



**Credit Bank Limited & 2 others v Nyanza Spinning & Weaving Mills Limited (Civil Appeal 233 of 2011) [2016] KECA 841 (KLR) (25 November 2016) (Judgment)**

Neutral citation: [2016] KECA 841 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 233 OF 2011  
EM GITHINJI, GBM KARIUKI & S OLE KANTAI, JJA  
NOVEMBER 25, 2016**

**BETWEEN**

**CREDIT BANK LIMITED ..... 1<sup>ST</sup> APPELLANT**

**VIPUL SHAL ..... 2<sup>ND</sup> APPELLANT**

**KAMAU SHAH ..... 3<sup>RD</sup> APPELLANT**

**AND**

**NYANZA SPINNING & WEAVING MILLS LIMITED ..... RESPONDENT**

*(An appeal from the ruling of the High Court of Kenya at Nairobi (Muga Apondi, J.) delivered on 7th December, 2010 in H.C.C.C. No. 407 of 2005)*

**JUDGMENT**

1. When this appeal came up for hearing before us on 27<sup>th</sup> September, 2016 we ordered upon application that Vipul Shah and Kamal Shah named as appellants be the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the appeal. Credit Bank Limited is the appellant while Nyanza Spinning and Weaving Mills Limited is the 1<sup>st</sup> respondent.
2. The whole matter started at the High Court of Kenya in Kisumu when the 1<sup>st</sup> respondent filed suit against the appellant claiming various reliefs. It is not necessary for purposes of this judgment to go into details of all the matters that were stated in the plaint. It will suffice here to say that there was a relationship between the appellant and the 1<sup>st</sup> respondent where the appellant advanced sums of money to the 1<sup>st</sup> respondent and a charge and debenture were created as security for the monies advanced.
3. According to the 1<sup>st</sup> respondent the appellant mismanaged its accounts and by the time a demand was made by the appellant against the 1<sup>st</sup> respondent for monies due the 1<sup>st</sup> respondent tried to make a case to show that it did not owe the money claimed or a part thereof. The 1<sup>st</sup> respondent thereafter exercised its powers in terms of the said charge and debenture and appointed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents



as receiver managers for properties and assets secured by the charge and debenture. The appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a joint defence where the 1<sup>st</sup> respondents claim was denied. Various applications then followed and again it is not necessary to reproduce them here.

4. On 30<sup>th</sup> January, 2007 the appellant and the 1<sup>st</sup> respondent filed a consent order in that suit. Because of the central role that the consent judgment played in the High Court and in this appeal we shall set it out here in full:

“The Plaintiff and the defendants hereby consent that:-

1. Judgment be entered for the 1<sup>st</sup> defendant against the plaintiffs for the sum of Kshs. 60,000,000.00 which amount shall attract interest at 10% per annum at monthly rests from 24<sup>th</sup> December, 2004 until payment in full. This sum is hereinafter referred to as “Settlement Sum;
2. That the plaintiffs do pay to the 1<sup>st</sup> defendant, within 30 days of filing of this Consent Order, the sum of Kshs.500,000.00 and thereafter, a further payment of Kshs.1,000,000.00 within 75 days of filing of this Consent Order;
3. That the amount outstanding thereafter inclusive of interest be paid by 31<sup>st</sup> July, 2007;
4. Subject to any sale as provided for in Clause 7 herein below, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants do remain in possession and control of the assets of the plaintiff as receivers/managers until payment of the settlement sum in full;
5. That the plaintiff do pay the defendants’ advocates in this matter and in High Court Civil Case Misc. Application Number 1003 of 2005, *In the Matter of the Constitution of Kenya and (nyanza Spinning & Weaving Mills Limited & Two others* and Nairobi Milimani Hccc No. 407 of 2005 (*nyanza Spinning & Weaving Mills Limited v Credit Bank Limited & two others* charges assessed at Kshs.1,000,000.00 all inclusive. That the plaintiffs do pay to the defendants advocates Kshs.500,000.00 seven days after filing of this consent order and the outstanding balance of Kshs.500,000.00 within 30 days of filing this Consent Order;
6. That in the event that payment of the defendants legal charges is not made within the above stipulated period, the defendant’s advocates be at liberty to tax their respective bills of costs;
7. That the plaintiffs scout, at their cost, for potential purchasers of the machinery and equipment provided that the sale price shall be paid through the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and provided further, that should sale of machinery and equipment be in separate lots, such sales shall be concluded on the same date and the total sale price shall be for a minimum of the settlement sum owing less Kshs.10,000,000;
8. That the sale price shall be paid by way of cash, local bank drafts payable locally in Nairobi or by irrevocable letter of credit payable on demand in Nairobi at an international bank of repute or by other mode of payment acceptable to the 1<sup>st</sup> defendant;



9. That for purposes of facilitating the sale, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall give, under their supervision, the plaintiff or their representatives access, to the machinery and equipment on the premises when and as required with prior arrangements;
10. That pending payment of the settlement sum herein, the plaintiff shall meet the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's costs when invoiced as per current billing schedules;
11. That in the event of default of any one payment as provided in Clauses 1 to 7 and 10 hereinabove, this agreement to accept the settlement sum in satisfaction of the 1<sup>st</sup> defendant's claim will be null and void and the parties shall revert in all respects to their respective positions immediately before the filing of the Consent Order.

Dated at Nairobi this 23<sup>rd</sup> day of January, 2007.

(Signed)

Singh Gitau

Advocates For The Defendants

(Signed)

Wasuna & Co.

Advocates for the Plaintiff”

5. Matters should have ended there but they did not. The 1<sup>st</sup> respondent paid some monies to the appellants but did not pay the full amount agreed in the consent.
6. By notice of motion filed at the High Court on 25<sup>th</sup> July 2007 it was prayed *inter alia* that execution of the orders arising out of the consent order filed in the High Court to be stayed pending hearing of that motion and further that pending the hearing and determination of that motion, the appellants and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents be restrained from disposing off any assets of the 1<sup>st</sup> respondent and finally that the court give directions on the purport and purpose of Clause 7 and other relevant clauses of the consent order.
7. That motion was heard by the late Lady Justice Khaminwa. The learned judge held among other things that the appellants and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had obstructed the 1<sup>st</sup> respondent from accessing the 1<sup>st</sup> respondent's premises at Nanyuki and in the event that the appellants and 2<sup>nd</sup> and 3<sup>rd</sup> respondents had obstructed the implementation of the decree arising from the consent judgment. The learned judge allowed a company appointed by the 1<sup>st</sup> respondent to be given access to those premises within 30 days to carry out an inspection and parties were given liberty to apply. That was on 29<sup>th</sup> June, 2009.
8. By another notice of motion filed at the High Court on 26<sup>th</sup> November, 2009 the 1<sup>st</sup> respondent prayed for orders:

“ 1 That the consent judgment (Order) dated 23<sup>rd</sup> January, 2007 and lodged in court on 30<sup>th</sup> January, 2007 be marked as satisfied with liberty to the plaintiff to take such action as it deems fit to recover its losses as a result of theft and vandalization of plaintiff's properties (plant, machinery, furniture, office equipment etc) on LR No 2787/517 situate 1.5 kilometres to the Northwest of Nanyuki Town.



2. That the 1<sup>st</sup> defendant do release to the plaintiff all the charges and debenture in respect of the said property duly discharged.
  3. That the defendants do cede possession of the said properties to the plaintiffs.
  4. That costs of this application be provided for.”
9. That motion was heard by Muga Apondi, J who in a ruling delivered on 7<sup>th</sup> December, 2010 made the following orders:

- “ 1 The consent judgment (order) dated 23<sup>rd</sup> January, 2007 and lodged in court on 30<sup>th</sup> January, 2007 is hereby marked as satisfied with liberty to the plaintiff to take such action as it deemed fit to recover its losses as a result of theft and vandalization of plaintiff’s properties (plant, machinery, furniture, office equipment etc) on LR No 2787/517 situate 1. 5 Kms. to the Northwest of Nanyuki Town.
2. The first defendant is hereby ordered to release to the plaintiff all the charges and debenture in respect of the said property duly discharged.
  3. That the defendant do cede possession of the same properties to the plaintiffs.
  4. The defendants are directed to pay the costs of this application.”

It is those orders that have provoked this appeal.

10. We were informed by counsel at the hearing of the appeal that the 1<sup>st</sup> respondent has filed HCCC No. 28 of 2010 against the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents which is a suit for damages arising from appointment of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents by the appellant in this appeal as receiver managers. Because of that we should not speak much about the issues of breach of relationship between the appellant as banker and the 1<sup>st</sup> respondent as customer for purposes of this appeal as any comment may prejudice that suit which is pending in the High Court.
11. There are 11 grounds of appeal set out in the memorandum of appeal. Ground 1 faults the learned judge for holding that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were agents of the appellant. In ground 2 the appellant faults the learned judge for what the appellant says is departing from the laid down principles upon which a consent order can be interferred with by the court. In grounds 3 and 4 the learned judge is faulted for ordering the discharge of properties that the appellant says were not subject to the consent and failing to set out succinctly the terms of such satisfaction.
12. In the next ground, the appellant says that the learned judge erred in entertaining a claim for negligence without following laid down procedures in law and proof of a claim for negligence. In the next ground the learned judge is faulted for relying on a report on issues of negligence and vandalism despite the fact that the report had not been interrogated at a full hearing and in failing to find that the report could not be challenged through affidavit evidence. The learned judge is then faulted for holding that the assessors were an independent firm while they had been appointed by the 1<sup>st</sup> respondent and could not be independent. In the next ground it is said that the learned judge relied on *obiter* findings of Lady Justice Khaminwa and that that could not be the basis for interfering with a consent order. In the 9<sup>th</sup> and 10<sup>th</sup> grounds it is said that the learned judge failed to consider or analyse the replying affidavit and documents produced before him. In the last ground, the learned judge is faulted for issuing orders that could only be made upon a full hearing and adduction of oral evidence.



13. In oral submissions to highlight written submissions that had been filed, George Oraro SC who led Mr. Wetangula for the appellant submitted that the consent order recorded at the High Court and which we have reproduced in this judgment was designed to suit existing circumstances agreed by the parties.
14. Learned counsel attacked the learned judge for relying on an expert report to make substantive findings that interfered with the consent judgment that had been entered. Learned counsel also submitted that the judge was wrong to interfere with the consent judgment and make new terms for the parties and submitted further that consent judgment once entered could only be set aside by an application for review or by bringing afresh suit.
15. On other grounds of appeal, Mr. Oraro submitted that it was wrong for the learned judge to make orders that did not originate in the plaint and that the prayers made in the motion amounted to instituting a new suit which according to counsel could not be done as a suit is not instituted through such a motion.
16. On the status of 2<sup>nd</sup> and 3<sup>rd</sup> respondents counsel submitted that the receivers were agents of the appellant and 1<sup>st</sup> respondent as their appointment was reflected in the consent judgment.
17. Mr. Maina who appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents supported the appeal and informed us that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents left the 1<sup>st</sup> respondent's premises after the ruling appealed from.
18. Mr. A.B. Shah who led Mr. F.E. Wasuna for the 1<sup>st</sup> respondent submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were agents of the appellant because the appellant's still held security documents owned by the 1<sup>st</sup> respondent. He further cited the consent order which provided that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents would remain in possession and control of the assets of the 1<sup>st</sup> respondent until payment of the full sum claimed and agreed in the consent. Learned counsel submitted that the 1<sup>st</sup> respondent was denied access to its factory and thus as found by Lady Justice Khaminwa there was breach of the consent of judgment. Counsel further submitted that the consent judgment was conditional upon the 1<sup>st</sup> respondent gaining access to the premises to be able to sell the assets. Learned counsel further submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' were in possession of the 1<sup>st</sup> respondent assets in 2005 until they resigned in 2011 and that it was during their management that the 1<sup>st</sup> respondent lost its assets. In a brief response Mr. Oraro submitted that in respect of a consent order a court cannot decide what is the best interest of the parties.
19. We have considered the whole record, the grounds of appeal, rival submissions and the law and have taken the following view of this appeal.
20. In the ruling appealed from the learned judge quoted the case of *Brooke Bond Liebig (T) Limited v Maliya* [1975] EA 266 where the predecessor of this Court set out the circumstances in which a consent judgment may be interfered with by a court and followed the holding by Law, JA who quoted from *Hirani v Kassam* [1952] EACA 131 and approved the following passage from Section of Judgments and Orders, 7<sup>th</sup> Edition Vol. 1:

“*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 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 materials 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.”



21. In the said ruling the learned judge found as fact that the circumstances set out in *Brooke Bond (supra)* for setting aside a consent judgment did not exist at all in the matter before him. He said:

“There is no suggestion of fraud or collusion. All material facts were known to the parties, who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension.”

22. The learned judge then found, correctly, that a court could not interfere with a consent judgment except in circumstances that would afford good ground for varying or rescinding a contract between parties. The learned judge did not stop there. He went on to analyse a report by the company called Mclarens Young International, appointed by the 1<sup>st</sup> respondent to visit its premises and prepare a report, and found as per that report that the 1<sup>st</sup> respondents premises had been vandalized and assets stolen during the 2<sup>nd</sup> and 3<sup>rd</sup> respondents watch. This led the learned judge, who had found that circumstances that would lead to the setting aside of a consent judgment did not exist in the matter before him, to hold that:

“From the above analysis it is apparent that it is the defendants who had appointed the receivers. It is also obvious that it is the defendants who had appointed the security firm to take good care of the suit premises which contained the equipment and the machinery. It will be highly inequitable, unfair and unjust to allow a party like the defendants to benefit from their own wrongdoing. This court believes that the consent judgment was entered in good faith. It was premised on the fact the equipment and machinery were working and in good order. It was also premised on the fact that the plaintiff would go out of his way to find potential purchasers to buy the above to enable them pay the outstanding amount of money which they had to pay the defendants.

This court is satisfied that the report made by Mclarens Young International was done independently, fairly, impartially and professionally. The said firm did not have any interest in the suit premises. The conduct of the defendants to initially block the plaintiff from entering the premises was not done in good faith. It took the intervention of Hon. Lady Justice Khaminwa for an independent party to go and access the equipment and the machinery. Following the negligence and vandalism which was carried out on the said machinery and equipment this court has no option but to place the blame squarely on the defendants. Section 3A of the *Civil Procedure Act* requires that this court should invoke its inherent powers to make such orders as may be necessary. Lastly the new *Constitution* also requires that courts must dispense justice without any undue regard to technicalities. In view of the above analysis, I hereby concede to the application on the following terms ”

23. For those reasons the learned judge ordered that the consent judgment had been satisfied; that the 1<sup>st</sup> respondent was at liberty to take such action as it deemed fit to recover its losses and the appellant was ordered to release to the 1<sup>st</sup> respondent all the charges and debentures and to cede possession of the properties to the 1<sup>st</sup> respondent

24. We have set out the grounds of appeal taken by the appellant and the thread running through is a complaint that the learned judge erred in ignoring principles well established which must exist for a court to set aside a consent judgment. We have already referred to *Brooke Bond Liebig (supra)*. There is a plethora of case law on the point relating to the effect of circumstances that must exist for a consent judgment or order to be set aside. See, for instance, the oft-cited case of *Flora Wasike v Destimo Wamboko* [1988] KLR 429 where it was held that a consent judgment or order has contractual



effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out. This was the same finding in the earlier case of *Munyiri v Ndunguya* [1985] KLR 370 where it was further held that where a consent judgment or order had been made and a party thereto wished to challenge it, the remedy available to that party was to set aside the consent order either by an application for review or by the bringing of a fresh suit to challenge the consent judgment or order.

25. Learned counsel for the appellant submits that the learned judge overstepped his mandate by giving orders that were not in the pleadings and were only in the motion filed by the 1<sup>st</sup> respondent. We agree with this submission. The prayers in the motion were totally unrelated to the pleadings and the 1<sup>st</sup> respondent was not entitled to those orders at all.
26. The learned judge proceeded very well in analyzing the matter before him and finding, correctly, that circumstances to set aside a consent judgment did not exist in the matter before him. With due respect to him he then wrongly proceeded to examine and rely on a report by a company appointed by the 1<sup>st</sup> respondent and make definitive findings based on the same. That report was produced through affidavit evidence and was challenged in opposing affidavits. The report was not put to proper evidential examination to entitle the court to rely on it at all. By relying on the said report and granting prayers that could not be granted as framed as they were not in accord with the pleadings the learned judge fell into grave error and the ruling he delivered was wrong and unsupportable in law.
27. We do not wish to make findings on other matters raised in the memorandum of appeal such as who had appointed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as that is a live issue in the pending litigation at the High Court.
28. The upshot of our findings is that the appeal succeeds and is hereby allowed. The Notice of Motion dated 26<sup>th</sup> November, 2009 filed at the High Court is hereby dismissed. The appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents will have costs of the appeal and of that Motion.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2016.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

