



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**LAND CASE NO.293 OF 2013**

**VICTORIA DISTRIBUTORS LTD.....PLAINTIFF**

**VERSUS**

**SYNOHYDRO CORPORATION .....DEFENDANT**

**RULING**

1. **Synohydro Corporation**, the Defendant, vide a notice of motion dated 20<sup>th</sup> April 2016 seeks to have the consent order of 16<sup>th</sup> July 2015 reviewed and amended in terms of the draft order annexed to the supporting affidavit sworn by **WU TIEJUN** on 20<sup>th</sup> April 2016. The application is based on the six grounds marked (a) to (f) on its face and supported by the said affidavit of **WU TIEJUN**, the Human Resources Manager, summarized as follows;

- a) That the consent order as drawn and extracted did not capture the agreement of the parties which was as captured in the draft order annexed.
- b) That the Plaintiff, Victoria Distributors Limited, has already be monetarily compensated for the damage suffered and to allow the consent order as drawn and extracted will amount to double compensation.
- c) That the Defendant has fitted a culvert to the Plaintiff's land which was not covered in the consent order and is therefore a bonus and an act in food faith.
- d) That the error in the consent order was as a result of oversight and the fact that the Defendant's officers are not proficient in English language leading to their failing to give proper instructions on the contents of the consent order.

2. The application is opposed by the Plaintiff through the replying affidavit of Yogesh Dauda, the Managing Director, sworn on 6<sup>th</sup> May 2016. He depose to the following among others;

- a) That the consent order dated 15<sup>th</sup> July 2015 was entered into after several meetings and the Defendant had sufficient time to seek proper interpretation of the agreement.
- b) That the extra works in part 1(one) of the consent order was pursuant to a negotiated settlement and was entered after the parties agreed on the terms.
- c) That the Defendant has since satisfied parts 2 to 5 of the consent order and justice shall be done

by looking at the totality of the matter and not on isolated items.

3. The application came up for hearing on the 28<sup>th</sup> September 2016 when Mr. Kiu and Yogo, learned counsel for the Defendant and Plaintiff respectively, made the oral submissions.

4. The issues for determination are as follows;

a) Whether the Defendant has established the existence of mistake, misapprehension and or lack of consensus in themaking of the consent order to warrant the court interference.

b) Who pays the costs.

5. The court has considered the grounds on the application, the affidavit evidence, the oral rival submissions by counsel, and come to the following findings;

a) That the copy of the consent order issued on 31<sup>st</sup> August 2015 that is annexed to the supporting affidavit of WU JIEJUN sworn on 20<sup>th</sup> April 2016, is in every word extracted from the letter of consent dated 15<sup>th</sup> July 2015 under reference **OYO/CIV/159/2012**, addressed to the deputy registrar and duly signed by consent of both parties.

b) That the copy of the draft consent order also annexed to the said affidavit is a replica of the consent order issued on 31<sup>st</sup> July 2015 except on order 1(one) which has deviated from order 1 (one) of the letter of consent dated 15<sup>th</sup> July 2015 which is duly signed by both counsel for the parties.

c) That the court is being asked by the defendant to review the consent order in terms of the draft order annexed for reasons that the Defendant did not understand fully the import of order 1 of the consent order by the time it was signed as they had understood their duty to be limited to spreading and leveling the ground on the two suits land. That the Plaintiff had understood the consent to obligate the Defendant to compact the whole 14 acres of land while the area affected by the Defendant's action was only three acres. That the Defendants counsel therefore submitted that there was no consensus between the parties due to existence of a misapprehension of the factual situation.

d) That the principles guiding the court in reviewing or setting aside of consent orders are the same to those applicable in reviewing or setting aside contracts. That the learned counsel referred the court to the case of **Products International Limited –V- Eastern and Southern African Trade and Development Bank** (The P.T.A. Bank), Nairobi C.A. C.A No.253 of 2002 where the court referred to its earlier decision of **Flora Wasike –V- Wamboko** [1982 – 88] I K.A 625 where the court, following **Hirani –V- Kassam** (1952) 19 EACA 131 had accepted the principle that;

***” Prima facie, any order made in the presence and with the consent of counsel is binding on all the 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 ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”***

That from the foregoing a consent order can be set aside or varied or reviewed for reasons of fraud, mistake, collusion, being contrary to the policy of the court, absence of sufficient material facts, ignorance of material facts and other sufficient reasons under **Order 45** of Civil Procedure Rules 2010.

e) That the Defendant's herein main basis for seeking the review is that there was a mistake in the understating of the extent of the works under order 1 of the consent order. That in the **Product International Limited case** (supra) the court said the following about the principle of mistake both

in common law and equity; “Nevertheless, “mistake”, in its legal sense, both in common law and equity has availed relief to parties invoking it, either to declare a contract void or voidable .....sufficeit to cite the passage by Lord Denning which was relied on by the respondent in **Solle -V- Butcher** {1949} 2 A11 ER 1107 at page 119;

“Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the right of **Bell -V- Lever Bros. Ltd** (14). The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, is set aside or for fraud, or on some equitable ground. Neither party

can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. A fortiori if the other did not know of the mistake, but shared it “.....

“Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. While presupposing that a contract was good at law, or at any rate not void, the count of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained. **Torrance -V- Bolton**

(19). This branch of equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of one party has been induced by a material misrepresentation of the other, even though it was not fraudulent, or if one party knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake”.....

“A contract is also liable to be set aside if the parties were under common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.”

That the court went ahead to opine that “equity will come to the aid of a party pleading mistake without distinguishing, as the common law did, whether it was one of fact or law, or mutual or unilateral.” That in the current case the Plaintiff counsel has disputed that there was any misapprehension or mistake on the import of the consent as the agreement was entered into after several meetings and that both parties were represented by counsel. That the consent order should be taken as a whole and not in isolation as it was a negotiated settlement.

f) That the court has taken note of the fact that the Defendant is a company that has been engaged in several big infractural developments in the Country where English language is one of the primary languages for business transactions. That the parties herein have been represented by counsel of their own choice throughout as shown by the fact that their respective pleadings are drawn and filed through counsel. That the counsel is obviously proficient in English language and the consent letter dated 15<sup>th</sup> July 2015 that crystalized the agreement of the parties is in ordinary English language. That though the Defendant at paragraph 2 of the supporting affidavit deponed that “.....After some negotiations the parties agreed on a settlement in terms of the draft order annexed hereto and marked “**WT -1**”, the deponent did not avail to the court the actual correspondence or copies of the minutes or source documents from which the draft consent order has been extracted from. That as the Plaintiff and Defendant have conceded that they had held several meetings and they were both represented by counsel all through, the court agrees with the Plaintiff’s deposition that the Defendant had sufficient time to seek proper interpretation of the agreement before their respective advocates signed and filed it with the court.

g) That the fact that the extent of the works in order 1(one) may be beyond the scope of what the Plaintiff had asked for in his pleading does not amount to a mistake on the part of the Defendant. That in any case among the prayers at paragraph 10 of the plaint dated 23<sup>rd</sup> October 2013 was “special damages of Ksh.53,392,000/= being the costs of desired repairs,” which was not specifically dealt with in the consent order but may be what informed the agreement on order 1 and 3 that describes the extent of the works to be done by the Defendant to make good or restore the lands. That the court therefore agrees with the Plaintiff that the consent order should be looked into as a whole and not on isolated items so as to capture the negotiated settlement.

h) That unlike the **Product International limited** (supra) case where the mistake was apparent as the consent order on arbitration recorded in court was contrary to the arbitration clause in the parties Facility Agreement that was binding to both parties, the consent order in this case is a culmination of negotiation over several meetings and the Defendant has not established the existence of any mistake that would enable the court to interfere with the parties negotiated settlement. That the court in the **Products International Limited** (supra) case found that there was mutual mistake where “... all along the lawyers on behalf of their parties were ignorant or they overlooked the unmistakable intention and binding effect of Article XIV in the Agreement regarding resolving disputes by Arbitration,” but there is no evidence of mutual mistake(s) by the counsel for the parties in this case on the extent and scope of works in the consent order.

6. That from the foregoing the court finds that there is no merit in the notice of motion filed by the Defendant, seeking review of the consent order dated 16<sup>th</sup> July 2015 and issued on 31<sup>st</sup> July 2015. That the notice of motion is dismissed with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER 2016**

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Odeny for Yogo for Plaintiff

Mr. Siganga for Kiu for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**14/12/2016**

14/12/2016

S.M. Kibunja Judge

Oyugi court Assistant

Parties absent

Mr. Siganga for Kiu for Defendant/Applicant

Mr Odeny for Yogo for Plaintiff/Respondent

Court: ruling dated and delivered in open court in presence of Mr. Odeny for Yogo for Plaintiff and Mr. Siganga for Kiu for Defendant.

**S .M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**14/12/2016**