IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL NO. 304 OF 2006

BENSON MBUCHU GICHUKI ……..……....….. APPELLANT

AND

1. **EVANS KAMENDE MUNJUA**
2. **JAMES MBUTI KUNGU**
3. **TERESIA T. MBUTI……………………….... RESPONDENT**

(Appeal from a judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J) dated 10th March, 2004

in

H.C.C. Suit No. 16 of 1998)

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JUDGMENT OF THE COURT

The history of the case resulting in this appeal is long but, in our view, the facts are straightforward. The appellant, **Benson Mbuchu Gichuki**, is by profession, an "arbitrator". The first respondent, **Evans Kamende Munjua** and the second respondent **James Mbuti Kungu**, were, in the year 1993, partners trading in the name and style of Uplands Agencies. They were, among others, involved in transportation business. Sometimes during the year 1993 or thereabouts, the respondents, under their firm name of Uplands Agencies, entered into a contract with an organization known as Norwegians Peoples Aid which was at that time supplying food and other relief cargo to Sudan, Zaire and other places. The third respondent is the wife of the second respondent and came into the scene much later as will be seen later in this judgment.

The first two respondents had a dispute with Norwegian Peoples Aid (NPA) over their contract as the respondents claimed a breach of contract entered into between the two of them. That contract had an arbitration clause, but the respondents, notwithstanding that, first filed a suit against NPA in the superior court at Kakamega – H.C.C.C No. 178 of 1996. It would appear that after filing that suit better counsel prevailed and the respondents, through their then advocates, Mugo & Co., sought to enforce arbitration clause. In a letter reference NO. NM/VA/858/96 dated 21st June 1996, addressed to the appellant by Mugo & Co. Advocates, the first two respondents under the firm name of Uplands Agencies applied to the appellant to act as their arbitrator in the dispute which was between the first two respondents and Norwegian Peoples Aid. The arbitration clause provided for such a dispute to be referred to two arbitrators, each party to the dispute appointing an arbitrator. The appellant, on receiving the request

from the respondents, wrote back to Mugo & Co. advocates on the same day setting out his conditions for acting as an arbitrator in the dispute. In response to that letter, Mr. Mugo, in a letter dated 1st July 1996, wrote back to the appellant confirming that his clients had agreed to all the conditions set out by the appellant for acting as an arbitrator in the matter. Thereafter, in a letter dated 1st July 1996, the appellant formally accepted to act as an arbitrator in the dispute. But there was the question of the other arbitrator to be appointed by the Norwegian Peoples Aid to be solved. The appellant wrote to M/S Okuom & Co. Advocates, then on record for the Norwegian Peoples Aid to act quickly and appoint an arbitrator. After some exchanges of correspondence, no second arbitrator was appointed due to delay by NPA to appoint one and so, the appellant proceeded as the sole arbitrator in the matter. He received some money for his work before he completed arbitration. At the end of his work as sole arbitrator, the appellant awarded the first two respondents a sum of Ksh.16,365,115/= which attracted interest of Ksh.4,895,517/= plus legal fees and disbursements. The appellant's fee was Ksh.4,184,761/= which was to be paid before he could release the award.

In July 1997 before the award was released, the respondents had issued to the appellant a cheque which the respondents said was not dated but which had a date 3rd July 1997 for Ksh.3,639,761/= being fee for the appellant's services. That cheque, on presentation was returned unpaid and a replacement cheque was issued on a date which again is disputed but which read 6th October 1997. That cheque was also returned unpaid. The first cheque was issued by the second respondent and his wife the third respondent. Apparently, the award was released on receipt of the first cheque but before it was dishonoured.

The respondents on receipt of the award, filed Miscellaneous Application No. 755 of 1997 to enable them enforce the award. The total amount they demanded at that time, together with the appellant's fee, was Ksh.26,031,178/= which was the total final award. That application was filed on 6th August 1997. The respondent in that case, Norwegian Peoples Aid, appointed Hamilton Harrison & Mathews to act for them. They filed chamber summons on 19th September 1997 seeking that the award be set aside on grounds that the arbitrator had gone beyond the scope of his powers; that the composition of the tribunal was not in accordance with the agreement of the parties; that the award was in conflict with the public policy as the arbitrator (read the appellant) had seriously misconducted himself in circumstances likely to compromise his impartiality by accepting before hearing, payments from the claimants which were not matched by payments from the respondent and which did not arise out of any obligation in the agreement of the parties and by awarding himself fees of Ksh.4,184,761 which was well above the proper fee. The first two respondents conceded the chamber summons and the two parties in the dispute apparently discarded the award and proceeded to record an agreement dated 27th October 1997. That agreement was in the following terms:

"1. In condition of the agreement by NPA to pay Shs.13,600,000/=, Uplands Agencies will mark as settled with no order for costs Nairobi Miscellaneous Application Number 755 of 1997 and Kakamega High Court Civil Case Number 178 of 1996.

2. Uplands Agencies further acknowledges that it has no further or other claims against NPA howsoever arising and of whatever nature soever.

3. Payment of the said sum will be made by NPA within two weeks of the receipt of evidence of the settlement of the two cases as aforesaid.

4. Uplands Agencies agrees to pay its own costs and the fee of the arbitration and indemnifies NPA against any claim in respect thereof.

5. NPA agencies to release to Uplands Agencies the vehicle and car log books, to release Peugeot 405 registration number EE 228HR and to release the logbook of KAC 650B."

The agreement was recorded in the court file and matters marked as settled on 3rd November 1997.

On noting that the parties in dispute had settled their dispute and cheques issued to him for payment of his fees were not paid on presentation, the appellant moved to the superior court by way of a plaint dated 7th January 1998. That was Civil Case No. 16 of 1998. In that case, the appellant sued Evans Kamende, James Mbuti Kungu, the first two respondents and Teresa T. Mbuti. Paragraphs 4 and 5 of their plaint read:

"4. The plaintiff's claim against the defendants is for Sh.3,639,761 (three million six hundred thirty nine thousands seven hundred sixty one) being payment for services rendered by the plaintiff to the defendants.

5. The defendants purporting to pay the said sum issued through the 2nd and 3rd defendants a cheque dated 3-7-97 for the said Kshs.3,639,761 which on presentation was dishonoured and replaced by a further cheque dated 6.10.97 issued by the 1st and second defendants for the said Kshs.3,639,761 which also on presentation was dishonoured."

The respondents filed a defence to that claim, though it would appear that that statement of defence was not served upon the appellant within the required time but memorandum of appearance was however filed on 12th January 1998. On 20th January 1998, the appellant filed a notice of motion seeking orders as follows:

"1. That summary judgment be entered against the defendants for Kshs.3,639,761 & interest as prayed for in the plaint.

2. Costs of the application be provided for.

3. Any other order the court may deem fit to grant."

That application was supported by an affidavit sworn by the appellant in which he stated at paragraphs 7 and 8 thereof that the total fee he claimed was Ksh.4,184,761/= but that the respondents had paid part of that fee and the amount he was claiming in the plaint and for which he sought summary judgment i.e. Ksh.3,639,761/= was the balance outstanding. That application was opposed by the respondents who also filed a notice of preliminary objection stating that the application was bad in law, was premature and misconceived. There were also replying affidavits filed by the respondents in opposition to the application. That application was heard by the superior court (Osiemo, J) and was in a ruling dated and delivered on 26th November, 1998, dismissed. The appellant was not amused. In an application dated 24th December 1998, he applied for review of the order of 26th November 1998 on grounds that there was an error on the face of the record in that the learned Judge had referred in his ruling to a statement of defence which the appellant was not aware of as he had not been served with any statement of defence in the matter at the time he filed an application for summary judgment. That application was also opposed. After some confusion as to which judge was to hear the application, the then Honourable Chief Justice ordered the application for review to be placed before Osiemo J. as the order sought to be reviewed was his order. After hearing the application for review, Osiemo J. in his ruling dated and delivered on 29th March 1999 allowed the application, reviewed his ruling dated 26th November 1998, set it aside and reinstated the appellant's application for summary judgment. That is the application that was heard by Ang'awa J. After hearing it, she delivered a ruling dated 30th June 1999 in which she dismissed it stating, *inter alia*, as follows:

"It is to this that the Respondent state (sic) there are triable issues. Even if the defendant were liable (sic), the third defendant is not a party to the arbitration proceedings and that alone is a triable issue.

I believe that in order for summary judgment to be entered it must be in the very clearest way and without any doubt.

I have noted the authority filed by the respondent. I have also noted the argument put forward

by the plaintiff/applicant that this court should not question the fee payable but enter summary judgment. I do not think this is the correct position. Parties came to court to be heard.

I find that there are triable issues. I hereby dismiss the application dated the 20th of January, 1998 for summary judgment with costs to the respondent/defendant."

Immediately after that application for summary judgment was dismissed, parties were given time perhaps to reconsider the matter further. The record shows that on the same day the parties returned to court and the record shows that the respondents' advocates told the court that they had a consent. The court recorded that consent judgment which was originally handwritten and signed by the parties. It read as follows:

"1. By consent, the claim against the third defendant Teresa T. Mbuti is withdrawn with no order as to costs.

2. The plaintiff's claim against the 1st and 2nd defendants is compromised at the sum of Ksh.700,000/=. The plaintiff to have judgment accordingly with no order as to costs.

3. The decretal sum of Ksh.700,000 to be paid in two equal installments as follows:

(a) Ksh.350,000 on or before 15.8.99.

(b) Ksh.350,000 on or before 30.9.99.

(c) In default of payment of any one installment on

its due date the whole amount then outstanding become due and payable forthwith and the plaintiff be at liberty to execute the decree against the defendants (sic).

Signed:

Evanson Kamende Munjua (1st Defendant)

James Mbuti Kungu (2nd Defendant)

Benson Mbuchu Gichuki (--- The Plaintiff)

S.W. Machiu (sic) Advocate for Defendants

M.A. ANG'AWA

JUDGE

Application granted and order accordingly.

M.A. ANG'AWA

JUDGE."

As we have stated above, the consent order was made on 30th June 1999, the same date the application for summary judgment was dismissed. There is evidence on record that part of the amount awarded in the consent order was paid to the appellant by the respondents but the record shows that it became difficult for the appellant to execute for the entire decretal amount as the respondents and other third parties made several attempts to frustrate the appellant's efforts to execute the decree. On 31st July 2000, the appellant and an advocate appearing for the respondents appeared before Sheik Amin J. and it was agreed that half

the decretal amount had been paid. Again on 24th January 2000, the parties appeared before Aluoch J. (as she then was) and the appellant stated:

"Mbuchu:

I have accepted the cheque of Ksh.100,000/= there is a balance of Ksh.250,000/=."

We mention the above to demonstrate that the record shows that part of the consent order had been honoured either through execution of the decree or by direct payment to the appellant of the proceeds of the consent judgment. There is, however, ample evidence to show that attempts by the appellant to execute for the entire amount was frustrated in one way or the other.

On 24th December 2003, about four years after the consent judgment was entered by Ang'awa J., the appellant was back in the superior court by way of a notice of motion dated 10th December 2003 and filed into the court on that date, 24th December 2003. We reproduce herebelow the salient parts of that notice of motion.

"TAKE NOTICE that this honourable court shall be moved on the 29th day of January 2004 at 9.00 a.m. in the forenoon or soon thereafter as parties may be heard on an application on part of the plaintiff for orders:

(a) That this court's consent decree made on 30.6.1999 vitiating the plaintiff's application dated 20.1.98 be reviewed.

(b) That the costs of this application be provided for.

Which application is on the following grounds namely:

1. The applicant has discovered that all fraudulently obtained decrees/judgments can be reviewed or appealed against without leave or out of time application (sic).

2. The above consent decree was obtained through undue influence, inequality of bargaining power, economic duress and coercion of the will (sic) against the plaintiff, which vitiates consent.

3. The defendants having issued dishonoured cheques and having failed to raise any substantive reasonable defence are unfairly benefiting from the applicant's rightful money amounting to Ksh.3,639,761/=.

4. The justice of the case requires that this fraudulently obtained decree through collusion of the defendants and the court be struck out/dismissed or reviewed for having been baked to defeat justice by denying the plaintiff his rightful money amounting to Ksh.3,639,761/=.

5. The defendants having received the arbitrator's money from NPA on 25.1.97 are unfairly trading with the arbitrator's money.

6. An order should be made to rehear the whole of the plaintiff's application afresh.

7. There are sufficient reasons for this Court to review this fraudulently obtained decree."

We note that there is a similar notice of motion dated 29th January 2004 and filed on 30th January 2004 in the record, but a careful reading of that notice of motion shows that it could not have been a genuine notice of motion that was heard by Ang'awa J. and which is the subject of this appeal. First, that notice of motion has notes after the grounds for the application that can only show it was not a proper court document. Secondly, and in any event, the ruling of Ang'awa J. clearly shows that the notice of motion argued before her was the one we have substantially reproduced above. That notice of motion, as we

have stated, was heard by Ang'awa J. In a considered lengthy ruling dated 10th March 2004, the learned Judge dismissed the application stating, in part, as follows:

"By executing the decretal sum before coming for review, the plaintiff/applicant has removed his rights to a review. There is nothing to review. To my mind the consent recorded in my present (sic) was so done without an undue influence.

The delay in bringing the application is inordinate. The issue of the summary judgment is finalized. It was an application that was dismissed and period for any appeal has expired. The applicant would have proceeded to hearing of his suit but instead opted out for a consent judgment."

The learned Judge then digressed onto other issues and later returned to the application and stated further:

"I hereby find that the application to set aside and review the court's consent judgment has no merits. No hearing of the application for summary judgment can be reheard as it is spent. No trial can be conducted as the suit had been finalised through the consent order and execution done.

The application itself has no merit and is defective. I nonetheless heard the parties on their merits.

The application dated 10th December 2003 and filed on 24.12.2003 be and is hereby dismissed with costs to the defendants."

The appellant felt aggrieved by that decision and hence this appeal premised on sixty grounds, a summary of which is that the learned Judge erred in considering irrelevant matters and in dismissing the application for review of her consent decree obtained through fraudulent means and through undue influence, coercion and collusion between the respondents and the learned Judge. Before us, Mr. Gichuki appeared in person and canvassed his appeal at length. He submitted that the consent decree of 30th June 1999 was obtained by fraud or collusion between the court and the respondents as the respondents misled the court and the court acted on that misleading information; that the consent was contrary to court policy (whatever that means) and that the consent was entered into without sufficient material or facts or was entered into as a result of misapprehension or ignorance. He contended that the order made by consent was a nullity as there was no defence on the record as the defence that was filed in the case was struck out by Osiemo J. on 29th March 1999 and has not been reinstated. He thus asked us to allow the appeal, set aside the decision of Ang'awa J. which refused review and thus in effect review the consent judgment entered on 30th June 1999 and revert to summary judgment application of 7th January 1998. It is not clear what he, in fact wants, but if consent judgment is reviewed as he wants, that would leave the position as at the ruling of Angawa J. of the same date which rejected summary judgment and so the issue could proceed to hearing, and if as he contends, there is no defence on record, then he would apply for judgment to be entered under **Order 9A rule 3 (1)** of the Civil Procedure Rules. Be that as it may, Mr. Kyonzo, the learned counsel for the respondents, opposed the appeal submitting that Ang'awa J. merely endorsed a handwritten consent signed by the appellant and the first two respondents. There was, in his view, no coercion, no fraud, no undue influence as the appellant and the respondents agreed between themselves and wrote down in their own hand what they had consented to. That is what the learned Judge endorsed and made a judgment of the court. He asked us to dismiss the appeal as there is no merit in the appeal.

We have anxiously considered the appeal. It is a first appeal and that enjoins us to reconsider all the facts afresh, analyse the same, evaluate them and come to our own independent conclusion, bearing in mind that the trial court had the advantage of seeing the parties, particularly in this case where the consent judgment being challenged was entered into before the learned Judge through a handwritten and signed document, and giving allowance for that – see the case of **Selle vs. Associated Motor Boat Co. Ltd & others (1968) EA 123**. Secondly, the learned Judge of the superior court, in deciding the review application, though guided by certain legal principles, was exercising a discretionary power particularly

when deciding whether any other sufficient reason existed for reviewing her ruling. And that being so, we are, by law, required to consider very carefully the entire case before we interfere with the exercise of her discretionary powers. We are, however, in law, entitled to interfere if we are satisfied that the learned Judge considered matters that she ought not to have considered or if she failed to consider matters she was bound to consider or if in the circumstances of the matter before her we are satisfied that she was plainly wrong in her decision – see the case of **Mbogo & another vs. Shah (1968) EA 93**.

Before we proceed to consider other more important aspects of this appeal, we need to consider the submission by the appellant that there is no defence to the plaint he filed in this matter as, in his view, the defence that was filed was struck out by Osiemo J. He referred us to pages 308 and 309 of the record in support of that contention on that matter of fact. We have on our own perused the record. With respect, we do not agree that Osiemo J. did strike out the defence that was filed in this case. Part of the ruling delivered by Osiemo J. on 29th March 1999, which we think is relevant to that submission, states:

"On perusal of the file, it is evident that there is a defence filed therein which is stamped 27.1.98. But according to the applicant, the same was sneaked into the file and therefore at the time when he was arguing his application he did not know of the (sic) its existence. That the defence was sneaked into the court file is a serious allegation which touches on administration of justice in the court registry and should be investigated. The counsel for the defendant did not appear to rebut this serious allegation. On that ground that at the time this application was being argued there was no defence on the record and on this ground alone, I allow this application."

The learned Judge decried the possibility that the defence was allegedly sneaked into the file such that when the application for summary judgment was being argued, the appellant was not aware of its existence in the file and called for the investigations of that allegation but that was all. He allowed the application on that score but certainly did not strike out the defence and probably could not strike it out before the results of the investigations he called for were known.

We now go back to the appeal. The notice of motion that was before Ang'awa J. was brought pursuant to **sections 80 and 3A** of the Civil Procedure Act, **Order 44 rule 1** of the Civil Procedure Rules and **section 47** of the Evidence Act Chapter 80 Laws of Kenya. **Order 44 rule 1** of the Civil Procedure Rules states:

"1 (1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when 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, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

Thus, the appellant was required to demonstrate to the superior court either that he had discovered a new and important matter which after exercise of due diligence was not within his knowledge or which he could not produce, when he, together with the respondents, drafted and signed a handwritten consent that they handed over to the learned Judge for endorsement and to be made a judgment of the court or that there was a mistake or error on the face of the record i.e. that there was a mistake or error in the consent judgment that they drafted and handed over to the learned Judge or that the learned Judge made a mistake or an error in reducing the same consent judgment they drafted when the learned Judge endorsed it and made it a judgment of the court or show any other sufficient reason why the consent judgment needed to be reviewed. This is the law as spelt out in the provisions of the rule above and the requirements, one of which if demonstrated to the satisfaction of the court, would be enough to secure a review. They apply in general to all cases where an applicant is seeking a review of the decree or order. However, in cases where an applicant seeks a review and setting aside of a judgment or ruling that was recorded pursuant to

a consent by the parties, the law requires something more. This is because the law treats a consent of parties as a contract between those parties and that being so, the law requires that reviewing and setting aside such an order or a decree is the same as setting aside a contract and so the rules that are applicable in law for setting aside a contract are the same as the ones applicable in setting aside a consent judgment like in this case. In the well known case of **Flora N. Wasike vs. Destimo Wamboko (1982 – 88) I KAR 625**, this Court stated as follows:

"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 – see the decision of this Court in J.M. Mwakio vs. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983. In Purcell vs. FC Trigal Ltd (1970) 3 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.""

In this case, we have reproduced above the grounds upon which the appellant is seeking review. His first ground is that he had discovered that all fraudulently obtained decrees or judgments can be reviewed without leave or out of time. That is clearly not a ground that would move any court to review a judgment let alone a consent judgment. It is no more than seeking to rely on ignorance of the law. That is no defence. In any case, he never adduced any evidence to show that the subject judgment was obtained by fraud. His second allegation that the consent decree was obtained through undue influence, inequality of bargaining power, economic duress and coercion against him cannot be made a basis of a review of any judgment let alone a consent judgment unless the same allegations are borne out by cogent and acceptable evidence. That cogent and acceptable evidence was, in our view, not only lacking in the notice of motion before the learned Judge, but it does appear to us that apart from making the allegations as were made before us during the hearing of the appeal, no attempt was made to buttress those allegations with evidence at all. In law, allegations, however serious they may sound, cannot suffice without evidence in support of them. The other allegation to the effect that the respondents were unlawfully enriching themselves from the proceeds that rightly belonged to the appellant, namely Ksh.3,639,761/= ignores two aspects; first that the consent judgment that reduced that amount to Ksh.700,000/= was entered by the appellant on his own volition despite the fact that notwithstanding that his application for summary judgment had been refused, he could still proceed and have his case heard before the superior court. Secondly, it ignored the fact that part of that money had been received by the appellant. In our view, the allegation that the consent judgment was obtained by fraud, coercion, economic duress, undue influence and inequality of bargaining powers cannot, in law, be proper grounds for reviewing the consent judgment that was written out in hand by the appellant and the first two respondents and handed over to the learned Judge who rightly endorsed it. In endorsing it, the learned Judge was not in collusion with the respondents.

Further, the learned Judge of the superior court was being asked to review the consent judgment over four years after the same judgment had been recorded. **Order 44 rule 1** is clear that an application for review should be made to the court which passed the decreed or made the order without unreasonable delay. In our view, four years delay which was not explained was an unreasonable delay. The appellant never told the superior court as to when he discovered that the judgment was obtained by fraud, or coercion, or undue influence, inequality of bargaining power or economic duress. The delay relates to when such a discovery is made and how long it takes to move to court after the discovery of the mistake, or such like other matters mentioned hereinabove. In this case, no attempt was made to explain the delay.

Lastly, it is not in dispute that by the time the application was made for review, part of the decretal amount had been received by the appellant. The appellant had attached some properties in execution of the consent judgment. We think that is what the learned Judge meant when she stated in her ruling that the summary judgment application could no longer be heard as the suit had been finalised through the consent order and execution done. In short, the appellant was seeking to have reviewed and set aside, a

judgment from which he had benefited. If, for example, it was set aside, he would be called upon to refund part of the consent decree already paid to him so as to enable the application for summary judgment to proceed. That would create unnecessary confusion in the entire case.

In conclusion, we have, on our own, considered afresh the entire matter that was before the superior court. We have also considered the law and the submissions by the appellant and Mr. Kyonzo. We find nothing that would persuade us to interfere with the decision of the learned Judge of the superior court and, we, like the superior court, are not satisfied that there was any merit in the notice of motion dated 10th December, 2003 and filed on 24th December 2003. That being our view of the matter, this appeal cannot succeed. It is dismissed. However, as we have stated above, we are of the view that the first two respondents made efforts to frustrate the appellant in the execution of the consent judgment. In the circumstances, we will not order any costs in their favour. We order that each party shall bear its own costs. The appellant is at liberty to execute for whatever is the balance of the decretal amount arising from the consent judgment. Judgment accordingly.

Dated and delivered at Nairobi this 21st day of November, 2008.

R.S.C OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR