REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

Civil Appeal 253 of 2002

TROPICAL FOOD PRODUCTS INTERNATIONAL LIMITED.....APPELLANT

AND

THE EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK

(THE PTA BANK) ....RESPONDENT

(An appeal from the ruling of the High Court of Kenya

Nairobi (Mwera, J.) dated 6th February, 2002

in

H.C.C.C. NO. 1534 OF 2001)

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JUDGMENT OF THE COURT

M/S. Tropical Food Products International Limited (hereinafter "TFPI") comes before us to challenge an order issued by the superior court (Mwera J.) allowing an application for review of an earlier order recorded by the same court with the consent of the advocates representing the parties. As far as we can gather from the record, the brief facts leading to the appeal are as follows:

TFPI was, for a fairly long period of time, engaged in the business of exportation of fish from Lake Victoria. In 1998, they decided to expand the business and they approached the *Eastern and Southern African Trade and Development Bank*, a body corporate established by Charter pursuant to the Treaty for the establishment of the Preferential Trade Area for Eastern and Southern African States, more commonly referred to as "PTA Bank" (hereinafter "the Bank"). In a "Facility Agreement" signed between TFPI and the Bank on 8th December, 1998, the Bank agreed to lend and TFPI agreed to borrow some USD 250,000 subject to the terms and conditions contained in that agreement. Within a year, however, TFPI started

raising complaints about implementation of the Facility Agreement. The Bank on the other hand complained about non-compliance with repayment arrangements under the agreement and threatened sale of the collateral securing the facility. Matters came to a head on 5th October, 2001 when TFPI, through ***M/S. Nyaencha Waichari & Co. Advocates***, filed suit before the superior court claiming general and special damages against the Bank for breach of contract. They also sought a perpetual injunction to stop the Bank from enforcing the facility agreement and a mandatory injunction to discharge the securities given for the facility. Contemporaneously with the filing of the suit, TFPI took out a chamber summons for a temporary injunction and for an order compelling the Bank to discharge and release the securities. The application was certified urgent and set down for *inter partes* hearing on 12th October, 2001. It was then served, together with the plaint, on the Bank and the Bank in turn instructed ***M/S. Salim Dhanji & Co. Advocates*** to act for them. As there was no summons to enter appearance served, the Bank's advocates filed a "Notice of appointment" on 11th October, 2001 and attended Court the following day to seek an adjournment of the matter. An order was made that the Bank was at liberty to file a replying affidavit before the hearing of the application on 1st November, 2001. The date of the first appearance in court by the parties has turned out to be crucial in this appeal, and we therefore reproduce the full text of what transpired on that day:

"*1.11.2001*

Coram: Mwera J.

Muhia – Court clerk

Nyaencha for applicant/plaintiff.

Miss. Muriu for respondent/defendant.

Application dated 4.10.2001.

Nyaencha: We have a consent.

Court: By consent this matter is to go to a single arbitrator agreed on by the parties' advocates in 30 days from today.

Mention on 30.11.2001 to record the name of the agreed arbitrator. In default of the foregoing this court be pleased to appoint an arbitrator. The award of the arbitrator shall be filed within 6 months from date of appointment or by such other time as the parties shall determine. In the meantime status quo to be maintained on the matter. Costs to abide the outcome of arbitration.

J. MWERA

JUDGE

1.11.2001"

Mwera J. was not present on 30th November, 2001 and the matter was stood over to 10th December, 2001. It is on that day when counsel for the Bank informed the Court that there was an error in the consent recorded earlier. Indeed an application had been filed on 7th December, 2001 under ***section 3A*** and ***80*** of the ***Civil Procedure Act*** and ***Order XLIV rules 1*** and ***2*** of the ***Civil Procedure Rules*** for the following order:

"*1. THAT the part of the Order of the Honourable Justice Mwera made by consent on 1st November, 2001 requiring that the court appoints an Arbitrator in default of agreement by the parties be reviewed, varied and/or set aside."*

So that, it was not the entire consent order that was sought to be reviewed, but the portion relating to the appointment of the Arbitrator. The legal counsel employed by the Bank, Ms. Sylvia Kitonga, explained in the relevant part of her affidavit why the review was necessary. In her own words: -

"*7. THAT subsequently, and on perusing the documents forwarded to them, our advocates formed the view that they ought not to respond to the injunction application since the agreement forming the basis of the suit contained an Arbitration Clause.*

Annexed hereto and marked "SK1"' is a true copy of the Agreement which at Clause XIV contains an Arbitration Clause.

8. THAT I am informed by Mr. Njoroge Regeru Advocate, which information I verily believe to be true that, when he mentioned the matter of the Arbitration Clause to the Plaintiff's Advocate, one Mr. Kennedy Nyaencha, the said advocate for the Plaintiff agreed that indeed there was a valid Arbitration Clause and it was therefore not necessary for the Defendants Advocates to file a formal application for stay of proceedings under section 6 of the Arbitration Act.

9. THAT in those circumstances, I am aware that it was agreed between the two firms of Advocates and with the consent of the Defendant Bank, that the matter could be referred to arbitration by Consent. The consent orders were then recorded on 1st November, 2001 before the Honourable Justice Mwera.

10. THAT I am informed by Mr. Regeru, which information I verily believe to be true that in the haste leading to the finalization of the terms of the consent Order, the Advocates clearly overlooked the fact that, according to Clause XIV of the Facility Agreement, the Laws of England and the Rules of the International Chamber of Commerce were to be applied.

11. THAT under the said rules, the appointing authority under clause XIV of the Agreement, is the Secretariat to the International Court of Arbitrators. Annexed hereto at the exhibit marked "SKS" is a true copy of an extract from the ICC Rules of Arbitration and Conciliation.

12. THAT it was clearly the intention of the parties to the agreement at the time they entered into the agreement, that the Courts were not to be involved in the determination of any dispute between them and the award of an Arbitrator (s) would be final and binding upon them.

13. THAT it is therefore apparent that part 3 of the order recorded by Consent of the parties' Advocates on 1st November, 2001 was done under a mistake."

The Arbitration Clause referred to in the Facility Agreement is in the following terms: -

"**DISPUTES AND ARBITRATION**

This Agreement shall be governed by and construed in accordance with the laws of England. Any dispute or difference which may arise between the parties hereto under this Agreement which shall not have been settled by mutual agreement of the parties shall be finally settled under the Rules Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules. The Arbitration award shall be final and binding on both parties."

A further affidavit was sworn by Ms. Edith Muriu, the advocate who was present when the consent was recorded on 1st November, 2001. She swore that the purpose of recording the consent was to give effect to the intention of the parties as per the Facility Agreement; and further:

"*4. THAT whilst in court, and in the process of thrashing out the terms of the said Consent Order with Mr. Nyaencha, I inadvertently overlooked the fact that according to the Agreement, the Laws of England and the Rules of the International Chamber of Commerce were to govern the resolution of any dispute between the parties.*

5. THAT in the result, I went ahead to record the consent order part of which was that in default of the parties agreeing on a mutual arbitrator, the Honourable court was to be at liberty to appoint one.

6. THAT I verily believe the advocate for the Plaintiff also acted under the same mistake as he did not mention or point out to me that the governing law of the Contract was the Law of England and the Rules of the International Chamber of Commerce.

7. THAT under the Rules of the International Chamber of Commerce, the appointing authority for an Arbitrator is the Secretariat to the International court of Arbitration. That is the body that should appoint an Arbitrator in the instant dispute as parties have failed to agree on one."

Learned counsel, Mr. Kennedy Keango Nyaencha, has handled the matter for TFPI since inception. He did not agree with Ms. Muriu that there was any rush towards the recording of the consent order. He swore that the consent was fully discussed by counsel before it was recorded in court and it was the intention of the parties that the manner of appointment of an arbitrator envisaged in the Arbitration Clause would cease to bind them as it was expensive. The allegation of a mistake having been committed did not therefore arise, and there was thus no basis for assisting a party who simply wanted to resile from a valid consent order.

The application fell before Mwera J. who had no difficulty in resolving the factual and legal issues raised before him. He found that a dispute had arisen between the parties and that they had provided for the manner of resolution of that dispute in the contract between them. The issue was whether the consent recorded in court which was materially different from the arbitration clause could be reviewed, varied or set aside. Citing this Court's decisions in **Flora Wasike vs. Wamboko (1982 – 88) KAR 625** and **Nairobi City Council vs. Thabiti Enterprises Ltd, C.A**. 264/96 (ur), the learned Judge concluded that he had the power to set aside the consent order and proceeded to do so on two grounds. Firstly, on the ground that the parties proceeded on a mistake, whether mutual, unilateral or otherwise, to record the consent in ignorance of the Arbitration Clause. In his own words:

"**This court, however is satisfied that by mutual mistake all along the lawyers on behalf of their parties were ignorant or they overlooked the unmistakable intention and binding effect of Article XIV in the Agreement regarding resolving disputes by Arbitration. The parties had clearly and in mandatory terms bound themselves to adopt the laws of England as the substantive law but more importantly to resolve their disputes before the International Chamber of Commerce. They had chosen a foreign monetary unit in which to deal and it is not in doubt that PTA Bank is a regional institution. So in general, the parties saw their dealings as being governed by international as opposed to national arbitration. This Court is not about to pronounce that parties to an international agreement cannot agree to have disputes arising from it arbitrated upon locally. This is in the light of the known principle in all kinds of arbitration that party autonomy reigns supreme. They choose and agree on all manner of things regarding their contracted relationship. Imposition is so rare that it can be said to be all absent (see International Commercial Arbitration in the United States by C.B. Born, 1994). However where it appears that one party brings to the fore, that a consent order to arbitrate locally as the case was here, was in error this court must address that aspect in its fullness. Here the counsel for the parties were acting in error by oversight or in ignorance of the parties' intention in the Agreement."**

He believed the Bank's Advocate, Ms. Muriu, that she had inadvertedly overlooked the provisions of the Arbitration Clause as she swore she did.

Secondly, the learned Judge relied on the rubric "*for any other sufficient reason*" under ***Order XLIV r 1*** of the ***Civil Procedure Rules,*** which is a ground for review of a court order. The "sufficient reason" was that the parties had by their own conscious acts decided on the dispute resolution mechanism. They had no intention of submitting to our local jurisdiction in the appointment of an arbitrator. In his view there was no limit to the time when parties could proceed to arbitration so long as no appearance or other proceedings had taken place as provided under ***Section 6*** of the Arbitration Act. In the end, the learned Judge set aside the consent order recorded on 1st November, 2001 and gave the parties liberty to proceed

as their agreement binds them.

TFPI was aggrieved by that order and submitted six grounds of appeal to challenge it. In summary they state that the learned Judge erred in fact and in law in:

"**1. ....finding that there was a mutual mistake among both lawyers in entering the consent order of 1st November, 2001.**

2. ....granting orders which were not prayed for.

3. ....relying upon the affidavit of Miss. Muriu advocate to determine mutual mistake among (sic) the Lawyers on record.

4. .....reviewing a consent order pursuant to allegation of mistake from one party.

5. .....holding the Arbitration Clause in the facility Agreement takes precedence over the consent order between the parties.

6. ......holding that the Respondent did not waive its right to arbitration by taking part in court proceedings."

Mr. Nyaencha was emphatic in his submissions that, although the learned Judge correctly set out the principles of law applicable in setting aside consent orders, he applied those principles with wrong facts. The facts in this matter, in his submissions, did not give rise to mutual mistake of counsel but a unilateral mistake by counsel for the Bank who pleaded that she misconstrued the arbitration clause. Misinterpretation of a clause, he submitted, did not amount to a mistake. According to Mr. Nyaencha, both counsel and their clients were aware of the arbitration clause and the fact that they recorded a consent which was materially different from that clause meant that they intended to alter their terms of contract. The clause was thus varied and superceded by the court order. The court must therefore enforce the new contract. Mr. Nyaencha further submitted that a party in default cannot be heard to seek the setting aside of an order in reliance of his own default. Finally Mr. Nyaencha submitted that it was erroneous for the superior court to set aside the entire consent order when only one part of it was challenged.

For his part, learned counsel who appeared for the Bank Mr. Oraro, found nothing objectionable in the manner in which Mwera J. exercised his discretion in the matter. There was clearly a dichotomy, which had to be resolved between what the parties themselves had expressly agreed on as a forum for resolution of their dispute and what the advocates recorded before the Court. There was no intention at any time that the parties would submit to the jurisdiction of the Court and that is why the Bank took no further action in the court process after being served with the plaint and the application for injunction. Only a notice of appointment of advocates was filed before the consent relating to arbitration was recorded. In his submission, neither the advocates nor the Court could purport to deal with the substance of the contract between the parties when it was not seized of the adjudication of it. The issue was not merely the choice of arbitration but the choice of law and forum for resolution of the dispute, and none of the advocates allude anywhere in the record that they considered the arbitration clause or went back to their clients before recording the consent. In such event, he submitted, both counsel acted under a mutual mistake, or generally by mistake in waiving the arbitration clause. Citing Treitel, "The Law of Contract", "Chitty on Contracts", and **Solle v Butcher (1949) 2 All ER 1107**, Mr. Oraro submitted that the superior court was justified in interfering with the consent. As for the complaint that the entire consent order was set aside when only a part of it was in issue, Mr. Oraro submitted that the order made was consequential upon the prayer made in the application. Upon the matter being submitted to arbitration, there is a consequential stay of further proceedings which is not dependent on another order. There was no basis therefore for the complaints laid out in this appeal, he concluded.

We have anxiously considered the matter and we must say it is not without some degree of difficulty. That is because, apart from the powerful arguments put forward by Mr. Nyaencha, in making the order

reviewing its earlier decision, the superior court was exercising undoubted discretion in the matter. There can be no doubt that this Court has the power in its appellate jurisdiction to interfere with such discretion, but the parameters for such interference are considerably circumscribed. Sir Clement De Lestang V-P in **Mbogo & Another v Shah [1968] EA 93** examined the limits of such interference thus: -"

"**I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

In the same case, Sir Charles Newbold P. said: -

"**..... A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."**

It was conceded by Mr. Nyaencha that the learned Judge correctly set out the law relating to review and no issue therefore arises about the power of the court to entertain the application that was before it. The only issue is the application of the principles to the facts and circumstances before the learned Judge. The learned Judge was guided by, among other cases, this Court's decision in **Flora Wasike v Wamboko [1982 – 88] 1 KA 625** where the Court, following **Hirani v Kassam (1952) 19 EACA 131** accepted the principle that:

"**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 the 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."**

Ultimately, before the learned Judge examined the facts and circumstances of the case before him, he summarized the grounds upon which a consent judgment or order may be set aside as follows:

"*(i) Fraud.*

(ii) Mistake.

(iii) Collusion.

(iv) An agreement being contrary to the policy of the court.

(v) Absence of sufficient material facts.

(vi) Ignorance of material facts.

(vii) Any general reason which may enable a court to set aside an agreement (see any other sufficient reason under Order 44 Civil Procedure Rules.)

These categories are not closed as to those upon which a consent order may be set aside. So it cannot be said that a consent order/judgment can never be varied or reviewed or even set aside."

We would have no quarrel with that summary as it captures the main elements or factors for consideration in the exercise of the court's discretion. As stated earlier, reliance was made on "*mistake*"

and "*any other sufficient reason*" in reviewing the consent. "*Mistake*" in its wider sense is of course a frequently used and abused English word. A graphic illustration was given in **Moynes v Cooper [1956] 1 All ER. 450**, at page 453, thus:

"'**A' shoots at a pigeon and kills a crow 'by mistake': 'A' shoots at a crow believing it to be a pigeon and kills it 'by mistake': 'A', not intending to fire his gun, lets the gun off 'by mistake'. In the first case, the mistake was simply a bad shot, in the second, a failure to distinguish a crow from a pigeon, and in the third, gross carelessness."**

Nevertheless, "*mistake*", in its legal sense, both in the common law and equity has availed relief to parties invoking it, either to declare a contract void or voidable. It is unnecessary to go into detailed learning about this subject as it has been amplified in numerous texts and court decisions over the centuries. Suffice it to cite the passage by Lord Denning which was relied on by the respondent in **Solle v Butcher [1949] 2 All ER 1107** at page 1119:

"**Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of *Bell v. Lever Bros., Ltd.* (14). The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, is set aside or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. *A fortiori* if the other did not know of the mistake, but shared it".....**

"**Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. While presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained. Torrance v. Bolton (19). This branch of equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental, or if one party knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake".....**

"**A contract is also liable in equity to be set aside if the parties were under common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault."**

So that, equity will come to the aid of a party pleading mistake without distinguishing, as the common law did, whether it was one of fact or law, or that it was common, mutual or unilateral.

The learned Judge believed the sworn explanation given by the advocate who represented the respondent in recording the consent that she was totally oblivious of the full terms and tenor of the arbitration clause which bound the parties and therefore consented to terms which did not express correctly the intention of the parties. She had not sought her client's instructions in the matter. We think the Judge was entitled to choose which party to believe on such matters of fact and we have no reason to interfere with that choice. The fact that there were discussions or exchange of correspondence before the consent was recorded does not preclude the court from re-examining the consent. Such was the case in the ***Solle case*** (supra) and in the ***Florence Wasike*** case (supra), where the parties themselves were present in court with their advocates. In a commentary on the ***Solle case***, Sir Guenter Treitel, the author of the

"*The Law of* C*ontract*" has this to say:

"**The cases of mistake dealt with at common law involve mistakes as to primary facts or as to private rights. But equity goes further and gives relieve against mistake of secondary fact, or mistaken inferences. In *Solle v Butcher* a flat was extensively altered and then let. Both landlord and tenant mistakenly thought that, as a result of the alterations, the flat had changed its "identity", so that it was no longer subject to the Rent Acts. In the Court of Appeal, the mistake was variously described as a mistake of secondary fact. The parties were under no mistake as to the primary facts: they knew what work had been done in the flat. Their mistake was as to the inference to be drawn from those facts and this mistake could be a ground for equitable relief."**

We think, with respect, that is a persuasive exposition of the law. As such, we do not fault the learned Judge of the superior court in considering the factor of mistake and granting relief thereunder in exercise of his discretion. Nor do we think there was any error in principle in considering the wider concept of "*any other sufficient reason"* under ***Order XLIV r I*** of the Civil Procedure Rules and ***section 80*** of the Civil Procedure Act which were expressly invoked in the application before him. The court was not seized of the suit by dint of the existence of an arbitration clause between the parties and it could not therefore purport to take over and control the arbitration process. There was certainly no intention by the respondent to submit to the jurisdiction of the court as there was no appearance entered in the suit or other action taken before the parties appeared in court. No application had been filed under ***section 6*** of the Arbitration Act, 1995 seeking a stay of proceedings but, that does not, in our view, preclude the parties in the suit from recording a consent pursuant to their arbitration clause whereupon the court proceedings would be stayed. As neither of the parties nor both of them could confer jurisdiction on the court where none existed, it was erroneous for the court to accept the order that it shall appoint the arbitrator or otherwise guide the arbitration process. The reappraisal of that order was thus a timely intervention.

On the whole, we think the superior court was right in the exercise of its discretion in the matter and we find no compelling reason to interfere with that discretion. In the result this appeal is dismissed with costs, and we so order.

Dated and delivered at Nairobi this 12th day of October, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR