IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: MUSINGA, MURGOR & KANTAI, JA]

CIVIL APPEAL NO. 324 OF 2010

BETWEEN

KENYA NATIONAL CAPITAL CORPORATION.....APPELLANT

AND

MOHAN GALOT.....1ST RESPONDENT

L.P. GALOT.....2ND RESPONDENT

S.P. GALOT.....3RD RESPONDENT

G.P. GALOT.....4TH RESPONDENT

GALOT INDUSTRIES LIMITED.....5TH RESPONDENT

KING WOOLLEN MILLS LIMITED

(Formerly) MANCHESTER OUTFITTERS

SUITING DIVISION LIMITED..... 6TH RESPONDENT

(An appeal from the Ruling and Decree of the High Court Nairobi Milimani

(Luka Kimaru, J.) dated 29th October, 2008

In

H.C.C.C NO. 2054 OF 1993)

****

JUDGMENT OF THE COURT

This is an appeal from a ruling delivered by **Kimaru, J** on 29 October 2008. Before the learned Judge was a Notice of Motion where it was prayed, *inter alia,* that the court adopts a decision of a Deputy Registrar delivered on 27th August 2004 as a judgment of the court. In the said decision, the Deputy Registrar had found that the appellant, **Kenya National Capital Corporation Limited**, (the defendant) owed the respondents, **Mohan Galot, L.P. Galot, S.P Galot, G.P. Galot, Galot Industries Limited, King Woollen Mills Limited** (formerly **Manchester Outfitters Suiting Division Limited** (the plaintiffs) a sum of **Kshs 48,951,536.00** together with interest thereon at the rate of 19% per annum until payment in full. The learned Judge allowed the application ordering further that the rest of the claim go to hearing.

A brief history of the case at the High Court will assist in appreciating the issues for determination in this appeal.

By a plaint filed in the High Court of Kenya at Nairobi being HCCC No. 2054 of 1993, it was claimed, amongst other things, that the respondents had borrowed money from the appellant; that the respondents had offered certain portions of land as security for the loans; that the appellant had mismanaged the loan accounts; that the appellant had advertised the land for sale which it was not entitled to do and for all that, the High Court was asked to declare the interest applicable on the loans; to declare that a variation of a charge executed in 1989 was null and void, to declare that the appellant had not given a valid notice under Section 69 of Transfer of Property Act; to declare that the respondents were entitled to a true account of the monies that the appellant had received and injunction be issued restraining the appellant from selling the mortgaged lands.

It is not clear from the record whether the appellant was served with Summons to Enter Appearance but that is not an issue in this appeal.

Before a defence to the suit was filed, the parties to the suit entered into negotiations which culminated into an agreement expressed by a letter addressed to Court dated **16th September, 1996,** signed by the respective advocates for the parties where the court was asked to record a consent in the following terms:

> "**KAMAU KURIA & KIRAITU ADVOCATES**
>
> **COMMISSIONERS FOR OATHS**
>
> Chai House -3rd floor Kiraitu Murungi, LL.B (Hons) LL.M. (Nbi), LL.M (Harvard)
>
> Koinange Street Gibson Kamau Kuria LL.B (Hons) (Dar) BCL (Oxon).LL.D
>
> Po Box 51806 Kathurima M'Inoti LL.B (Hons) LL.M (Nbi)
>
> Tel: 228614/340592
>
> Fax 340596
>
> NAIROBI –Kenya
>
> Our Ref:4346/93 Date: September 16, 1996
>
> Your Ref:
>
> Deputy Registrar
>
> High Court of Kenya
>
> **NAIROBI**
>
> **RE: HCCC NO. 2054 OF 1993**
>
> **MOHAN GALOT & Others V KENYA NATIONAL CAPITAL**
>
> **CORPORATION LIMITED**

Please record the following Consent Order:-

> (i) The rate of interest applicable to the charges pleaded between 1981 and August, 22, 1989 is 13%.

(ii) The rate of interest applicable between August 23, 1989 and March, 31, 1990 is 18%.

(iii) The rate of interest applicable to the charges pleaded between 1st April, 1990 to today is 19%.

(iv) That the Registrar of the High Court do examine the parties' respective accounts pertaining to the loans pleaded herein.

(v) That the parties' respective auditors/accountants do file in court affidavits to which will be annexed each party's accounts.

(vi) The respective parties be at liberty to cross-examine the deponents of affidavits in (v) above.

(vii) The decision of the Registrar as to which party owes the other money be binding on the parties.

(viii) Each party to bear its cost.

_____(SIGNED_____

KAMAU KURIA & KIRAITU

ADVOCATES FOR THE PLAINTIFFS

_____(SIGNED)_____

HAMILTON HARRISON & MATHEWS

ADVOCATES FOR THE DEFENDANT"

That consent order was reduced into a formal order of the court which was issued on **23rd of March, 1999** as appears at page 54 of the record.

Various applications then followed and we shall only refer to those that have an impact to this appeal.

We observe that a Defence and Counter-Claim was filed on or about 30th November, 1999 (over 3 years after the said consent letter) but, again, that is not an issue in this appeal.

By a Notice of Motion said to be brought under Section 80 of the Civil Procedure Act and Order XLIV Rule 1 (the numbering has since changed) of the Civil Procedure Rules, the appellant applied that the consent order be reviewed, varied and or set aside; that the issue in dispute be determined by a court of competent jurisdiction; that pending the hearing of the application, the consent order be stayed and costs be provided for. In the grounds in support of the motion and in a supporting affidavit of the appellant's Company Secretary/Legal Officer, it was said that there was a fundamental incurable error or mistake on the face of the consent, which error or mistake went to the root of the matter; that the Registrar of the High Court had no jurisdiction, judicial, administrative or otherwise to preside over and give a final ruling in a matter like the one before the Court; that there was an error apparent on the face of the record on the said consent order in that it did not set out the opening balances, the basis of computation by both parties; that the consent order lacked clarity and was incapable of being given effect to reach a logical conclusion in the matter; that the consent order was silent on its finality or otherwise of the parties' right of appeal, that the consent was silent about the status of the remaining issues in the suit and was therefore incomplete; and that finally the consent order lacked any known legal basis and was a nullity *ab initio.*

The motion was opposed and was heard by **Ringera J.** (as he then was). In a considered ruling dated **8th October, 2002**, the learned Judge made various findings. He found that the appellant had not placed before the court any material to enable him exercise his jurisdiction on an application for review. The Judge found that the consent order required the Registrar to do what amounted to judicial acts in addition to ministerial acts and further, that reference of the parties on the dispute on accounts to the Registrar did not involve an issue of jurisdiction. He found:

> ***''There is no rule of law or procedure which provides that a Registrar in his capacity as a referee cannot with consent of the parties examine the accounts and make findings binding on the parties. In doing so he is exercising a role analogous to that of an arbitrator or umpire chosen by the parties for the purpose of resolving their dispute……"***

The Judge further found that the consent order as agreed was capable of implementation because the interest rates and the periods for their application had been agreed. The learned Judge found that the application had been brought with inordinate delay and dismissed the same, finding, however that the consent order could not dispose of the whole dispute between the parties because there were reliefs sought in the plaint which went beyond accounts. The Judge therefore corrected the omission or oversight and ordered that once the Registrar had concluded his mandate of determining accounts, he should submit his report and findings to the Court for further proceedings and final orders in the suit.

It is significant to state that the ruling was not appealed.

The matter then fell on the desk of **A. L. Kindy**, Deputy Registrar, who heard the parties' *viva voce* evidence through their respective auditors on the issue of accounts. In a ruling delivered on 27th August, 2004, the Deputy Registrar found that the appellant owed to the respondents as an overpayment the sum of **Kshs 48,951,536/=.** This was reduced into a formal Order issued on 22nd October, 2004.

The respondents then filed an application said to be brought under Section 3(A) of the Civil Procedure Rules (this should be Civil Procedure Act) where it was prayed in the main that:

> ***"1. The decision of the Deputy Registrar dated 27th August 2004, that the Defendant owes and should pay the Plaintiff Kshs 48,951,536/= together with interest thereon at 19% per annum which continues to accrue until payment in full, for further order, inter alia, the same be confirmed as the judgment of the court.***
>
> ***2. That upon the grant of order 1 above a decree be issued accordingly.***
>
> ***3. The Defendant do discharge the Charge and Mortgage registered against the Plaintiff's properties known as LR 7022/7, LR 209/1640/2 and LR 209/ 7197 Nairobi charged with it to secure repayment of Kshs 2,500,000/= and Ksh 3,000,000/=.***
>
> ***4. The Defendant do release the Title Deeds of the said properties to the Plaintiffs.***
>
> ***5. Such further or orther order as the court may deem just to grant.***
>
> ***6. ……..."***

The motion was supported by an affidvit of **Mohan Gallot**, the 1st plaintiff who said that he was the Chairman of the Board of Directors of the 5th and 6th respondents and was related to the other respondents. He gave a history of the case which we have set out and we need not restate it here. The application was opposed and was heard by **Kimaru, J**. who in a ruling dated **29th October, 2008**, found merit in the application and allowed prayers 1 and 2 of the same, effectively adopting the decision of the Deputy Registrar and the Judge entered Judgment in favour of the respondents against the appellant for the sum of **Kshs 48,951,536/=** together with interest thereon at the rate of 19% per annum with effect from 27th **August 2004** until payment in full. The Judge ordered in concluding the ruling:

> ***''The court hereby directs that a partial or preliminary decree shall issue in respect of the said sum decreed to be paid to the plaintiffs by the defendants. As regards the other prayers sought by the plaintiffs in their plaint, and the counter-claim of the defendant, the said deputy registrar did not make any decision in respect of the same. The said aspects of the plaintiffs'claim and the defendants'counter-claim shall be heard by the court in a full trial. The plaintiffs shall have the costs of this appliction.''***

Those are the orders that have provoked this appeal through the Memorandum of Appeal drawn by the appellants' lawyers, **M/s Kangethe and Co. Advocates** where 8 grounds of appeal are taken. The learned Judge is faulted in law and fact for adopting the decision of the Deputy Registrar as a decree of the court thereby occassioning a miscarriage of justice to the appellant; that the Judge erred in law and fact by ignoring an earlier decision of **Ringera, J,** and purported to overule a Judge of parallel jurisdiction; that the Judge erred by determining the pending suit without taking *viva voce* evidence and in contradiction of an earlier decision of the same court occassioning serious miscarriage of justice; that the Judge erred in law and fact by clothing an order of the Deputy Registrar with legality when it was a nullity *ab initio* occassioning a serious miscarriage of justice; that the judge errred in law and fact by invoking the inherent jurisdiction of the court in circumstances that did not warrant the same; that the Judge erred in entering judgment for the said sum and for ignoring the appellants' counter-claim; that the motion before the Judge was fatally defective and, finally, that the reasoning of the Judge and conclusions reached were plainly wrong given the factual circumstances obtaining in the matter.

When the appeal came up for hearing before us on **5th November, 2018**, **Mr. Edwin Musyoka** instructed by Kangethe & Co. Advocates appeared for the appellant but there was no appearance for the respondents. It was pointed out and we noted from the records that the hearing date had been given on **13th June, 2018** by the Deputy Registrar at the Case Management Conference when the advocates for the parties were present, thereby allowing the hearing to proceed.

Mr. Musyoka had filed written submissions on **5th September, 2018** and a list of authorities on **13th September, 2018.** He entirely relied on the same and did not wish to highlight any issue at all.

We have perused the said submissions and list of authorities.

It is the appellant's case that Order 49 of the Civil Procedure Rules, 2010 gave a Registrar certain powers but that the Deputy Registrar in the matter before the High Court had exceeded his mandate and his ruling was null *ab initio*. Further, that **Ringera, J,** erred in law and fact by confirming and adopting the Deputy Registrar's ruling. It is submitted that the Registrar could not perform judicial acts as he was only allowed to perform ministerial acts and that by examining accounts and making an order, the Registrar erred and that **Ringera, J**, erred in endorsing what the Registrar had done. It is further submitted that **Kimaru, J,** erred in entertaining the application by the respondents to adopt the Registrar's ruling on accounts and order judgment accordingly which, according to counsel for the appellant, the Judge could not do as it amounted to a challenge on the orders of **Ringera, J**, delivered earlier, which, it is said, amounted to the latter Judge sitting on appeal on orders of a Judge of parallel jurisdiction.

The next line of attack by the appellant relates to the way **Kimaru, J**, dealt with the application by the respondents for adoption of the ruling of the Deputy Registrar as a judgment of the court. It is said in the submissions that:

> ***" In view of the fact that the respondents' application was brought under one provision only (Section 3A) the learned Judge's duty was to ensure that he exercised his judicial discretion to give orders such that the ends of justice are met and to ensure that the process of the court is not abused to achieve injustice …"***

It is submitted on behalf of the appellant that because there were issues pending in the plaint, and in the appellant's counter-claim it was wrong for the Judge to invoke inherent jurisdiction to grant definitive prayers as doing so occasioned a miscarriage of justice and substantially prejudiced the appellant. It is further submitted that because the appellant's counter-claim was pending and stood un-heard, the appellant's constitutional rights to a fair trial had been breached. For all that we are asked to allow the appeal and enter judgment for the appellant by dismissing the ruling of **Kimaru, J.** and in effect strike out the respondents' application for adoption of the ruling of the Deputy Registrar and strike out that (the Deputy Registrar's) ruling so that a full trial of the suit can be heard and determined in the High Court.

We have considered the whole record, submissions made and the law and this is what we think of this appeal.

As we have shown, after the filing of the suit parties entered into negotiations which culminated in the consent Order where they agreed to various things including interest applicable on loans and the relevant periods for application of interest. Interest for the period 1981 to 22nd August, 1999 was agreed to be 13% while for the period 23rd August, 1989 to 31st March, 1990, it was agreed that the interest applicable was 18% and for the final period of 1990 to the date of the consent, it was agreed that the rate of interest was 19%. It was the parties' further agreement in the consent that the Registrar of the High Court do examine the parties' respective accounts pertaining to the loans and that the parties' respective auditors/accountants file in court affidavits to which the parties' accounts would be annexed. The parties were at liberty to cross-examine the deponents of the affidavits of the auditors/accountants and it was agreed that the decision of the Registrar as to which party owed the other money would be binding on the parties.

Ringera, J. was asked in the motion filed by the appellant to review vary or set aside the consent Order and that issues in dispute between the parties be determined by a competent court.

In the considered ruling which we have already referred to, the learned Judge had this to say of the application for review:

''Has the applicant made a case for review of the Order? On a consideration of the rival arguments, I agree with the applicant's submissions that what the Registrar was required to do by the terms of the consent Order were not ministerial but judicial acts. He was required to decide the rights of the parties to litigation on the basis of the rival accounts submitted to him and on which the parties could be cross-examined and then make definivite and binding determinations. That was not a formal administrative function such as issuing someone with summons to enter appearance or entering judgment. It was a judicial act. The question is whether what he was required to do raised a jurisdictional issue and, if it did, whether he had jurisdiction to do so, and further, if he didn't, whether the parties could by their consent confer the same on him…."

The Judge weighed the various submissions made before him and found that reference of the parties' disputes on accounts to the Registrar did not involve an issue of jurisdiction. The Judge found that the law did not preclude a Registrar with consent of parties from examining accounts and make findings binding on the parties. On freedom of parties to settle their own disputes, the Judge held that:

''Parties are not only free to agree on their rights and obligations by consent without so much as a hearing but also to agree on another person and process of determining the same…"

Judge found that the consent order reached by the parties was capable of being implemented, rates of interest applicable and periods of their application having been agreed. The Judge therefore did not welcome the invitation to review, but instead refused the application. As we have shown in this judgment, the Judge corrected an error in the Deputy Registrar's ruling by stating that the other prayers in the plaint should go for trial. Again as we have stated, there was no appeal against this ruling.

The matter that went before **Kimaru, J.** was an application by the respondents for the court to adopt a ruling of the Registrar which had been made after hearing the parties' respective auditors/accountants as had been agreed in the consent. The Deputy Registrar had given a ruling and the Judge after reviewing the findings of **Ringera, J.** which we have spoken to, found that the application was merited and entered judgment for the sum of and interest rates found by the Deputy Registrar. The Judge also ordered that the other claims of the respondents in the plaint and the counter-claim by the appellant would be heard in a full trial.

We have summarized the complaints raised by the appellant in the Memorandum of Appeal. It is stated that **Kimaru, J.** erred in adopting the decision of the Deputy Registrar as a decree of the court. This complaint has no merit for various reasons: firstly **Ringera, J.** found that the Deputy Registrar was entitled to examine the issue of accounts as had been agreed by the parties in the consent filed in court. **Ringera, J.** reviewed the issue of whether the Deputy Registrar had jurisdiction to examine and finalize the accounts of the parties as agreed in the consent letter, and found that the Deputy Registrar was entitled to do what he did. Secondly, the Registrar of the High Court has jurisdiction donated by the Civil Procedure Act to perform various duties and we are in agreement with **Ringera, J.** that the Deputy Registrar did not go out of his mandate when he heard the parties' auditors or accountants and reached his findings. Thirdly, and as we have stated, there was no appeal against the said ruling of **Ringera, J**. It is therefore wrong for the appellant to claim as set out in the Memorandum of Appeal that **Kimaru, J**. overruled a Judge of parallel jurisdiction. The Judge did not do that at all. The parties on their own accord and with advice of their counsel on record after negotiations entered into a consent which was adopted as an Order of the court. Once parties entered into such a consent and upon it being adopted as an Order of the court, the same became binding on the parties and could not be vitiated at all as it had contractual obligations save in circumstances where a contract could be set aside – see the case of **Flora N. Wasike vs. Destimo Wamboko [1988] eKLR** where the following passage appears:

"*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 the decision of this in S.M. Mwakio vs. Kenya Commercial Bank Ltd. Civil Appeals 28 of 1982 and 69 of 1983."*

Hancox, JA, in the said **Flora Wasike** (supra) case quoted "**Setton on Judgments and Orders (7th edn), vol. 1, P.124"**, as follows on consent orders:

> ***"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 general for a reason which would enable the court to set aside an agreement…."***

The complaint before **Ringera, J**. was not whether the parties had entered a valid consent. The appellant was questioning the Registrar's authority to examine the parties' accounts and make a determination as agreed by the parties. The Deputy Registrar examined the accounts as agreed by the parties and found that the respondents were owed money by the appellant. **Ringera, J.** found that the Registrar had authority to examine those accounts and had not exceeded his authority in doing so.

The application before **Kimaru, J.** and from which ruling this appeal arises merely asked the Court to adopt the findings of the Registrar as a judgment of the court. The Judge found that he was entitled to adopt the said findings but he opened up an avenue for the parties by stating that the other prayers in the plaint (apart from issues of accounts) and the matters raised in the counter-claim by the appellant be heard in a full trial. The Judge was entitled to make those findings and he did not err at all.

We have gone through all the grounds of appeal and cannot see any merit in any of them as **Kimaru, J**. did not err in law but reached a correct finding.

The appeal has no merit and is accordingly dismissed. The respondents are not entitled to costs as they did not attend hearing of this appeal.

Dated and Delivered at Nairobi this 8th day of February, 2019

D. K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR