IN THE COURT OF APPEAL

AT NAKURU

(CORAM: NYARANGI, PLATT & GACHUHI JJA)

CIVIL APPEALS NOS 43 AND 153 OF 1986 (Consolidated)

WILLIAM KARANI & 47 OTHERS ……..APPELLANTS

VERSUS

WAMALWA KIJANA

NDEGE LUMUNYAJI

RONALD WEKESA ……..……...…… RESPONDENTS

(Appeals from the High Court at Eldoret, Patel J)

JUDGMENT

Nyarangi JA These are two appeals, the first Civil Appeal No 153/86 against a judgment of the High Court, Eldoret (Patel, J) given on December 24, 1985 and the second against an order of the High Court, Eldoret (Patel J) made on January 16, 1986 which were consolidated on the application of the appellants and with the approval of the court and heard together because each appeal raises the same question directed at the order dated September 24, 1985. The judge dismissed the application on January 16, 1986 and the 48 appellants are aggrieved and contend that:

"The judge erred in refusing to review the order, that the order did not deal with reliefs sought in the plaint, failed to dispose of the suit and so was a nullity, order was irregular and invalid because it purported to evict the plaintiffs when neither party had prayed for eviction and when there is no material on which to base that order, there was a failure to comply with order XX of the Civil Procedure Rules, the judge erred in not appreciating that not all plaintiffs were present and that the previous advocates of the plaintiffs could not have been properly instructed to enter a consent judgment for all the plaintiffs and that the order is unconscionable in the circumstances of the case."

Under section 80 of the Civil Procedure Act and order XLIV rule 1 of the Civil Procedure Rules once an appeal is preferred a review is incompetent.

The question at issue is whether the appellants consented to the order. According to the record of the proceedings of the material date, most of the plaintiffs were present and an advocate, Mr Kamau, appeared not for most plaintiffs but for plaintiffs, meaning all plaintiffs. During the hearing of the application for review, Mr Kamau testified and told the judge this.

"I wish to say categorically and emphatically that I had full instructions from the applicants/plaintiffs, to enter the consent orders recorded that day and they were to a great extent the architects of the said orders."

The judge appears to have believed Mr Kamau. I say I have not the slightest doubt that Mr Kamau had the clear, express instructions to enter the Consent Order. Most of the appellants were present and discussed amongst themselves and four of those present told Mr Kamau about the consent. The four spoke not for themselves and the others present but for all plaintiffs. That is so because on the evidence the four, on their behalf and on behalf of all the others had instructed Mr Kamau to file the action. For my part that is enough to dispose of the question at issue. It matters not that the plaintiffs do not sign the order. They instructed their advocate on the matter and he acted in the best interests of all of them. The consent order, therefore, covers all of them.

I now come to the argument on the first and second grounds of appeal urged by Mr Onalo that there is no mention of dissolution of partnership, no reference to taking of accounts and that the consent order purported to evict the appellants. That is all correct, and it is precisely what the plaintiffs wished. It is not accidental. It was part of their design. The plaintiffs know a great deal about the background to the litigation. They know what the panel of elders decided. They were aware of the decision of the senior resident magistrate on the matter. They considered all that and more. They simply could not have forgotten that their claim was that they had been denied peaceful and quiet enjoyment of a parcel of land. That notwithstanding they consented to the order the subject matter of the appeal. I am unable to accept that because these two issues are not specifically referred to in the order, that, therefore, the plaintiffs could not have been its architects or given instructions on the matter to Mr Kamau. The fact is that all the plaintiffs knew what they were doing and could not have willingly agreed to the consent order unless they, individually and severally, stood to benefit. In my judgment there are no difficulties or obscurities about the consent order. The Consent Order is neither hard nor harsh. The conscience of the plaintiffs was entered for by the agreed *ex-gratia* payment which they were satisfied is of greater value than continuing to litigate for dissolution of partnership etc.

The other matters canvassed by Mr Onalo and Miss Murungi include the omission of acreage in the Consent Order, failure by advocates to append their signatures to the Consent Order and whether or not the *ex-gratia* payment affects the second and third respondents. With respect, these matters have nothing to do with validity of the consent order. Those matters, even if they are correct, do not affect the all–important question which is whether or not the plaintiffs consented, which is the proper test. I have held that there was a valid consent.

This leads to the further point bearing on this matter namely, whether in the particular circumstances of this case, the advocates should have appended their signatures to the Consent Order. I would accept that in this situation, the judge ought to have caused each of the plaintiffs present, each of the defendants and counsel to append their signatures or thumb prints to the Consent Order.

We in this court now have the practice with regard to orders to be made by consent whereby the parties and their advocates append their respective signatures to such orders. I would commend this useful practice to VV Patel J and also to other judges. The adoption of the practice as a safeguard might reduce subsequent argument about or contrary to the consent order. This is no small benefit.

I find there is no merit in the appeals and I would dismiss them for the grounds stated with costs to the first respondent. The second and third respondents will bear their costs. As Platt and Gachuhi JJA agree, it is so ordered.

Platt JA. Both appeals before this court, which were consolidated, must be struck out *in limine* for want of election between mutually exclusive causes of appeal.

Civil Appeal No 43 of 1986 between the appellants William Karani and 47 others and Michael Wamalwa Kijana, Ndege Lumunyaji and Ronald Wekesa, concerned an appeal from the ruling, order and judgment of the High Court at Eldoret given on January 16, 1986. The High Court refused to review its consent

judgment given on September 24, 1985.

Civil Appeal No 153 of 1986 between the same parties exactly concerned an appeal preferred against the consent judgment of September 24, 1985.

The order, so heavily attacked, concerned all the appellants and the respondent Ndege Lumunyaji and Ronald Wekesa vacating the land they occupy, to which all these aforesaid persons declared that they had no legal right, claim or interest. They preserved their right to harvest their crops. The plaintiffs alone were entitled to share out *an exgratia* payment of Kshs 60,000. The general attack is that the plaintiffs had not given their consent to the compromise reached. That attitude was founded upon allegations on affidavit which conflicted seriously with the sworn testimony of Mr Kamau, the advocate for the appellants. Mr Kamau supported the cause of the learned judge who, Mr Kamau testified had properly recorded a genuine consent order.

On the other hand, Mr Onalo attacked the consent order on serious as well as improbable grounds. Of the latter type, he insisted that the consent order could not have had the consent of the appellants, because it bore no resemblance to the prayers in the amended plaint, matters which the appellants had obviously abandoned if they claimed no right in the land. Eviction was thought to be impossible of consent. But the appellants had agreed to vacate the land. They agreed to eviction only in default. Thirdly the consent order had nothing to do with order XX of the Civil Procedure Rules, as indeed no consent orders do. The serious attacks concerned the absence of 39 plaintiffs, only 9 out of 48 being present. Lastly, the consent order was said to be unconscionable as dispossessing the appellants.

Mr Mulwa answered these points effectively. I need only refer to two of the attacks, namely the presence of only 9 of the plaintiffs and the alleged unconscionable nature of the consent judgment. On the first of these points, Mr Kamau had ostensible authority to compromise the appellants' claims. (See *Waugh v HB Clifford & Sons Ltd*, (1982) 2 All ER 1097). But he had taken express instructions from those plaintiffs who had instructed him, and the latter confirmed their instructions to the learned judge. On the second point, what could be unconscionable about people who had no interest in the land they occupied, vacating it in favour of the real owner. However instructive and enthralling as these issues might be, section 80 of the Civil Procedure Act and order XLIV of the Civil Procedure Rules, intervene to cause a choice of procedure.

Both section 80 and order XLIV commence by explaining the fundamental nature of review. It is to be a means of curing gross or obvious errors when an appeal is allowed by the Act, from a decree or order, but no appeal has been preferred; and secondly in cases where no appeal is allowed at all. The broad division then is between the appeal procedure as the general method of curing errors, with its scope to deal with errors of evidential fact or law, or mixed fact and law, and the review procedure, to cure a narrower compass of defects, which cannot be allowed to stand in justice, simply because there is no appeal. From the nature of section 80 and order XLIV both procedures cannot be adopted at once. Hence, supposing that an appeal is allowed by the Act but has not been preferred, review may be taken, if appropriate. Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal. It would not be possible for example to pray for review because there was error on the face of the record, on the grounds that the court had no jurisdiction to pass the decree or order complained of, and then by an appeal complain of misdirections on the evidence. That would be an absurd use of the appeal process, because if the court had no jurisdiction, the misdirections on the evidence would, of course, be unimportant. The proper approach would be to put all the complaints into one appeal.

Yet I symphathise with Mr Onalo's predicament. He championed the cause of his client under the review procedure because section 67(2) of the Civil Procedure Act, in Mr Onalo's words, could not be clearer in providing that no appeal can lie from a decree passed by the court with the consent of the parties. But a climate of opinion has encouraged the growth of the interpretation that in certain exceptional cases section 67(2) must be read broadly to allow an appeal against consent judgments. Exactly what these exceptional cases encompass is not easy to divine, and Mr Onalo must be forgiven if he were not clear on this point. But as matters stand he must make his choice. Either he considers that an appeal will lie against the consent judgment within the range of the exceptions, or he abandons that course and steers into the

clearer waters of the review procedure. Once the appeal is brought, the review must merge into it. But suppose, as Mr Onalo did, that he was not sure whether all that he complained of, which he said fell within the scope of review, would also fall within the scope of appeal, in that case he pressed the contention that there might be no appeal on some issues, and an appeal on other issues, and consequently the appeal lay on issues relevant to the appeal, and review lay on issues left out of the appeal, so that altogether, both procedures could lie at one time, on the basis of the issues relevant only to each of those procedures. That is ultimately a logical conclusion, but it is unfortunately wrong. Review only lies if no appeal has been taken. If an appeal has been taken at all, that is the major process, and it must be prosecuted as far as it can go. Of course it was a simpler procedure in the old days when it was understood that section 67(2) did not allow any appeal against a consent judgment. But order XLIV is very accommodating. It provides for cases where an appeal can be brought, but has not been brought. Moreover there is always the alternate procedure of bringing a suit to set aside the agreement for the compromise (see *Brooke Bond Liebig (T) Ltd v Mallya* [1975] ER 266). It is clear that from the nature of the review procedure, Mr Onalo had to chose whether he would proceed with review or appeal.

But Mr Onalo refused to make his choice. Even when it was explained to him by the court and by Mr Mulwa, Mr Onalo still thought he could divide up the issues, some for appeal and some for review. Apart from not knowing exactly what issues are involved in each process except for the issue of the unconscionable nature of the consent, which appeared to gravitate from review to appeal, it is not possible now for this court to choose which process would be more suitable in the interests of Mr Onalo's clients. Either process may be open by withdrawing one or other process. It follows then that both must be struck out for want of election.

Fortunately I would indicate that on the strength of Mr Kamau's evidence and the guidance to be found in *R Shah v Westlands General Stores*, [1965] EA 642, and *Waugch v Clifford & Son Ltd*, (1982) 1 All ER 1095 that there was nothing amiss in this case with the consent order in my opinion.

I would strike out the appeals with costs, otherwise on the merits I would dismiss the appeals. I agree with Nyarangi JA's proposed order as to costs.

Gachuhi JA. The two appeals arise from a consent order made in Eldoret High Court Civil Suit No 67 of 1985. Appeal No 153 of 1986 is directly from the consent judgment of the court. The other civil appeal No 43 of 1986 is from the refusal to review the consent judgment in an application filed by the plaintiffs under order XLIV rule 1.

Both the application for review and the appeal against the judgment attack the consent order that was entered by the parties. It is submitted that the terms of the consent order are outside the pleading. The plaintiffs' were to be given *ex-gratia* payments of Kshs 60,000 and agreed to vacate the land. It is also claimed that the Consent Order could not apply to those who were not present at the time as they could not give their consent.

This is a matter of common sense in my view. Mr Kamau's evidence on the application for review is that he was instructed by four people on behalf of the rest. The four people instructed him to enter into consent. Five other plaintiffs were present but did not object. Surely, those who gave instructions have ostensible authority on behalf of others to enter into the consent to settle the dispute. Mr Kamau's authority to act had not been withdrawn at all and so had the authority to enter into the consent complained of.

There is no limit or fore under which a consent can take so as to finalise the whole dispute. The doors of negotiations are very wide. One can bring in matters which were not in this pleading or leave out any matter or claim pleaded so long as the interion of the parties is to bring the whole dispute into finality. In my mind, taking the whole dispute into account, the plaintiffs' intention of settlement was achieved.

There must have arisen a second thought later because the consent judgment also affected two respondents. An application for review was made. Review is a matter of discretion. *Abdulla Jaffer Dewji v Ali Raza Mohamedali Shoriff Dewji* [1958] EA 558. The learned judge exercised his discretion after

hearing all the submissions and refused to review the consent judgment.

Appellants filed the appeal against such refusal as well as direct appeal from the judgment. Mr Onalo was put to election. He could have abandoned an appeal from the refusal to review and proceed with the direct appeal. He opted not to do so. Both appeals cannot proceed side by side, because under section 80 of the Civil Procedure Act and order XLIV rule 1, there can be no place for review once the appeal has been filed. There should be only one appeal arising from the judgment irrespective of the number of grounds there may be, but once the main appeal is filed any appeal arising from the refusal to review the judgment is washed away.

Miss Murungi for the respondents (original defendants) supported Mr Onalo on this stand. There was no cross-appeal from these two respondents though affected by the consent judgment. Their position is obscure and stands on shaky grounds. They are nowhere. They could have filed a cross appeal but did not. There is a mess up. The result is that on my part, I would dismiss these appeals. I agree with the order proposed by Nyarangi JA that the court should make on costs.

Dated and Delivered at Nakuru this 19th March, 1987

J.O. NYARANGI

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JUDGE OF APPEAL

H.G. PLATT

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL