IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, AZANGALALA & KANTAI, JJ.A.)

CIVIL APPLICATION NO. NAI 1 OF 2015

BETWEEN

SAMUEL MBUGUA IKUMBU ……..…….…. APPLICANT

AND

BARCLAYS BANK OF KENYA LIMITED ……. RESPONDENT

(Being an application under Rule 42 & 47 of the Court of Appeal Rules, Order 45 Rule 1 (b) of the Civil Procedure Rules for review of the Orders of the Court made on 28th April 2015 in the application for stay of execution dated 18th December 2014 (Mwera, Mwilu & S. Otieno-Odek, JJ.A.) of this Honourable Court

in

HCCC No. 147 of 2002)

****

RULING OF THE COURT

High Court Civil Case No. 147 of 2002 (Nakuru) between the applicant, **Samuel Mbugua Ikumbu** and the respondent, **Barclays Bank of Kenya Limited**, was dismissed by M.J. Anyara Emukule, J, in the Judgment delivered on 5th December, 2014 where the learned judge, after a hearing, found the same to have no merit. The applicant was dissatisfied with those findings and filed an appeal to this Court being **Civil Appeal No. 4 of 2015** which is pending for hearing. The applicant also filed an application in this Court under **Rule 5(2) (b)** of this **Courts rules** in **Civil Application No. NAI 1 of 2015 (UR.1/2015)** where he prayed, *inter alia*, that an injunction be issued restraining the respondent from selling or transferring a property known as

Nakuru Municipality/Block 5/133 pending hearing of the said appeal. That application came for hearing before a bench of this Court on 28th April, 2015 and both parties were represented by their respective advocates. The following order was recorded on that day:

"ORDER OF THE COURT

When the notice of motion dated 18th December, 2014 was called out for hearing in presence of learned counsel, Mr. Ilako and Mr. Mogere for the respective parties herein, we were informed that C.A. 4/15 has since been filed and served.

And on further discussion with the parties, it was agreed and therefore ordered by consent as follows:

(1) The applicant to pay Sh.7.5m to the respondent towards reduction of indebtedness in the next 21 days in which case we grant prayer 2 of the notice of motion.

(2) In default of (1) above, the notice of motion herein to automatically stand dismissed.

(3) With the above (1) being complied with, parties to expedite the hearing of C.A. 4/15.

(4) Today's costs to be paid by the applicant to the respondent.

Dated at Nairobi this 28th day of April, 2015

J.W. MWERA

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JUDGE OF APPEAL

P.M. MWILU

…….

JUDGE OF APPEAL

S. OTIENO-ODEK

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

(Signed and Sealed)

DEPUTY REGISTRAR"

Matters should have so ended pending hearing of the appeal but the applicant has now come to this Court on this application said to be premised under **Rules 42 and 47** of this **Court's rules** and **Order 45 Rule 1(b)** of the **Civil Procedure Rules** where it is prayed in the main that the said orders made on 28th April, 2015 be reviewed. The grounds in support of the Motion and the affidavit sworn by the applicant give a long history of the matter which we do not intend to reproduce here. Suffice to say that the applicant denies that it owes the original debt adjudged by the trial judge as owing and that the property intended to be sold is worth a colossal sum of money. It is also stated that justice demands that the property be preserved pending the hearing of the appeal and that there is a mistake apparent on the face of the record entitling the applicant to a review of the orders made on 28th August, 2015. The applicant states at

paragraph 69 and 70 of the affidavit in support of the Motion:

> ***"69. THAT I did not instruct the Advocate who attended Court on 28th April, 2015 to enter any consent nor was I in Court on that date to participate in the discussions leading consent.***
>
> ***70. THAT my advocate on record Mr. Koceyo has equally informed me that he never gave any instructions to counsel Mr. Ilako to enter any consent on this matter nor was he consulted in the said discussions."***

When the motion came up for hearing before us on 8th July, 2015, **Mr. Titus Koceyo,** learned counsel for the applicant, submitted that the consent recorded in court was not recorded with the consent of the applicant because, according to counsel, the lawyer who appeared in court, and who Mr. Koceyo informed us was employed by the law firm on record had no instructions to record the said consent. Learned counsel conceded that the said advocate was an employee of that law firm and that it was Mr. Koceyo himself who had sent him to attend court on the said date. According to counsel, mistake of an advocate should not be visited on the client and for these reasons we should review the orders earlier made by this court.

Mr. Guto Mogere, learned counsel for the respondent, in opposing the application reminded us that he was in court on the said date and that the consent order was freely recorded; that there was no mistake made in the matter at all; that the advocate who appeared in court had authority to record the consent; that no material had been placed before court to interfere with the earlier orders and that the application had been made outside the time allowed by this Court to pay the sum ordered to be paid by consent.

Mr. Koceyo, in a brief reply, while still urging for review, admitted that Mr. Ilako, the advocate who recorded the consent for the applicant, was still employed by his law firm and that no complaint had been lodged with any authority against the said advocate.

Prior to the Constitution of Kenya, 2010 this Court took a dim view of applications for review taking a position that being the apex court the principle of finality dictated that the courts decisions not be reopened but remain so as binding and precedent to lower courts – See for instance, **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others Civil Application No. 307 of 2008** where it was held that this Court was a creature of statute and had no jurisdiction to re-open or review its own decisions. That position was held to be in the interest of public policy to ensure that litigation came to an end because the Court of Appeal was the apex court.

This Court has after promulgation of the Constitution of Kenya 2010, relaxed its earlier position and reviewed its decisions by holding that it has residual jurisdiction to review and reopen its decisions – In **Benjoh Amalgamated Limited & Anor v Kenya Commercial Bank Limited [2014] eKLR** where this Court recognizing that it was no longer the apex court in the Republic after creation of the Supreme Court held on the issue of reviewing its earlier decisions:

> ***"57..Jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).***
>
> ….....
>
> ***"61. It is our finding that this Court not being the final court has residual jurisdiction to review***

its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice."

The Court not only limited the exercise of residual jurisdiction in matters that will promote public interest and enhance public confidence in the rule of law and the justice system, it also limited its power of review to decisions that have been made post-2010 by stating as follows;

"This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice. It will not entertain review of decisions made before the 2010 Constitution came into being."

It is therefore settled that this Court has jurisdiction to review its earlier decisions made after the promulgation of the Constitution of Kenya 2010 where circumstances permit and call for such review. To that extent, therefore, the Motion by the applicant for review of earlier orders is properly before us.

The applicant prays that we review the consent order entered and recorded in this Court on 28th April, 2015 for reasons stated in the Motion and the affidavit in support of the same particulars of which we have discussed in this Ruling.

It is not disputed that when the application for stay of execution pending appeal came up for hearing on the said date Mr. Ilako, counsel for the applicant instructed by the law firm of Koceyo and company advocates, on record for the respondent recorded the consent order which we have set out in this Ruling.

Mr. Koceyo, learned counsel for the applicant, who had instructed the said Mr. Ilako to attend court and urge the said application, now says that the said advocate had not been instructed by the applicant to record the consent that was reached and was adopted by the court as an order of the court.

What are the circumstances that would lead to a consent order or judgment which has been adopted as an order of the court to be varied or set aside?

The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.

Hancox JA (as he then was) in the case of **Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625**, said in his judgment at page 626 -

"It is now settled law that a consent judgement 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 Court in* ***J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983,***

This Court in the case of **Brooke Bond Liebig v. Mallya 1975 E.A. 266** held:-

"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."

In **Hirani v. Kassam (1952)**, **19EACA 131**, this Court with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, 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 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."

In a situation where the Advocate has no authority at all to enter a consent judgment, the consent judgment will be a nullity. See **Kafuma v. Kimbowa Contractors 1974 EA (U) 91.** This, however, cannot be construed to mean that the general authority given to an Advocate to act on behalf of his client in a matter allows for his conduct in all matters with an exception to entering consents. As adopted from common law, an Advocate who is duly instructed to act on behalf of his client has authority to act in every single thing that pertains to that matter even, enter consents on his or her behalf.

The extent of authority of a solicitor to compromise is set out in a passage in the **Supreme Court Practice 1979 (Vol.2) paragraph 2013 page 620** as follows:-

"Authority of Solicitor- a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen, [1903] 1 Ch pp 817,818; Little vs Spreadbury, [1910]2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice-see Welsh vs Roe [1918 - (9] All E.R Rep 620." (Emphasis by underline)

This Court has adopted this postulation of the Advocate's authority in the Supreme Court's Practice with approval as was quoted in the case of **Kenya Commercial Bank v. Specialized Engineering Company Ltd 1980 eKLR.**

Consequently, the variation of a consent judgment at the instance of counsel's conduct can only succeed due to the general factors that would vary an agreement. This Court adopted the judgment of **Harris J. R** in the case of **Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd (1982) KLR P. 485** and held that:

"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 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.

In the same case the Court further held that:

"An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding".

It has not been demonstrated that Mr. Ilako, the advocate employed by the law firm on record for the applicant had no authority to enter into the consent that was recorded. Instead Mr. Koceyo, advocate, who had sent Mr. Ilako to act for the applicant on that day readily admits not only that he sent the said advocate to deal with the matter but also that no complaint had been made against that advocate at all. The said law firm had authority to act for the applicant and had full mandate to compromise the application as it did. In any event, and as was properly submitted by learned counsel for the respondent, the applicant was required to pay the sum of Kshs.7,500,000/= within 21 days of 28th April, 2015. The application before us was filed on 21st May, 2015, way outside the period agreed by consent, and it is mischievous for the applicant to ask us to review a consent order when he has not complied with what was agreed either within the compromised period or at all. The application has no merit and we dismiss it with costs to the respondent.

Dated and Delivered at Nairobi 25th day of September, 2015.

M. K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

……..…

JUDGE OF APPEAL

S. ole KANTAI

……..……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR