IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: KWACH, TUNOI & SHAH, JJ.A.)

CIVIL APPEAL NO. 160 OF 1997

BETWEEN

GREENFIELD INVESTMENTS LIMITED .....APPELLANT

AND

BABER ALIBHAI MAWJI .....RESPONDENT

(Being an appeal from the Ruling of the High Court of
Kenya at Nairobi (the Honourable Mr. Justice Pall)
dated the 12th day of March, 1997

in

H.C.C.C. NO. 3655 OF 1995 (O.S.))
****

RULING OF THE COURT

By this application expressed to be brought under rules 1(2), 42(1) and 80 of the Rules of this Court (the Rules) Baber Alibhai Mawji, the respondent in Civil Appeal No. 160 of 1997 (the respondent), moves the court for the following orders which, for the sake of clarity, we shall reproduce seriatim:-

(1)That the Notice of Appeal dated 24th March, 1997 filed by Mohammed & Muigai, Advocates, for the Appellant, Greenfield Investments Limited and this Appeal, namely, Civil Appeal No. 160 of 1997 be both struck out.

(2)AND that the co sts of and incidental to this application as well as the Notice of Motion dated 12th November, 1997 of the Appellant and the Civil Appeal No. 160 of 1997 be paid by the Appellant to the Respondent.

(3)That the Notice of Motion filed by the Appellant on 12 th November, 1997 seeking leave to amend its Notice of Appeal be also struck out and/or dismissed with costs and for the further order that the purported Consent Order made and/or recorded by the Honourable Mr. Justice A. A. Lakha, Justice of Appeal, on 25 th June, 1998 be vacated, discharged and set aside with costs.

The background of this application is as follows. By a chamber summons under Order 39 rule 2 of the Civil Procedure Rules the respondent sought an order for injunction against the appellant to restrain it from in any way interfering with the quiet enjoyment and possession of the respondent of a residential house and buildings situate on plot NO. L.R. 214/275, Nairobi, (the suit property) pending the disposal of

the originating summons brought under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya. In his affidavit in support of the application, the respondent alleged that he has been in continuous possession and occupation of the suit property since January, 1976 and that his possession has been hostile and adverse to the appellant who is the registered proprietor as owner of the suit property.

The respondent further deponed that his suit Nairobi H.C.C.C. NO. 2762 of 1982 (the suit) which had sought, inter alia, a declaration that he was the beneficial owner of the suit property which was held in trust for him by the appellant, was struck out for not disclosing any cause of action. An attempt to prefer an appeal proved futile. Though the appellant counter-claimed against the respondent claiming rent for the suit property, it did not seek any order for possession. On 23rd August, 1995, the appellant withdrew the counter-claim in the suit.

Subsequent to the respondent's substantive originating summons, the appellant filed its grounds of opposition and took out a motion on notice under sections 3A, 6 and 7 of the Civil Procedure Act and Order VI rule 13 (1)(a) and (d) of the Civil Procedure Rules for, inter alia, an order of (a) stay of proceedings of the summons; (b) for an order striking out of the originating summons on the grounds that it does not disclose a reasonable cause of action, and; (c) that the suit and the application are res judicata.

The learned Judge (Pall, J. as he then was) heard the two applications together. In a reserved ruling, he held that in the 1982 suit in order to succeed the respondent had to prove his right to ownership of the suit property by virtue of an express trust which had been denied by the appellant. In the 1995 suit, he held similarly, that the respondent had the onus to prove that the distress was unlawful, that there was no relationship of landlord and tenant, that he was occupying the suit property as beneficial owner thereof and that he had suffered loss and damage by unlawful distress. But, in the present suit commenced by originating summons, the respondent has only to prove that he has been in occupation of the suit property for a continuous period of at least 12 years and that his possession has been open and hostile to the appellant. The learned Judge then held that the originating summons as it stands shows a perfectly valid cause of action which was not directly and substantially involved in either of the two earlier suits.

He further held that as the issue of adverse possession had not been put in issue in the previous two suits, and it could not have been as put, no bar of res judicata can arise in the suit. Applying the principles enunciated in American Cyanamid Co. v. Ethicon Ltd [1975] A.C. 396 he granted the respondent an interlocutory injunction. There are indeed contentious issues in the appeal. However, we will not say anything on them at this stage. On 24th March, 1997, Messrs. Mohammed & Muigai, Advocates, for the appellants lodged the following notice of appeal which we re-produce in full:

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CASE NO. 3655 OF 1995 (O.S.)

BABER ALIBHAI MAWJI ..... PLAINTIFF

V E R S U S

GREENFIELD INVESTMENTS LIMITED ... DEFENDANT

NOTICE OF APPEAL

TAKE NOTICE that the Plaintiff herein BABER ALIBHAI MAWJI being dissatisfied with the Ruling of the Honourable Mr. Justice Pall given at Nairobi on the 12th day of 1997 intends to appeal to the Court of Appeal against the whole of the said Ruling.

The address for service for the appellants is care of Mohamed & Muigai Advocates, Hazina Towers, P O Box 61323, Nairobi.

It is intended to serve copies of this Notice on: -

SATISH GAUTAMA
ADVOCATES
INTERNATIONAL HOUSE
P O BOX 47413
NAIROBI

DATED at Nairobi this 24th day of March, 1997.

MOHAMMED & MUIGAI
ADVOCATES FOR THE DEFENDANT
To the Deputy Registrar High Court of Kenya Law Court Nairobi.

LODGED in the High Court of Kenya at Nairobi this day of 1997
DEPUTY REGISTRAR
HIGH COURT OF KENYA NAIROBI "

In the above notice of appeal it is obvious that there are at least three glaring fundamental errors. One, the respondent is erroneously described as being dissatisfied with the ruling delivered in his favour and therefore intends to appeal against the whole of the said ruling. He is in the circumstances an intending appellant, a fact which is not true. Two, the respondent is wrongly shown as the party serving the notice of appeal through the advocates for the opposite party. Three, the month in which the ruling was delivered is omitted. On 12th November, 1997, the appellant took out a notice of motion under rule 44 of the Rules to amend the notice of appeal.

We think we should now narrate the events which culminated in this application being heard on 25th June, 1998, because it became a subject of a heated debate how the application found its way into the Chambers of the learned single Judge of this Court, Lakha, J.A. Since Mr. Gautama averred that at no time had he agreed to the application being heard on any specific date, this Court directed the Deputy Registrar, Mr. Luvuga, to explain in details what exactly happened after the application was lodged until it was finally disposed of. Mr. Luvuga deponed that on 17th February, 1998, a letter was written to the advocates for the parties inviting them to send their representatives to appear at the Court of Appeal Registry on 19th February, 1998, at 10:00 a.m. to fix a hearing date in respect of this appeal ***(C.A. No. 160 of 1997) .***

That when all the representatives appeared on that date they agreed to return on the following day, 20th February, 1998, at 10:00 a.m. They did so. They took the hearing dates of 25th and 26th June, by consent. Later, when settling the cause list for the month of June, 1998, it was noted that there was an application under rule 44 of the Rules filed on 12th November, 1997, to amend the notice of appeal. It is normally the procedure of this Court that an application filed in an appeal and bearing the same number should be heard first before the main appeal, and; in this regard, the Honourable the Chief Justice decided to allocate the said application to Lakha, J.A. for hearing on 25th June, 1998. A cause list to that effect was released on 19th May, 1998.

The court record for 25th June, 1998, shows that the application came for hearing before Lakha, J.A. as scheduled in his chambers on 25th June, 1998 at 9:30 a.m. Mr. Mohammed Nyaoga, appeared for the appellant while Mr. Nyakeno held brief for Mr. Gautama who was then on record for the respondent. The learned Judge recorded that by consent the application for amendment of the notice of appeal filed on 12th November, 1997, be granted as prayed with costs of the application being costs in the appeal. On the same day a hearing date for this appeal was by consent fixed for 21st and 22nd October, 1998 at 9:30 a.m.

Mr. Gautama has submitted that the notice of appeal in its present format is incurably bad, defective and deficient. Further, he averred, it being a primary document and it having been filed and served it cannot be amended at all, even with consent of the parties. He contended that the order made by Lakha, J.A. was erroneously recorded and under a misapprehension of the true position and in excess of jurisdiction. Assuming that it is true that the advocate who appeared before Lakha, J.A. had no authority from Mr.

Gautama to consent to the appellant's notice of motion of 12th November, 1997, the most logical move by Mr. Gautama to take was to make a formal complaint to Lakha, J.A. that Mr. Nyakeno had exceeded his authority and had obtained orders of which he was not authorised so to do and Mr. Gautama would then have sought to expunge those orders.

It was also open to Mr. Gautama, but he did not exercise the option, if he was dissatisfied with the decision of Lakha, J.A., a learned single judge of this Court, to seek to vary, discharge or reverse his order by the Court under the provisions of rule 54 (2) of the Rules. Mr. Oraro has submitted that the respondent having not chosen any of those options he cannot now challenge the consent order which he has not attempted to have set aside. The circumstances in which a consent judgment may be interfered with were considered by this Court in ***Hirani v. Kassam (1952), 19 E.A.C.A. 131***, where the following passage from ***Seton on Judgments and Orders, 7th Edn., Vol. I, p. 124*** was approved:

> "Prima facie , any order made in the presence and with 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."

This passage was approved by this Court in ***Flora Wasike v Destimo Wamboko (1982 - 88) 1 KAR 625*** where Hancox, J.A. (as he then was) said:

> "***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: see the decision of this court in*** *J M Mwakio v Kenya Commercial Bank Ltd Civ Apps 28 of 1982 and 69 of 1983."*

Mr. Gautama has not been successful in demonstrating that Mr. Nyakeno did not have his authority, ostensible or otherwise, to compromise the application so far as Mr. Nyaoga was concerned. We are satisfied that Mr. Nyakeno was properly briefed to act for Mr. Gautama and he did carry out his instructions as was professionally required of him. It was rather unfair on the part of Mr. Gautama to make unsubstantiated allegations against Mr. Nyakeno without giving him the benefit of replying to the allegations that he exceeded his authority.

In this instance Mr. Gautama has not suggested that the consent order was obtained by fraud or collusion. Neither has Mr. Nyakeno explained that he misapprehended or was not in possession of or in ignorance of material facts before he recorded the consent order to which he clearly appended his signature before and in the presence of Lakha, J.A. The application was in simple terms and posed no complications.

With due respect to Mr. Gautama, this application is without merit and is accordingly denied. We dismiss it with costs to the appellant.

We now hope that the parties will take an early hearing date for the appeal.

Dated and delivered at Nairobi this 13th day of November, 1998.

R. O. KWACH

.....

JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR