IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & G.B.M. KARIUKI, JJ.A.)

CIVIL APPEAL NO. 24 OF 2012

BETWEEN

MWIHANGIRI FARMERS LIMITED..APPELLANT

AND

ECUMENICAL DEVELOPMENT CO-OPERATIVE

SOCIETY (E.D.C.S.).. RESPONDENT

(From Ruling of the High Court of Kenya, Nairobi (Koome, J) delivered on 12th day of November 2010

in

H.C.C.C. NO.2026 of 2000)

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JUDGMENT OF THE COURT

APPEAL

1. This is a judgment in the appeal filed by Mwihangiri Farmers Ltd (**the appellant**) against the ruling of the High Court (Martha Koome, J) as she then was) delivered on 12th November 2010 in Nairobi (Milimani) commercial Courts Civil Case No.2026 of 2009 dismissing an application by the appellant against Ecumenical Development Co-operative Society (**the respondent**) seeking to set aside a consent decree dated 6th June 2009.

BACKGROUND

2. The litigation that gave rise to the suit in the High Court and eventually to this appeal arose in the following circumstances. The appellant sought and obtained from the respondent financial accommodation to develop in Southern Kinangop a milk cooling plant and related structures. Following a

loan agreement dated 16th September 1996, the respondent advanced to the appellant in US Dollars a sum equivalent to Kshs.17,863,650/. Under the agreement, the appellant was to repay the loan with interest at the rate of 9% per annum. It seems the loan was secured on a chattels mortgage over equipment purchased with the loan proceeds for the milk cooling plant and further security was given by way of charges or mortgages created over properties belonging to members of the appellant (company) including a charge over Plot No.NYANDARUA/KARATI/2352 registered in the appellant's name on which the plant was located. The appellant subsequently defaulted in making payments in accordance with the loan agreement. Discussions relating to the repayment of the money owing ensued between the officials of the appellant (company), and the officials of the respondent cooperative society culminating in an agreement to the effect that the titles of the members of the appellant would be discharged and title deeds returned to the respective owners; that the appellant would pay Shs.2 million; that Title No. Nyandarua/Karati/2352 on which the plant stood would be sold in exercise of the respondent's statutory power of sale; and that the respondent would write-off more than US$407,000 due by the appellant to the respondent.

3. A consent letter signed by J. K. Mwangi & Company, the advocates then on record for the appellant and Swale Mwangi & Co., the advocates for the respondent stated that the respondent would sell Plot No.Nyandarua/Karati/2352; that the respondent would return the title deeds of plots of the members of the appellant duly discharged.

APPLICATION GIVING RISE TO THE RULING APPEALED FROM

4. By a notice of motion dated 15th January 2010, premised on Order III rule 9A, Order 44 rule 1 and Order 50 rules 1 and 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the appellant sought to set aside or to have reviewed the consent decree as it related to the order for sale of the Plot No. Nyandarua/Karati/2353 which gave the respondent carte blanche to sell the said plot.

5. By the time the said notice of motion was presented, consent decree dated 6th June 2009 had been issued on 29th June 2009.

6. There was opposition to the application. In the ruling dated 9th November 2010 but delivered on 12th November 2010, the High Court (Martha Koome J, as she then was) dismissed the appellant's said notice of motion with costs to the respondent. It is that ruling that the appellant appealed against, hence this judgment.

GROUNDS OF APPEAL

7. The appellant put forward 12 grounds of appeal in which it contended that the learned Judge was wrong in her decision. In summary, the appellant contended that the learned Judge erred in law and fact in holding that (without evidence of fraud on the part of the advocates) the consent order could not be set aside for mistake apparent on the face of the record; that there was no error apparent on the face of the record; that there was no liability owing by the appellant to the respondent after the consent in which the latter wrote off the debt by the appellant to the respondent; that the decision of the High Court was contrary to the law in that the court failed to appreciate the injustice the proposed sale would cause to the appellant.

HEARING OF APPEAL

8. Ms Gichumbi, learned counsel for the appellant submitted during the hearing of the appeal that the notice of motion had merit. She submitted that the appellant's chattels had been sold and that there was no debt owing as the respondent had written it off. She referred to Sections 78(1) and 17 of the Land Act and urged us to allow the appeal and set aside the High Court ruling appealed against.

9. Mr. Muriithi, the learned counsel for the respondent referred us to the history of the matter and wondered what the appellant aimed to achieve if the impugned order is set aside. He pointed out that the High Court had good reasons for declining to set aside the consent decree. It was his contention that no

grounds had been advanced to buttress the prayer for setting aside.

DETERMINATION

10. We have perused the record of appeal and the memorandum of appeal. We have also given due consideration to the submissions made by counsel. The issue for determination before the learned Judge of the High Court was whether the appellant had shown sufficient ground/s in the notice of motion dated 15th January 2010 to warrant the setting aside of order 1 in the consent pursuant to which the consent decree was issued on 29th June 2009. Order 1 of the consent decree stated –

> ***"that in exercise of the statutory power as chargee, the defendant be and is hereby at liberty to sell and or dispose of at its sole discretion all that parcel of land known as Nyandarua/Karati/2352 now registered in the plaintiff's name and charged to the defendant."***

11. The order sought to be reviewed or set aside reflected in the consent decree was made by consent of the parties. It is now well settled that a consent judgment or order or decree 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 **Flora Wasike v. Destino** [1982-1988] 1 KAR 623; see also **J. M. Mwakio v. Kenya Commercial Bank Ltd** (Civil Application Nos. 28 of 19823 and 69 of 1983]; see also in **Purcell v. F.C. Trigell Ltd** [1970] 3 All ER 676 in which Winn LJ stated -

> ***"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 of rectification of this order looked at as a contract."***

12. The appellant invoked Order 45 of the Civil Procedure Rules (previously Order 44) which requires that for the court to order review, it must be shown on the balance of probabilities that there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the appellant's knowledge or could not be produced by him at the time the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The appellant did not at all satisfy this rule and clearly the learned Judge could not have interfered with the consent decree on the basis of Order 45.

13. There was not a whimper that the consent resulting in the consent decree was made through duress, undue influence, or inequality of bargaining power or coercion. As correctly held by the High Court in **Kenya Commercial Bank Ltd v. Specialized Engineering Company Ltd** [1982] e KLR 1,

> ***"a consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud, or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement."***

The Court of Appeal for E.A. in **Brooke Bond Liebig (J) Ltd v Mallya** [1975] 1 EA 206 (CAD) held that a consent judgment may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement (see **Hirani v. Kasam** (1) followed)).

14. In our view, there was no basis shown in the application on which the learned Judge could set aside the order as prayed. The order by the Judge in dismissing the notice of motion dated 15th January 2010 was without error. We uphold it and dismiss the appeal with costs to the respondent.

Dated and delivered at Nairobi this *19th day of May 2016*.

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR