**Diamond Trust Bank of Kenya Ltd v Ply and Panels Ltd and others**

**Division:** Court of Appeal of Kenya at Nakuru

**Date of ruling:** 27 February 2004

**Case Number:** 243/02

**Before:** Omolo, Shah and Githinji JJA

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*Civil procedure – Judgment – By consent – Setting aside – Whether consent judgment may be set aside –*

*Grounds for setting aside consent judgment – Order XLIV, rule 1 – Civil Procedure Rules.*

**Editor’s Summary**

The Appellant, Diamond Trust Bank (K) Ltd, by two debentures registered on 11 April 1995 and 17 January 1997, lent to the First Respondent a total sum of KShs 100 000 000. As additional security for the loan two charges were registered against the title number Nakuru Municipality Block 8/21 belonging to the Second Respondent. The Third, Fourth, Fifth and Sixth Respondents by way of additional security, provided their personal guarantees for the repayment of the sum lent to the First Respondent. The sum lent was not repaid in terms of the agreement between the parties and some time in the year 2000 the Appellant recalled the loan. The Respondents thereupon instituted proceedings against the Appellant seeking taking of accounts, interim injunction against enforcement of the recovery and damages for breach of contract, among other prayers. The Respondents also took out a chamber summons seeking injunctive relief which was granted on 2 May 2000. The parties thereupon entered into negotiations and on 16 May 2000 they sent to the Court a comprehensive consent agreement which was made a decree of court. The consent agreement granted the Respondents relief of five months within which to pay the outstanding amount. This time was set to expire on 6 October 2000. On 4 October 2000, two days before the expiry period, the Respondents made an application to the Court praying that the consent judgment be set aside. The grounds for setting aside the consent judgment were that the sum specified in the consent judgment contained a very substantial sum by way of penal interest, that no accounts were taken before the said consent judgment was recorded and that there were certain misrepresentations. This application was granted precipitating the appeal to the Court of Appeal.

**Held** – A consent judgment may only be set aside on the grounds of fraud or collusion, mistake or misrepresentation. An advocate had ostensible authority to reach a compromise on behalf of a client (*Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 266, *Wasike v Wamboko* [1982–88] 1 KAR 266 and *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd and another* [1997] LLR 640 (CAK) followed). The Respondents’ application for setting aside the consent judgment was made merely to try to avoid their obligations under the judgment as it was made after inordinate delay only two days before expiry of time. Further, the Respondents’ advocates had ostensible authority to reach a compromise on their behalf and the advocates never complained that they had been cheated or misled. *Per Githinji JA* – Where the consent judgment impugned has been executed as in the present case, the courts are less likely to set aside the consent judgment (*F and G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] Llyods Rep 53 adopted). Appeal allowed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 266 – **F**

*Hiram v Kassam* [1952] 19 EACA 131

*Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd and another* [1997] LLR 640 (CAK) – **F**

*Mukisa Limited v West End* [1970] EA 469

*Wasike v Wamboko* [1982–88] 1 KAR 266 – **F**

***United Kingdom***

*F and G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] Llyods Rep 53 – **A**