REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO 4 OF 1991

SOFIA MOHAMED.....APPELLANT

VERSUS

RODAH SITIENEI.....RESPONDENT

JUDGMENT

This appeal arises from the Business Premises Rent Tribunal decision entered in the case on 28th May 1990. The appellant was a tenant of the respondent in business premises known as LR No 1181/71 Kapsabet.

On 24th January 1990 the respondent issued notice to the appellant to terminate the tenancy by 1st April 1990. When the appellant received this notice she referred the dispute to the Tribunal, namely, Tribunal Case No 14 of 1990.

The parties to the dispute appeared before the Tribunal sitting at Eldoret on 28th May 1990 and were represented by counsels.

According to the record of that date, Mr Kalya appeared for the appellant while Mr Njuguna appeared for the respondent. Counsels then entered into a consent order in the following terms:

> "By consent the tenancy herein be terminated on 31st December 1990 and the tenant to give vacant possession of the premises to the landlord as from 1st January 1991.
>
> There shall be no order as to costs."

On 3rd August 1990 a new counsel for the appellant, namely A G N Kamau, advocate, came into the scene and filed an application by Chamber Summons dated 4th July 1990 praying that the order made on 28th May 1990 be set aside.

Counsels argued this application before the Tribunal headed by it's Chairman on 24th January 1991 and in a ruling delivered on the same date, the application was dismissed with costs assessed at Kshs 500/- to the respondent, hence the present appeal.

In this appeal, counsel for the appellant submitted that counsel who appeared before the Tribunal for the appellant had no authority or consent to record or make orders dated 28th May 1990. He submitted that an advocate is only an agent of the client and where he intends to compromise a matter on behalf of his client under litigation he should seek and obtain the client's express authority to do so.

He argued further that on the date of the consent order the appellant was unwell and had a doctor's

certificate to that effect shown to the Court. According to him the previous counsel for the appellant compromised this matter without the client's authority and that if any action is taken by an advocate without the client's consent then the client is entitled to apply to have the order set aside.

The respondent on the other hand submitted that the appeal had no merit. According to him, what counsel was supposed to do before the Tribunal was to make an application under section 12(1) (i) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act to have the order of the Tribunal rescinded or varied by the same Tribunal and not to apply to have it set aside by Chamber Summons as was done in the application subject to this appeal.

He contended that the procedure followed by the appellant in the Tribunal to set aside its order was wrong and the Rules of Civil Procedure should not have been invoked unless and until the provisions of the Act were exhausted.

In my view, an advocate who appears for a client is presumed to be properly instructed by such client unless the contrary is proved. The medical report shown to this Court is dated 25th May 1990 but when the parties appeared before the Tribunal on 28th May 1990 such a report was not produced to indicate that the appellant was unwell and/or that she did not want her case disposed of in her absence. This implies that whichever orders were entered into on that date by counsels were with full consent and knowledge of the appellant otherwise her husband who was present should surely have raised an objection.

In the ruling delivered by the Tribunal on 24th January 1991, it was observed that the appellant's husband was present on the date in question and that during normal investigations he stood up and made an offer on behalf of the appellant emphasizing that she had told him she would vacate the premises as per the consent order. This Court cannot take this observation lightly.

At the same time although the consent order was recorded on 28th May 1990, no application was made to have it varied or rescinded by the Tribunal under section 12(1) (i) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act until 3rd August 1990 when an application was filed to set it aside. The Tribunal asked, and I think validly, why there should have been such a delay if indeed the appellant did object to the consent order at the initial stage.

One would expect the appellant to react immediately she received information from her husband that a consent order had been entered into prejudicing her tenancy and immediately instructed the same counsel to have it rescinded.

But on a more legal ground, one could start with section 67(2) of the Civil Procedure Act (cap 21) which provides that no appeal shall lie from a decree passed with the consent of parties.

What the appellant is urging the Court through her new counsel is that if her advocate at the time consented to the judgment then this was without her knowledge and authority.

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 *J M Mwakio v Kenya Commercial Bank Ltd;* Civil Appeals Nos 28 of 1982 and 69 of 1983. Also see *Pancell v F C Trigell Ltd* [1970] AER 671.

In *Hirani v Kassam* (1952) 19 EACA 131 at page 134, the former Court of Appeal for East Africa approved Windham J's decision, as he then was as follows:

> "*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 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." – underlining mine.

This passage was followed by the same Court in *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266 at page 269 in which Law, Ag P, as he then was, said.

> "A Court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

In *Flora N Wasike v Destimo Wamboko* Civil Appeal No 81 of 1984 now reported (1982 – 1988) KAR at page 625 Chief Justice Hancox opined that he was not wholly convinced that section 67(2) was an absolute bar to an appeal in the case quoted; though there he was dealing with a slightly different issue.

The question in this case is really whether the appellant did consent to the judgment which was entered by the Tribunal.

The practical difficulty herein is that on 28th May 1990 when the consent order was recorded the appellant was not present. She is said to have been in an advanced stage of pregnancy.

However, from the record, her husband was present and is observed to have stood up in the Tribunal, though not a party to the dispute, and stated that the appellant had informed him that she would vacate the premises.

Another difficulty, though not a very serious one, is the medical report shown to the appellate court to indicate that the appellant was sick on 28th May 1990 such that she could not attend the Tribunal hearing then.

But as pointed out earlier, this report is not indicated to have been shown to the Tribunal on the date of the hearing, neither was it shown to the same Tribunal on 24th January 1991 when the application to set aside the consent judgment was made.

On the first difficulty, the record of the Tribunal shows that the parties were represented by counsel at the time the consent judgment was recorded and that it is counsel, after deliberating with the landlord and husband to the tenant, who recorded the said judgment.

In *Waugh & Others v H B Clifford & Sons* (1982) Solicitor Journal 29th January page 66, there is a persuasive authority that solicitor or counsel would ordinarily have ostensible authority to compromise a suit so far as the opponent is concerned; and on this authority Mr Kalya, who acted for the appellant initially would seem to have had this authority in this case to record the consent judgment.

In the circumstances, I detect no valid reasons on record for saying that there exists any valid ground for setting aside the consent judgment as a contract.

But in passing, it is proper to draw counsel's attention to the *Brooke Bond* case where Law, Ag P, with whom the rest of the Court agreed, said that the consent judgment could be challenged either in the suit itself or by an application for review under the order relating to that procedure.

For these reasons, I would dismiss this appeal, which I hereby do, save that each party should bear her own costs of this appeal.

Dated and delivered at Eldoret this 9th day of October 1992

D.K.S AGANYANYA

JUDGE