IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NYARANGI, PLATT & GACHUHI JJA)

CIVIL APPEAL NO. 25 OF 1986

KASMIR WESONGA ONGOMA & ANOTHER……...APPELLANTS

VERSUS

WANGA…….....….....…RESPONDENTS

(Appeal from the High Court at Kakamega, Aganyanya J)

JUDGMENT

We have before us an appeal from an order made by Aganyanya, J at Kakamega on October 30. The judge's order is in these terms:

"By consent the defendant to sub-divide land number North Wanga/Mayoni/276 and to give one portion therefore measuring 30 acres to the first plaintiff and the second plaintiff. The parties to make arrangements for the district surveyor to visit the said land and do the necessary demarcations. No order as to costs."

According to the record of the proceedings of the date, the plaintiffs were present and the defendant was represented by Mr Owinyi.

The four grounds of appeal in the joint memorandum of appeal taken together really amount to a contention that the appellants did not consent to the order, the subject matter of this appeal.

It should be remembered that the plaintiffs sued the respondent as defendant claiming that their deceased fathers and the defendant, a paternal uncle of the plaintiffs, held the material parcel of land measuring 243 acres in common with the defendant and that on the death of their fathers, the defendant was left with the land to hold the same in trust for the beneficial interest of the plaintiffs, that the whole land was registered in the defendant's name and that the land should be sub-divided into three equal portions so that each party in the action is registered as owner of 81 acres.

In his defence, the respondent averred that he is not the only living paternal uncle of the plaintiffs, denied that when the plaintiffs father died, the material parcel of land was not existent, that he, the defendant had acquired absolute title thereto at first registration, that there is no trust between himself and the plaintiffs, but that without prejudice to the above, the family land measured 95 acres and was distributed among the sons of the defendant's father and that the rightful share of the plaintiff's father was 15 acres each which the defendant had been willing to transfer.

The starting point of this litigation must, I think, be the order which was made by Gicheru, J on June 26,

1984 by which all the matters in dispute were referred to the District Officer Mumias for arbitration with the assistance of four elders, two to be selected by each party. The award of the arbitrators was set aside by consent on February 6, 1985 and Aganyanya, J ordered that the suit do proceed to hearing. The trial was held on May 29, 1985. In his evidence, the first appellant, Kasmir Wesonga Ongoma said the whole land measured 243 acres and asked the court to make an order for the sub-division of the land, "so that we get our portions." This plaintiff argued that the defendant being younger than his deceased brothers ought to have got smaller portions of the land.

The second plaintiff adopted what the first stated in court.

The defendant said in his evidence that he was prepared to give the plaintiffs their portions of the land, and that the whole land which includes his portion is 240 acres in size. The defendant admitted having given one of his daughters 20 acres of the land and that he the defendant and the deceased fathers of the plaintiffs had shared out the land amongst themselves, that the fig trees formed the boundary, that if the first plaintiff agreed not to cross the valley, he, the defendant, had no objection and also provided the second plaintiff does not claim beyond the fig tree, he would have no quarrel.

At the end of the defendant's evidence, ie on May 29, 1985, Aganyanya, J on his own motion made the following order:

"The district surveyor to visit the disputed land in company of the Mumias district officer and the parties to point out what belongs to whom on the ground taking into account that the valley marks the first plaintiff's boundary. The surveyor will report to court as to what acreage of each of the plaintiffs is. Mention on July 29, 1985."

There is one further point. Two days before the mention date, ie July 27, 1985, the trial judge, in chambers, made the following order:

"Court: I have read a report of district surveyor and I find it deplorable that government institutions which ought to assist in the administration of justice and law and order cannot do so when called upon to assist. Now I repeat that the district surveyor should visit the disputed land in company of the district officer, Mumias. The parties to point out what belongs to whom on the ground, taking into account that fig trees mentioned in part of the evidence mark the 2nd plaintiff's boundary and that the valley marks the first plaintiff's boundary. The surveyor should be given police escort by Mumias police post.

The surveyor will report to the court in detail what he observed on the land including what acreage is owned by each plaintiff and the conduct of the parties at the scene. Whoever will be found to have flouted any part of this order or otherwise interrupted the surveyor's work - upon which the surveyor should report – will be arrested under warrant of arrest, brought here and summarily committed for contempt of court. Mention on October 28, 1985. Copies of this order to be sent to the district officer, Mumias, in-charge Mumias police post, district commissioner, Kakamega."

The plaintiffs were present. And so was the defendant , without his advocate.

That brings me to the order the subject matter of this appeal. The order is dated October 30, 1985. There is nothing on record to show that the matter was mentioned on July 29, 1985. Nor is there any indication whether the court's order dated July 27, 1985 was complied with. There is no evidence of the surveyor having reported in detail to the trial court, as per the court's order dated July 27, 1985.

It is against this background that I turn to consider the validity of the order dated October 30, 1985.

First, as already observed, there is no note by the trial judge as to what became of the previous orders of the court, in particular the order dated July 27, 1985. The order the subject-matter of the appeal is on the face of it inconsistent with the case of the plaintiffs as presented to the court. Neither the plaintiffs nor the defendant applied to the court for an order requiring the district surveyor to visit and view the land and thereafter to prepare a report for the court. The trial judge was entitled, in the circumstances, to ask for a

surveyor's report in view of the defendant's evidence. However, having asked for a report from a surveyor, the trial judge was bound by his own order and therefore had to wait to hear from the surveyor. To come straight to the point, the material order as it appears is a follow-up of the two previous orders dated May 29, 1985 and July 27, 1985 which were made by the trial judge without the court being moved by either party. This particular order was made in chambers. There is just the note of the appearances followed by the order. In view of the plaintiff's evidence right to the end of the hearing, one would have expected the plaintiffs to have made some statement to the trial judge to show that they had changed their minds and that they were in agreement with the defendant as to how much of the 243 acres each would be given by the defendant. One would also expect to see a note of the observation of the defendant's advocate to the plaintiffs' statement. The record of the proceedings has none of that. Not even some record to the effect that the order was read out by the trial judge and interpreted to the parties. That was all the more necessary here because the plaintiffs' claim was that the land should be sub-divided into three equal portions of 81 acres each. So that the plaintiffs had to understand that consequent upon the order of

October 30, 1985, the acreage which each would get had been considerably reduced and there should to date be clear evidence in the relevant proceedings that all that was done. A consent judgment is a judgment, the terms of which are settled and agreed to by the parties to the action. Where is the evidence that the terms were settled? How am I to tell if the parties agreed? It would have made all the difference if each party had signed or thumb printed. This court has already suggested the adoption of such practice.

The High Court is a court of record a court whose proceedings are recorded to furnish a judicial record or a precise history of civil and criminal proceedings from commencement to termination. It could not be reasonably held that the trial judge has enabled this court to have an accurate record of the proceedings. That is a matter which in my judgment gives rise to trouble for the reason that the real vital allegation of the appellants is that they did not consent to the material order and that no such order was ever read out and interpreted to them. On the evidence of the proceedings of the material date, the contention of the appellants is irresistible. In my judgment, it is intolerable for this court to be placed in a position where it is required to hold entirely on an assumption that the trial judge must have been moved to record the order which is in the proceedings and that the trial judge must have caused the terms of the order to be interpreted and explained to all the parties. The fact is that there is no material or circumstance upon which I can fairly and justly so hold. It would be contrary to the evidence for me to so hold. It would amount to my saying that judges do not make mistakes. But, the great thing about us judges is that we err. Whereas the honesty and integrity of a judge cannot be questioned, his decision may be impugned for error either of law or of fact. I would be setting bad precedent if I were to uphold the order just because the judge made it. After all it is my task to look beyond this case to provide for the period after today.

Even assuming that the trial judge had a discretion to record a note of what was said, all the same, as Lord Mansfield said in *Rex v Wilkes* (1770) 4 Burr 2527, 2539:

"discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful; but legal and regular."

It is habitual and customary for courts to make adequate records of proceedings. The demands of consistent justice have caused the practical to emerge.

For my part I am impressed by the argument of the appellants and therefore express the conclusions that as a matter of fact and the order of the judge made on October 30, 1985 whose opening words are "By consent …." lacks all the essential ingredients of an order made by the consent of the parties to an action and is invalid. For that reason section 67(2) of the Civil Procedure Act is inapplicable.

Accordingly, in my judgment, the appeal should be allowed, the order of the trial court made on October 30, 1985 set aside and the suit shall be tried *de novo* by a different judge or by a Commissioner of Assize.

Costs of the appeal and of the trial before the High Court to the appellants.

As Gachuhi JA agrees it is so ordered.

Platt JA (Dissenting). The respondent to this appeal is the registered owner of a parcel of land registered as No 276/Mayoni/North Wanga, of about 243 acres in extent. The respondent was the youngest of three brothers; the eldest was Yona Ongoma, the father of Kasmir Wesonga

Ongoma, the next was Asman Otochi, the father of Pascal Onyango Otochi. Kasmir and Pascal are thus cousins and the nephews of the respondent. Kasmir and Pascal brought the suit against the respondent Ismael, and after abortive arbitration proceedings, the suit was heard. It ended in a consent judgment dated October 30, 1985, which is the burden of the appeal. It provides:-

"By consent defendant to sub-divide land number North Wanga/Mayoni 276 and to give one portion therefore measuring 30 acres to the first plaintiff and the second portion measuring 25 acres to the second plaintiff. The parties to make arrangements for the district surveyor to visit the said land and do the necessary demarcation. No order as to costs." (sic)

Although the plaintiffs Kasmir and Pascal were successful in obtaining a sub-division of the land, they have become dissatisfied with the acreage allotted to them. So they attack the consent judgment in the form of this appeal, they claim that they did not consent to the order being entered.

They claim that the trial judge was wrong not to realise and consider all the factors and circumstances in the case. The judge ignored the respondent's admissions (I am not clear exactly what were the admissions referred to). The learned judge disregarded the district surveyor's findings and gave the plaintiffs only 55 acres. They had together claimed 100 acres, 60 acres and 40 acres respectively. The district surveyor found the acreage within Kasmir's alleged boundary to be 61.1 acres and the acreage of Pascal's area to be 26.6 acres. The settlement therefore left Pascal more or less intact; but Kasmir's area was cut down from 60 acres to 30 acres.

It would appear that Pascal had a small dispute on the area measured by the surveyor, but that he had little to complain about. The main complaint must be that of Kasmir who might complain that he had lost half his land.

This was a consent judgment which finally determined the wishes of the parties and as such falls within the provisions of section 67(2) of the Civil Procedure Act. It is worth recalling the provisions of the Act:

"67(2) No appeal shall lie from a decree passed by the court with the consent of the parties."

It is plain that the prohibition only lies from decrees, and therefore the final decision of the dispute between the parties. If the prohibition means what it says, and certainly the words are extremely clear, then there is no room for this appeal. No appeal means what it says; *Re Racal Communications Ltd* [1960] 2 All ER 634. Furthermore, it would not be right to complain that the learned judge did not take into account the background of the case; nor the rival claims, nor the surveyor's report. The purpose of a consent judgment is for the parties to inform the court that they have composed all their differences in a manner suitable to themselves without asking the court to make any further decision. The principle is that the parties know best how to conduct their own affairs, and that by entering into a consent judgment they have entered into a contractual agreement to compose their differences to their own satisfaction. Following upon this analysis section 67(2) provides that there shall be no appeal from a decree entered into by consent of the parties.

It happens, however, that the parties to such an agreement quite often feel that they were either misguided, or under pressure, or plainly mistaken in entering into the agreement, and the question arises in what way they may escape. This situation was considered in *Brooke Bond Liebig (T) Ltd v Maliya* [1975] EA 266. It was an appeal against an order made in the High Court of Tanzania, setting aside an agreement of compromise made between the parties to a civil suit, and ordering that the hearing of the suit be resumed. The plaintiff in that case had sued his employer, a limited company, for damages for alleged wrongful dismissal. In the course of the hearing before the High Court, a settlement was reached

between the parties, and a written agreement of compromise filed in the proceedings, was made an order of the court. Both parties signed the agreement as did their advocates and the judge himself. On the afternoon of the same day, the plaintiff advocates claimed two sums as due under the agreement. The company's advocate replied enclosing a cheque for one sum, but denied liability to pay the second sum. Thereupon the plaintiff's advocate applied for a review and for an analysis of the compromise. The trial judge held that as the parties did not come into an agreement at all to the basis of the compromise he set aside the compromise, and ordered the hearing of the suit to be resumed.

The Court of Appeal heard argument as to whether the High Court's order could be reviewed by an application in the suit itself, or whether a fresh suit must be brought to set aside the compromise. The conclusion reached was that both methods could be adopted. There is further the decision of this court in *Flora Wasike v Destimo Wamboko*, Civil Appeal No 81 of

1984 that the section 67(2) of the Civil Procedure Act may be considered as not necessarily barring an appeal, and it is that opinion, that I must now examine closely to ascertain the nature of such an appeal.

The leading judgment makes clear that section 67(2) of the Civil Procedure Act is the starting point. It then discloses the nature of the dispute in that case. It was that the appellant did not consent to the compromise. She claimed that her advocate must have acted without authority. Her advocate had met her outside the court where pressure had been brought to persuade the parties to consent. When they went into court the consent judgment was already being read. That judgment was based on the new price of the land at Kshs 150,000 as against an original price of Kshs 1,200.

This court then held that it was settled law that a consent judgment or order had contractual effect, and could only be set aside on grounds which would justify setting aside a contract. Support for this proposition was found in *Purchell v Trigell Limited* [1970] 3 All ER 671; but it was also pointed out that the Master of Rolls thought that the consent would be appealable with leave. It was acknowledged that there was express provision in section 31(1)(h) of the Supreme Court of Judicature Act (1925) which permitted such an appeal. It was equally acknowledged that there is no similar provision allowing such an appeal in Kenya. In view of the lack of statutory provision, it is difficult to understand the special reference to the provision of an appeal in England. But it may be of interest to follow the history of this English provision. It will be seen in the notes on page 124 of *Seton's Judgments and Orders*, 2nd Ed. That an appeal with leave of the court or judge making the consent order, had been permitted by section 49 of the Judicature Act (1873). Oddly enough the marginal note reads – "consent order not subject to appeal." Neither in this learned treatise nor in the notes and commentaries in the *Supreme Court Practice* – volumes 1 and 2, is there any example of an appeal being taken from a consent order. Perhaps I may hazard a tentative view, that although the provision was repeated in the 1925 Act in England, referred to above, an appeal was rarely if ever resorted to. The result is that there is no guidance from England as to the nature of such an appeal. Even in *Purchell v Trigell Limited* where Lord Denning supported the decision in (1879) 11 Ch D 763 at page 767, it was said that there was a larger discretion as to orders made on interlocutory applications than as to compromises which are final judgments. This discretion took two forms – (1) to set aside the consent order, and (2) the rufusal to enforce it. Lord Denning declined both. But the basis of the decision concerns what Lord Denning thought might be the case in an interlocutory consent order, apart from a final order. Hence it follows that even *Purchell v Trigell Limited* affords no positive guidance as to the nature of an appeal against a final consent judgment, and indeed the opinion was obiter since no leave to appeal had been granted.

The court therefore had to rely on first principles, and it held that a consent judgment or order had contractual effect, and could only be set aside on grounds which would justify the setting aside of a contract. It will be seen that in *Hirani v Kassam* (1952) 19 EACA 131 the statement in *Seton's Judgments and Orders* 7th Edition Vol 1 page 124 was approved as follows:

"*Prima facie*, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings for action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or if the consent was given without sufficient material facts, or in misapprehension or in ignoranceof material facts, or in general for a reason which would enable the court

to set aside an agreement."

That statement is rather wider than perhaps relied on by this court. The statement was also approved in the *Brooke Bond Liebig* case. The statement is wide enough to cover the review procedure as well as the bringing of a fresh suit. It is clear that where issues of fact are disputed, that the English courts have preferred a fresh suit to be brought. Although that was not made clear by this court in the *Brooke Bond Liebig case*, it must be difficult to unravel contested issues of fact on affidavits and counter-affidavits, and indeed the review procedure is *prima facie* concerned only with the discovery of new and important matter or evidence, and secondly, some error or mistake apparent on the face of the record. There are also cases where within a third category, of "other suficient reason"; but these are not to replace the bringing of a fresh suit or an appeal. I would therefore hazard the opinion that where there are serious issues such as fraud or misrepresentation and where the mistake is such that a contract can be set aside, resort should be had to a fresh suit. What should perhaps be left to an appeal are cases where there is no dispute of fact, and perhaps that area of public policy referred to in *Seton*. An example of such public policy was referred to at the end of *Hirani's* case when *King v Michael Faraday* (1939) 2 KB 753 was considered. There, it was declared that the court would not enforce a consent order, which would have the effect of depriving the debtor of all means of supporting himself and his family. What is certainly clear is that a person who has consented to a compromise cannot think better of it later and complain on appeal.

It is in this light that I view the court's finding in *Flora Wasike's case*, that

"the burden on the appellant to displace a judgment would be formidable one and possibly difficult to discharge on appeal particularly in view of the fact that (the judgment) states on the face of it, that it is a judgment by consent ..."

Having stressed that it is a consent judgment *ex facie*, it is clear that this court will not lightly overturn a consent judgment; indeed the appellant would have formidable burden on him in doing so. That is understandable because the nature of a compromise is such, that it replaces the original contract in the suit by the contract of compromise (see the explanation in *Hirani's* case). The compromise is entered before no less a person than a judge of the High Court. The situation will, of course, be enhanced if the parties and their advocates have all agreed to the compromise and have signed it. But even where the signatures of the parties have not been subscribed, it is still an order of the High Court, which requires cogent proof to show that is was wrongly entered.

Applying those principles in the instant case, it is conceded that the consent judgement was not one drawn up as a written agreement by the parties, nor signed by them in court. On the other hand it was recorded in their presence in court, and in the presence of Mr Owinyi, the respondent's advocate. Generally speaking when a consent judgment is entered, it is not necessary for the court to look at the issues involved in the case. That is certainly the position where the parties have asked the court merely to mark the case settled. But this case raises two problems. The first is whether the consent judgment should be set aside because of the surveyor's report. The second is whether the court should enquire further to ascertain what occurred.

On the first of these questions, it is true that the surveyor estimated that the first plaintiff/appellant Kasmir had 61.1 or so acres; the second appellant, Pascal, was estimated to have some 26 acres. It is very difficult to see that Pascal has any complaint. It is easy to see that Kasmir might have some complaint, since the consent judgment awarded him half the area estimated by the surveyor. On the other hand, if one refers to the respondent's proposed distribution of the whole 243 acres amongst members of the family who now exist, the areas of 30 acres and 25 acres awarded to these appellants in the consent judgment leave them as persons who are amongst the largest share owners of this land. It could well be that the areas which they are alleged to have agreed to accept in the consent judgment, being much more than the respondent at first wished to give them, was a settlement which they accepted. Moreover, it is difficult to go back to the days when the fathers of these appellants would have inherited. Was the land altogether there then? Looking at both sides of this story I cannot say that intrinsically this was an unfair settlement.

The second problem, concerns the way in which the court should have presented to it the facts with regard

to the disputed settlement. There is no provision in an appeal for affidavits, but they may be necessary in order to ascertain whether there is any truth at all in a complaint. The court has had some experience of a party resiling from a consent judgment for grievous reasons, only to find that when the advocate present was allowed to explain the situation, there was really no lack of consent at all (see *William Karani and 47 others vs Michael Wamalwa Kijana and others,* Nakuru Civil Appeal No 43 of 1986 and 153 of 1986 (consolidated). In that case the affidavits were filed in review proceedings which again illustrates how the older methods of review and bringing a fresh suit are to be preferred to an appeal. In the present case the appellants did file affidavits, and in my opinion it would be only fair that the respondent or his advocate should be allowed to respond. I would even go so far as to recall the old procedure, that if a record of a judge is impugned, he may be called upon to explain, as indeed happened in *Hirani's* case at page 132. These appellants were adamant that no such further evidence of what occurred should be called, especially from the respondent's advocate. I find that very instructive and causes me to doubt their *bona fides*.

In the end, it is my opinion that the appellants have failed to discharge the burden of proof to the level laid down in *Flora Wasike v Destimo Wamboko*. I am not satisfied that the learned judge was wrong in naming this judgment a consent judgment. I would dismiss the appeal, noting that the appellants are perfectly at liberty to file a suit to set aside the consent judgment, bringing evidence to support their claim, which can be challenged and sifted by cross-examination.

I would award the costs of the appeal to the respondent.

Gachuhi JA. The facts and the background of this appeal leading to the order appealed against have been set out in the judgment of Nyarangi JA which I had the advantage of reading in draft. I agree with the conclusion reached and the orders proposed that this court should make.

Having read the record, and having noted how the judge was particular in trying to get information from the district surveyor, I am perturbed by the final conclusion. On July 27, 1985 the learned judge ordered for the district surveyor to prepare a report of the land as appears on the record and file the report before the date the case was listed for mention which was on

October 28, 1985. I take it that the report was filed on October 29, 1985 as it is part of the appeal record.

On October 28, 1985, the day the suit was fixed for mention, there is no record for that date. Even though, it must be presumed that the parties attend court otherwise they would not have attended court on October 30, 1985 when the order was made. On that day, the surveyor's report must have been on the file. The judge was anxious to see the surveyor's report before delivering his judgment.

On October 30, 1985, the order was recorded. There is no mention of the surveyor's report either by the parties or by the court. The record bears the attendances and the order. There is no indication that judgment was entered in terms of the consent order. It does not appear that the surveyor's report that was long awaited for was considered or whether the parties commented on it before the consent was recorded.

The first appellant gave his notice of appeal on November 5, 1985. It is unusual to file an affidavit in the record of appeal, which affidavit was not in the court below. In this appeal, the appellant included in their record of appeal affidavits which were sworn on December 5, 1985. Both affidavits are identical and are in support of ground one of the appeal.

They read:

2. That I did not consent to the purported consent order entered in the aforesaid case on October 30, 1985 by the learned trial judge.

3. That I was surprised but powerless to comment when the said order was entered as final judgment and order in the case.

The record having been filed by lay people, there is tendency to include irrelevant papers in the record. The counsel for the respondent never objected to the inclusion of these affidavits though he referred to them.

The appellant expressed their objection to replying affidavits being filed by the then counsel for the defendant.

The position of this case is ambiguous. Perhaps the trial judge should have recorded the views of the parties before recording the consent order to clear the air. Normally orders are obtained on notice of motion or on interlocutory matters but judgment is the final determination of the dispute. There are some ordered embodied in the judgment. Where no agreement the parties are bound by the consent orders unless they are set aside. In the present appeal the order recorded is challenged. Grievous have been expressed which indicate that there was no real consent. While the proceedings were going on, the appellants were pressing for their claims but never knew what the judge would award to them. In my view, I fail to apprehend why they should resile from an order which has met part of their claim if at all there was consent. Had the judge written his judgment even disregarding the surveyor's report, the ground attacking his judgment would be clear on the record. Here, the record of the High Court does not assist this court very much and I do not know, from the record what transpired between the parties.

I am aware of section 67(2) of the Civil Procedure Act (cap 21) that no appeal shall lie from a decree passed by the court with the consent of parties. Orders or judgment entered by consent would amount to the same thing. But his section was the subject of consideration in *Flora Wasike v Destimo Wamboko* Civil Appeal No 81 of 1984 (unreported) which was considered as not necessary barring an appeal from consent orders. The appellants must have been grieved very much by the consent order. It may be that only one of the appellant who was much grieved. Yet their claim was joint and the land they claimed was adjacent on the ground as marked by a boundary. Considering the case of *John Kuria v Kalen Wahito* CA 19/83 land matter is so sensitive that any decision concerning land should not be taken so lightly. It is for this reason that I should agree to set aside the consent order made on October 30, 1985 for the suit to be reinstated to the hearing before a different judge.

Dated and Delivered at Kisumu this 8th September, 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