REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 126 of 2005

SAMSON MUNIKAH practicing as MUNIKAH & COMPANY ADVOCATES…….APPELLANT

AND

WEDUBE ESTATES LIMITED…….…..RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at

Nairobi (Ransley, J) dated 28th April, 2005

in

H.C.C.C. NO. 1145 OF 2004

****

JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (Ransley, J) delivered at Nairobi on 20th April 2005 in which the learned Judge dismissed the appellant's application for review and setting aside a consent judgment.

The respondent herein, Wedube Estates Ltd, sued the appellant, Samson Munikah practising as Munikah & Company Advocates, in the superior court seeking judgment in the sum of Kshs. 104,671,743/60, interest at the rate of 20% per month, interest on the principal amount and interest and costs of the suit. In order to appreciate the nature of the dispute we would reproduce herein the salient paragraphs of the plaint dated 27th October, 2004 and filed in the superior court on 28th October 2004.

"**1. The plaintiff is a Limited Liability Company duly incorporated under the provisions of the Companies Act (Cap. 486 Laws of Kenya) whose address of service for the purposes of this suit shall be care of Vincent Gule Esq. Advocate Tetu Apartments Apt. D2 Opp. Milimani Hotel main gate, State House Avenue/Ralph Bunche Road, P. O Box 50755, Nairobi**

2. The defendant is an advocate of the High Court of Kenya practicing law under the name of Munikah & Company Advocates in Nairobi. His address for purposes of this suit is care of P O Box 30729 Nairobi. Service of summons shall be effected through the plaintiff's advocate's office.

3. The defendant issued cheques number 003298, 003294, 003308 003309 003310 and 003295

drawn upon Commercial Bank of Africa limited and adding to Kshs. 29,576,560.00 in favour of the plaintiff, which cheques were on due presentation returned with remarks "Account closed".

4. During a reconciliation of account on partial payments made by the plaintiff between the plaintiff and the defendant on 11th November 2003, the defendant admitted owing the plaintiff a sum of shs. 20,000,000.00 in consideration of the returned cheques and in lieu of professional undertakings and various liabilities and agreed in writing to pay the sum owed in the following terms.:

(a) Kshs. 11,000,000.00 recoverable from a debt owed to the defendant by Nairobi City Council through the defendant's irrevocable letter of undertaking for payment to be made to the plaintiff's lawyers, M/s Onalo & Company Advocates.

(b) Kshs. 6,000,000.00 recoverable from transfers of property at Nairobi South C, L.R. No. 209/10690 (L.R. No. 53391) and Flat number 602 at Dhanjay Apartments, Valley Arcade, Nairobi it be done on or before 30th November 2003 and

(c) Kshs. 3,000,000.00 payable in two equal monthly instalments in November 2003 and December 2003.

5. The defendant offered that in default of full settlement of the sum of Kshs. 20,000,000.00 by 31st December 2003, he would repay the unpaid sums together with a monthly interest rate of 20% until payment in full and the offer to pay the said interest was accepted by the plaintiff.

6. The defendant has made nominal cash payments amounting to Kshs. 1,810,000.00 and granted possession of flat number 602 at Dhanjay Apartments, Valley Arcade, Nairobi valued at Kshs. 4,000,000.00.

7. The Defendant is in breach of the said terms of agreement and the defendant owes a balance sum of Kshs. 104,671,743.60 which was due and outstanding as at 1st October, 2004.

<u>Particulars of breach of the agreement</u>

(a) The defendant issued a revocable letter in lieu of an irrevocable letter of undertaking to Nairobi City Council for payments to the plaintiff's lawyers, M/s Onalo & Company Advocates which revocable letter he later unilaterally revoked.

(b) The defendant has up to date failed to cause the transfer of the property in South C, L.R. No. 209/10690 (I.R. No. 53391) in favour of the plaintiff in terms of paragraph 4(b) above.

(c) The defendant failed to make payments of Kshs. 3,000,000.00 in November 2003 and December 2003 in terms of paragraph 4(c) above.

8. Further and in the alternative the plaintiff claims a sum of Kshs. 29,576,560.00 plus interest at 20% per month against the defendant in respect of cheques numbers 003298, 003294, 003308, 003309, 003310 and 003295 drawn by the defendant upon Commercial Bank of Africa Limited in favour of the plaintiff which cheques were on due presentation returned with remarks "Account closed". The total sum claimed plus interest restricted to Kshs. 104,671,743.60 as at 1st October 2004.

9. Despite demand and notice of intention to sue the defendant has refused, or otherwise neglected to pay the plaintiff the sums owed.

10. There is no other suit pending and there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter.

11. The cause of action arose within the jurisdiction of this Honourable Court."

On 16th November, 2004 a Memorandum of Appearance was filed by Kennedy O. Asinuli Advocate on behalf of the appellant. But on 17th November 2004 the respondent's advocates filed a Notice of Motion stated to be under "**Order XXXV Rules 1(i) (a)** and **1(2)** of the Civil Procedure Rules, **Section 3A** of the Civil Procedure Act and all other enabling provisions of law" seeking summary judgment to be entered against the appellant in the sum of Kshs. 104,671,743/60 plus interest at agreed rates of 20% per month and also at Court rates. That notice of motion was fixed for hearing on 3rd December, 2004. Before the hearing date of that notice of motion a letter dated 26th November, 2004 from the firm of Onalo & Company Advocates was addressed to the Deputy Registrar seeking a consent order to be recorded. The contents of that letter were as follows:-

"**The Deputy Registrar**

High Court of Kenya

Nairobi Central Registry

NAIROBI

Dear Sir

RE: HCCC NO. 1145 OF 2004

WEDUBE ESTATES LIMITED VS SAMSON MUNIKAH practicing as MUNIKAH & COMPANY ADVOCATES

Kindly record the following consent by the order of the parties herein.

1. That judgment be and is hereby entered of the plaintiff against the defendant for the sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/) in full and final settlement of the principal sum plus interest at court rates.

2. That each party to bear their own costs of this suit as at the date of this consent.

3. That the decretal amount be liquidated in Monthly instalments of Kenya Shillings Six hundred and Twenty Five Thousand (Kshs. 625,000) per month with effect from the 31st day of January 2005 and thereafter on the last day of every succeeding month until payment in full. That in default of any single instalment on its due date, execution to issue for the full unpaid balance plus costs and interest at court rates.

Dated at Nairobi this 26th day of November, 2004.

SIGNED …….

KENNEDY O. ASINULI

Advocate for the defendant

SIGNED …….

ONALO & COMPANY

Advocates for the plaintiff

DRAWN AND FILED BY:

ONALO & COMPANY ADVOCATES

STATE HOUSE AVE/RALPH BUNCHE ROAD

TETU APARTMENTS APT. D2

OPP. MILIMANI HOTEL MAIN GATE

P O BOX 50755

NAIROBI"

Pursuant to the foregoing the matter was placed before a Judge on 3rd December 2004 (the date fixed for the hearing of the application for summary judgment) and the learned Judge (Kihara Ag. J as he then was) made the following order:-

"**It is ordered that the consent judgment or either orders as set out in the consent letter dated and filed on the 26th November, 2004 be and are hereby entered accordingly in the terms thereof and orders accordingly**."

Hence from the foregoing there was then a consent judgment entered by the superior court in terms of the consent letter dated and filed on 26th November 2004. It is that consent judgment that the appellant asked the superior court to set aside. To that end a notice of motion application was filed in the superior court on 1st March 2005.

That application was stated to have been brought under "**Order XLIV** rule 1 of the Civil Procedure Rules, **Order 2** of the Civil Procedure Rules **Section 80** and **3A** of the Civil Procedure Act Cap 21 of the Laws of Kenya, the inherent powers of the Court and all other enabling provisions of Law." The main reliefs sought in that Notice of Motion were:-

"**6 That the Honourable court be pleased to review and/or set aside the consent judgment dated and filed on the 26th of November 2004 and consequential decree dated 3rd December 2004.**

7. That the honourable court do grant the defendant leave to defend the suit herein and to file and serve its defence out of time in terms of the draft annexed defence and counter claim annexed to the supporting affidavit of Samson Munikah in support of the application herein.

8. That the applicant be at liberty to apply for such other or further orders as the honourable court may deem fit to grant."

The application was brought on the following grounds:-

"**(a) That there is sufficient reason to review the consent judgment.**

(b) That the plaintiff is seeking to enforce an agreement tainted with illegality.

(c) That the plaintiff's suit has been brought in aid of an extortion and blackmail scheme by the plaintiff acting through one of its directors, the said Peter Leo Onalo, advocate.

(d) That the consent judgment is in aid of an extortion and blackmail scheme by the plaintiff acting through one of its directors, the said Peter Leo Onalo Advocate.

(e) That the plaintiff's suit and the consent judgment herein is contrary to law and public policy

of the Republic of Kenya.

(f) That the Honourable Court has no jurisdiction to adjudicate and grant relief in aid of an extortion and blackmail scheme.

(g) That the circumstances leading to the execution of the consent judgment amount to extortion and black mail.

(h) That the consent judgment was obtained by undue influence by the plaintiff over the defendant.

(i) That the defendant did not instruct his previous advocate to execute the consent judgment.

(j) That the suit herein is an attempt by the plaintiff to use the court process for unjust enrichment.

(k) That the professional undertaking the plaintiff is relying on is null and void.

(l) That the defendant has a good defence which raises various triable issue.

(m) That the defendant/applicant will be prejudiced if the court does not grant an order of temporary stay of execution pending the inter partes hearing and determination of this application.

(n) That it is in the interest of justice that the aforesaid orders be granted as prayed."

There were two affidavits sworn in support of that application. The first affidavit was sworn by Mr. Kennedy O. Asinuli an advocate who had been acting for the appellant. The second affidavit was sworn by Mr Samson Munikah the appellant herein. It was a detailed and lengthy affidavit running into 98 paragraphs in which the appellant gave all the details of his transactions with Mr. P.O. Onalo the advocate who was acting for the respondent. It must however be pointed out that the pleadings on behalf of the respondent were drawn and signed by Vincent Gule Advocate but by a notice of change of advocates dated 25th November 2004 the firm of Onalo & Company Advocates came on record as having been appointed to act for the respondent.

It was that notice of motion application dated 1st March, 2005 that came up for hearing before Ransley J. on 11th March 2005 when Mr. Ochieng Oduol appeared for the appellant (as the applicant in that application) and Mr Wanyama appeared for the respondent herein (and the respondent in the application).

The learned Judge very carefully considered the submissions by counsel appearing for the parties and in the end came to the conclusion that the application was for dismissing. In concluding his ruling which he delivered on 20th April, 2005 the learned Judge expressed himself thus:-

" **I have given this matter anxious thought especially in view of the allegations made by the applicant. However, in this case I am of the view that I have jurisdiction to make the order asked for on the ground of other sufficient reasons. However, on the evidence I am not satisfied that the applicant entered into the consent order under duress, had that been the case I see no reason why he should have written the letter of the 26/11/2004 referred to above. This letter appears to have been written with sober reflection and no hint of duress is contained in it. Indeed the applicant approved the court order with minor amendments. That being the case I do not see how it can be said Mr Asinuli entered into the consent order without knowledge of it. The applicant must I am afraid accept the court order as it is and make an effort to pay it. In the result this application is dismissed with costs to the respondent."**

It is that order dismissing the appellant's application by the superior court that triggered this appeal.

Hence the appellant's advocates filed a Memorandum of Appeal setting out the following 17 grounds:-

"**1. That the learned Judge while correctly appreciating the honourable court jurisdiction on review erred in law and fact in failing to find that the transaction, cause of action and agreement the basis of the suit was tainted with illegality and therefore the parties could not enter into a valid legal consent judgment.**

2. That the learned Judge erred in law and fact in failing to find that the plaintiff was seeking to enforce an agreement tainted with illegality.

3. That the learned Judge erred in law and fact in failing to find that the circumstances leading to the execution of the consent judgment amounted to extortion and black mail.

4. That the learned Judge erred in law and fact in failing to find that the circumstances leading to the execution of the consent judgment clearly showed an abuse of the Honourable court's process and that the suit had been brought in aid of an extortion and blackmail scheme by the plaintiff acting through one of its directors, one Peter Leo Onalo, advocate.

5. That the learned Judge erred in law and fact in failing to find that the suit by the plaintiff was contrary to law and public policy of the Republic of Kenya.

6. That the learned Judge erred in law and fact in failing to find that the circumstances leading to the suit vitiated the jurisdiction of the Honourable court to adjudicate and grant relief in aid of an extortion and blackmail scheme by the plaintiff.

7. That the learned Judge erred in law and fact in failing to find that the consent judgment was induced and obtained by undue influence of the plaintiff over the defendant.

8 That the learned Judge erred in law and fact in failing to find that the consent judgment was obtained by deception and misrepresentation by one Peter Leo Onalo, advocate of the plaintiff on the defendant's counsel

9. That the learned Judge erred in law and fact in failing to find that the defendant did not instruct his previous advocate to execute the consent judgment.

10 That the learned Judge erred in law and fact in failing to find that the suit by the plaintiff was not aimed at restitution but was aimed at abusing the honourable court process and to facilitate unjust enrichment.

11. That the learned Judge erred in law and fact in failing to find that the professional undertaking the plaintiff was relying on is null and void.

12 That the learned Judge erred in law and fact in failing to find that Peter Leo Onalo could not have accepted and enforced a professional undertaking given by the appellant in light of the fact that Peter Leo Onalo at all material times held no practicing certificate.

13 That the learned Judge erred in law and fact in failing to find that the defendant had a good defence which raised various triable issue.

14 That the learned Judge erred in failing to appreciate all the undisputed facts of the case between the appellant and the respondent and their impact on the jurisdiction of the Honourable court.

15 That the learned Judge erred in law and fact in finding that the parties voluntarily entered into a consent judgment on the 26th of November 2004.

16 That the learned Judge erred in law and fact in failing to find that there was sufficient reason to review the consent judgment.

17 That the learned Judge erred in law in dismissing the appellants application dated the 1st of March 2005 to the superior court for review and/or setting aside the consent judgment dated 26th November 2004 and consequential decree given on 3rd December 2004 and issued on the 26th January 2004".

We have deliberately set out the seventeen grounds of appeal since, in our view, these grounds form the basis of the appellant's case in this appeal.

That is the appeal that came up for hearing before us on 19th March 2007 when Mr Ochieng Oduol, the learned counsel for the appellant, took us through all the seventeen grounds supporting his submissions with various authorities. The appeal was then adjourned to 22nd March 2007 when Mr Wanyama the learned counsel for the respondent made very strong submissions opposing the appeal. Mr Wanyama gave the details of the transactions between the parties leading to the consent judgment being entered. Mr Wanyama, like Mr Ochieng Oduol supported his submissions with a number of authorities.

The appeal could not be concluded on 22nd March 2007 and so it had to be adjourned to 28th June, 2007 when Mr Ochieng Oduol made his final submissions in reply.

We must on the outset express our appreciation, and indeed admiration, at the clarity and forceful manner in which both Mr Ochieng Oduol and Mr Wanyama presented their arguments which were backed by well researched authorities on the issue at hand.

Mr Ochieng Oduol argued the appeal under the following headings.

(i) illegality

(ii) abuse of court process

(iii) public policy

(iv) undue influence and misrepresentation

(v) restitution

(vi) failing to consider the matters placed before the superior court.

It was Mr. Ochieng Oduol's submission that Mr. Munikah had received a sum of Kshs. 6 million from the respondent company when Mr Onalo came to the scene and started threatening Mr Munikah who was then forced to issue the cheques referred to in the plaint. This figure of 6 million was then pushed to shs. 29million. When Mr Munikah protested the question of 20% interest per month was brought in. While Mr Munikah was out of Nairobi Mr Onalo approached Mr Asinuli and obtained a consent. Mr Onalo then threatened to use criminal process knowing that the cheques were drawn on Mr Munikah's clients account. And during this time Mr Onalo did not have a practising certificate.

It was further submitted that in view of the foregoing there was sufficient material to show that there was an illegality which the learned Judge should have investigated. It was pointed out that it was illegal for one to use trust account as a professional undertaking. To support his submission on the issue of illegality the appellant's counsel relied on the decision of the Court of Appeal in England in **Birkett v Acorn Business Machines Ltd [1999] 2 ALL ER (Comm) 429** in which it was held that if a transaction was on its face manifestly illegal the court would refuse to enforce it whether or not either party alleged illegality.

It was the counsel's contention that there was sufficient evidence of blackmail, intimidation and threats on the appellant.

There was then the issue of money being used to bribe City Council Officials. It was contended on behalf of the appellant, that legal process cannot be used to bribe officials. It was Mr Ochieng Oduol's strong submission that once the court finds that there was something illegal or immoral no amount of consent will give it legality.

On the issue of public policy it was submitted that this went hand in hand with the issue of illegality. Mr Ochieng Oduol faulted the learned Judge for not considering this aspect of the matter before him.

On the issue of restitution we were reminded that the whole purpose of restitution was to put a litigant in a position he would have been and not profiteering.

Finally, Mr Ochieng Oduol submitted that in view of what was stated in the seventeen grounds of appeal we should allow this appeal with costs.

To counter the foregoing submissions Mr Wanyama contended that this was a clear case in which the appellant borrowed money from the respondent on various occasions and issued four cheques. The appellant failed to pay and a consent entered on how the amount owing would be repaid. Mr Wanyama conceded that Mr Onalo did not have practising certificate but it was Mr Wanyama's view that the professional undertaking could only be invalid but not illegal. It was contended that the appellant was merely trying to run away from a bad bargain because he is unable to pay. It was Mr. Wanyama's submission that there was no evidence of duress, blackmail threats or intimidation.

On the issue of illegality Mr. Wanyama submitted that this was dealt with by the learned Judge and that the issue of bribery did not arise. He went on to point out that the learned Judge considered allegations of extortion, undue influence and blackmail but found no basis for all these allegations. It was Mr. Wanyama's submission that the consent was entered into freely and that the appellant failed the burden placed on him, in order to set aside consent judgment.

In asking us to uphold the findings of the learned Judge Mr. Wanyama relied on this Court's decision in **Choitran v Nazari [1984] KLR 327** in which it was held, inter alia, that an appellate court would not interfere with the decision arrived at by the exercise of discretion of the lower court unless the appellate court was satisfied either that the lower court Judge had misdirected himself in some matter and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result, there was injustice.

The foregoing is the summary of the rival submission presented very ably by counsel appearing for the parties herein.

This appeal raises the vexed question: (of) What are the circumstances in which a consent judgment may be set aside? In **BROOKE BOND LIEBIG (T) Ltd V. MALLYA [1975] E.A. 266**, the then Court of Appeal for East Africa set out the circumstances in which a consent judgment freely entered into by the parties to a dispute in court, would be set aside by the courts. Delivering the leading judgment of the Court Law Ag. P. expressed himself thus: -

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

Prima facie, any order made in the presence and with the consent of the 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.

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the party who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham, J. said in the introduction to the passage quoted above from Hiranis' case, a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding it. …"

For his part Ag. Vice President Mustafa had this to say:

"**The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could have been no mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed. .."**

The Court of Appeal applied these principles in **FLORA WASIKE v. DESTIMO WAMBOKO (1982-88) 1 KAR 266** where the main holdings of the Court were as follows: -

1. It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation.

2. An advocate would have ostensible authority to compromise a suit or consent to a judgment so far as the opponent is concerned.

3. The court would not readily assume that a judgment recorded by a Judge as being by consent was not so unless it was demonstrably shown otherwise.

The foregoing decisions were followed by this Court in recent cases of **KENYA COMMERCIAL BANK LTD v. BENJOH AMALGAMATED LTD & ANOTHER – Civil Appeal No. 276 of 1997 (unreported)** and **DIAMOND TRUST BANK OF KENYA LTD v. PLY & PANELS LTD & OTHERS – Civil Appeal No. 243 of 2002 (unreported).**

In view of the foregoing, we think it can safely be stated that a consent judgment may be set aside only in certain circumstances e.g. on the ground of fraud or collusion; misrepresentation of the facts, public policy or for such reasons as would enable a court to set aside or rescind a contract.

When the appellant made an application before the superior court to set aside the consent judgment the burden of proving any of the grounds/reasons was upon him. We have considered the genesis of this dispute through the consent judgment and the application to set aside the same ending up to this Court by way of this appeal.

The issue before the superior court and this Court was whether the appellant placed sufficient material before the learned Judge to warrant the setting aside of the consent judgment. We have already given the background of this dispute starting with the plaint filed in the superior court, the consent judgment entered pursuant to a consent letter and the application to set aside the consent judgment.

It would appear that the appellant's main complaints were that the consent was not entered freely, that there were threats, intimidation, misrepresentation, illegality and the consent was against public policy. In a bid to prove the foregoing there was an affidavit sworn by Mr. Asinuli who is the advocate who signed the consent letter that culminated into the consent judgment. In that affidavit Mr. Asinuli states, inter alia: -

"**7. THAT on the 26th of November, 2004 I received a draft copy of the consent judgment from the Plaintiff's advocate, Peter Leo Onalo for execution on behalf of the Defendant herein.**

8. THAT the Plaintiff's advocate Peter Leo Onalo informed me and I verily believed that he had agreed with the defendant to settle the claim at 30 Million.

9. THAT I executed the consent judgment on the said representation of Peter Onalo and forwarded it to him for filing on the representation and belief that Peter Onalo had agreed with the Defendant to settle the claim at 30 Million.

10. THAT sometime in January 2005 the Defendant herein informed me that the Plaintiff through its advocates had been harassing him and issuing threats to institute criminal proceedings against the Defendant in respect of certain cheques that he had issued to the Plaintiff and which were dishonoured by the bank.

11. THAT at the time of executing and filing the consent I had not been informed of the aforesaid circumstances under which the consent was obtained.

12. THAT had I been informed of the Plaintiff's acts of extortion and blackmail against the Defendant I would not have executed the said consent."

Pausing here for a moment, it would appear that Mr. Onalo is being blamed for having misled Mr. Asinuli into signing the consent letter.

As we have already stated elsewhere in this judgment the application to set aside consent judgment was supported by a lengthy affidavit of Mr. Munikah. We have read all that Mr. Munikah deponed to but we would only reproduce a few paragraphs herein on the issue of illegality and public policy: -

75. THAT on 24.11.2004 Mr. Onalo informed me that he did not want to go through protracted court process and offered to accept the sum of Kshs. 30,000,000 in settlement of the claim instead of Kshs.104,671,743.900 as claimed in the Plaint.

76. THAT Mr. Onalo informed me that the settlement sum of Kshs. 30,000,000 included a purported sum of fifteen Million (Kshs.15,000,000) that he had used to bribe Ministry of Local Government officials and City Hall officials in order to speed up recovery of payment of Kshs.42,093,640.80 due as at 31/5/2003 and interest due to me from the City Council of Nairobi.

77. THAT I strongly disputed and protested to Mr. Onalo on the sum of 15Million that he purportedly had used to bribe Ministry of Local Government officials and City Hall officials in order to speed up recovery the amount payment of Kshs.42,093,640.80 due to me."

All this was before the learned Judge. He considered the same and concluded that the applicant had entered into the consent freely without duress. The learned Judge based his finding on the fact that there was no duress. In his ruling the learned Judge concluded thus:

"**However on the evidence I am not satisfied that the applicant entered into the consent order under duress, had that been the case I see no reason why he should have written the letter of the 26/11/2004 referred to above."**

From the foregoing it is clear that the application for setting aside the consent judgment was decided on the issue of duress. But, that might not be the accurate position since the appellant narrated various instances that led to the consent judgment. The conduct of Mr. Onalo in the entire transaction called for investigation. For example, the issue of bribing officials of City Council could not be lightly dismissed. We have seen correspondence emanating from Mr. Onalo to the then Minister for Local Government, the late Hon. Karisa Maitha, to the effect that the Minister should intervene to ensure payment of Kshs.46,293,640/80. There is similar correspondence to the then Town Clerk threatening "swift

execution" which would burden the Council with further costs.

We found it rather strange that transactions involving large sums of money could be conducted by scribbling on loose pieces of paper obtained in social places like Galileo. These can be found at pp. 131 to 137 of the record of appeal. In view of all this, the complaints by the appellant as contained in his lengthy affidavit should not have been taken lightly.

When we consider the time the plaint was filed (18th October, 2004), the application for summary judgment (17th November, 2004), the signing of consent letter (26th November, 2004) and the rate of interest at 20% per month, we are not satisfied that this was the normal way of dealing with such transactions. It is to be observed that the respondent's advocate on record when the plaint was filed and summary judgment applied for was Vincent Gule Esq. Advocate. Then, suddenly, Mr. Onalo appears on the scene at the time of the consent letter, and from there onwards, he takes charge of the situation. And, it must be remembered that all this time the said Mr. Onalo did not have a practicing certificate!

Having considered the background to this matter and especially the long affidavit of Mr. Munikah together with its annextures we are unable to say that the consent was freely entered into. Indeed, we find that the consent was tainted with illegality, undue influence and the whole transaction was against public policy as the respondent and its legal advisers wanted to use the court process to achieve what was illegal. We are of the view that had the learned Judge considered all these other aspects of the consent judgment he would have reached a different decision.

For the foregoing reasons we allow this appeal, set aside the order of the learned Judge dated 20th April, 2005 and in its place substitute an order setting aside the consent judgment of the superior court together with all consequential orders. Costs of this appeal shall be awarded to the appellant. These shall be the orders of this Court.

Dated and delivered at NAIROBI this 23rd day of November, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR