.

c) The entire sale proceeds from L/R No. 12661/66 shall be used to offset the agreed debt as set out in paragraph 5 above together with the agreed legal costs as set out above.

10. LR No. Nairobi /Block 106/12 remains charged as security to NIC Bank and will be discharged upon settlement of total outstanding liabilities to the Bank.

11. The original logbooks of motor vehicles registration numbers KAP 922A, KAN 998C, KAR 924P, KAR 872M, KAQ 223J, KAQ 921R, KAS 117R, ZC 1226 and KAU 633A ZC 2274, ZC 2280, KAU 635L, ZC 2971 shall be released to the principle debtor upon receipt by NIC Bank of the all respective sale agreements accompanied by valuation reports by Bank valuers, and/or sale proceeds of all the above listed motor vehicles. All valuation costs shall be borne by the principal debtor/and or administrators of the estate of the deceased guarantor.

12. Subject to successful completion of the sale of property L/R No. 12661/66 and receipt by NIC Bank of the full purchase price, the logbooks for motor vehicles registration numbers ZC-1548, KAT/833S/475S, KAU 983J, ZC 3697, KAV 392B, KAU 246J and 784 R shall be released to the principal debtor upon receipt of the sale agreements for each respective hire purchase account, valuation report by NIC Bank's valuers and/or sale proceeds of the listed motor vehicles.

13. The principal debtor and/or administrators of the estate of the deceased guarantor and the existing guarantors remain liable and shall settle any outstanding shortfalls and provided that their liability shall remain for as long as the banker customer relationship between the principal debtor and NIC Bank remains in place.

14. Upon receipt by the bank of the full purchase price from the sale proceeds of L/R No. 12661/66, the parties shall within 30 days of receipt by the bank of the full purchase price agree on the payment of any shortfall. In the event that the parties fail to reach an agreement on the payment of the shortfall of the debt after expiry of the 30 days, NIC Bank shall exercise its contractual and/or statutory power of sale in the following order of priority.

a) Dispose off the various motor vehicles set out above.

b) In the event of any further shortfall from the sale of the motor vehicles, proceeds to sale by private treaty LR No. Nairobi/Block 106/12.

15. The Defendants' Notice of Motion dated 9th June 2009 and fixed for hearing on 15th June 2009 be and is marked as withdrawn with no orders as to costs and the matter taken out of the hearing list for 15th June 2009

Yours faithfully,

HAVI & COMPANY

ADVOCATE FOR THE PLAINTIFFS

WALKER KONTOS

ADVOCATE FOR THE DEFENDANTS.”

18. In his written testimony, Justus states that subsequent to a Court ruling and order of Court in HCCC No. 97 of 2009 dated 25th March 2009, the Banks Advocates M/s Walker Kontos Advocates initiated discussions for settlement of the Plaintiffs claim with their advocates, Havi & Company Advocate. That by an email sent on 7th May 2009, their advocates forwarded to them a draft consent for approval (P. Exhibit Pages 228-232). In speaking in plural, Justus was referring to himself and his co-plaintiffs.

19. The witness stated that they did not agree with the extremely prejudicial and unconscionable terms of the consent and asked for time to consider the Bank's proposal. He adds that their instructions on settlement were those in their advocate's letter of 6th April 2009 to Walker Kontos Advocates (P. Exhibit 16 pages 258-260).

20. Justus further told Court that without their approval or consent, the firm of Havi & Co. Advocates, in collusion with the Bank's advocates filed the impugned consent. He further stated that the firm of Havi & Co. Advocates posted the letters purporting to seek instructions from them as Plaintiffs on 15th January 2010. He produced a copy of an envelope showing a post stamp of 15th January 2010 (P. Exhibit Page 233).

21. Mr. Havi who acted for the Plaintiffs attended Court and testified on the strength of summons issued by Court at the request of the Bank. He stated that his email of 7th May 2009 was sent to Lilian Nalianya. That Lilian was the spouse of Justus. The email forwarded a draft consent and required a confirmation from the clients as to whether it was in order.

22. Under cross-examination, counsel Havi testified that a week after the email, on date he could not exactly remember, he together with Justus, Lilian and a Bett, on the part of the Plaintiffs, held a meeting with the Bank's lawyer on record, Allen Gichuhi of Walker Kontos. He says that it was in that meeting that the terms of the consent that was finally entered were settled. Pressed for the record of the minutes, he said he did not have any.

23. What is to be made of the evidence this far? It is common ground that although the email of Mr. Havi of 7th May 2009 was sent to one Lilian Nalianya, the email and its contents got to Justus. Justus confirmed that he received it together with the draft consent enclosed therein (P. Exhibit Pages 229-232). It is therefore believable that, as testified by Mr. Havi, Lilian Nalianya was a spouse of Justus.

24. In his testimony Justus states that the terms of the draft consent were extremely prejudicial and unconscionable. Of this draft consent, he says as follows under cross-examination:-

“We had no issue with the terms of the settlement but the draft forwarded to us for approval had no figures. (P. Exhibit Page 262) we did not agree to any consent. The draft came without figures.”

25. He reiterates this in re-examination:-

“We had to agree to settlement but the draft forwarded to us did not have figures. The challenge was the figure not the words.”

26. Yet his testimony, that the draft consent did not have figures, is not entirely accurate. The draft consent had figures of the sums guaranteed by NIC Bank (P. Exhibit Page 229). The draft consent had a breakdown of the debt (P. Exhibit Pages 229 and 230) and the total outstanding debt as at 30th April 2009 was Kshs.48,912,775.32. Again at page 230, the draft consent provides:-

“b. That the total arrears as at 30th April 2009 in the Hire Purchase Accounts standing at Kshs.8,376,423.89 and the total outstanding amount in the Insurance Premium Account be debited in the amalgamated current account to make a total of Kshs.29,182,593.63.”

27. The only figures missing are in respect to legal fees and collection charges from sales proceeds of LR. No. 12661/66 (See item 9 – P. Exhibit page 231).

28. What is crucial, as a test to the credibility of the testimony of Justus, is what was captured as the agreed total debt. One notices that the figure of Kshs.48,912,775.32 on the draft consent was retained in the final consent. Justus was well aware of this figure as early as when he

received the draft consent. If the Court detours for a moment, one of the Plaintiffs grievance is that this final sum was at great variance with the sum of Kshs. 18,585,234.78 demanded by the Bank in its statutory notice of 2nd February 2009(Exhibit page 227).It seems to me that the demand was only in respect to the debt secured by the charge over LR.No.12661/66 and did not include the amounts outstanding on the hire purchase facilities. The Court does not therefore perceive an inconsistency between the amount demanded in the statutory notice and the amount finally agreed to be the entire debt of the Plaintiffs.

29. In respect to whether a meeting took place after the draft consent so as to firm up the terms of the settlement, the account of Mr. Havi that this happened at the offices of the Bank's lawyer seems believable. This is because Justus himself confirmed his presence at the meeting. In re-examination by his counsel he stated:-

“I was present in the meeting of Havi, myself and advocates for Walker Kontos. The meeting was in the offices of Walker Kontos. We never gave instructions on what was finally recorded.”

Of course as to whether the terms of the consent were firmed up, Mr. Havi's testimony was different. It was his evidence that it was at this meeting that the terms of the consent were settled.

30. I turn to another aspect of the evidence of Justus. His testimony was that:-

“It came to our attention that the consent had been filed without our authority when a tenant was being evicted from a house charged to the Bank and a statement showed a credit into our account and we were not aware of it.”

31. This may be at odds with other evidence. On 18th June 2009, NIC writes to Utalii as follows:-

“NIC Bank,

18th June 2009

Utalii Transport Company Limited,

NAIROBI.

Dear Sirs,

RE: L. R NO. 1160/566

The above refers.

Enclosed please find original Grant for property L. R. No. 1160/566 in compliance with Clause 4 of the filed consent.

Please acknowledge receipt by signing a copy of this letter.

Yours faithfully,

Lilian Sogo

H. Maina

For Manager – Legal

Manager - Legal

Debt Recovery Unit

Debt Recovery Unit.”

32. The original grant was through that letter received by Lilian Nalinya whose connection with Justus has been discussed earlier. That letter explicitly makes reference to clause 4 of the filed consent.

33. At paragraph 19 of its Defence, the Bank pleaded:-

“Further to aforementioned, the Bank released a grant of property known as L. R. No. 1160/561 on 18th June 2009 as provided for in the consent and the same was collected by the Plaintiff's agent L. Nalinya. The Bank also renewed all the outstanding guarantees.”

This, as pointed out by counsel for the Bank, was not refuted by way of a reply to Defence.

34. It seems clear to the Court that the Plaintiffs were aware of the existence of the consent as at 18th June 2009 when its agent, Lilian, collected the grant in compliance with clause 4 of the consent. The Court refuses to accept the evidence of Justus that he learnt of the consent for the first time when his tenant faced an eviction which would be sometime after October 2009 when the property was sold to Kanini Haraka.

35. From the Court's perception of the evidence, it accepts the evidence of counsel Havi that he was authorized by the Plaintiffs to enter the consent.

36. As I understood the evidence, the final consent was not in the exact terms of the draft consent sent to the Plaintiffs on 7th May 2009 because the final text was settled in the subsequent meeting held at the offices of Walker Kontos in which Justus was present. The extensive exercise in which counsel for the Plaintiffs points out the differences between certain aspects of the draft consent and the impugned one may therefore not take the Plaintiffs case any further as this Court has found that the final consent was entered with the authority of the clients. Put differently, the final text was agreed upon by the Plaintiffs and it is needless to refer back to the draft.

37. Even if this Court had found that the consent was entered by Havi and Advocates without the authority of their clients, still the Court would not set it aside. It is accepted by the Plaintiffs that Havi & Co. Advocates were their advocates in HCCC 97 of 2009. On the authority of the decisions discussed earlier in this Judgment, counsel had authority to compromise the suit in the manner he did. The Plaintiffs have neither argued nor proved that they had expressly limited counsel from entering or making certain compromises.

38. Again this Court is unable to find any wrongdoing on the part of the Bank and more so when the person alleged to have been the major perpetrator of the fraud and illegality was not joined to the suit. In this regard the decision of Shah J A in Nrb Civil Appeal No. 165 of 2000 Lalchand Fulchand Shah & Another v Investments & Mortgages Bank Limited is instructive. The Judge held:-

“It would be very simple for any chargor to postpone an auction sale by simply saying that the charge is not properly attested. If such a state of affairs was allowed to be taken cognisance of there would be no end to the chargors streaming to courts to stop an auction sale on that ground. If the Shahs were serious about what they say in regard to attestation they ought to have filed a declaratory suit to avoid the charge by making the Bank, the borrower and Mr. Sheth defendants to that suit. Alternatively they could have added Mr. Sheth and the Borrower as co-defendant in the suit they have filed. If Mr. Sheth acted wrongfully he would possibly face the consequences.”

39. Whichever way one looks at it, this Court finds no reason to impeach the consent order dated 10th June 2009 and filed on 12th June 2009 in HCCC No. 97 of 2009. As the consent survives and is unscathed then all the other complaints by the Plaintiffs, save for one, fall on the way side and do not call for further examination.

40. Clause 9 of the consent reads:-

“The plaintiffs and/or the administrator of the estate of the deceased guarantor together with NIC Bank have agreed that within 30 days from the date of filing this consent, to mutually cooperate and identify various interested buyers for the purchase of L. R No. 12661/66 on the following conditions:-

d) LR No. 12661/66 shall remain charged in favour of NIC Bank pending the conclusion of the sale of the said property to the person offering the best price offered to the mutual satisfaction on both parties.

e) Once a buyer has been found, the property shall be sold by private treaty by NIC BANK.

f) The entire sale proceeds from L/R No. 12661/66 shall be used to offset the agreed debt as set out in paragraph 5 above together with the agreed legal costs as set out above.”

The Bank was permitted to sell the said property by way of private treaty and criticism that it chose that method of sale is without merit.

41. The other grievance by the Plaintiffs is that the property was sold at undervalue, below a supposed open market value of Kshs.47,000,000.00. A valuation by Crystal Valuers Ltd (P. Exhibits Page 269-285) commissioned by National Bank (at the behest of Justus) returned the following values as at 3rd September 2009.

- i. Open market value - Kshs.47,000,000.00
- ii. Mortgage value - Kshs.43,000,000.00
- iii. Forced sale value - Kshs.36,000,000.00
- iv. Estimated maintainable rental value - Kshs.180,000.00
- v. Insurance value - Kshs.22,500,000.00

42. As for the Bank, it commissioned a valuation by Landmark Realtors Limited (D. Exhibit 1 Pages 66-79) who returned the following values as at 25th May 2009:-

- i Open market value - Kshs.35,000,000.00
- ii Estimated reserve price (forced sale)- Kshs.24,000,000.00

iii Gross Replacement Cost for Insurance

Purposes - Kshs.30,000,000.00

43. The property was sold on 12th June 2009 to the 2nd Defendant at Kshs.38,500,000.00. The valuation of the Bank was conducted just over a fortnight to the date of sale and the valuation of the Plaintiffs was about two and half months after the sale.

44. The sale was concluded before the advent of the current land law regime and so in answering the question whether the sale price was an under price, the Court must rewind the clock and turn to the provisions of the Indian Transfer of Property Act (now Repealed) as the sale was akin to the exercise of a chargee's statutory power of sale. Section 69(1) reads:-

“A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage- money, or part thereof, immediately due and payable.”

45. In **Standard Chartered Bank vs Walker** [1982] 3 ALL E.R. 938, Lord Denning MR opined:-

“So far as mortgagees are concerned the law is set out in **Cuckmere Brick Co. Ltd. vs Mutual Finance Ltd.** [1972] 2 ALL E.R. 633, [1971] Ch. 939. If a mortgagee enters into possession and realises a mortgaged property it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible.”

46. The duty of the Mortgagee in the sale, be it by private treaty or public auction, was to take reasonable care to obtain the best possible price in the circumstances. That price, could, but need not be the market value. It is common ground that the Plaintiffs themselves had secured a buyer offering Kshs. 38,000,000.00 which was Kshs. 500,000.00 less than the price (Kshs. 38,500,000.00) that was eventually obtained by the Bank. This proposed purchase is acknowledged by the Plaintiffs and even a draft agreement for sale was prepared between the Bank, the Plaintiffs and a Mr. George Mwangi, the intended purchaser, which reflects the said purchase price of Kshs. 38,000,000.00 (see P Exhibit pages 237 to 257 and as further reiterated in the Plaintiffs' submissions under paragraphs 202 & 203). Again, the sale price was more than the forced sale value in the Plaintiff's own valuation and the Plaintiff's cannot be heard to complain that the price was at an under value. Yet, most crucially, the onus was on the Plaintiffs to prove that the sale price of Kshs. 38,500,000.00 was not the best price possible in the circumstances, a task they failed given that the price they could obtain was half a million shy of what the bank achieved.

47. The upshot is that the Plaintiffs case is lacking in merit and must fail. It is hereby dismissed with costs to the Defendants.

Dated, Signed and Delivered in Court at Nairobi this 15th Day of March 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Court Assistant: Nixon

Ahomo for Plaintiff

No appearance for Defendants