



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 136 OF 1982

TIWI BEACH HOTEL LIMITED PLAINTIFF

VERSUS

GABRIELLE KATHLEEN BROWN DEFENDANT

RULING

There are two applications pending in this matter both of them arising from a judgment entered in this cause by the consent of the parties on the 11th day of April, 1989 when the case came up for hearing.

The first application was filed by Tiwi Beach Hotel Limited, the original plaintiff against the defendant Gabrielle Kathleen Brown. This application was filed under a Certificate of Urgency on the 24th day of May, 1991 and under the provisions of sections 128, 133, 159 and 163 of the Registered Land Act, section 3A, order 50 rules 9, 10, 13 and order 50 rule (1) of the Civil Procedure Rules.

Prayer (1) and (2) seeks for orders against the Kunde Land Registrar.

Firstly for him to remove a caution placed on the suit premises known as Mombasa/MS/Tiwi/Beach Block/46 by one Juliane Ulrike Stamm and registered on the title on 24th of July, 1989.

Secondly that the Registrar be ordered to register a transfer of the suit premises in favour of the applicant.

In the alternative and without prejudice to the above prayers the cautioner Stamm be made a party to the suit as a defendant/respondent.

I will not go into the grounds upon which the applicant relies. It suffices to say that Mr Nowrojee is on record for the cautioner and has filed objection to the application.

The other application was filed on 30th of September, 1991 by way of Notice of Motion under the provisions of section 80 CPA and order 44 rule (1) and section 3A of the Civil Procedure Rules in that:-

“This honourable Court do review the judgment entered by consent in this suit on the 11th day of April, 1989 and/or set aside the said judgment and decree and order that the hearing of this suit be resumed.”

Counsel in this matter agreed that the latter application be determined first since the ruling therein was bound to affect the outcome of the other application.

The application is grounded on three affidavits sworn by the defendant/respondent Gabrielle Brown, David Evans and one from Kokila Anoop Khanna, the advocate who represented the applicant at the hearing of the suit. I have read all the affidavits from both sides with great care. I have, if I may humbly say, endeavoured to follow and consider the very detailed submissions made by both sides verbally and in writing. With that in mind I say the following:

The principles upon which an application for review can be granted are, I think, now well settled. Rule 1(1) of order 44 of the Civil Procedure Rules read as follows:-

“Any person considering himself aggrieved:

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order.”

It is clear that an application for review is open to the applicant, in any of these three cases, if there has been “a discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge and cannot be produced at the time when the decree was passed or the order made”, or “on account of some mistake or error apparent on the face of the record” or for “any other sufficient reason”. That this is the correct interpretation of the said rule is clear not only from the plain words of the rule itself but from several decisions upon the essentially identical corresponding in every provision of Indian Code of Civil Procedure. The words “for other sufficient reason” must be construed *ejusdem generis* with or analogous to one or other of the two other reasons. The Privy Council has construed these words in that way, it has also been applied in our Courts in the same manner.

Applying those principles to the case before me I see nothing in the affidavits which brings the application within the ambit of the rule. All the documents now attached to the affidavits are such that were in existence at the date when the judgment was entered or could have been available after the exercise of due diligence. There is no material before me that were not within the applicant’s knowledge or could not be produced by her at the time when the decree was passed. She was represented by an advocate of her choice and there was no adjournment sought by her before the judgment was entered. Indeed, the advocate approved the draft decree and subsequently three months after the said consent judgment the applicant executed the transfer documents.

In so far as the application seeks to set aside the judgment, I remind myself that the judgment was a consent judgment and the principles on which it can be set aside are now well settled. A consent judgment 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 the Court of Appeal in *J M Mwakio vs Kenya Commercial Bank Ltd*, CA Nos 28 of 1982 and 69 of 1983. In *Purcell v F C Trigell Ltd*, [1970] 3 All ER 671, Winn LJ said at 676:

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside of rectification of this order looked at as a contract.”

Both Lord Denning MR and Buckley LJ appeared to agree with this statement and moreover, that there was very little distinction between interlocutory orders and final orders in this respect. This decision was followed in *Chanel Ltd vs FW Woolworth & Co Ltd*, [1981] All ER 745, per Buckley LJ at 751, and in *Siebe Gorman & Co vs Pneupac* [1982] 1 WLR 185, per Lord Denning MR at 189, and Eveleigh LJ at

It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in *Hirani vs Kassam* (1952) 19 EACA 131, at 134, as follows:

“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. No such ground is alleged here. The position is clearly set out in *Seton on Judgments and Orders* (7th edn), Vol 1 p 124, as follows:

‘*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.’”

The underlining being mine.

The main ground upon which the applicant seeks to set aside the consent judgment is that the contract sued upon was an illegal contract because the applicant alleges that an integral part of the contract of sale was that a substantial part of the proceeds was to be paid in foreign convertible currency. There is nothing in the Agreement of Sale which makes such a provision. Such a condition, in my judgment, was not precedent to the contract, nor embodied in the Sale Agreement nor was it a condition of completion. The document “GKB-A” annexed to the applicant’s affidavit was at all times well known to the advocates appearing for the applicant before the entry of the consent judgment. What appears to have happened was that the respondent had offered to assist the applicant to get approval of the Central Bank to remit part of the purchase price in foreign currency and when the approval was not forthcoming the applicant requested for payment in Kenya currency. This is substantiated by the letter GOO/419 of the 7th November, 1985 from the applicant’s then advocates. The respondent would not have intended to contravene the provisions of the Exchange Control Act by paying part of the purchase price in foreign currency without the approval of the Central Bank. I find no substance in the allegation that the contract was in any way illegal. The burden of proving illegality is upon the applicant as the party alleging it. I am not satisfied on the material before me that payment of part of the purchase price in foreign currency was part of a term or condition of Sale Agreement.

Giving the matter the best consideration I can and having carefully considered all the affidavits and submissions made by the advocates for both the parties I am satisfied that no ground exists for setting aside the consent judgment.

For the reasons stated above in this ruling, the application fails and is dismissed with costs.

Dated and Delivered at Nairobi this 23rd day of June, 1993

E. OWUOR

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JUDGE