**Equip Agencies Ltd v Credit Bank Ltd**

**Division:** Milimani Commercial Courts of Kenya at Kisumu

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**Date of ruling:** 7 June 2004

**Case Number:** 1265/02

**Before:** Emukule J

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Advocate – Client – Ostensible authority – Whether advocate has ostensible authority to*

*compromise a case on client’s behalf.*

*[2] Civil procedure – Review – Consent judgment – Ground upon which a consent judgment may be*

*reviewed – Order XLIV, rules 1, 3 and 4 – Civil Procedure Rules – Section 80 – Civil Procedure Act*

*(Chapter 21).*

*[3] Mortgage – Chattels mortgage – Whether party may sell movable property situated on a mortgaged*

*property in absence of a specific chattels mortgage or general debenture.*

**RULING**

**EMUKULE J:** This ruling relates to the application dated 10 March 2004 brought by way of a notice of motion under the provisions of Order XLIV, rules 1, 3 and 3 (I think rule 4) Order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules, section 3A and section 80 of the Civil Procedure Act and all enabling provisions of the law. The application was filed under a certificate of urgency and orders were in the first instance granted *ex parte*. The application seeks the orders following: “(1) Spent (2) That pending the hearing and final determination of this suit, a temporary injunction do issue restraining the respondentfrom doing any of the following acts or any of them, that is so say advertising for sale, alienating, selling or disposing by public auction or otherwise howsoever, interfering with the applicant’s title to or interest in all that piece of land known as title number LR number Eldoret Municipality/Block 10/34 including the plant and/or machinery thereon and all its components. (3) That this Court does review and set aside the consent judgment entered on 22 January 2003 and all consequential orders and this matter proceed to trial. (4) That the respondent whether by itself, its servants, agents advocates or auctioneers or any of them or otherwise howsoever be restrained by a temporary order of injunction from doing any of the following acts, or anyone of them, that is to say, from interfering with the applicant’s right of possession, advertising for sale, disposing by public auction or otherwise interfering with the ownership of and title to and/or interest in the title number Eldoret Municipality Block 10/34 pending the determination of this suit. (5) That in the alternative and without prejudice to the foregoing prayers, the Court do issue an injunction restraining the respondent from advertising for sale, by public auction or otherwise howsoever all the plant, equipment, machinery and Chattels currently situated on title number Eldoret Municipality block 10/34, and a further injunction do issue restraining any auction, sale or disposal of the suit land for a period of one year to enable the removal of the said chattels, plant, equipment and machinery. The application was supported by the supporting affidavit of Divyesh Indubhai Patel sworn and filed on 10 March 2004 and the grounds that:

(I) That there is sufficient reasons for review because: ( *a*) T he said consent order was recorded without the knowledge and authority of the applicant. ( *b*) T he advocates who recorded the said order were not advocates *per se.* ( *c*) N o valid statutory notice has ever been served on the allicant. ( *d*) W hereas the parties herein filed a “consent order” the deputy Registrar erroneously issued a “decree” thereby marking the suit as finalised contrary to the intention of the parties. (II) That the order was recorded by mistake and by an error apparent on the face of the record in that: ( *a*) T he parties did not address themselves to the fate of the chattels, plant and machinery worth KShs 82 000 000 currently situated on the suit premises. ( *b*) T he sum of KShs 31 643 469-50 recorded as due to the applicant was not in fact so due, the applicant having to date paid to the defendant the sum of KShs 61 347 516-40 in repayment of the original loan of KShs 25 000 000. ( *c*) T he charge document is fatally defective and incapable of taking effect and no statutory power of sale can properly be exercisable thereunder. ( *d*) T he plant, machinery and chattels, thought not charged are not provided for in the consent yet the respondent seeks to sell the same; ( *e*) T he said consent order in effect gave the respondent a decree for the sum of KShs 25 million whilst not taking away the statutory power of sale contrary to tenor of section 74(3) of the RLA (Chapter 300), (the Registered Land Act) and thereby subjecting the applicant to double jeopardy over the same purported debt. ( *f*) The consent made no mention of the equipment, plant and machinery in the suit premises which is of more value than the charged premises. The affidavit of Divyesh Indubhai Patel reiterates the above ground and summarise them in paragraph 19 thereof that: (*a*) No statutory power of sale can arise out of the “charge” document as the same is fataly defective. (*b*) The applicants are decree holders and cannot enforce both a decree and the statutory power of sale, (*c*) The charge is null and void and of no effect for non-compliance with the mandatory provisions of the Registered Land Act and the Law of Contract Act, (*d*) No valid statutory notice has ever been sent. and adds that these matter were not addressed by the consent order, and that the applicant was to suffer irreparably in the event of sale it would be near impossible to source similar machinery in view of the enormous first cost of the project of KShs 350 000 000. The deponent also lays blame upon their previous advocate who they say had now jumped ship and joined the opposition in a manner of speech. The application is opposed and in a replying affidavit of Narendra Kumar Agarwal the respondent’s Managing Director, the deponent says that the consent was recorded by advocates on record who were duly authorised to do so, and with which order the applicant had partially complied in that the applicant had paid both the respondent’s advocate’s fees as well as the auctioneer’s fees. The applicant had also paid instalments due under the consent order, and further purported to pay off the entire sum due under the consent, but that the cheques issued by the applicant, were returned unpaid or “dishonoured”. The deponent charges that the applicant is not entitled to the remedies it seeks because: (*a*) It is truly indebted to the respondent, and having admitted that indebtedness, it has returned to court with half truths, unclean hands and in bad faith. (*b*) That having admitted the indebtedness and having made part payment pursuant to the consent, it is precluded from challenging either the consent or the charge instrument. (*c*) The defendant has come to court belatedly after part compliance with the terms of the consent herein and well after one (1) year after recording the consent and is therefore guilty of indolence. (*d*) By its previous conduct of filing numerous applications and/or suits and as admitted by the applicant in those previous applications and affidavits in support the applicant is merely interested in buying time and is abusing the process of court. (*e*) The present application and the supporting affidavits are unmerited and untenable in law, for *inter alia*, failing to meet the requirements for granting the remedies sought. (*f*) In any event, compensation in damages would be an adequate remedy, which the respondent being a sound banking institution would be able to meet. (*g*) In the interests of justice parties should adhere to their contractual obligations and/or obligations under the consent decree/order. (*h*) That this application is a belated after-thought and fatal attempt by theapplicant to delay the respondent from enforcing its rights. Central to the determination of issues raised by this application is the nature and substance of both the applicant’s claim in accordance with the applicant’s chamber summons (application) dated and filed together with the plaint on 20 December 2002, the defence filed by the respondent on 16 January 2003, the replying affidavit of Narendra Kumar Agarwal, the respondents’Managing Director sworn on 15 January 2003 and filed on 16 January 2003, to the subsequent compromises reached in the letter dated 22 January 2003 signed jointly by the applicant’s then advocates on record, Cheptumo and Company Advocates and Nyachae and Company advocates, leading to the recording of the consent decree on 22 January 2003 and issue thereof on 26 February 2003. When Mr *Gichuki King’ara*, counsel for the applicant urged this matter before me on 27 April 2004 he told the Court in as many words that the consent order/decree be reviewed. The applicant had no knowledge of it when it was recorded, counsel for the applicant then did not have authority to and entered into such a consent order without the applicant’s authority. Counsel also told the Court that there was an error apparent on the fact of the record, the consent was intended to record a consent in respect of the chamber summons application of 20 December 2002 and not the entire suit, and thus become a judgment leading to the issue of a decree and not an order. Counsel also attacked the decree for not dealing with the issue of the chattels whose value he said was far in excess of the value to the land on which the machinery was situated; and that this fact is acknowledged by the respondent. The applicant’s counsel also attacked the charge, for being defective, and not complying with the provisions of section 108 of the Registered Land Act, and that therefore it was null and void. Unless the respondent was restrained the application was open to double jeopardy as under both the charge, and the consent decree, the respondent was at liberty to sell the suit property together with plant, equipment, machinery and the chattels situate on the suit property. Counsel for the applicant also told the Court that in the alternative, the applicant be permitted to remove the plant, machinery and equipment from the suit premises within one year presumably from the date of the order under this application. In response to the applicant’s counsel’s submissions, Mr *Ashitiva*, counsel for the respondent relied upon and reiterated the averments contained in the replying affidavit of Mr Narendra Kumar Agarwal, the respondent’s Managing Director, and already referred to above. The conduct of the applicant had not been exemplary. The applicant had partially observed the terms of the consent decree to the extend of even issuing cheques for the payment of the full decretal sum, but for their being dishonoured, this matter would have been finalised. The prayers being canvassed under this application had been canvassed before. The letter containing the terms of the consent decree was signed by both counsel for the applicant and the respondent respectively. The applicant’s counsel had authority as a recognised agent of the applicant to negotiate and sign the consent letter in this professional capacity. Having observed the terms of the consent decree, the applicant cannot now be heard to say that his counsel had no authority to sign or that they had no knowledge of the terms thereof. Counsel for the applicant cannot accuse the Deputy Registrar for issuing a decree rather than an order. The consent letter stated that the case be marked as settled thus making the consent letter, a judgment of the Court by the consent of the parties, and issue a decree and not an order. The issue regarding the defectiveness and therefore legality of the charge had also been previously urged, and had been settled by the consent decree. The respondent had issued a valid statutory notice dated 7 June 2002, and the same had been acknowledged by Messrs Mackecha and Company Advocates on 19 July 2002 on behalf of the applicant and that the schedule exercise of the statutory power of sale which had been scheduled for 23 January 2003 were regular and lawful in terms of the Registered Land Act and the Auctioneers Rules 1997. The applicant had therefore failed to make out any *prima facie* case entitling him to the injunctive reliefs sought on this leg of the application. On the alternative prayer, that injunctive relief do issue in respect of the plant, machinery and equipment and other chattels, the respondent’s counsel Mr *Ashitiva* in the presence of the applicant’s counsel*, Gichuki King’ara*, on 4 May 2004 told the Court that the respondent was willing to give a written undertaking in terms of paragraph 16 of the replying of affidavit of Narendara Kumar Agarwal, sworn and filed on 11 December 2003 in respect of High Court civil case number 773 of 2003 between the applicant and the respondent. Both counsel confirmed that such an undertaking would take away the equipment, plant and machinery from the ambit of the charge, and thus leave the respondent with the liberty to realise its security by sale of the suit property together with other improvements thereon other than the said machinery, plant and equipment. What has been set out above are essentially the facts and the submissions of counsel on this matter. I will now revert to the law. As stated at outset of this ruling, the application is expressed to be brought under the provisions of Order XLIV, rules 1, 3 and 4 (not rule 3 as stated in the application), and Order XXXIX, rules 1, 2 and 3 of the Civil Procedure Rules and section 3A and 80 of the Civil Procedure Act, and all enabling provisions of the law. Reference to rule 4 of the said order is because the Judge who passed the decree or order is no longer attached to this Court and the application may be heard by any other Judge who is attached to the Court at the time the application comes for hearing. The decree for review was made by Honourable Mr Justice Ringera (as he then was) who is no longer attached to this Court and hence this Court has jurisdiction to determine this application. Otherwise rule 1 of the said Order provides that: 1(1) any person considering himself aggrieved: ( *a*) b y decree or order from which an appeal is allowed but from which no appeal has been preferred, or ( *b*) b y a decree or order from which no appeal is hereby allowed. And who desires a review of the decree passed or order made may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay: (*a*) upon 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 was made; (*b*) on the account of some mistake or error apparent on the face of the record; or (*c*) for other sufficient reason. Rule 3 thereof says that where it appears to the Court that there is not sufficient ground for a review, it shall dismiss the application, and where it is of the opinion that the application for review should be granted, it shall grant the same, (rule 3(2)). The only proviso is that no review shall be granted on the ground of a new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree was passed or order made, except upon strict proof of such allegation. For the record, the following cases were cited to the Court in support of the application for review by the applicant. They are: (1) Galot and others v Kenya National Capital Corporation [1993] LLR 1628 (CCK). (2) Kimita and another v Wakabiru [1985] LLR 246 (CAK). (3) Tropical Food Products International v Eastern and Southern African Trade and Development Bank and another [2001] LLR 1530 (CCK) (4) *Simiyu v Housing Finance Co of Kenya* [2001] 2 EA 540. (5) Kenya Commercial Bank Ltd v Kariuki [2001] LLR 1642 (CCK). (6) *Wasike v Wamboko* [1982-88] 1 KAR 625. (7) Kanorero River Farm Ltd and others v National Bank of Kenya Ltd [2001] LLR 1056 (CCK) These cases concerned the subject at issue here. In *Galot and others v Kenya National Capital Corporation* the issue was whether the Court has jurisdiction to review consent orders and the grounds for interfering with a consent order. The case of *Wasike v Wamboko* also concerned a review of a consent judgment, and so did the case of *Kanorero River Farm Ltd*. For the purpose of the first leg of the applicant’s application I shall refer to the holding in *Wasike v Wamboko* from the judgment of Hancox JA at 626 and 628. At 626 he said: “It is now 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 carried out”. In *Purcell v FC Trigell* [1970] 3 All ER 671, Winn LJ said at 676: “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 setting aside or rectification of this order looked as a contract.” That decision was followed in *Channel Ltd v FW Woodworth and Co Ltd* [1981] 1 All ER 745, per Buckley LJ at 571, and in *Siebe Gorman and Company v Principal* [1982] LR 185 per Lord Denning MR at 189 and Everleigh LJ at 191. It seems the position is exactly the same in East Africa. It was set out by Windham J as he then was, and approved by the Court of Appeal for East Africa, in *Hirani v Kassam* [1952] 19 EACA 131 at 134 as follows: “The mode of paying the debt, then, is part of the consent of judgment. That being so, the Court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground was alleged here. The position is clearly set out in *Section ... Judgments and Orders* (7 ed) Volume 1 at 124, as follows: ‘*prima facie* any order made in the presence of and with 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’”. This passage was followed by the same court in *Brooke Bond Liebig v Mallya* [1975] EA 266 at 269 in which Law Ag P said: “A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between parties”. On the position of the parties advocates, it is not necessary to record in a consent judgment or order that “parties” or “their advocates” consent to the consent judgment or order entered, for the advocates as recognised agents of their clients it will be an unusual situation where a consent judgment or order would be entered into except in the presence of either the parties or their advocates. In *Chandless-Chandless v Nicholson* [1994] 2 All ER 315 at 317 Lord Greene MR stated the universal practice is to record that a judgment or order is by consent, if that be the case, and it is difficult to believe unless demonstrably shown otherwise that the Court would so head the judgment if it were not the case, at least so far as the Judge was aware. Further *Waugh v HB Clifford and sons* [1982] Ch 374 is persuasive authority that a solicitor or counsel would ordinarily have ostensible authority to compromise a suit so far as the opponent is concerned. Following the words of Hancox JA in *Flora Nasike*’s case I can detect no valid reasons on the record for saying that there exist grounds such as I have referred to which would justify the setting aside of the consent decree as a contract. Following again the edicts of rule 3(1) of the Order XLIV, that where it appears to the Court that there is not sufficient ground for review, it shall dismiss the application. I am of the view that for the reasons given, there are no grounds or sufficient grounds for varying or setting aside the consent decree passed on 22 January 2003 and issued on 26 January 2003 and this part of the applicant’s application fails. This leaves the Court to consider the second substantive leg of the applicant’s application, that injunctive reliefs be granted to the applicant’s pending the determination of this suit, that is to say, the respondent be restrained from selling by public auction or otherwise, and the respondent’s by itself or by its officers, employees, servants or agents, be restrained from selling the suit property (that is to say title number Eldoret Municipality Block 10/34) pending the determination of this suit. From the analysis of the facts of this case and findings above that there are no grounds for reviewing the consent orders herein, the plaintiff has not satisfied the cardinal principles for granting of an interlocutory injunction laid down in the case of *Giella v Cassman Brown and Co Ltd* [1973] EA 358. These are firstly that the applicant must establish a *prima facie* case with a probability of success. Secondly that unless an injunction is granted, the applicant will suffer irreparable loss which will not be sufficiently compensated in damages, and thirdly if in doubt, the Court will decide the matter on the balance of convenience. Even if the respondent were not a sound lending institution, this is one of those cases where the Court would refuse to grant an interlocutory injunction. The applicant has not made a *prima facie* case with a probability of success. Counsel for the applicant told the Court that the respondent never gave the necessary statutory notice required under the provisions of section 74 of the Registered Land Act. A reading of paragraphs 10 of the defence dated and filed on 16 January 2003 clearly shows that such notice was given. As to whether the charge was defective and therefore unenforceable, I find that the charge on the face of it clearly states that it was an instrument prepared in a manner approved by the Chief Land Registrar in terms of section 108 of the Registered Land Act. Similarly the responsible Land Registrar examined it and caused it to be duly registered. There are no other grounds for impinging its legality or validity, and therefore enforceability. The applicant’s application must also fail in this ground as well. Finally, there is left to deal with, the applicant application in the alternative, “that without prejudice to the foregoing, injunctive relief do issue in respect of the plant, machinery and equipment and other chattels”. On this point, the respondent’s counsel told the Court that the respondent was prepared to concede that in absence of a chattel’s mortgage it was not entitled to sell the applicant’s plant, machinery and equipment and other chattels situate on the suit property that is land. Indeed this is the legal position, for in the absence of such a chattels mortgage or a general debenture, the respondent has no legal basis for selling the said movable and therefore removable assets, on the footing that the land and other improvements on the suit property are adequate if sold at the best price in a forced sale and would satisfy the consent decree. The applicant therefore succeeds on this point, and the respondent is therefore restrained from advertising for sale, by public auction or private contract, the plant, equipment and machinery and other chattels currently installed in buildings stores or other facilities in the suit land and shall issue to the applicant written undertaking in terms that the respondent shall in advertisement of the suit land specifically exclude from such advertisement reference to the sale of the plant, machinery and any equipment and other chattels situate upon the suit land, and shall carry out such advertisement strictly in terms of and in conformity with the contract, charge instrument, decree and all statutory and legal provisions applicable to the intended sale”. There shall be orders accordingly. As each party has on its own peculiar way succeeded in this matter,

I order that each party shall bear its own costs.

For the applicant:

*G King’ara*

For the respondent:

*Ashitiva*