REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, GITHINJI & VISRAM JJ.A.)

CIVIL APPEAL NO. 317 OF 2004

GATEWAY INSURANCE COMPANY LTD..... APPELLANT

VERSUS

ARIES AUTO SPRAYS.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Kisumu (Tanui, J.) dated 18th December, 2003

in
H.C.C.C. NO. 90 OF 2001)
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JUDGMENT OF GITHINJI J.A

This appeal raises an important point of law namely whether a court which has entred a consent judgment or made a consent order in which time for taking certain actions or steps had been stipulated has jurisdiction to extend time so stipulated on application by a party to the consent judgment or order.

The background to the appeal is as stated hereunder.

Sometime in 1998 Aries Auto Sprays the respondent herein filed a suit in the **Chief Magistrate Court Kisumu – CMCC No. 1273 of 199**8 against Michael Mugele (1st defendant) and Gateway Insurance (2nd defendant) claiming Shs. 198,750 being the amount due and owing in respect of services rendered and spares supplied for repair of motor vehicle registration no. KAD 226W Toyota Corolla *"owned by first defendant and insured by the second defendant"* at the defendants' request. The two defendants files respective defences denying the claim. Gateway specifically pleaded that the plaint did not disclose a cause of action against it. On 9th February 2007 the hearing date was fixed for 16th March 2001 by consent Mr. Yogo appearing for Gateway. However there was no appearance for both defendants on the hearing date and the suit proceeded *exparte*. The plaintiff testified, among other things, that, he repaired the vehicle under the instructions of Gateway and on 9th April 2001 the subordinate court entered judgment against defendants jointly and severally for Shs. 198,756 with costs.

A subsequent application by Gateway for setting aside the *exparte* judgment on the ground that the hearing date was taken by an advocate who had no instructions and that Gateway was not aware of the hearing date was dismissed by the subordinate court on 14th June 2001. Gateway subsequently filed Civil

Appeal no. 90 of 2001 against the Ruling and Order of 14th June 2001.

At the hearing of the appeal on 22nd May 2003, a consent order was recorded thus:-

ORDER – BY CONSENT

(1) this is compromised upon the following terms:- (sic)

(a) The judgment and decree in Kisumu CMCC No.1273 of 1998 shall stand vacated and to proceed for trial before a different magistrate

(b) The appellant to file and serve the respondent within 14 days, a certified copy of deposit slip for the sum deposited at HFCK Nairobi vide cheque No. 011425 of 25/10/2001. The deposit in that cheque to remain in the joint account of the parties until the disposal of Kisumu CMCC No. 1273 of 1992.

(c) In default of any one term of this consent the orders setting aside judgment shall stand vacated and the plaintiff shall be at liberty to enforce its judgment in Kisumu CMCC No. 1273 of 1998.

(d) There will be leave to apply."

Gateway having defaulted in filing and serving a certified copy of the deposit slip within 14 days as stipulated by the consent order filed an application on 10th June 2003 under *Section 3A* and *95* of *Civil Procedure Act* seeking enlargement of time to file and serve the certified copy of the deposit receipt.

The grounds in support of the application for enlargement of time were inter alia, that on 29th May 2003 M/s Mwaura & Mwaura Wahiga advocates for the applicant (Gateway) whose offices are in Nairobi, forwarded the document by Securicor courier to M/s Siganga & Co. Advocates of Kisumu to file and serve on their behalf; that due to oversight the document was not filed within the prescribed period; that the document was filed two days later on 9th June 2003, and that the respondent would not suffer any prejudice if the application was allowed. The letter dated 29th May 2003 from M/s Mwaura & Mwaura Waihiga advocates to B.A. Siganga & Co. Advocates of Kisumu enclosing a certified copy of the deposit certificate for service on M/s H. M. Wasilwa advocate was annexed to the application. A copy of fixed term deposit certificate dated 8th November 2001indicating that Shs. 318,234 was held on fixed deposit by HFCK in the names of Mwaura & Mwaura Waihiga Advocates and M/s H. M. Wasilwa & Co. Advocates was also annexed. Nancy Afandi, a secretary in the firm of Siganga & Co. Advocates filed a replying affidavit verifying, among other things, that, the letter from M/S Mwaura & Mwaura Wahiga Advocates was received on 30th May 2003, and that through inadvertence the document was placed in the file without service by the court clerk and that it is on 6th June 2003 that she discovered that the deposit slip had not been served.

On 18th December 2003 the superior court (Tanui J) dismissed the application stating:-

"The parties willingly entered into a consent relating to the compromise of the case. They agreed to set aside judgment and decree in Kisumu CMCC No. 1273 of 1998 and that the case was to proceed to trial. The conditions for that decision was the payment of throw away costs of Shs. 30,000/= and the filing and serving of certified copy of deposit slip for a sum deposited at HFCK Nairobi, by a cheque No. 011428 of 25th October 2001 meant to be held in the joint names of advocates for the parties. The parties also agreed that if there was a default of any of the two conditions the consent would stand vacated and the Plaintiff would be at liberty to enforce its judgment in Kisumu CMCC No. 1273 of 1998.

It is evident to me that the parties in entering into that consent did not leave any room for the court to exercise its discretion for enlargement of time".

For better appreciation of the issues of law raised by the appeal I reproduce the five grounds of appeal in

extenso:-

1. The learned judge erred in law and fact in finding that he did not have jurisdiction to extend time for filing and serving the deposit slip.

2. The learned judge erred in law and in fact in proceeding with the application for leave to extend time as though the same were a review application of consent orders.

3. The learned judge erred in law and in fact in not taking into consideration that the consent order had provided for leave to apply.

4. The learned judge erred in law and in fact in failing to exercise his unfettered discretion in the circumstances of the case to grant extension of time.

5. The learned judge erred in law and in fact in failing to give full effect to the consent order."

Mr. Nyaga learned counsel for the applicant contended, inter alia, that, court has power under **Order Rule (6) Civil Procedure Rules (CPR)** to extend time limited by an order of the court, that the consent order provided for leave to apply which means a party can apply for extension of time; that a consent order is an order of the court and court has power to extend time limited by it, and, lastly, that the application was for extension of time and not for setting aside the consent judgment.

Mr. Wasilwa the learned counsel for the respondent on his part submitted, among other things, that, court has no jurisdiction to extend time where there is a consent order; that leave to apply in a consent judgment does not confer new rights and that grounds for setting aside a consent judgment such as mistake, fraud, collusion have not been established. Neither counsel cited any relevant case relating to extension of time stipulated in a consent judgment or order. However my research has yielded the authorities referred to hereinafter.

The application for enlargement of time was made under **Section 95** and under **Section 3A** of **Civil Procedure Act (CPA)**. **Section 95** of CPA provides:-

"*Where any period is fixed or granted by the court for doing of any act prescribed or allowed by this Act, the court may in its discretion from time to time, enlarge such period even though the period originally fixed, or granted may have expired"*

By Section 59 of the Interpretation and General Provisions Act, where the court is given power by a written law to extend time prescribed by such written law for doing an act or taking a proceeding, the court has power to extend such time.

"although the application for extension is not made until after the expiration of the time prescribed."

Similarly, and this is apparent from **Section 95 of Civil Procedure Act,** the court has power to enlarge time granted by the court even though the application for extension of time is made after the expiration of time prescribed by the court.
Needless to say Section 3A saves the inherent power of the court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The court has also jurisdiction under **Order 50 rule 6, CPR** referred to by the applicant's counsel **(formerly order XLIX rule 5) CPR** to enlarge time limited by the rules or by order of the court even though the application for enlargement of time is made after the expiration of the time appointed or allowed.

There is no doubt that, generally speaking a court has jurisdictional and discretion either under the Rules or under the inherent jurisdiction to extend time. However the court has jurisdiction to extend time so long as it retains control over the case or proceedings and it cannot exercise the discretion if it has finally and conclusively determined the matter. Where the court has finally disposed of the matter it becomes *functus officio* and ceases to have jurisdiction to extend time.

In the Indian case of **Periasami Asari –Vs- Illuppur Penchayat Board AIR 1973 Mad 250** dealing, with a rule identical to **rule 6** of **Order 50** it was held:-

"The principle that when the effect of the order granting time (in the event of non-compliance) has to operate automatically the court has no power to extend time as it becomes functus officio, will apply when the suit is finally disposed of. If the order is not final and the court retains control over it and seized of the matter, it will have power to extend time".

Again in **Gogardhan –Vs- Barsati AIR 1972 ALL. 246**, an Indian case, also dealing with a rule identical to **rule 6** of **order 50** it was held:-

"Even in cases where an order is made by the court for doing a thing within a particular time and order further provides that the application, a suit or appeal shall stand dismissed, if the thing is not done within the time fixed, the court has jurisdiction, if sufficient cause is made out, to extend the time even when the application for extension of time is made after the expiry of the time fixed. It is not the application for grant of further time, whether made before or after the expiry of the time granted, which confers jurisdiction on the court".

The contention by Mr. Wasilwa that court has no jurisdiction to extend time stipulated in a consent judgment or order is not with respect, entirely correct. In my view a consent or compromise reached by parties is, when recorded and signed by the court merged or subsumed in the judgment or order of the court. It becomes a judgment or order of the court. In particular, the time stipulated in such a consent order or judgment becomes the time fixed or granted by the court and the court would generally have discretion to enlarge such time in furtherance of the ends of justice.

Moreover although a court has no jurisdiction to re-write a contract between parties or vary the terms of the consent judgment it nevertheless has jurisdiction as a court of justice to relief a party from the rigours of a penal or forfeiture clause even in a consent judgment or order.

My view is reinforced by a Ruling of Ringera J (as he then was) in **June Jebet Moi Vs Fuelex Oil Company Limited and two others – HCCC No. 305 of 2000 (Milimani Commercial Courts)**. In that case a consent order requiring the Plaintiff in that suit to supply particulars was recorded on 24th May 2001. The Plaintiff defaulted and later applied for extension of time within which to file the particulars under Rule 5 of Order XLIX (now Order 50 Rule 6) CPR. The application was opposed on the ground that a consent order could not be varied unless it is shown, among other things, that, it was obtained by misrepresentation, fraud or undue influence. Mr. Mungu the plaintiff's counsel in support of the application contended that the issue was not the setting aside of the consent order but rather the extension of time to comply with a consent order. He contended that the court had inherent power to extend time. The superior court (Ringera J) allowed the application saying:-

"In my opinion the court has power on plain wording of Order 49 rule 5 to extend such time. And even if such power were not conferred by the rule, it would be within the courts inherent power for purposes of securing the rights of justice to extend such time if reasonable cause were shown. I agree with the submission of Mr. Mungu that this is not a case of setting aside or varying a consent judgment. It is a case of extension of time to comply with a court order and the court has jurisdiction to extend such time".

That case is identical to the present case in so far as it relates to the extension of time within which to comply with a order made by consent. I would respectfully construe **Section 95** of **Civil Procedure Act** under which the present application is made in the same manner in respect of orders made by consent.

Mr. Nyaga also relies on the **"leave to apply"** clause as giving jurisdiction to court to extend time but according to Mr. Wasilwa the clause does not confer new rights. The clause is, in my view, synonymous with "liberty to apply" clause. The meaning to be given to such a clause will largely depend on the context in which it is used. However it was held in **Cristel –Vs- Cristel [1951]2 All E.R 574** that such a clause cannot be used to alter or vary the agreement of the parties and that the clause meant that when the order was drawn up, its working might involve matters which it might be necessary to obtain a decision of

the court.

Whether or not the superior court had jurisdiction *to* extend time in this case dependson the true construction of the consent orders considered as a whole. The consent orders required the appellant to serve and file a certified copy of the deposit slip for the money already deposited at HFCK vide cheque no. 011425 of 25th October 2001. The consent orders did not require the appellant to deposit any money. It merely ordered that the money deposited at HFCK over one -and -half (1½) years before be retained in the joint account until the suit in subordinate court was determined. The consent order referred to the fact that the money had already been deposited. It follows that the purpose of the requirement for filing and serving the certified copy of the deposit slip was for records only. It was a procedural requirement which did not materially affect the substance of the consent order. Thus the consequence of failing to file and serve the certified copy of deposit slip as stipulated in clause (c) of the consent orders could only have been penal.

Therefore the enlargement of time to relieve the appellant from rigorous of such penalty clause would not be considered as altering, varying or setting aside the compromise. On the contrary, such extension would not only give effect to the intention of the parties which was to have the suit retried but would also further the ends of justice. In the context of this case, *"leave to apply"* would in my view include leave to apply for extension of time for filing and serving a certified copy of the deposit slip.

In any case the consent order does not specifically state that the filing and serving of the certified copy of the deposit slip was a condition precedent to the setting aside of the judgment of the subordinate court. The finding of the superior court that the conditions for the consent order was the payment of throw away costs of Shs. 30,000 and the filing and serving of deposit slip is not supported by the terms of the consent order.

The consent order did not finally determine the dispute. Therefore time could be validly extended. On the true construction of the consent order the court after ordering a re-trial still retained the control of the consent order and the dispute.

On the merits of the application the appellant established that the short delay of two days according to the appellant, and 6 days according to respondent was an inadvertent omission by the advocates instructed by its lawyers to file and serve the deposit slip.

In the final analysis, I find that the superior court erred in declining jurisdiction and in dismissing the application.

On my part, I would allow the appeal with costs to the appellant, set aside the order of the superior court dated 15th December 2003 and substitute therefor an order allowing the appellant's application for enlargement of time dated 9th June 2003 and the certified copy of the deposit slip already filed as duly field in time. I would give the costs of the application to the respondent.

Dated and delivered at Nairobi this 14th day of October 2011

E. M. GITHINJI
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JUDGE OF APPEAL

JUDGMENT OF VISRAM, JA

This is an old case. It started in 1998 in the Chief Magistrate's Court, by way of a plaint filed by Aries Auto Spares, the respondent herein. In that plaint, the respondent sought to recover Kshs.198,750/=

together with interest in respect of services rendered and spares supplied to the appellant's insured, Michael Mugele. The appellant denied the claim.

On 9th April, 2001, in the absence of the appellant, the Chief Magistrate's Court (S. Wamwayi) proceeded to hear the case ex parte and entered judgment for the respondent for Kshs.198,750/= together with interest and costs. Subsequently, the appellant applied to have the ex parte judgment set aside but failed, and thereafter filed an appeal in the High Court against the refusal to set aside the judgment.

At the hearing of the appeal on 22nd May, 2003, the parties entered into a consent, recorded as follows:

"ORDER - BY CONSENT
1. This is compromised upon the following terms:-

(a) The judgment and decree in Kisumu CMCC no. 1273 of 1998 shall stand vacated and to proceed for trial before a different magistrate.

(b) The appellant to file and serve the respondent within 14 days, a certified copy of deposit slip for the sum deposited at HFCK Nairobi vide cheque no. 011425 of 25/10/2001. The deposit in that cheque to remain in the joint account of the parties until the disposal of Kisumu CMCC NO. 1273 of 1998.

(c) In default of any one term of this consent, the orders setting aside judgment shall stand vacated and the plaintiff shall be at liberty to enforce its judgment in Kisumu CMCC no. 1273 of 1998.

(d) There will be leave to apply."

Unable to comply with the 14 day time limit stipulated in paragraph 1 (b) of the Consent, the appellant filed an application in the High Court on 10th June, 2003 seeking extension of time beyond the 14 days stipulated in the Consent Order. The application was vigorously opposed by the respondent. In a ruling delivered by the High Court (Tanui, J) on 18th December, 2003, the court declined to extend time, delivering itself, in part, as follows:

"I have perused the record of this case and found that the appellant appears to have not been too diligent in prosecuting its case, but when considering the application before me that issue is really irrelevant. The parties willingly entered into a consent relating to the compromise of this case. They agreed to set aside judgment and decree in Kisumu CMCC No. 1273 of 1998 and that the case was to proceed to trial. The conditions for that decision was the payment of the thrown away costs of shs.30,000/= and the filing and serving of a certified copy of deposit slip for a sum deposited at HFCK Nairobi by cheque No. 011428 of 25th October 2001 meant to be held in the joint names of the advocates for the parties. The parties also agreed that if there was a default of any one of the two conditions the consent would stand vacated and the plaintiff would be at liberty to enforce its judgment in Kisumu CMCC No. 1273 of 1998.

It is evident to me that the parties in entering into that consent did not leave any room for the Court to exercise its discretion for enlargement of time. In those circumstances I would dismiss the application with costs."

It is against that ruling that the appellant has preferred this appeal, citing the following five grounds of appeal:

"1. The Learned Judge erred in law and in fact in finding that he did not have jurisdiction to extend time for filing and serving the deposit slip.

2. The Learned Judge erred in law and in fact in proceeding with the application for leave to extend time as though the same were a review application of the consent order.

3. The Learned Judge erred in law and in fact in not taking into consideration that the consent order had provided for leave to apply.

4. The Learned Judge erred in law and in fact in failing to exercise his unfettered discretion in the circumstances of the case to grant extension of time.

5. The Learned Judge erred in law and in act in failing to give full effect to the consent order."

In his submissions before this Court, Mr. P. M. Nyaga, learned counsel for the appellant, argued that the learned Judge erred in concluding that the court had no jurisdiction to entertain the application when in fact ***Order 6*** of the Civil Procedure Rules gave it the power to intervene; that the learned Judge erroneously concluded that the application before him was for "review" of order when in fact the consent order gave the parties "leave to apply"; and that the extension sought was for only two days.

In opposing the appeal, Mr. Wasilwa, learned counsel for the respondent, argued that the High Court had no power to interfere with the consent which essentially represents a "contract" between the parties; that "leave to apply" stipulated in the consent order does not create new rights, or give the court any discretion to interfere with the consent; and that the appellant had not demonstrated that the consent had been obtained through fraud or mistake. He relied on the cases of ***Mungai versus Ndaba (Court of Appeal, at Nairobi, Civil Appeal No. 20 of 1981) (Unreported)*** and ***John Ndungu Mbugua versus Muchoni Gikonyo, Court of Appeal at Nairobi, Civil Application No. (NAI) 279 of 1997***.

The issue is: what are the circumstances in which a consent judgment may be interfered with, and were these present before the superior court to entitle it to set aside (or alter) the consent filed by the parties?

The consent order was clearly entered into freely, and stated in unambiguous terms exactly what was to happen within the time limits stipulated therein, and provided for a default clause in the event of any breach. There is no dispute about that. The parties were represented by their respective two advocates. The extent of the authority of an advocate to compromise suits on behalf of clients is set out in a passage in **The Supreme Court Practice 1976** (vol. 2) paragraph 2013 at 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".

Mulla – The Code of Civil Procedure, Vol. 1 page 53, states:-

"Counsel and advocate have an implied authority to compromise in all matters connected with actions and not merely collateral to it."

In the case of ***Brooke Bond Leibig (T) Limited vs. Mallya [1975] E.A.* 266**, Law, J.A. said as follows:-

"The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs. Kassam [1952], 19 EACA 131, where the following passage from Seton on Judgments and Orders, 7th Edition, Vol. 1 page 124 was approved:

'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'."

There is nothing in this case to show that such circumstances existed. There is no claim of fraud or

collusion. The consent was entered into freely, and it is unambiguous. There is nothing to show that there could have been a mistake or misapprehension. As Windham, J. said, in the introduction to the passage quoted above from ***Hirani's*** **case**, *"a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties"*.

In his judgment in the case of ***Flora Wasike vs. Destimo Wamboko*** ***[1988] 1 KAR 625***, Hancox, J.A. (as he then was) said at page 629 –

"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".

These are the principles that the High Court applied in determining whether the consent judgment should have been interfered with. I agree with the learned Judge that there were no such circumstances – there was no suggestion of fraud, misrepresentation, or collusion, and no possibility of mistake. No specific statute or provision of law was cited to show that the consent judgment was contrary to such law, or public policy. The High Court had absolutely no jurisdiction to alter the terms of the contract between the parties, and correctly rejected the appeal before it.

Finally, with regard to the appellant's argument that the consent order provided for "leave to apply", thus giving the court jurisdiction to extend time, in my humble view that provision is inapplicable in this case as the application for extension of time was made well beyond the 14 day time limit stipulated in paragraph 1 (b) of the consent. The consent order was made on 22nd May, 2003, limiting the time for the doing of any act to 14 days from that day. The appellant herein lost its right to apply to court for extension on 5th June, 2003. By that date, the default clause 1 (c) of the consent order had become operational, and the orders stood vacated, giving the respondent the liberty to enforce its judgment.

Accordingly, and for reasons cited, I disallow this appeal with costs to the respondent.

Dated and delivered at Nairobi this 14th day of October, 2011.

ALNASHIR VISRAM
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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGMENT OF OMOLO, JA

I read in draft form the judgment prepared by Visram, JA. I agree with him fully and I have nothing useful to add. Accordingly, the appeal shall be dismissed with costs to the respondent as proposed by Visram, JA.

Dated and delivered at Nairobi this 14th day of October, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR