



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, TUNOI, BOSIRE JJA.)
CIVIL APPEAL NO. 276 OF 1997
BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPELLANT

AND

BENJOH AMALGAMATED LIMITED.....FIRST

RMUEISRPUO NDENCTOFFEE ESTATE LIMITED.....SECOND RESPONDENT

**(Appeal from the Order and Ruling of the High Court
of Kenya at Nairobi. (The Honourable Mr. Justice
Githinji) dated 31st day of October, 1997**

In

H.C.C.C. NO. 1219 OF 1992)

JUDGMENT OF THE COURT

Benjoh Amalgamated Limited (the first respondent) and Muiri Estate Limited (the second respondent) sued Kenya Commercial Bank Limited (the appellant) in the superior court claiming inter alia what was referred to in the plaint filed on 4th Mcaormcphl,e ti1o99n2 ofas th"ae contract by the defendant and/or damages for breach thereof."

The appellant lent the respondents a sum of Kshs.23,175,000/=, which was secured by a charge over two pieces of land namely L.R. No. 1211/1 and 12411/2 Kiambu. Upon default, the appellant moved to realise the security and the respondent thereupon filed the suit to forestall that exercise. The appellant did not file a defence but on 4th May, 1992, a consent judgment was recorded before Githinji J, in the presence of counsel for both parties marking the suit settled in the following terms:-

"(a) The plaintiffs to pay the total outstanding sums, principal and interest, to the defendant on or before 31st July, 1992.

(b) In default, the defendant to be at liberty to proceed with the realization of the two securities.

(c) The plaintiffs to pay to the defendant the costs of this application to be agreed or taxed by the taxing master of this honourable court.

(d) The plaintiffs to pay the auctioneers' charges on the abortive sale to be agreed."

As we have said the consent judgement was entered by Githinji J, in the presence of counsel for all the

parties. The history of the suit after the entry of the consent judgement is not at all easy to ascertain since the court file disappeared shortly afterwards and was never recovered. On 4th April, 1997, almost five years later, the respondents applied by Chamber Summons under Order 44 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, for the consent order entered into by the parties on 4th May, 1992, to be reviewed and in the alternative, that it be set aside. The application was supported by three affidavits, the first sworn by Minea Ngina Muigai, a director of the second respondent. In her affidavit dated 21st March, 1997, she deponed inter alia:-

"(4) That, I am also made to understand that the consent order was entered into after counsel for the plaintiffs had been instructed by one Kungu Muigai, a director of the first plaintiff.

(5) That the said Kungu Muigai is not a director of the second plaintiff and he could not enter into binding consents without the express authority of the second plaintiff director which has never been solicited and/or asked for nor granted. (6) That the import of the said consent order was to bind the second plaintiff into paying colossal sums of monies which were not even stipulated in the alleged consent order.

(8) That counsel for the plaintiffs had no written or verbal instructions whatsoever to enter into any consents that would be prejudicial to the second plaintiff who had all the intentions to see the conclusion of this suit as there were triable issues which could not be determined by way of consents."

The second affidavit, also dated 21st March, 1997, was sworn by Kungu Muigai, a director of the first respondent. He deponed inter alia:-

"(2) That the plaintiffs filed the current suit against the defendant way back in 1992 and the same has not been disposed off (sic) to date.

(3) That the defendant through its agents Watts Enterprises advertised for sale properties belonging to the plaintiff in June, 1996.

(4) That in a bid to stop the sale I went to court vide Civil Suit No. 1520 of 1996 which application was dismissed with costs to the defendant.

(11) That upon reading the consent entered upon without my authority I am unable to understand the terms thereof as the sums outstanding are not indicated and the accounts and breach have always been the bone of contention."

The same Kungu Muigai, swore a second affidavit on 12th May, 1997 in which he deponed that Nairobi H.C.C.C. No. 1520 of 1996 and H.C.C.C. No. 285 of 1995 were both dismissed because of the consent recorded on 4th May 1992. He also deponed that the second respondent filed yet another suit, Nairobi H.C.C.C. No. 1611 of 1996 asking for accounts.

The replying affidavit on behalf of the appellant was sworn by Mr. John Akello Ougo, who also appears for the appellant in this appeal. He stated that apart from the other suits deponed to in Kungu Muigai's affidavit of 12th May 1997, the respondents had also filed H.C.C.C. No. 24 of 1997 in the High Court at Nyeri and obtained an ex parte interim injunction restraining the appellant from exercising its statutory power of sale. The appellant had this suit struck out on 9th May 1997 as an abuse of the process of the court.

The application for the review of the consent order was heard by Githinji J, on 27th October, 1997, and Kungu Muigai, who is not an advocate but only a director of the second respondent, was allowed by the Judge to argue the application without being required to comply with the mandatory provisions of Order 3 rule 2(c) of the Civil Procedure Rules. He told the Judge that his lawyer was Mr. D. M. Kinyua, and not Mr. Meenye who apparently appeared for the respondents when the consent order was recorded

before Githinji J, on 4th May, 1992. The learned Judge allowed the application and set aside the consent order. And it is from that decision that the appellant now appeals to this Court.

There are four grounds of appeal which Mr. Ougo, for the appellant, argued together the gist of which is that the learned Judge erred in law in setting aside the consent order when there was no basis in law for doing so. The Judge relied on the case of Gerald Gikonyo and Another vs Wamuchege Gatu and Others (H.C.C.C. No. 2002/96) (unreported) a decision of his own in which he had held that where the original record is lost and certified copies of the record and judgement or order made by the court are not available at the time of hearing, an application by a party challenging the judgment or order allegedly made by the court in the original record has to succeed ex debito justitiae so that a retrial can be held to facilitate the making of a proper record. If the learned Judge was trying to lay down a general principle in that case then we must disabuse him of any notion he might have entertained that he had succeeded in doing so. So general a statement as he adumbrated can only bring the law into disrepute and provide a field day for unscrupulous litigants who wish to obstruct the course of justice. If by simply arranging for the court records to disappear you can put back the clock and postpone the day of reckoning, the courts will be forced to enlist the services of armed guards to secure the safety of its files.

In the course of his ruling, the learned Judge said -

"In the present case, the original record is lost or misplaced. There is no copy or certified copy of the proceedings leading to the consent order. Although there is a photostat copy of the decree, the original decree is not available. There is no way to vouch for the correctness of the photostat copy of the decree. It is apparent from the copy of the plaint that plaintiffs' lawyers were D.M. Kinyua and Co. Advocates. It is conceded that the consent order impugned was recorded in the presence of Mr. Meenye Advocate and not in the presence of Mr. D.M. Kinyua. Mr. Kungu Muigai states that plaintiffs have never engaged Mr. Meenye advocate. In the absence of the original record, it is not known in what circumstances Mr. Meenye advocate attended the court and entered into the consent order. It is not known whether or not he had filed a notice of change of advocate or whether he was holding a brief for Mr.Kinyua." (emphasis added)

With regard to the appearance of Mr. Meenye before him we do not understand how the learned Judge could have had any difficulty with that because the consent was recorded by the Judge himself, and in the ordinary course of events counsel must have told him on whose behalf he appeared. The fact that the learned Judge accepted and recorded the consent is the clearest demonstration that he was satisfied that the counsel who appeared before him had authority to appear for the parties they claimed to represent.

The Judge also said that it was not known whether or not Mr. Meenye had filed a notice of change of advocate or whether he was holding Mr. Kinyua's brief. Again, that presented no insurmountable difficulty. We are told D.M. Kinyua died in 1993 but Mr. Meenye is alive and well and is still practising as an advocate. The easiest thing would have been for the respondents to ask him to clarify the matter by way of an affidavit. They chose not to do so, and the only inference we can draw from that is that Mr. Meenye's response would have been adverse to their case. But even in the unlikely event that Mr. Meenye had no authority to represent the respondents, it cannot be the appellant's fault, and in any event, they are not left without a remedy at law. This takes care of the only reason given by the Judge for setting aside the consent order and would suffice to dispose of this appeal, but as there appears to be some confusion in the mind of Mr. Thiongo, for the respondent, as to the principles which should govern applications to set aside consent orders, we think we ought to state them again.

The respondents took five years before bringing the application. During that period they were busy filing frivolous suits to ward off the appellant, one of which was filed as far afield as Nyeri, quite obviously to exasperate the appellant and drive it to despair. A litigant with that kind of track record is not entitled to any equitable remedy. The Judge should have taken that into account. He did not, and in failing to do so, he was clearly wrong. There can be no doubt about that.

The respondents' case is that they did not instruct Mr. Meenye. We cannot see how he could have intruded into the suit without being asked to do so by Mr. Kinyua. The extent of authority of a solicitor to compromise is set out in a passage in *The Supreme Court Practice 1976 (Vol.2) paragraph 2013 page 620* as follows:-

"Authority of Solicitor- 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; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen, [1903] 1 Ch pp 817,818; Little vs Spreadbury, [1910]2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice- see Welsh vs Roe [1918 - (9) All E.R Rep 620. "

In the case of *Brooke Bond Liebig (T) Limited vs Mallya* [1975] E.A. 266, Law JA, stated the law at p. 269 in these terms:-

:*"The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19EACA 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. "

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties, who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham, J, said, in the introduction to the passage quoted above from Hirani's case, a court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

In his judgement in the case of *Flora Wasike vs Destimo Wamboko* (1988)1 KAR 625, Hancox JA (as he then was) said in his

judgment at page 626 -

"It is now settled law that a consent judgement 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. "

Those, in essence, are the principles which the learned Judge should have applied to determine the application before him. Applying those principles to this case, we can find no circumstances that could have entitled the Judge to vary or rescind the consent order. Accordingly, we allow this appeal, set aside the ruling and order of Githinji J, and in lieu thereof substitute an order dismissing the respondents' application for the review of the consent order with costs. The appellant will also have the costs of the appeal.

Dated and delivered at Nairobi this 10th day of March 1998.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR