**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.*

**JUDGMENT**

**Omolo JA:** In *Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 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 AP expressed himself thus: “The circumstances in which a consent judgment may be interfered with were considered by this Court in *Hiram v Kassam* [1952] 19 EACA 131 where the following passage from *Seton on Judgments and Orders* (7 ed) Volume I at 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 parties 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 Mustafa AVP 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, for example 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 Kenya Court of Appeal applied these principles, first in the case of *Wasike v 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. Next these decisions were followed by this Court in the recent case of *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd and another* [1997] LLR 640 (CAK), where the Court considered all the previous authorities on the subject of setting aside consent judgments and concluded as follows: “Those, in essence, are the principles which the Learned Judge should have applied to determine the application before him. Applying those principles to this case, we can find no circumstances that could have entitled the Judge to vary or rescind the consent order”. For the purposes of my judgment, the brief facts underlying this dispute are that by two debentures registered respectively on 11 April 1995 and 17 January 1997, Diamond Trust Bank (K) Limited, the Appellant hereinafter, lent to Ply and Panels Limited, the First Respondent, the total sum of KShs 100 000 000. As additional security for the loan two charges were registered against title number Nakuru Municipality Block 8/21; that property belonged to Uni-Prop Limited, the Second Respondent herein. Again Narwar Singh Bhogal, Gurbux Singh Bhogal, Bhupinder Singh Bhogal and Jaspal Singh Bhogal, the Third, Fourth, Fifth and Sixth Respondents herein, provided their personal guarantees for the repayment of the sum lent to the First Respondent. As is usual in these circumstances 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 and according to plaint filed in the High Court of Kenya at Nakuru on 2 May 2000, the prayers which the Respondents sought against the Appellant were: “(a) An order that proper accounts be taken to determine the amount, if any, lawfully and legitimately due from the First Plaintiff to the Defendant; (b) If any amount is found due from the First Plaintiff to the Defendant judgment be entered for such an amount in favour of the Defendant with a proviso that payment thereof be postponed and/or be made in instalments in the terms to be set out by this Honourable Court. (c) In the interim the Defendant by itself and/or its agents/servants be restrained in any manner including by way of appointment of receiver/manager against the Plaintiffs or any of them from enforcing recovery of any money allegedly due under any security documents until determination of this suit. (d) Damages for breach of contract. (e) Costs. (f ) Value Added Tax on the costs. (g) Such other or further relief as this Honourable Court may deem fit”. Accompanying the plaint was a chamber summons under a certificate of urgency, and the summons sought injunctive reliefs in terms of prayer (e) in the plaint. Mr Justice Rimita duly granted the injunctive relief on 2 May 2000. It appears that after the injunctive relief was granted the parties entered into negotiations and on 16 May 2000, they sent to the High Court a detailed consent document which was on the same day made a decree of the Court. The terms of that decree were:

“1. The parties having taken accounts, it is hereby agreed and admitted by the Plaintiffs that the sum due by them to the Defendant as at 2 May 2000 is KShs 106 625 065,18 (Kenya Shillings one hundred and six million six hundred twenty five thousand and sixty five cents eighteen). 2. I t is hereby agreed by the Plaintiffs that the said sum of KShs 106 625 065,18 (Kenya Shillings one hundred and six million six hundred twenty five thousand and sixty five cents eighteen) shall accrue interest at the Defendant bank’s base rate (from time to time) plus 4% per annum from 3 May 2000 until payment in full. 3. T he Plaintiffs hereby acknowledge that the said sum of KShs 106 625 065,18 (Kenya Shillings one hundred and six million six hundred twenty five thousand and sixty five cents eighteen) together with interest as aforesaid shall become due and payable on the 5 October 2000. 4. T he Defendant whether by itself, its agent and/or servants be and is hereby restrained from appointing a receiver/manager or disposing of the properties secured by the debentures and charges issued and/or granted by the First and Second Plaintiffs in favour of the Defendant or enforcing the personal guarantees of all the Plaintiffs granted in favour of the Defendant until 5 October 2000 but without prejudice to the Defendant’s right to inspect the plant machinery land and buildings secured by the debentures and charges (on giving reasonable notice) and to issue any notices thereunder. 5. U nless the amount as aforesaid (clause 1 and 2) is paid in full on the 6 October 2000 the injunction referred to in 4 above shall stand discharged and vacated and the Defendant shall be at liberty to exercise all its powers under the said debentures and charges including but not limited to appointment of receivers and managers and disposal of the plant, machinery, land and buildings whether by public auction or by private treaty. 6. C osts to the Defendant to be agreed or in default to be taxed. 7. T his suit and all issues between the parties hereto be marked as settled on the terms enumerated hereinabove”. The consent document which gave birth to these orders was written on the letterheads of the Respondents’ advocates and was duly signed by the respective advocates of the parties. Accordingly, there could not have been any question of undue influence by one side over the other. Indeed at the time the document was signed, there was already in force an order of injunction restraining the Appellant from enforcing its rights under the debentures and charges. The terms of the consent order gave to the Respondents a breathing space of nearly five months during which time the Appellant was injuncted from enforcing its right under the debentures and the charges. Mr Sehmi who argued the case of the Respondents, freely admitted before us that the Respondents became aware of the consent judgment almost immediately. The Respondents did not do anything about the matter until 4 October 2000, two days before the day of reckoning, when they ran back to Rimita J demanding that the consent judgment be set aside. The alleged 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, therefore, the Respondents misapprehended the facts or were in ignorance of those facts, that there were certain alleged misrepresentation(s) by the Appellant and so on and so forth. I listened to Mr Sehmi argue these points and all I could get was that the consent judgment itself contained a false statement that accounts had been taken when none had in fact been taken, that there was some misrepresentation on the side of the Appellant, but Mr Sehmi would not say exactly who made the misrepresentation and to whom it was made. It is clear from the authorities with which I started this judgment that the burden on a party who alleges that there was in fact no consent or that the consent was invalid, is a heavy burden, and for my part I am at a loss to understand how it came to be that the experienced counsel, Mr *Sheth*, who signed the consent on behalf of the Respondents could have agreed to the statement in paragraph one of the consent that accounts had been taken when none had been taken. Add to that the fact that the Respondents came to know of the judgment almost immediately and yet they did not come to court until some five months later and that at the time when the grace period was due to run out, and it becomes clear beyond any reasonable doubt that the consent judgment ought not to have been set aside. The Respondents’ advocates had ostensible authority to reach a compromise on their behalf. The advocates did so and it is to be noted the advocates have not complained that they were cheated or misled over anything. The Respondents came to know of the consent immediately and if it was true that accounts had not been taken contrary to what was specifically stated in paragraph one of the consent judgment, one would expect them to have immediately challenged the judgment instead of waiting until two days before the date when they would be required to meet their part of the bargain. For my part, I have no doubt that the Respondents, by their motion brought to court on 4 October 2000 were merely trying to avoid the evil day and the Learned Judge of the High Court ought to have dismissed that motion. I agree with Githinji JA whose judgment I had the privilege to read in draft form, that this appeal must be allowed. I would accordingly allow the appeal, set aside the ruling and orders of the High Court dated 24 July 2002 and substitute them with an order dismissing with costs the Respondents’ amended notice of motion dated 19 September 2001. I would also award the costs of this appeal to the Appellant. Githinji JA agrees and those shall be the orders of this Court. I only need to add that this judgment is delivered pursuant to the provisions of rule 32(3) of the Court’s Rules, one member of the Court having ceased to hold office.

**Githinji JA:** This is an appeal from the ruling and order of the superior court (Rimita J) given on 24 July 2002 in which the court set aside a consent judgment and decree given on 16 May 2000. This is the convenient stage to set out the relevant circumstances under which the consent judgment was entered and subsequently set aside. The six Respondents in this appeal filed a suit against the Appellant (hereinafter referred to as “the bank”) in the superior court on 2 May 2000. The plaintiffs aver in the plaint, *inter alia*, that the bank granted a loan in the aggregate sum of KShs 100 000 000 to the First Respondent in 1995 and 1997; that the loan was secured by two debentures and two charges over land registration number Block 8/21 Nakuru owned by Second Respondent and further secured by personal guarantees executed by Third, Fourth, Fifth and Sixth Respondents; that the First Plaintiff ceased operations and closed the factory in 1999 as a result of a government ban on harvesting of timber; that subsequently the First Plaintiff and Defendant entered into negotiations in which Defendant agreed to suspend repayment of the balance of the loan until the supply of raw material to First Plaintiff was resumed; that in breach of the agreement, the Defendant has “recalled” the loan and has threatened to realise the debentures, the charges and personal guarantees on alleged balance of KShs 114 000 000 while First Plaintiff has already paid KShs 114 000 000; that the Respondent has, in contravention of the terms of the debentures, charged excessive rate of interest penalties and bank charges and has unlawfully compounded them which if removed, would drastically reduce the charged balance of KShs 114 000 000; and that the debentures which defendant had threatened to enforce have no force of law and are null and void *ab initio*. The relief sought in the plaint was:

“(a) An order that proper account be taken to determine the amount if any lawfully and legitimately due from first plaintiff to defendant. (b) If any amount is found to be due from first plaintiff to the defendant judgment be entered for such an amount in favour of defendant with a proviso that payment thereof be postponed and/or made in instalments in the terms to be set out by this honourable court. (c) In the interim the defendant by itself and/or its agents/servants be restrained in any manner including by way of appointment of receiver/manager against the plaintiffs or any of them from enforcing recovery of any money allegedly due under any security documents until the determination of this suit. (d) General damages for breach of contract. (e) Costs. (f ) value added tax on the costs. (g) Such other or further relief as this Honourable Court may deem fit”. The plaintiff filed an application for interlocutory injunction on the same date they filed the suit seeking an order to restrain the bank from enforcing any recovery of any sum under the security documents including appointment of receiver/manager until the final determination of the suit. The application was supported by a short affidavit of Narwar Singh Bhogal, managing director of First Plaintiff in which he repeated the contents of the plaint and stated that First Defendant had by a letter dated 2 May 2000 suddenly threatened to unlawfully recover the security documents. The application for interlocutory injunction was listed for hearing *ex parte* in the first instance before Rimita J on 2 May 2000. An *ex parte* order of injunction was given against the Defendant on 2 May 2000 and the application fixed for hearing *inter partes* on 16 May 2000. The Defendant upon service of the application filed grounds of opposition and a long replying affidavit supported by documents sworn by Mrs Nasim Devji, general manager of the Defendant. Mrs Nasim Devji discloses in the affidavit that the First Defendant has defaulted in the repayment of the loan since mid-1998 and had by a letter dated 15 September 1998 sought a review of the repayment terms which review was granted but Plaintiff failed to adhere to the agreed terms. The replying affidavit further discloses that thereafter the Plaintiff sought the consolidation of the two loans and a rescheduling of the repayments. The Defendant agreed to that request. An agreement was executed on 1 March 2000 by which the parties agreed, *inter alia*, that the total sum due to the bank after the consolidation of the accounts as at 31 May 1999 was KShs 104 373 414,85. Similarly, a deed of guarantee and indemnity was executed on 1 March 2000 by Third and Fourth Plaintiffs in favour of the bank in which it was agreed that the maximum liability of the guarantors was KShs 104 373 414,85 plus interest and other costs, charges and expenses. On 16 May 2000 when the application for interlocutory injunction was scheduled to be heard, Mr *Sheth*, learned counsel for Respondents and Mr *Madhani* for the Appellant, appeared before Rimita J and recorded a consent judgment in terms of the consent letter dated 16 May 2000. That consent letter is addressed to the Deputy Registrar of the High Court and states in the relevant part: “We have the honour to request that by consent the following orders be recorded herein: 1. T he parties having taken accounts, it is hereby agreed and admitted by plaintiffs that the sum due by them to the defendant as at 2 May 2000 is KShs 106 625 065,18 (Kenya Shillings one hundred and six million, six hundred and twenty five thousand and sixty five and cents eighteen). 2. I t is hereby agreed by the plaintiffs that the said sum of KShs 106 625 065,18 (Kenya Shillings one hundred and six million, six hundred and twenty five thousand and sixty five and cents eighteen) shall accrue interest at the defendants bank’s base rate (from time to time) plus 4% per annum from 3 May 2000 until payment in full. 3. T he plaintiff hereby acknowledges that the said sum of KShs 106 625 065,18 (Kenya Shillings one hundred and six million, six hundred and twenty five thousand and sixty five and cents eighteen) together with interest as aforesaid shall become due and payable on the 5 October 2000; 4. T he Respondent, whether by itself its agents and/or servants be and is hereby restrained from appointing a receiver/manager or disposing of the properties secured by the debentures and charges issued and/or granted by the first and second plaintiffs in favour of the defendant or enforcing its personal guarantees of all of the plaintiffs granted in favour of the defendant until 5 October 2000, but without prejudice to the defendants rights to inspect the plant machinery land and buildings secured by the defendants and charges (on giving reasonable motive and to issue any motives thereunder. 5. U nless the amount as aforesaid (clause 1 and 2) is paid in full on the 6 October 2000 the injunction referred to in 4 above shall stand discharged and vacated and the defendant shall be at liberty to exercise all its powers under the said debentures, charges including but not limited to appointment of receivers and managers and disposal of the plaint, machinery land and buildings whether by public auction or private treaty. 6. C osts to the defendant to be agreed or in default to be taxed. 7. T his suit and all issues between the parties hereto be marked as settled on the terms enumerated herein above*.* Signed.............................................. Signed.................................................................... Sheth and Wathigo Mohamed Madhani and Co Advocates for Plaintiffs Advocates for the Defendant”. On 4 October 2000, a day before the judgment sum was due and payable Respondents filed an application under Order XLIV, rule 1 of the Civil Procedure Rules seeking an order that the consent judgment entered on 16 May 2000 be reviewed and/or set aside. The Respondents also sought an order for extension of injunction until the determination of the application. The application for review of the consent judgment was mainly based on the ground that the consent judgment was recorded on the misrepresentation that the accounts had been taken which was not the case. The application was again listed before Rimita J for hearing *ex parte* in the first instance on the same day and interim orders granted. On 27 November 2000, it was ordered that: “1. … 2. T he interim orders are extended and *status quo* be maintained until final disposal of the plaintiffs application dated 4 October 2000. 3. T he defendant be at liberty to file and serve upon all plaintiffs a replying affidavit 30 days prior to the hearing date. 4. … ”. The application was fixed for hearing for 23 March 2001 but it was not heard until 30 April 2001. In the meantime, the bank filed a replying affidavit sworn by Mrs Nasim Devji on 19 March 2001 in which she disclosed that on 11 December 2000 during the pendency of the application for review, the Respondents paid to the bank KShs 121 482 658,40 being the full amount outstanding and due to the bank. She also disclosed that following the payment to the bank the bank has since discharged all the securities that had been given to it by the applicants. That notwithstanding, Rimita J allowed the application on 24 July 2002, set aside the consent judgment and ordered parties to draw issues and fix suit for hearing. Before Mr *Sehmi* for the Respondents concluded his submissions in support of the application for review, he stated that the affidavit of Mrs Nasim Devji filed on 19 March 2001 in reply to the application for review was irregular and irregularly filed because it was filed four days before the hearing date in contravention of the order of 27 November 2000 that it be filed 30 days before the hearing date. He however, reminded court that it had power to enlarge time and left the issue to the discretion of the court. Mr *Sheth* for the bank, however, urged the court to extend time for the filing of the affidavit as the affidavit was filed before the hearing of the application and no prejudice had been caused. On that issue, the Learned Judge held thus: “I think the Respondent’s counsel should have made an application to have the Respondent’s affidavit admitted out of time and obtain an order to that effect. It was not good enough nor does it serve any purpose to have the affidavit admitted out of time. The Respondents’ replying affidavit is not properly on record and cannot be used as a pleading in the matter before me”. The bank has appealed against that finding. Mr Ochieng *Oduol* who argued the appeal on behalf of the bank submitted that since the affidavit was filed on 19 March 2001 more than 30 days before the hearing of the appeal commenced on 30 April 2001, the affidavit was not filed in contravention of the court order. By the order that the bank do file the replying affidavit 30 days prior to the hearing, the Learned Judge in fact reduced the time provided by Order L, rule 16 of the Civil Procedure Rules for filing a replying affidavit. Order L, rule 16(1) of the Civil Procedure Rules then and now provides that a respondent who wishes to oppose a motion should file and serve a replying affidavit if any, not less than three clear days before the date of hearing. The purpose of requiring that the replying affidavit be filed 30 days prior to the hearing date was to give the Respondents sufficient time to study the affidavit. The application was heard more than 30 days after the affidavit was filed and Respondents had not been prejudiced and did not claim to have been prejudiced. By the affidavit of 19 March 2000 Nasim Devji mainly adopted the contents of her long affidavit of 12 May 2000 and it was highly prejudicial to the bank to exclude the affidavit from consideration. In any case, the Learned Judge had the discretion and inherent jurisdiction to admit the affidavit out of time even on an oral application if the justice of the case demanded so. I am satisfied that in this, the Learned Judge misdirected himself in law and made a plainly wrong decision in rejecting the replying affidavit of Nasim Devji and this calls for interference with the Judge’s discretion. The bank opposed the application for review on several grounds including the ground that the application was incurably defective, as the affidavit of Narwar Singh Bhogal sworn on 4 October 2000 in support of the application did not show the place where the oath was taken contrary to section 5 of the Oaths and Statutory Declarations Act (Chapter 15). There is a rubber stamp of the Commissioner of Oaths on the affidavit showing that the address of the Commissioner of Oaths is PO Box 16000 Nakuru. The Learned Judge concluded that the rubber stamp showing the postal address of the Commissioner of Oaths was enough to show the place of swearing and that the irregularity was in form only which is curable under Order XVIII, rule 7 of the Civil Procedure Rules. That rule authorises the Court to receive any affidavit for purposes of being used in a suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form. The affidavit was sworn for the purposes of the suit and complied with the provision of Order XVIII of the Civil Procedure Rules as to content. The affidavit is shown to have been drawn and filed by Sheth and Wathigo Advocates of Nakuru. The deponent has shown his address as PO Box 15903 Nakuru. In the circumstances, there was sufficient evidence to show that the affidavit was sworn in Nakuru as shown in the rubber stamp of the Commissioner of Oaths. I agree with the Learned Judge that the affidavit was not fatally defective and that ground of appeal fails. The main ground of appeal is in effect that the Learned Judge erred in fact and in law in setting aside the consent judgment on the ground of alleged misrepresentation. The letter dated 16 May 2000 which constitutes a compromise was signed by the respective advocates for the parties who were also present in court when the consent judgment was recorded. The law is that, so long as a counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and has apparent authority to compromise all matters connected with the action – see *Shah v Westlands* GSP *Ltd* [1965] EA 642; *Wasike v Wamboko* [1982–88] KAR 625; *Karani and others v Kijana and others* [1987] KLR 557. The authority of the Respondents’ advocates – Sheth and Wathigo Advocates – to compromise the suit is not challenged by the Respondents. Mr Rajnikant *Sheth* does not in his affidavit sworn in 4 October 2000 in support of the application for review say that he did not have authority from the Respondents to compromise the suit. Similarly, Mr Narwar Singh Bhogal (Third Respondent) did not in his affidavit sworn on 4 October 2000 to support the application for review say that the Respondents had not given their advocates instructions to compromise the suit. The compromise of a disputed claim made *bona fide* is a good consideration and the Court cannot interfere with it except in the circumstances which would afford a good ground for varying or rescinding a contract between parties – *Hiram v Kassam* [1952] 19 EACA 131. That case has been followed in subsequent cases by the Court of Appeal – see *Brooke Bond Liebig (T) Ltd v Mally* [1975] EA 266; *Wasike v Wamboko* (*supra*). In *Wasike*’s case (*supra*) Hancox JA stated the law very succinctly at 626 thus: “It is now settled law that a consent judgment or order has contractual effect and can only be set aside on the grounds which would justify setting a contract aside”. The legal consequences of recording a compromise under Order XXIV, rule 6 of the Civil Procedure Rules as Rimita J did on 16 May 2000 is that the decree is passed upon a new contract between the parties superseding that original cause of action – *Hiram v Kassam* (*supra*). There is support for that principle in paragraph 1584 of *Chitty on Contracts* (26 ed) Volume 1 which partly states: “More often, however, the claimant will agree to accept the other party’s promise of performance in satisfaction of his claim. The original claim is then discharged from the date of agreement and cannot be revived. The claimant’s sole remedy, in the event that the other party fails to perform, is by an action for breach of the substituted agreement; and has no right to resort to the original claim. If he wishes to proceed with the original claim should the other party fail to perform, an express term should be incorporated in the agreement to that effect”. The Court has jurisdiction to set aside a consent judgment if it is shown to have been based on an agreement induced by misrepresentation. The representation must be shown to have in fact influenced the representee into entering into an agreement. In this case the Learned Judge made the following finding: “What happened prior to the entering of the consent judgment no doubt clearly shows that if the minds of the parties could be probed genuine consent would be found wanting in the consent judgment entered on 16 May 2000. Mr Rajni *Sheth* entered into the consent in a mistaken belief that the accounts between the parties were in order as only interest had been charged as agreed between the parties and no penalties or illegal bank charges had been levied as stated by the defendant. The defendant had therefore misrepresented the position of the accounts to Mr Rajnikant *Sheth* advocate, thereby obtaining a consent judgment”. Mr Rajnikant *Sheth* does not say in his affidavit sworn on 4 October 2000 that the Respondent misrepresented to him that the accounts had been taken and were correct before he entered into a compromise. What he states in paragraph 4 of that affidavit is that he has been informed by Mr Narwar Singh Bhogal that Plaintiffs did not take accounts prior to recording the consent order and solely relied on the amount in the affidavit of Nasim Devji. Mr Narwar Singh Bhogal depones in paragraph 26 of his affidavit sworn on 4 October 2000 that the accounts had not been taken prior to recording of the consent judgment and that the statement in the consent letter that the accounts had been taken was a misrepresentation to court. So, neither Mr Rajnikant *Sheth* nor Mr Narwar Singh Bhogal claims that the Respondents had misrepresented to him that the accounts had been taken. The Respondents’ advocates knew that the main prayer in the plaint is for accounts to verify the amounts that the First Respondent owed to the bank. It is, therefore, incredible that they could have prepared and signed the letter evidencing the compromise if they had not already ascertained the exact amount due. The Respondents’ advocates knew that accounts had not been taken but nevertheless agreed on KShs 106 625 065,18 as the amount owing and prepared a consent letter to that effect. There is nothing surprising about the figure of KShs 106 625 065,18 in the consent letter because on 1 March 2000, less than three months before the consent letter was signed, Respondents had signed a rescheduling agreement and guarantee and indemnity in which they agreed that they owed the bank KShs 104 373 414,85 as at 31 May 1999. Admittedly, the Respondents were in possession of the latest bank statement annexed to Nasim Devji’s affidavit sworn on 12 May 2003 showing that Respondents owed the bank KShs 106 625 065,18 as at 2 May 2000 and how the sum had been computed. The sum agreed upon is definitely less than the KShs 114 000 000 referred to in the plaint as the amount that the bank was claiming. Lastly, although the Respondents averred in the plaint that the bank had in contravention of the debenture charged oppressive and excessive interest, penalty and bank charges, the Respondent did not even attempt in the subsequent affidavits to show any specific charge in the several bank statements filed by the bank that is not based on the contract. The Respondents merely made general complaints about the incorrectness of the bank account. It follows from the foregoing that there was indeed no misrepresentation made by the bank or any evidence that the Respondents were induced by any misrepresentation to enter into the compromise. The conduct of the parties since the compromise was recorded is a relevant consideration in an application to set aside the compromise. Excessive delay in making an application to set aside may be construed as an affirmation of the compromise depending on the circumstances of each case. In this case, the application to set aside the compromise was made over four-and-a-half months after the consent judgment was entered and only two days before the bank became entitled to realise the securities. There is no explanation for this delay. It is apparent that the application to set aside the compromise was made to facilitate an application to stay the execution of the consent judgment and thereby buy more time. Further, the Respondents satisfied the consent judgment on 11 December 2000 by paying KShs 121 482 656,40 to the bank. As the bank statements annexed to the affidavit of Nasim Devji sworn on 19 March 2000 show, the figure of KShs 121 482 656,40 was computed on the basis of the outstanding balance of KShs 106 625 065,18; the amount in the disputed compromise. The Respondents paid this sum despite the fact that the order of 27 November 2000 staying execution of the consent judgment until the application for review had been determined was still in existence. That conduct amounts to an affirmation of the contract – see paragraph 474 at 316 of *Chitty on Contracts* (*supra*) which states: “If the representee having discovered the misrepresentation either expressly declares his intention to proceed with the contract, or does some act inconsistent with an intention to rescind the contract, he is bound by his affirmation”. Moreover, where the consent judgment impugned has been executed like in the present case, the courts are less likely to set aside the consent judgment. In the case of *Mukisa Limited v West End* [1970] EA 469 at paragraph 472D the Court cited a passage from Lord Denning MR in *F and G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] Llyods Rep 53: “In a commercial agreement the further the parties have gone on with their contract the more ready the courts are to imply any reasonable terms so as to give effect to their intention. When much has been done, the courts will do their best not to destroy a bargain. When nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed”. Lastly, I agree with the view of the Appellant’s counsel that the whole suit is exhausted and nothing more remains to be done. By making the disputed payments which are the subject matter of the suit resulting in the releasing of securities to the Respondents, the substratum of the suit is gone and it is not possible to deal with the suit in the present form unless drastic amendments are made. For the foregoing reasons, I am satisfied that there were no valid grounds for setting aside the consent judgment and that it is now too late to set aside the consent judgment. I would allow the appeal in the terms proposed by Omolo JA. For the Appellant:

*MK Madhani* instructed by *Mohamed Madhani and Co*

For the Respondents:

*RD Sheth* instructed by *Sheth and Wathigo*