REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.35 OF 2006

TERESIA KIMANI.....APPELLANT/APPLICANT

VERSUS

SOKORO PLYWOOD LIMITED.....RESPONDENT

RULING

On 28th July, 2010, the parties herein recorded a consent in the following terms:-

> **"That the application dated 21.5.2010 be withdrawn with no orders as to costs. The appeal be fixed for hearing within 30 days from today's date failing which it stands dismissed."**

For reasons that the appellant contends were beyond his control, the appeal was not fixed for hearing within the time stipulated in the consent above. Consequently, in terms of the consent above, the appeal stood dismissed as at 28 August, 2010.

Despite the appeal having been dismissed, on 4th November, 2013, the appellant brought the notice of motion dated 9th July, 2013 seeking to set aside the consent judgment herein and reinstate the appeal for hearing on its merits.

The application is supported by the affidavit of the appellants' advocate, Kisilah Daniel Gor, and is premised on the grounds that the consent was entered into in the absence of sufficient material facts; that owing to factors beyond the appellant's control to wit, inavailability of dates in the court diary, the appeal could not be fixed for hearing within the agreed time; that the inavailability of dates frustrated the consent and that the appeal has high chances of success.

In the affidavit sworn in support of the application the deponent has reiterated the grounds thereon and given a background of the appeal and the circumstances that led to entry of the consent herein. Reiterating the contention that the consent was entered into without sufficient information regarding availability of dates in the court's diary, the appellant's advocate has explained that his efforts to list the appeal within the agreed time were in vain.

The application is opposed through the affidavit of the respondent's advocate, Tombe Charles, in which it is deposed that the application is not only bad in law but mischievous, misleading and an afterthought. Terming the allegation that the consent was entered into without sufficient information regarding availability of dates ridiculous, the respondent's advocate has averred that the issue of availability of dates could be clarified at the time of recording the consent. Further that the allegation that the appeal could not be fixed for hearing owing to inavailability of dates is false as, given the urgency of the matter a hearing date would have been squeezed in the diary. In this regard the respondent argues that without comprehensive evidence of existence of vitiating factors, the appellant should not be allowed to challenge

a consent he voluntarily entered into.

On 25th March, 2014 the court directed that the application herein be disposed off by way of written submissions.

Despite that order having been made in the presence of the advocates for the respective parties, at the close of this matter, the respondent had not filed its submissions.

In the submissions filed on behalf of the appellant, it is reiterated that the consent herein was frustrated by inavailability of hearing dates. Relying on the decision in **Flora Wasike** v. **Destimo Tamboko** (1988) 1 KAR 625 where the Court of Appeal observed:-

> **"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."**

The appellant has submitted that availability of dates in the court diary was an implied condition precedent for performance of the obligations imposed under the consent herein.

I have read and considered the arguments made by the advocates for the respective parties, together with the submissions filed on behalf of the appellant. I have also read and considered the authorities cited by the appellant in support of his application. The sole issue for determination is whether the appellant has satisfied the conditions for setting aside consent orders?

The Court of Appeal for East Africa in **Hirani v Kassam (1952) 19 EACA 131** had this to say about consent orders:-

> **"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 the 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."**(Emphasis supplied)

In the current application, the applicant contends that the consent was entered into without sufficient information regarding availability of dates in the court diary. Terming availability of dates in the court diary an implied condition precedent for meeting of the obligations created under the agreement, the applicant has submitted that the consent was frustrated the moment he was unable to secure dates within the time stipulated in the consent.

While rejecting the argument advanced by the appellant, the respondent, through the affidavit of its advocate, has averred that with due diligence the issue of availability of dates could have been clarified at the time of entering into the consent and that there is no way a matter with such foreseeable loss could not have been squeezed in the diary with proper explanation by counsel for the appellant. Terming the application frivolous, vexatious and an abuse of court process, the respondent has urged the court to dismiss it with costs.

Having considered the rival arguments herein, I agree with the respondent that with due diligent the appellant would have known about the availability or otherwise of dates in the court diary. I also agree with the respondent's contention that with due diligence the appellant would have managed to either get the appeal given priority for hearing or mentioned for purpose of extension of the time within which to have it fixed for hearing.

The appellant having failed to take any prudent measures to save the appeal either within the time stipulated in the appeal or within a reasonable time thereafter, I agree with the respondent's contention that the application is an afterthought, the same having been brought nearly three and half years after the

consent was recorded. Consequently, I find the application to be without merit and dismiss it with costs to the respondent.

Delivered and dated this 4th day of July, 2014 at Nakuru.

H.A.OMONDI

JUDGE