REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 931 OF 2013

SUPERIOR HOMES (KENYA) LTD…….…….....PLAINTIFF

VERSUS

EAST AFRICA PORTLAND CEMENT COMPANY LTD……DEFENDANT

RULING

Introduction

The Plaintiff and Defendant recorded a consent order on 14th December 2012 in which they essentially settled the suit herein. A decree was consequently issued on 17th December 2013 on the terms of the said consent. The Plaintiff has now filed an application by way of a Notice of Motion dated 30th July 2013 seeking orders that the terms of the said decree be varied and/or reviewed, so as to enlarge and/or extend the completion period of one hundred and forty five (145) days set in the Decree with the consent of the parties by a further three hundred and sixty five (365) days or any other reasonable period in the circumstances, to enable the Plaintiff and Defendant to fully comply with the said Decree.

The application is premised on grounds that by consent of the parties which was adopted as an order of the Court, the Defendant was ordered to transfer to the Plaintiff a portion of land measuring three hundred and thirty seven (337) acres excised off all that the parcel of land known as Land Reference number 8784/4 (hereinafter referred to as "the suit property") at a purchase price of Kshs.750 Million. It was further ordered that the completion period for the said transaction was 145 days from the date of the Decree or 7 days of successful transfer of the suit property to the Plaintiff or its nominees whichever is earlier.

The Plaintiff states that despite its letters calling for completion documents and providing a Facility Letter, the Defendant refused to perform its obligation under the Decree and completely refused to release the completion documents to the Plaintiff as agreed. That the Defendant instead, by its letter dated 12/6/2013 purported to discharge itself from the terms of the Decree, and accused the Plaintiff of breach of the terms of Decree on the ground that Plaintiff has not procured a Bank Guarantee as required.

The Plaintiff's Case

The application was supported by an affidavit and a supplementary affidavit sworn on 30/7/2013 and 18/10/2013 respectively by Ian Hazlit Henderson, the Managing Director of the Plaintiff. The Plaintiff avers that pursuant to paragraph 3 of the Decree it paid the sum of Kshs.100 Million to the Defendant's Advocates, M/s Letangule & Company Advocates, as deposit on the purchase price to be held in stakeholder capacity and not to be released to the Defendant or any other party until completion of the sale transaction. The Plaintiff states that the Defendant's Advocates acknowledged receipt of the deposit

and forwarded a copy of the deposit receipt to the Plaintiff's Advocates in the transaction, M/s Muriu Mungai Advocates.

It is the Plaintiff's averment that its advocates carried out due diligence on the title of the property so as to ensure that the Plaintiff acquires a good title, and to enable it obtain a suitable Bank Guarantee from a reputable Bank for the purposes of financing the balance of the purchase price. The Plaintiff avers that as a result of the due diligence, its advocates vide a letter dated 4/4/2013 to the Defendant's advocates raised various concerns and sought clarifications in respect of the suit property, including why the suit property has been listed in the Ndung'u Land Commission Report and whether the process of acquisition of the suit property by the Government of the Republic of Kenya initiated by Gazette Notice 5321 of 30/11/1988 had been completed. Further, that in view of the foregoing uncertainties, the Plaintiff through the aforesaid letter sought an indemnity from the Defendant against all loss, claims and liability likely to arise at any time upon the conclusion of the transaction. In addition, the Plaintiff also sought to know the progress made in obtaining the completion documents for the transaction.

The Plaintiff claims that subsequent to the letter dated 4/4/2013, a meeting was held at the Plaintiff's Advocates offices on 8/5/2013 between the Plaintiff and his Advocates on the one hand, and the Advocates for the Defendant on the other, whereby the following was discussed and agreed:

a. The Defendant's Advocates were in the process of obtaining title relating to the suit property (a subdivision of Land Reference Number 8784/4) in accordance with section 42 of the Land Registration Act of 2012. The Defendants' Advocates confirmed that the said process was on-going and the was expected to be completed shortly;
b. The transfer of the suit property would only be engrossed upon receipt by the Defendant's advocates of the new title for the sub-divisions;
c. The Defendant' Advocates would avail without delay the rest of the completion documents save for title to the subdivision;
d. The Defendant's Advocates would continue pursuing the approvals of the Ministry of Industrialization;
e. The Defendant's Advocates would provide an Indemnity in favour of the Plaintiff together with the completion documents for the transaction in light of the recommendation made in the Ndungu Land Commission Report that the Title relating to the suit property be revoked; and
f. The Plaintiff's Advocates would forward an appropriate letter from the Bank Confirming the financing of the balance of the purchase price.

The Plaintiff states that following the meeting of 8/5/2013, and in accordance with paragraph 4 of the Decree, its Advocates vide a letter dated 9/5/2013 duly forwarded to the Defendant's Advocates a Facility Letter dated 5/4/2013 issued by I & M Bank Limited, confirming the financing the balance of the purchase price in the sum of Kshs.650 Million. Thus having duly performed its obligations under the Decree, the Plaintiff's advocates requested for a release of the completion documents to enable them register a Transfer and Charge over the suit property in order to facilitate the release of the balance of the purchase price. It is the Plaintiffs averments that its advocates wrote to the Defendant's advocates on 29/5/2013 requesting for the release of the Completion Documents and the agreed Indemnity in its favour.

The Plaintiff reiterated that in the meeting of 8/5/2013, the Defendant's Advocates confirmed that a Facility Letter from a Bank confirming the financing of the balance of the purchase price would be sufficient for purposes of Paragraph 4 of the Decree, and as such, the Defendant is estopped from replying on the non-issuance of a Bank Guarantee as the sole ground for non-completion and termination of the sale transaction. Further, that the Defendant's action is malicious, mischievous and intended to steal a march on the Plaintiff. The Plaintiff states that it is manifestly clear that the period set in the Decree for the completion of the sale lapsed and/or expired due to no fault whatsoever on part of the Plaintiff, and the purported termination of the sale leaves the Plaintiff exposed to a very high risk of loss and damages should the Defendants decide to sell and/or transfer the aforesaid property to a third a party(ies) as it intends to do.

The Plaintiff states further that it is apparent that the Defendant was never ready to complete the sale

transaction within the stipulated time, since the Defendant being a State Corporation was experiencing difficulties in procuring the relevant and necessary approvals from the various agencies and bodies within the Government, including, the mandatory approval from the Ministry of Industrialization. The Plaintiff referred the Court to the Defendant's letter dated 8/5/2013, which is the date that the completion period was supposed to lapse, wherein it confirmed that it was still in the process of obtaining the necessary approvals to enable completion.

The Plaintiff avers that it is justifiably apprehensive that the Defendant is likely to interfere with, waste, damage, alienate, sell, remove, and/or dispose off the property to its detriment. Further, that it stands to suffer substantial financial loss on the infrastructure already constructed on an adjacent parcel of land, sold to it by the Defendant, which infrastructure has been put in place in anticipation of developing the suit property as an extension of its larger project. Consequently, it shall suffer loss on expected earnings and profits to be realized from the proposed housing project and further loss of its business, goodwill and reputation. The Plaintiff states that it is ready, able and willing to complete the sale transaction in accordance with the terms and condition of sale set out in the Decree but cannot do so unless the completion period set out therein is extended and/or enlarged.

The deponent reiterated the foregoing facts in his supplementary affidavit, and explained that the entire proceeding giving rise to the decree emanated from an Agreement for the Exercise of the Option to Purchase dated 1/9/2005 entered into by the parties herein, but that the Defendant had reneged to honour its obligations under the agreement, which he annexed. He also annexed other documents in support of the Plaintiff's application including the Decree issued on 17/12/2012; correspondence between the advocates on the deposit of the purchase price; correspondence on the concerns over the title of the property raised by the Plaintiff; a letter dated 9/5/2013 summarizing the events of the meeting of 8/5/2013; a letter dated 29/5/2013 requesting release of completion documents; the Facility Letter dated 5/4/2013 and Demand Letter dated 18/6/2013; correspondence from the Defendant discharging itself from the transaction; and the Defendant's letter dated 8/5/2013 on the difficulty of obtaining approvals.

The Defendant's Case

The Managing Director of the Defendant, Kephar Tande, swore a Replying Affidavit on 26/8/2013 in response to the Plaintiff's application. The deponent stated that the Defendant instructed its Advocates to cancel the transaction and discharge itself from the conveyance on 12/6/2013 following the failure by the Plaintiff to comply with the terms of the consent decree, thus the cancellation was proper and legal in the circumstances. He deponed further that the Plaintiff has not challenged the propriety and legality of the cancellation, and that there is therefore nothing more between the Plaintiff and the Defendant based on the contract.

As regards the application for extension of time to enable the Plaintiff to complete the transaction, the deponent averred that the same has been made after the cancellation and therefore there is nothing to extend time for as the contract was determined following the discharge of the Defendant by the cancellation. Further, that the application has been made almost 3 months after the decreed 145 days, and no reason has been advanced for the delay in making the application. The deponent contended that if indeed the Plaintiff was desirous of the extension of time, it ought to have made the application in reasonable time.

It was the deponent's averment that the Plaintiff has not advanced any reason for the prayer for variation and or review of the consent decree. He deponed that it is now settled law that a consent order/Judgment can only be set aside and or varied on grounds which would justify the setting aside of contract. Further, that the application does not meet the legal threshold for the grant of the prayer for variation and or setting aside consent decree. The deponent maintained that the reason for the rescission of the transaction by the Defendant was following the Plaintiff's failure to comply with the terms of the decree, and that no other or further agreement was entered between the parties for any variation of the terms of the decree at all. The deponent stated that no bank guarantee was ever issued the Defendant or its Advocates contrary to the express provision of paragraph 4 of the Decree. The deponent refuted the claim that there was agreement as to the substitution of a bank guarantee in accordance to paragraph 4 of the decree with a

bank facility letter as alleged.

The deponent explained that the letters by the Plaintiff's advocates of 9/5/2013 and 29/5/2013 sought the Defendant's Advocates confirmation whether the Facility Letter would suffice and acceptable to the Defendant, but that the Defendant's Advocates responded by asking for a suitable bank guarantee in the letters of 8/5/2013. The deponent stated that the Defendant could not release any completion document to the Plaintiff's Advocates in the transaction without the Bank Guarantee to secure its interest in the matter, and in compliance with the terms of the consent entered in court. Consequently, the decision to rescind the sale was arrived at by a decision of the Board of Directors of the Defendant and the same was in good faith and upon the default of the Plaintiff.

In support of the Defendant's response, the deponent annexed to his Replying Affidavit the cancellation letter, the Consent Decree, the Bank Facility Letter furnished by the Plaintiff and correspondence between the Plaintiff and Defendant's advocates.

The Submissions

The Plaintiff's application was canvassed by way of written submissions upon consensus of both parties,. Nyachoti & Company Advocates for the Plaintiff filed submissions dated 18/10/2013 wherein counsel reiterated the contents of the application and affidavits in support. As regards the provisions of paragraph 4 of the consent decree, counsel submitted that the Bank Facility furnished by the Plaintiff was not incompatible with the said provision which allowed the Plaintiff to furnish "*such other security that shall be agreed between the parties to secure the balance of the purchase price.…..*"

Counsel submitted that further to the meeting of 8/5/2013 when furnishing a Bank Facility in place of a Bank Guarantee was discussed and agreed, the Plaintiff's advocates followed the meeting with a letter dated 9/5/2013 capturing the discussion and forwarding the said Facility letter which the Defendant acknowledged receipt but purported to reject it without justification more than 1 month after receiving the same. Counsel submitted that the Plaintiff did in fact perform its obligation and that the Defendant's action was due to its inability to obtain completion documents.

It was counsel's submission that in the letter dated 9/5/2013, the Plaintiff proposed to the Defendant that they extend the completion period by 60 days to allow the latter to obtain the necessary completion documents. Counsel submitted that this letter was unanswered for over 1 month, and the Plaintiff made an inference that the Defendant's silence or failure to respond could be interpreted as acceptance. Counsel submitted while referred to the Defendant's letter dated 8/5/2013 that in any event, the consent decree lapsed without the Defendant providing the necessary completion documents as required. Hence it is evident that the Defendant was not ready to complete the purchase.

However, that the Defendants averments in its correspondence that it had substantially secured completion documents demonstrate sufficient commitment on its part to the transaction. Similarly, counsel submitted, the Plaintiff in paying the deposit of the purchase price demonstrated its commitment to the transaction. Further, that in view of the period the Plaintiff has been without the deposit and considering that if the sale collapses the refund shall be without interest, the Plaintiff will be exposed to substantial loss and damage hence the need to complete.

Counsel submitted that the Defendant had not expressly shown how it would be prejudiced if the orders sought are granted. Counsel also submitted that in view of paragraph 12 of the consent, the consent was open ended in that it gave parties the liberty to apply to the Court in any circumstance such as extension of time. Counsel also submitted that after carrying out due diligence, it became apparent that the Defendant had withheld material facts, to wit, failing to disclose a recommendation for the revocation of title to the suit property in the Ndungu Land Commission Report, and therefore, had the Plaintiff been aware of them prior to entering the consent order, then its terms particularly on the completion period would be significantly different.

Counsel submitted further that the discovery of new facts necessitated the variation of the consent order

to include an indemnity for loss and liability. It was counsel's submission that where discovery of a misrepresentation or sufficient material facts were not present at the time of signing the consent, such consent order or decree can be set aside or varied as the circumstances of the case may require. Counsel relied on the case of **Brooke Bond Liebig (T) Limited v Mallya (1975) E.A.** which was cited with approval in the case of **Samson Munikah P/A Munikah & Company Advocates v Wedube Estates Limited (2007) eKLR** .

In respect of enlargement of time, counsel referred the Court to the provision of Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, and submitted that the Court still had discretion to enlarge time even where the application for the same was not made until after the expiration of the time.

Letangule & Company Advocates for the Defendant filed submissions dated 27/1/2014 wherein counsel reiterated that the Plaintiff has failed to perform its obligation of the consent decree, that is, to furnish a suitable bank guarantee to the Defendant or its advocate. Counsel submitted that the provisions of clause 4 of the agreement were never amended either in meetings or correspondence between advocates. Consequently, time within which to comply with the consent lapsed before the Plaintiff furnished the Defendant with a suitable bank guarantee prompting the latter to terminate the contract. Counsel submitted that the consent decree did not make provision for extension, and further that the Plaintiff did not seek to extend the completion date before its lapse. It was counsel's submission that the principles guiding a Court in exercising its discretion to set aside or review a consent decree were well established in the case of **Flora N. Wasike v Destimo Wamboko (1982 – 88) 1 KAR 625** where the Court held that a consent judgment or order has contractual effect, and can only be set aside on grounds which could justify setting a contract aside or if certain conditions remain to be fulfilled, which are not carried out.

Counsel submitted that the Plaintiff had not advanced any or valid grounds to have the consent set aside. Counsel submitted that the Plaintiff had not demonstrated that the consent was obtained either by fraud or collusion or by an agreement contrary to the policy of the court, or without sufficient material facts or misapprehension of or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement. Counsel further submitted that the provision in the decree as to the right of a party to apply ought to have been exercised during the lifetime of the consent decree and not after the termination.

Consequently, counsel submitted, the mere fact that the consent was lawfully terminated following a notice for failure to perform on the part of the Plaintiff does not in law call for the setting aside of the consent decree. Counsel submitted further that the Plaintiff filed the application 60 days after the lapse of the stipulated time period and had not advanced any reason as to the delay and that the application was therefore an afterthought. Counsel submitted that the Defendant would be prejudiced if the decree were to be set aside requiring the Defendant to reverse its decision to be discharged from the contract, which decision had already rarified by a board resolution.

The Issues and Determination

It is not disputed that the parties herein entered into and signed a consent order dated 30th November 2012 that was filed in court on 12th December 2012, and recorded by the Deputy Registrar of the High Court on 14th December 2012. It is also not disputed that a decree was subsequently issued by the Deputy Registrar on the terms of the said consent on 17th December 2012. The terms of the said decree were as follows:

1. That the Defendant to Transfer the Plaintiff a portion of land measuring 337 acres of to be excised and/or hived off the parcel of land known as Land Reference Number 8784/4.
2. That the purchase price of the entire parcel of land measuring 337 acres shall be Kenya Shillings Seven Hundred and Fifty Million (Kshs.750,000,000/=).
3. That the Plaintiff to pay a deposit of Kenya shillings One Hundred Million (Kshs.100,000,000/=) within seven (7) days from the date of the Decree to be held in a stakeholder capacity by the Defendant's Advocates in the transaction, Letangule & Company Advocates, and not be released

to the Defendant or any other party until completion;

4. That the completion documents shall be released to the Plaintiff's Advocates in the transaction upon receipt of an acceptable Bank Guarantee issued on behalf of the Plaintiff's Advocates or such other security as shall be agreed between the parties to secure the balance of the purchase price of Kenya Shillings Six Hundred and Fifty Million (Kshs.650,000,000/=)
5. That the balance of the purchase price of Kenya Shillings Six Hundred and Fifty Million (Kshs.650,000,000/=) shall be paid to the Defendant within seven (7) days of successful Transfer of the parcel of land measuring 337 acres of the Plaintiff or its Nominees;
6. That the agreed completion period is one hundred and forty-five (145) days from the date of the Decree or seven (7) days of successful transfer of the parcel of land measuring 337 acres to the Plaintiff or its Nominees whichever is earlier.
7. That in default of completion for whatever reason the deposit of Kenya Shillings One Hundred Million (Kshs.100,000,000/=) shall be refunded to the Plaintiff within seven (7) days of writing demand without interest;
8. That in default by the Plaintiff in completing the transaction for purchase of the above mentioned parcel of land for want of the balance or for whatever reason, the Plaintiff will have no other claim against the Defendant in respect of land;
9. That the Plaintiff shall be granted vacant possession without any encumbrances upon payment of the balance of the purchase price as stipulated in order (15) above;
10. That the Plaintiff has inspected the property and purchases it on as it is condition;
11. That each party do bear its own costs for this suit, and
12. That there be liberty to the parties herein to apply.

What is in dispute between the Plaintiff and Defendant herein is whether the said decree is still binding on the parties, and if so, whether the time of completion can be extended . In order to resolve these two questions, this court finds it necessary to address and determine the following issues:

1. Whether the Defendant could unilaterally discharge itself from the consent order.
2. Whether this court has discretion to extend the time of completion agreed to by the parties in the consent order.
3. Whether the Court can vary terms of the consent order as to the time of completion.

On the first issue as to whether the Defendant could unilaterally discharge itself from the consent order, the Defendant's arguments in this regard are that such discharge followed the failure by the Plaintiff to comply with the terms of the consent decree, and that the cancellation of the decree was thus proper and legal in the circumstances. The Plaintiff on the other hand maintins that it had completed its part of the decree, and that the Defendant had no justification to discharge itself from the decree.

Order 25 Rule 5 of the Civil Procedure Rules provides for the compromise of a suit, and states that where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement or compromise, it shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith. In this suit the parties herein in their consent order which was recorded by the court agreed to settle the suit with finality. I am in this regard in agreement with the finding in **Agrafin Management Services Limited V Agricultural Finance Corporation & 5 Others [2012] eKLR** that the effect of this action was that the consent order becomes an order of the court upon being endorsed by the Court, and that is why a decree was subsequently issued.

Once such a consent order as the one herein was recorded by the court and a decree issued, it consequently became subject to the law governing the discharge of court orders and decrees. Under the Civil Procedure Act such discharge can only be by way of appeal from the order, or review and setting aside of the order. It is in this respect to be noted that under section 67(2) of the Civil Procedure Act, that no appeal shall lie from a decree passed by the court with the consent of parties. The only allowed legal procedure therefore through which a consent order and a decree issue thereof can be discharged is by way of review and setting aside. In **Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd (1982) KLR 485**. It was held *inter alia* in this regard as follows:

"The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds."

The Court of Appeal in **Munyiri vs Ndunguya (1985) KLR 370** also held that the only remedy available to parties who want to get out of a consent order is to set aside the consent order by way of review or by bringing a fresh suit in court. A review can only be by way of judicial process. There was no such review sought by the Defendant in the present case to set aside the consent order, and neither was there any consent by the parties herein that the Defendant be discharged from the consent order. In the circumstances this court finds that the said discharge by the Defendant of the consent order to be of no legal effect and that the said consent order and decree are consequently still subsisting and in force.

Having found the decree to be still in force, this court will now consider the second issue as to whether it has discretion to extend the time of completion agreed upon by the parties in the consent order. The Plaintiff in this regard relies on the provisions of section 95 of the Civil Procedure Act which allows the court in its discretion to enlarge any period fixed or granted by the court for the doing of any act prescribed or allowed by the Act, even though the period originally fixed or granted may have expired. He also relies on Order 50 Rule 6 of the Civil Procedure Rules which provides as follows:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

The Defendant on its part argued that time within which to comply with the consent lapsed before the Plaintiff furnished the Defendant with a suitable bank guarantee rendering the consent terminated, and that the consent decree did not make provision for extension. Further that the Plaintiff did not seek to extend the completion date before its lapse.

It is my view that while this court has discretion to extend time under the said provisions of section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules if good reason is shown, the court must interrogate whether these provisions are applicable to court orders where the time for doing an act is set not by the court, but by the parties themselves in a consent order. I find in this respect that the foregoing findings as to the setting aside of a a consent order by way of review must also apply to any terms as to time in a consent order. This is because there are well established grounds as to when a consent order can be reviewed, which of necessity also apply to time limits agreed to by the parties in a consent order.

The reason for this position was stated in **Brooke Bond Liebig Ltd vs Mallya (1975) E.A 266** where it was held that a court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for varying and rescinding a contract between the parties. This position was also reiterated in **Contractors Ltd vs Margaret Oparanya [2004] eKLR** where this court stated as follows;

"This court has qualified or conditional discretion when it comes to interfering with consent Judgments or orders. Moreover, where the consent order or Judgment is still executory, the court may refuse to enforce it if it would be in equitable to do so. The mode of paying the debt, then is part of the consent Judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

The Plaintiff also argued in this respect that the consent order was open ended in that it gave parties the

liberty to apply to the Court in any circumstance including for extension of time. This court is of the view that the provision for liberty to apply in a consent order must be read in light of the provisions of order 25 Rule 5(2) of the Civil Procedure Rules, which provides that upon a decree being entered upon settlement of a suit, the Court may, on the application of any party, make any further order necessary for the implementation and execution of the terms of the decree.

This Court is also guided in this respect by the Court of Appeal decision in **Nathalal Monji Rai and Others vs Standard Chartered Bank Kenya Limited (1998) LLR 6400 (CAK)** that in a consent order, the phrase "liberty to apply" means that when an order is drawn up, its working out might involve matters which it might be necessary to obtain the decision of the court, but does not confer any right to vary the order. The liberty to apply provisions are therefore only for purposes of assisting in the implementation of a consent order, and are not to be used for varying the same.

It is therefore the finding of this court and for the foregoing reasons, that this court has no discretion to extend time set in a consent order, and that for the Plaintiff to be able to set aside or vary the terms of their consent order and decree as to time, it must show a good ground.

This finding leads to the consideration of the final issue before the court, which is whether there are any grounds to vary the terms of the consent order and decree issued herein as to time. The grounds on which a consent order or judgment can be varied and/or set aside have been restated in various court decisions, which have held that a consent judgment or order has a contractual effect and can only be set aside on the grounds that would justify the setting aside of a contract, or if certain conditions remain to be fulfilled, which are not carried out.

These grounds for setting aside are where the consent order or judgment was 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. See in this regard the decisions in **Brooke Bond Liebig Ltd vs Mallya (1975) E.A 266** and **Flora Wasike vs Destimo Wamboko (1988) KLR 429,**

The Plaintiff argues in this regard that the Defendant had withheld material facts by failing to disclose a recommendation for the revocation of title to the suit property in the Ndungu Land Commission Report, and that this affected the term as to the completion period and the variation of the consent order to include an indemnity for loss and liability. The Plaintiff brought evidence of correspondence and meetings with the Defendant in this regard. The Defendant's main argument on this issue is that the Plaintiff had not filled the conditions of the decree as to the provision of a bank guarantee which entitled it to rescind the contract.

The Plaintiff has brought evidence to show that upon discovery of the fact of the possible revocation of title to the suit property, it engaged the Defendant to see how the consent order could still be implemented in light of the new information. The evidence in this regard were the letters by the Plaintiff's Advocate raising this issue dated 4th April 2013 and the response by the Defendant's Advocate dated 8th May 2013 in which he states that he had raised the Plaintiff's concerns with his client, and in which he requested for the bank guarantee. The possibility of revocation of a title of the suit property is in my view a material fact that ought to have been disclosed by the Defendant, and it is apparent that the Plaintiff's consent was given in ignorance of this fact. In addition the Defendant does not dispute that the title to the suit property was at risk of revocation, and it is my finding that these are sufficient grounds to vary the term of the consent order as to time for completion.

In addition the said consent order and decree did clearly state that completion documents were to be released to the Plaintiff's Advocate upon receipt of an acceptable Bank Guarantee or such other security issued by the Plaintiff as shall be agreed upon the parties to secure the balance of the purchase price. The Plaintiff produced as evidence a letter from its Advocates addressed to the Defendants Advocate dated 9th May 2013 in which reference is made to a meeting between the Advocates held on 8th May 2013 and in which it was agreed that a letter from a bank confirming financing be forwarded by the Plaintiff. The Plaintiff's Advocate in the said letter the Facility Letter issued by I&M Bank dated 5th April 2013 and

sought confirmation from the Defendant that it was acceptable as security. A copy of the said Facility Letter was also produced as evidence.

The issue of whether the said Facility Letter was a security within the terms of the Decree is one that the parties had discussed and which if there was a disagreement thereto, ought to have been resolved by the clause allowing the parties liberty to apply as to the implementation of the decree. Consequently, the Defendant had no valid ground to rescind the consent order and/or decree as the circumstances giving rise to the Facility Letter were expressly provided for in the said consent order and decree.

I will therefore allow the Plaintiffs' Notice of Motion dated 30th July 2013 for the foregoing reasons. I accordingly order that the terms of the decree issued herein on 17th December 2013 be and is hereby reviewed only to the extent of extending the completion period stated in paragraph 6 of the said decree by a further one hundred and twenty (120) days with effect from the date of this ruling.

Each party shall meet their own costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 11th day of March , 2014.

P. NYAMWEYA

JUDGE