**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO NAI 79 OF 2004**

**BENSON MBUCHU GICHUKI …….....……..… APPLICANT**

**AND**

**1. EVANS KAMENDE MUNJUA**

**2. JAMES BUTI KUNGU**

**3. TERESIA T. MBUTI …….....……RESPONDENTS**

**RULING**

This is an application by motion by Benson Mbuchi Gichuki ("the applicant"). The application is drawn by himself in person. He has argued the application himself with considerable competence. The respondents to the application are Evans Kamende Munjua, James Mbuti Kung'u and Teresia T Mbuti who were the defendants in the superior court also did not have the benefit of counsel at the hearing of the motion.

The application is for orders that the appeal be lodged without prior payment of fees of the Court and the security for costs and is brought under rule 112 (1) of the Court of Appeal Rules ("the Rules") which I set out below. 112.

> (1) If in any appeal from a superior court in its original or appellate jurisdiction in any civil case the Court is satisfied on the application of an appellant that he lacks the means to pay the required fees or to deposit the security for costs and that the appeal is not without reasonable possibility of success, the Court may by order direct that the appeal may be lodged-
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> (a) without prior payment of fees of Court, or on payment of any specified amount less than the required fees;
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> (b) without security for costs being lodged, or on lodging of any specified sum less than the amount fixed by rule 104, and may order that the record of appeal be prepared by the registrar of the superior court without payment therefor or on payment of any specified sum less than the fee set out in the Second Schedule, conditionally on the intended appellant undertaking to pay the fees or the balance of the fees out of any money or property he may recover in or in consequence of the appeal.
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> (2) The Registrar shall be entitled to be heard on any such application.
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> (3) No fee shall be payable on the lodging of any such application.

(4) The Registrar shall have power to take such action as he may think necessary to enforce any undertaking given in accordance with sub-rule (1).

It is clear from rule 112(1) that there are two essential conditions to be met before any order can be granted under this rule.

The Court must be satisfied both that the appellant lacks the means to pay the required fees and that the appeal is not without reasonable possibility of success. Failure to satisfy either of these criteria will result in the application being dismissed.

Most of the argument during the hearing of the application was directed at surmounting the reasonable possibility of success hurdle. In order to consider this it is necessary to examine the history of the litigation and the approach of the learned trial judge Lady Justice Ang'awa.

In her ruling Ang'awa J stated the facts leading up to her decision.

The applicant (who practices as a lay arbitrator) had been appointed sole arbitrator in a dispute between the first and second respondents herein and a Norwegian NGO ("the NGO").

The applicant agreed to be the sole arbitrator. There was a written agreement covering his remuneration as arbitrator the terms of which are not relevant to this application.

In due course after an arbitration hearing the applicant published his award for payment by the NGO to the respondents a total of Shs 25.2 million, later reduced by consent to Shs 15.17 million, which was paid by the NGO to the respondents.

The applicant had not been paid his fees claimed as arbitrator amounting to the sum of Shs 3.64 million payable by the respondents.

The applicant eventually filed suit on January 7, 1998 being HCCC 16/ 98 against the respondents and applied for summary judgment by motion dated 20th January 1998. In a ruling dated 26th November 1998 Osiemo J dismissed the application for summary judgment.

The applicant filed an application for review of the Osiemo J dismissal of the summary judgment application. This application for review was heard by Osiemo J on 8th March 1999 and in his ruling dated 29th March 1999 Osiemo J set aside his orders dismissing the application for summary judgment. This meant that the original application for summary judgment dated 20th January 1998 was reinstated for hearing afresh and was allocated to Ang'awa J. In her ruling dated 30th June 1999 she dismissed the summary judgment application on the basis that there were triable issues raised by the defence.

On that very day, the 30th June 1999 the applicant and the respondents reached a compromise agreement and a consent order was signed and recorded. The consent order read as follows:-

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

2. The plaintiff's claim against the first and second defendant is compromised at the sum of Kshs 700,000. The plaintiff to have judgment accordingly with no orders as to costs.

3. The decretal sum of Kshs 700,000 be paid in two equal instalments as follows:-

a. Kshs 350,000 on or before 15.8.99.

b. Kshs 350,000 on or before 30.9.99

c. In default of payment of any one instalment on its due date the whole amount outstanding to

became due and payable forthwith and the plaintiff be at liberty to execute the decree against the defendant."

The plaintiff, the two defendants and their advocates duly signed Ang'awa J's file. The applicant caused the decree to be drawn up embodying the consent.

The respondents did not comply with the agreed instalment payments with the result that paragraph 3 (c) of the decree came into play. Attempts were made by the applicant to execute the decree during 1999 through to 2003.

On December 10, 2003 the applicant filed a Notice of Motion for review of the consent seeking orders that the Court do set aside the consent orders dated June 30th, 1999.

This application eventually came before and was heard by Ang'awa J on March 4, 2004. She delivered her ruling on the review application on March10, 2004. This is the ruling, which the applicant, in the application now before me, wishes to appeal against with exemption from the payment of filing fees and security for costs.

Ang'awa J in her March 10, 2004 ruling considered the question whether the Civil Procedure Rules bestowed on her the right to review a consent judgment.

Order 44 (1) (a) enables review of judgments by the Court which passed the decree provided that the decree is one from which no appeal is allowed.

Ang'awa J then observed that s 67 (2) of the Civil Procedure Act provides that:

> "No appeal shall lie from a decree passed by the Court with the consent of parties."

The learned judge concluded from these two provisions that the consent judgment in question could be the subject of a review if there was compliance with certain conditions set out in order 44 rule 1(b) were satisfied. The rule reads as follows:

> "Any person considering himself aggrieved 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."

The learned judge does state that the question arising on the review would be whether the consent entered into was fraudulently entered. This implies that she is applying the principles stated in the *Flora Wasike* case that she then cited. That case was an appeal not a review.

I consider that it would indeed be logical to apply the same principles to the setting aside of a consent judgment irrespective of whether the procedural route is that of review or appeal.

The learned judge has stressed that in the present case, the applciant, despite now claiming to have been under duress at the time he entered into the consent, he nevertheless went ahead to take execution proceedings based on the consent judgment.

The learned judge says that to apply for review would have been in order if done without reasonable (sic) (surely a "unreasonable") delay. Here the review application was filed more than four years after the consent and after taking steps in execution of the consent judgment.

The applicant in his submissions before me relied heavily on *dicta* by Hancox JA in *Flora Wasike v*

*Destimo Wamboko* 1 KAR 625 at page 626 to the effect that a consent judgment can be set aside "if certain conditions remain to be fulfilled". The applicant argues that "certain conditions" means conditions in the consent itself eg instalment provisions. He argues that since the instalments were not paid in accordance with the consent judgment it can and should be set aside.

However I consider that the only conditions the non performance of which could give rise to the setting aside of a consent judgment refer to conditions precedent to the coming into force of the consent and cannot refer to conditions or in other words, "terms" of the consent itself.

The full text of the passage in *Flora Wasike v Destimo* containing the words "if certain conditions remain to be fulfilled" reads as follows:-

> "It is now well 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 v Kenya Commercial Bank Limted* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F C Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:
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> '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 of rectification of this order looked at as a contract.'

The hand written consent judgment and the decree in which it was embodied do not contain any conditions, which could be construed as conditions precedent to the coming into force of the consent.

In my opinion the remedy for any failure to perform the instalment provisions in the consent judgment was to enforce the judgment by execution not to seek to set aside the judgment itself.

The applicant did argue before Ang'awa J that he was made to enter into the consent by duress, undue influence, inequality of bargaining powers and coercion but there is no detailed evidence before the Court to support these claims with which his subsequent conduct in drawing up the decree and executing it in part is inconsistent.

I am therefore satisfied that Lady Justice Ang'awa correctly dealt with the application for review of the consent judgment and I do not consider that the applicant has a reasonable possibility of success in his intended appeal.

Having reached this conclusion, I need not consider the other requirement for a successful application namely proof of the applicant's lack of means to pay. His claim in this respect is reasonably convincing and the affidavits on behalf of the respondents do not touch upon the applicant's present financial state so much as his part, which is of little assistance.

Since it is clear from the wording of rule 112 that a reasonable possibility of success is an essential precondition to the granting of exemption from fees and the provision of security for costs I am unable to make the orders sought in the application which is dismissed but I make no order as to costs of this application.

**Dated and delivered at Nairobi this 21st day of July, 2004.**

**DEVERELL**

**……..**

**AG JUDGE OF APPEAL**