



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 158 OF 2014

BETWEEN

EAST AFRICAN PORTLAND

CEMENT COMPANY LIMITED..... APPLICANT

AND

SUPERIOR HOMES LIMITED RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Nyamweya, J) dated 11th March, 2014 in

ELC Case No. 931 of 2013)

JUDGMENT OF THE COURT

1. This appeal has taken some time to hear and determine owing, partly, to the request made by the parties and granted by the Court, for time to negotiate a settlement. At some point those negotiations were reportedly at an advanced stage and the parties were directed to file their consent, if any, in arrest of judgment, but the results were never disclosed or filed with the Court; hence the order for delivery of this judgment. The issue at hand is whether the High Court correctly exercised its discretion in varying a decree obtained by consent of the parties, and extending time for completion of a sale transaction.

2. The appellant, (hereinafter, '**Portland**') and the respondent ('**Superior Homes**') are not strangers to each other. Portland is a cement manufacturing company based in Athi River, Machakos County, which owns several tracts of land for limestone mining. The relevant parcel herein is **LR No.8784/4** situate in Athi River area measuring approximately 1,329.89 Acres. Superior Homes on the other hand is in the business of land development and sale. According to the record before us, both parties had, in the year 2005, discussed and agreed on the sale of some 500 Acres out of the said parcel of land on terms that 163 Acres would be sold outright at the rate of Sh. 292,000 per Acre and Superior Homes would have the option of purchasing the balance of 337 Acres at the same rate within 12 months after completion of mining process by Portland. Superior Homes took possession of the 163 Acres and developed a housing estate thereon. The option to purchase the other 337 acres was executed between the parties on 1st September, 2005 and Superior Homes exercised the option to purchase on 30th August, 2006.

3. Portland did not seem keen to proceed with that arrangement and therefore Superior Homes filed suit, HCCC 371 of 2011, (also appearing as Environment and Land Court (ELC) Case No. 931 of 2013) to enforce it. Before the suit was heard on merits, the parties compromised it and filed a consent on 14th December, 2012, essentially enforcing the option to purchase the 337 Acres but at the revised price of Sh. 2,225,519.28 per Acre, making the total purchase price Sh. 750 million. A decree ensued from that consent and was issued on 17th December, 2014.

4. The terms of the decree were as follows:-

- 1. THAT the Defendant do Transfer to the Plaintiff a portion of land measuring 337 acres to be excised and/or hived off the parcel of land known as Land Reference Number 8784/4;**
- 2. THAT the purchase price for the entire parcel of land measuring 337 acres shall be Kenya Shillings Seven Hundred and Fifty Million (KShs.750,000,000/=);**
- 3. THAT the Plaintiff do pay a deposit of Kenya Shillings One Hundred Million (KShs.100,000,000/=) within seven (7) days from the date of the Decree to be held in a stakeholder capacity by the Defendant's Advocates in the transaction, Letangule & Company Advocates, and not be released to the Defendant or any other party until completion;**
- 4. THAT the completion documents shall be released to the Plaintiff's Advocates in the transaction upon receipt of an acceptable Bank Guarantee issued on behalf of the Plaintiff's Advocates or such other security as shall be agreed between the parties to secure the balance of the purchase price of Kenya Shillings Six Hundred and Fifty Million (KShs.650,000,000/=);**
- 5. THAT the balance of the purchase price of Kenya Shillings Six Hundred and Fifty Million (KShs.650,000,000/=) shall be paid to the Defendant within seven (7) days of successful Transfer of the parcel of land measuring 337 acres to the Plaintiff or its Nominees;**
- 6. THAT the agreed completion period is one hundred and forty-five (145) days from the date of the Decree or seven days of successful transfer of the parcel of land measuring 337 acres to the Plaintiff or its Nominees whichever is earlier;**
- 7. THAT in default of completion for whatever reason the deposit of Kenya Shillings One Hundred Million (KShs.100,000,000/=) shall be refunded to the Plaintiff within seven (7) days of written demand without interest;**
- 8. THAT in default by the Plaintiff in completing the transaction for purchase of the above mentioned parcel of land for want of the balance or for whatever reason, the Plaintiff will have no other claim against the Defendant in respect of the parcel of land.**
- 9. THAT the Plaintiff shall be granted vacant possession without any encumbrances upon payment of the balance of the purchase price as stipulated in order (5) above;**
- 10. THAT the Plaintiff has inspected the property and purchases it on as it is condition;**
- 11. THAT each party do bear its own costs for this suit; and**
- 12. THAT there be liberty to the parties herein to apply.”**

5. The completion date set under clause 6 would have been 11th May, 2013, at the latest, but there was no completion. The reasons for that are not agreed on. Superior Homes paid the deposit of Sh.100 million to be held in escrow without interest by Portland's Advocates and expected to receive the completion documents from those advocates. Midway, however, they discovered in the course of due diligence, that the Government had expressed an intention to acquire the property and had issued a Gazette Notice for

compulsory acquisition on 30th August, 1988. It also discovered that the property was one among those listed in the “*Ndung'u Land Commission Report*” where revocation of the Title was recommended. That was a fact known at all material times but not disclosed by Portland before the consent judgment was entered into.

6. Superior Homes sought an explanation on those issues in a letter dated 4th April, 2013 and in a crisis meeting held between the parties on 8th May, 2013. That was only 3 days before the expiry of the Decree. It also became apparent at the meeting that Portland had not obtained all the documents and approvals in readiness for completion of the transaction which it said were in the process of being obtained. Superior Homes insisted on clarification of the issues on compulsory acquisition and clarity of Title, or an indemnity from Portland *in lieu* before completion, and were ready to have the decree extended by consent for that purpose.

7. According to them, the following matters were agreed on prior to the expiry of the decree:-

“(a) THAT Respondent’s Advocates were in the process of obtaining title relating to the suit property (a subdivision of all that parcel of land known as Land Reference Number 8784/4 in accordance with section 42 of the Land Registration Act of 2012. The Respondent’s Advocates confirmed that the said process was on-going and was expected to be completed shortly;

(b) THAT the Transfer of the suit property would only be engrossed upon receipt by the Respondent’s Advocates of the new title for the Subdivision;

(c) THAT Respondent’s Advocates would avail without delay the rest of the completion documents save for title to the subdivision;

(d) THAT the Respondent’s Advocates would continue pursuing the approvals of the Ministry of Industrialisation.

(e) THAT the Respondent’s Advocates would provide an Indemnity in favour of the Applicant together with the completion documents for the transaction in light of the recommendation made in the Ndungu Land Commission Report that the Title relating to the suit property be revoked;

f. THAT the Applicant’s advocates would forward an appropriate letter from the Bank confirming the financing of the balance of the purchase price.”

8. On 5th April, 2013, Superior Homes obtained a “*Facility letter*” from their Bankers, I & M Bank, confirming that the bank would finance the balance of the purchase price, Sh. 650 million, and forwarded it to Portland on 9th May, 2013. According to Superior Homes, the ‘Facility letter’ was the alternative to the ‘Banker’s guarantee’ as stated in the Decree, and had been discussed and agreed on in the crisis meeting of the same day. There was no further correspondence between the parties until 12th June, 2013 and 25th June, 2013 when Portland, through their advocates, communicated the decision of its Board of Directors rescinding the entire transaction on the ground that the date of completion had expired before the bank guarantee envisaged in the decree had been availed by Superior Homes.

9. It seemed to Superior Homes that Portland was covering up for its inability to avail the completion documents in time or was intending to sell the property to other parties to unjustly enrich itself and so, they rushed to court and filed the motion dated 30th July, 2013 seeking a temporary injunction as well as the following orders:-

“3. THAT the terms and conditions of the Decree issued herein by this Honourable Court on the 17th day of December, 2013 be and are hereby varied and/or reviewed.

4. THAT the completion period of one hundred and forty five (145) days set in the Decree issued

by this Honourable Court on the 17th day of December 2012 with the consent of the parties herein be and is hereby enlarged and/or extended by a further three hundred and sixty five (365) days or any other reasonable period in the circumstances to enable the Applicant and Respondent to fully comply with the said Decree.

5. THAT this Honourable Court do issue any such further and appropriate orders in the circumstances of this matter as it deems fit.”

10. Portland denied that it was at fault in completing the transaction in terms of the decree stating that it had carried out the subdivision of the land and obtained approval for change of user as well as substantially obtaining other documents to facilitate completion but Superior Homes were not ready to provide an acceptable Banker's Guarantee. They dismissed the alleged compulsory acquisition by the Government as having abated since it was never completed. They saw no valid grounds for interfering with a consent freely entered into by the parties which amounted to a binding contract. Furthermore, they contended, the application for extension of time had been made too late in the day after expiry of the decree.

11. Upon considering the application, the affidavits on record and the submissions of counsel, the trial Court (**Nyamweya, J.**) was persuaded that Superior Homes had made out a case for review of the decree but only to the extent of extending the completion period stated in the decree by a further one hundred and twenty (120) days with effect from the date of the ruling, which was 11th March, 2014.

12. In reaching that decision, the trial court framed three issues which it answered as follows:-

(i) Whether the Defendant could unilaterally discharge itself from the consent order.

"Order 25 Rule 5 of the Civil Procedure Rules provides for the compromise of a suit, and states that where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement or compromise, it shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith..... the effect of this action was that the consent order becomes an order of the court upon being endorsed by the Court, and that is why a decree was subsequently issued.... , it consequently became subject to the law governing the discharge of court orders and decrees. Under the Civil Procedure Act such discharge can only be by way of appeal from the order, or review and setting aside of the order. It is in this respect to be noted that under section 67(2) of the Civil Procedure Act, that no appeal shall lie from a decree passed by the court with the consent of parties. The only allowed legal procedure therefore through which a consent order and a decree issue thereof can be discharged is by way of review and setting aside.... the only remedy available to parties who want to get out of a consent order is to set aside the consent order by way of review or by bringing a fresh suit in court. A review can only be by way of judicial process. There was no such review sought by the Defendant in the present case to set aside the consent order, and neither was there any consent by the parties herein that the Defendant be discharged from the consent order. In the circumstances this court finds that the said discharge by the Defendant of the consent order to be of no legal effect and that the said consent order and decree are consequently still subsisting and in force."

(ii) Whether this court has discretion to extend the time of completion agreed to by the parties in the consent order.

"While this court has discretion to extend time under the provisions of section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules if good reason is shown, the court must interrogate whether these provisions are applicable to court orders where the time for doing an act is set not by the court, but by the parties themselves in a consent order. I find in this respect that the foregoing findings as to the setting aside of a consent order by way of review must also apply to any terms as to time in a consent order. This is because there are well established grounds as to when a consent order can be reviewed, which of necessity also apply to

time limits agreed to by the parties in a consent order.... It is the finding of this court that it has no discretion to extend time set in a consent order, and that for the Plaintiff to be able to set aside or vary the terms of their consent order and decree as to time, it must show a good ground."

(iii) Whether the court can vary terms of the consent order as to the time of completion.

"A consent judgment or order has a contractual effect and can only be set aside on the grounds that would justify the setting aside of a contract, or if certain conditions remain to be fulfilled, which are not carried out. These grounds for setting aside are where the consent order or judgment was obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if 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.... The possibility of revocation of a title of the suit property is in my view a material fact that ought to have been disclosed by the Defendant, and it is apparent that the Plaintiff's consent was given in ignorance of this fact. In addition the Defendant does not dispute that the title to the suit property was at risk of revocation, and it is my finding that these are sufficient grounds to vary the term of the consent order as to time for completion.

In addition, the said consent order and decree did clearly state that completion documents were to be released to the Plaintiff's Advocate upon receipt of an acceptable Bank Guarantee or such other security issued by the Plaintiff as shall be agreed upon the parties to secure the balance of the purchase price. The Plaintiff produced as evidence a letter from its Advocates addressed to the Defendants Advocate dated 9th May, 2013 in which reference is made to a meeting between the Advocates held on 8th May, 2013 and in which it was agreed that a letter from a bank confirming financing be forwarded by the Plaintiff....The issue of whether the said Facility Letter was a security within the terms of the Decree is one that the parties had discussed and which if there was a disagreement thereto, ought to have been resolved by the clause allowing the parties liberty to apply as to the implementation of the decree. Consequently, the Defendant had no valid ground to rescind the consent order and/or decree as the circumstances giving rise to the Facility Letter were expressly provided for in the said consent order and decree."

13. Portland was aggrieved by those findings, hence the appeal before us. We are informed that an order for stay was subsequently issued to hold matters in *status quo* pending the hearing and determination of the appeal.

14. The memorandum of appeal filed through **M/s Letangule & Co. Advocates** raises twelve grounds but they were urged as 4 grounds in written submissions as follows:-

(a) Whether the court erred in reviving and purporting to extend the time of completion in the rescinded contract.

(b) Whether the court owned the consent and therefore had discretion to interfere with time limited by the parties.

(c) Whether any compelling grounds were given by the respondents to enable the court to vary the terms of the consent decree.

(d) Whether there was any confirmation on the part of the appellant or its advocates that the respondent's Bank Facility Letter was a suitable security.

15. On the first ground, counsel took the view that the motion filed on 30th July, 2013 could not be entertained because the decree had already been lawfully rescinded and there was nothing to extend. The decree itself, in any event, had provided for the consequences in the event of breach, that Superior Homes would have no further claim. The clear breach was in the failure to provide the Banker's Guarantee and

therefore there was a firm basis for rescission of the agreement by Portland's Board of Directors on 12th June, 2013.

16. On the 2nd ground, it was submitted that there was a misdirection in the application of **section 95** (CPA) and **Order 50 Rule 6** (CPR) which provide for extension of time. That is because the completion date of the sale agreement was not fixed or granted by the court but was set by the parties themselves, and it is trite law that a court cannot rewrite a contract between the parties. Only the parties in this case could have extended the term by consent or upon such other grounds as would permit the setting aside or variation of a contract. The court therefore assumed a jurisdiction it did not have.

17. On the 3rd issue, counsel cited the general principle of law that a consent judgment or order has the effect of a contract and can only be set aside on grounds which would justify setting aside of a contract. Copious reference to several authorities establishing the principle was made, including: **Brooke Bond Liebig Ltd vs Mallya [1975] EA 266**, **Flora Wasike vs Destimo Wamboka (1988) 1 KAR 625** and **Samson Munikah t/a Munikah & Company Advocates vs Wedube Estates Limited [2007] eKLR 13**. On the basis of those authorities, counsel conceded as he had to, that the court had the power to set aside or review a consent decree but contended that it can only do so upon proof of fraud, collusion, any other agreement, initial lack or ignorance of material facts. In this case, asserted counsel, none of those matters were proved and the trial court was in error to vary the term without any good reason.

18. According to counsel, the finding that material facts were withheld by Portland in respect of the compulsory acquisition and threatened revocation of Title to the property failed to take account of the agreed terms of the decree that Superior Homes had inspected the land and was purchasing it in the condition it was. In counsel's view, it meant that Superior Homes had investigated the property physically and the Title thereto, through requisitions or objections, to ascertain its status. The burden of carrying out due diligence lies on the purchaser and not the seller, it was submitted. Furthermore, the *Ndung'u Report* has been in the public domain for many years and Superior Homes could not pretend to have been ignorant about it. Challenging the agreement on the basis of those allegations was thus an afterthought.

19. Finally, counsel contended that the trial court failed to consider correspondence on record to confirm that there was no agreement on substitution of the 'Bank Guarantee'. To the contrary, Portland had expressly stated that the 'Facility Letter' was not suitable. The failure to provide the Bank Guarantee could not be cured by the clause on "liberty to apply" as the trial court erroneously held, because the two instruments were totally different in effect. Default by Superior Homes was thus complete as at the time of rescission.

20. As a parting shot, counsel submitted that the extension of time to complete the sale on the original terms would be prejudicial to Portland since the price of land has since skyrocketed, and it would be unfair for a court of equity to come to the aid of a defaulting party to the detriment of an innocent party.

21. Superior Homes did not file written submissions before this Court but referred us to the submissions on record filed in the ELC by learned counsel **Mr. Philip Nyanchoti**, instructed by M/s Nyanchoti & Company Advocates. Counsel also made oral submissions supporting the findings of the trial court on its jurisdiction and reasoning in reviewing the decree. He argued that Superior Homes was the innocent party in this saga. That is because it acted in good faith when it entered into the consent decree and had no knowledge of any intentions of compulsory acquisition or threatened revocation of the title in the *Ndung'u Report*, which facts were known to Portland but were not disclosed. Counsel observed that the issues were raised with Portland before the completion date and there were letters on record to show for it dated 7th February, 2013, 3rd April, 2013; 4th April, 2013; 8th May, 2013 and 9th May, 2013. There was also a crisis meeting held on 8th May, 2013 to reaffirm the parties' commitment to the transaction and review progress on completion. Following the meeting, a letter dated 9th May, 2013 confirming the deliberations and agreements arrived at in the crisis meeting was dispatched to Portland's counsel and was never controverted or disputed in these proceedings. It included the agreement on providing the 'Facility Letter' from I & M Bank guaranteeing the financing of the balance of the purchase price, which was forwarded to Portland's Advocates the same day. It also offered an extension of time for completion of the

transaction. According to counsel, it was clear that Portland was not ready to complete the transaction before the expiry of the term stated in the decree and its purported act of rescinding it long after the expiry was in bad faith. Superior Homes had in compliance deposited Sh. 100 million with Portland's counsel, which is still being held for the last five years earning interest for them, and had furnished them with a facility letter from a bank as discussed between the parties on 8th May, 2013. All Superior Homes awaited were the agreed completion documents from Portland, concluded counsel.

22. None of the parties filed any list of authorities for our consideration although they referred to some decided cases in their submissions.

23. We have fully considered the appeal which seeks our interference with the discretion of the lower court. As such, the parameters of our approach are well defined. If the discretion was exercised judiciously, we cannot interfere simply on the ground that if we were sitting at first instance, we might have given different weight to that given by the judge to the various factors in the case. We may go back fifty years to Sir Charles Newbold (President) in ***Mbogoh & Anor vs Shah [1968] E A 93*** for the formal caveat:-

"A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

24. Madan, JA (as he then was) in ***United India Insurance Co. Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] eKLR*** rephrased it as follows:-

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong".

25. In view of the concession made by learned counsel for the appellant that the trial court had the jurisdiction and power to set aside, vary or review a consent decree, grounds 1 and 2 of the appeal lose their sting. It becomes unnecessary, therefore, to consider whether the variation of the decree in this matter came before or after expiry of the decree and whether the parties' consent and the decree were mutually exclusive, with the consequence that **section 95** (CPA) and **Order 50 Rule 6** (CPR) were inapplicable, as contended in the submissions. At all events, we find no substance in those submissions. As correctly held by the trial court, once parties compromise their suit under **Order 25 Rule 5 CPR**, a judgment ensues upon which a decree issues out which is subject to the law governing the discharge of court orders and decrees. Part of that law, which the respondent invoked, was **section 95** which provides for enlargement of time even though the period originally fixed or granted may have expired. The procedural provision of **Order 50 Rule 6** carries forward that general power. We would reject those grounds of appeal.

26. Before we examine ground 3 which is really the crux of the appeal, we shall deal with ground 4 which revolves around factual issues. Was there an agreement on the "Bank Facility Letter" in place of the "Bank Guarantee"? The Decree in clause 4 provided for:

'an acceptable Bank Guarantee issued on behalf of the Plaintiff's Advocates or such other security as shall be agreed between the parties to secure the balance of the purchase price of Kenya Shillings Six Hundred and Fifty Million (KShs.650,000,000/=).' (Emphasis added)

The case for Superior Homes is that they obtained and furnished Portland's Advocates (Letangule) with a 'Bank Facility Letter' which guaranteed the payment of the balance of the purchase price. It is an elaborate

document running into 17 pages. Portland on the other hand insists that only a Bank Guarantee was acceptable. We have examined the contention on both sides, and it seems to us, on a balance of probability, that the bank facility letter was agreed upon by the parties.

27. In their letter dated 7th February, 2013, Letangule, amongst other matters, reminded Superior Homes' advocates (MMC):

"to prepare to issue the bank guarantee and necessary undertaking on your part."

On 3rd April, 2013 Letangule wrote to the Director of Survey seeking replacement of deed plans in respect of the land which they said had been 'misplaced'. MMC wrote to Letangule on 4th April, 2013 as a follow up to an earlier letter of 15th March, 2013 and discussions held in relation to the discovery of threats to the validity of Title to the land. The issue of financing was broached as follows:

"On another note, please let us know the terms of undertaking for payment that you would require from our client's bankers. Currently our client is seeking financing from the following banks:-

Commercial Bank of Africa

Kenya Commercial Bank Ltd, and

I & M Bank Ltd."

Responding to that aspect on 8th May, 2013 Letangule stated:

"We would require an acceptable bank guarantee as per the consent and paragraph 4 of the decree".

28. A crisis meeting was then held the same day to discuss the emerging issues so close to the completion date and agree on the way forward. What was discussed and agreed on was recorded in the letter dated 9th May, 2013 from MMC to Letangule and among the items was No. 6 stating:

"It was agreed that we will forward to you an appropriate letter from a Bank confirming the financing."

The letter continued:-

As agreed and in accordance with paragraph 4 of the court order, we enclose herewith a copy of the facility letter issued by I & M Bank Ltd dated 5th April, 2013. Please confirm that the Facility Letter is acceptable for purposes of that paragraph."

29. There was no response to that letter despite a reminder made on 29th May, 2013 after the expiry of the completion date. The issue was not even referred to in the bombshell letter dated 12th June, 2013 from Letangule terminating the transaction. In the affidavit of **Kepha Tande** filed in response to the motion, the deponent conflates Letangule's letter of 8th May, 2013 as the response to MMC's letter of 9th May, 2013. A letter cannot be responded to before it is written! In those circumstances, it is difficult to blame Superior Homes for believing that the recorded minutes of the crisis meeting were correct and the Facility Letter was accepted. There was a reasonable basis therefore, upon which a judicial discretion could be made by the trial court when it found thus:

"The Plaintiff produced as evidence a letter from its Advocates addressed to the Defendants Advocate dated 9th May, 2013 in which reference is made to a meeting between the Advocates held on 8th May, 2013 and in which it was agreed that a letter from a bank confirming financing

be forwarded by the Plaintiff.....The issue of whether the said Facility Letter was a security within the terms of the Decree is one that the parties had discussed and which if there was a disagreement thereto, ought to have been resolved by the clause allowing the parties liberty to apply as to the implementation of the decree. Consequently, the Defendant had no valid ground to rescind the consent order and/or decree as the circumstances giving rise to the Facility Letter were expressly provided for in the said consent order and decree."

30. Was Portland ready to complete the transaction by the due date -11th May, 2013? On their own showing, it was doubtful, to say the least. By February 2013, they were still pursuing approval from the Ministry of Industrialization (letter dated 7th February, 2013); by April 2013 they were looking for lost or misplaced deed plans for the property (letter dated 3rd April, 2013); in March 2013 they were confronted with information about compulsory land acquisition and revocation of Title and given a list of completion documents required (letter dated 4th April, 2013); in May they were confirming that they had "substantially secured the completion documents" (letter dated 8th May, 2013); and in the crisis meeting of 8th May, 2013 they were confirming that they were "in the process of obtaining all the necessary approvals to enable completion". By 11th May, 2013, there was no confirmation that all the completion documents were available from Portland despite the letter addressed to them by the advocates for Superior Homes on 9th May, 2013, which they did not respond to. There is no basis therefore, in our view, for Portland to brand itself as the innocent party.

31. On the aforesaid grounds we are unable to say that the decision made by the trial court on the 4th ground of appeal was plainly wrong. We dismiss that ground also.

32. As for the final ground 3, we need not belabour the principle, properly conceded by counsel, that the trial court was entitled to consider and if found appropriate vary, set aside or review the consent judgment. The only issue is whether there were compelling grounds for varying or reviewing the consent decree. Way back in 1952, the predecessor of this Court in Hirani vs Kassam (1952) 19 EACA 131, at 134, stated as follows:

"The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgments and Orders (7th Edn), Vol 1, p 124, as follows:

"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."

33. That decision has been followed in many other decisions and we only sample two more:

The Brooke Bond Liebig Ltd case (supra) where the Court stated that:

"a consent order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if 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."

And the Flora Wasike case (supra) stating:

"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.... In Purcell vs F C Trigell Ltd [1970] 2 All ER 671,

Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

34. In this case, the trial court was certainly aware of those principles as it cited and applied the **Brooke Bond Liebig Ltd** case which was followed in the case of **Contractors Ltd vs Margaret Oparanya [2004] eKLR**, stating thus:

“This court has qualified or conditional discretion when it comes to interfering with consent Judgments or orders. Moreover, where the consent order or Judgment is still executory, the court may refuse to enforce it if it would be inequitable to do so. The mode of paying the debt, then is part of the consent Judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

35. The factors considered by the trial court as the basis for varying the decree and extending time were the existence of a Gazette Notice for compulsory acquisition and the possibility of revocation of Title to the land as recommended in the *Ndung'u Report*. The court found that Superior Homes entered into the consent in ignorance of those facts which were material and that Portland did not dispute that it was aware of them but did not disclose them. Indeed, before us at the hearing of the appeal, counsel for Portland freely admitted that fact. They contended instead that they had no duty to disclose them. The reason given was that the compulsory acquisition had abated while Superior Homes should have carried out due diligence to discover for themselves that there was a threat to revocation made in the *Ndung'u Report*.

36. With respect, we think the attitude taken by Portland says little about fair play and candour in the conduct of this transaction. The information was surely within their knowledge and the least they could have done was to disclose it and let Superior Homes walk into the transaction with their eyes open. Taking refuge, as submitted by counsel, in the clause about the property having been inspected by Superior Homes and sold "*on as it is condition*" does not avail them. No authority was cited for the proposition that inspection goes beyond the physical. They also undertook in another clause to transfer the property "*without any encumbrances*". The duty to ensure there were no encumbrances was Portland's.

37. Being of that view, we do not fault the trial court in the manner it exercised its discretion to interfere with the consent decree. There was sufficient reason grounded in law to do so. In the event we reject ground 3 of the appeal.

38. The upshot is that the entire appeal is lacking in merit and we order that it be and is hereby dismissed with costs. The decision of the Environment and Land Court made on 11th March, 2004 is hereby affirmed and the extended period of 120 days shall commence on the date of this Judgment.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of September, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR