IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KAJI. J, A. RUTAKANGWA, J.A And KIMARO , J. A,)

CIVIL APPEAL NO 78 OF 2001

ARUSHA PLANTERS AND TRADERS LTD
JAYANT NARSHIBHAI PATEL. } **.....APPELLANTS**
ROZINA JAYANT PATEL

VERSUS

EUROAFRICAN BANK (T) LTD.....RESPONDENT

(Appeal from the decision of the Court of Tanzania at Dar es Salaam)

(Dr. Bwana, J.)

Dated 30th day of May, 2001
in
Commercial Case No. 58 of 2001

JUDGMENT OF THE COURT

5th December, 2007 & 28th December, 2007

KAJI, J, A.

The respondent Euro African Bank (Tanzania) was the plaintiff in the High Court Main Registry Civil case No. 279 of 1998, whereby Arusha Planters and Traders Ltd, Jayant Narshbhai Patel and Rozina Jayant Patel , who are the first, second and third appellants respectively, were defendants. The respondent was claiming

payment of specified sums of money arising from an overdraft facility extended to the appellants. In the course of the hearing a consent judgment was entered and the matter was adjourned for setting terms of payment. Later the appellants instituted Commercial Case No. 58 of 2001 in the Commercial Division of the High Court claiming for the following reliefs:-

(a) A declaration that the plaintiffs (now appellants) were induced to execute the deed of settlement by coercion/duress and undue influence and that the said deed of settlement is null and void and it be adjudged cancelled.

(b) A declaration that the order of settlement given by this court was obtained due to factors in (a) above and fraudulently and be therefore vacated.

(c) An order that civil case No. 279 of 1998 may proceed from the stage it had reached before the order of settlement was recorded.

(d) .....

(e) .....

In its written statement of defence the respondent/defendant raised a preliminary objection on the following points of law:-

(1) That the suit was improperly instituted and was an abuse of the court process.

(2) That the court had no jurisdiction to reconsider a deed of settlement already adjudicated upon by the court with the consent of the parties thereto present and fully represented before the said court.

(3) That the court could not reopen, rescind or otherwise vary its own decision by way of another suit.

After considering rival submissions by learned counsel of both parties the learned judge (Dr. Bwana J.) held the view that the appellants should have filed an application for review under Order XLII rule 1 (a)(b) of the Civil Procedure Act Cap 33 R.E 2002 in the same court (Main Registry) before the same judge (The late Katiti J.) who had

recorded the consent settlement. The learned judge further held the view that by ordering Civil Case No. 279 of 1998 to proceed from the stage it had reached before the order of settlement was recorded, that would amount to ordering Katiti J. to do so which, in his view, would be improper as both of them were judges of the High Court with similar jurisdiction. The learned judge also held the view that since Katiti J. had adjourned the case (No.279/98) for ruling on the appellants' application for postponement of the payment schedule, that case was still pending, and that in the circumstances it was improper to institute another suit in another Division of the same court. The preliminary objection was sustained and the suit (No.58 of 2001) was dismissed. The appellants were dissatisfied with the decision; hence this appeal. Before us the appellants were represented by Mr. Marando, learned counsel, assisted by Mr. Maira, learned advocate. The appellants' appeal is based on two grounds of appeal, namely:

1. *The learned trial judge erred in law in holding that a consent order/judgment*

allegedly procured through fraud, undue influence or coercion can only be assailed by way of review and not by a separate suit.

2. *The learned trial judge erred in law by holding that where a consent judgment/order has been entered and subsequently parties approach the court for the purposes of recasting payment schedule, the said suit is said to be pending in terms of Order IV rule 3 of the Civil Procedure Code.*

The two grounds were argued seriatim by Mr. Marando. Arguing the first ground of appeal Mr. Marando contended that, where a party is aggrieved by a consent settlement which he alleges was procured through fraud or coercion, he may challenge it by way of instituting another suit. The learned counsel cited **Mulla Code of Civil Procedure 14th Edition Vol.1 at page 581**, and the decision of the Court of Appeal of Kenya in the case of **Wasike v Wamboko**

(1976-1985) EA 625, in support of his submission on this. Mr.Marando asserted that, if the appellants case would proceed to hearing, the appellants would prove through evidence that they were coerced by the office of the Director of Criminal Investigations. The learned counsel pointed out that the aggrieved party has also an option to apply for review under Order XLII rule 1 of the Civil Procedure Code. Relying on the above authorities the learned counsel faulted the learned trial judge for holding that a consent judgment/order allegedly procured through fraud, undue influence or coercion cannot be assailed by way of a separate suit but only by way of a review. The learned counsel pointed out that in the circumstances of the case at hand, a review would not be appropriate because in a review no new evidence is allowed and moreover in the instant case the appellants would have to adduce new evidence in support of the alleged coercion by calling witnesses.

Arguing the second ground of appeal, the learned counsel contended that, the learned judge erred in holding that Civil Case No.

279 of 1998 was still pending. The learned counsel pointed out that, since there was already a consent settlement decree, the case had come to an end. It was no more pending notwithstanding the pending schedule of payment. Mr. Marando observed further that, a consent settlement is a contract and that it may be challenged in a Commercial Court. However the learned counsel conceded that, prayer (c) in the plaint was wrong because it asked for an order to require Katiti J. to proceed from where the case had reached before recording the consent settlement. But the learned counsel was quick to point out that the court should have granted prayers (a) and (b) and should have rejected prayer(c).

Responding to the submissions on the first ground Prof. Mwaikusa, learned counsel for the respondent, asserted that, there is no provision in the Civil Procedure Act allowing a consent judgment to be assailed by way of instituting a separate suit. The learned counsel pointed out that, a consent judgment may be assailed by way of a review by the same court and before the same judge who

recorded it or his successor in office as provided for under Order XLII rule 1(a)(b). That being the position of the law the learned counsel held the view that there is no need to resort to **Mulla** on the position prevailing in India or on the **Waisake** case on the position in Kenya. But on reflection the learned counsel held the view that, in a proper case, a separate suit may be instituted. He however pointed out that the instant case was not a proper one in view of prayer (c) which required the Commercial Court (Dr. Bwana) to order the Main Registry of the High Court (Katiti, J.) to proceed with Civil Case No. 279 of 1998 from the stage it had reached before the order of settlement was recorded. The learned counsel observed that, the Commercial Court, which is a Division of the High Court, has no jurisdiction to grant that order, because judges of the two branches have similar jurisdiction. Prof. Mwaikusa contended that, in the circumstances of the case at hand, the appropriate remedy was either to apply for a review or to lodge an appeal with leave of the High Court. The learned counsel pointed out that, in a review, even a recovery of new evidence is allowed. The learned counsel

observed that, if the appellants were in possession of documents to prove the alleged coercion, they would have used them in the review. As far as the second ground of appeal is concerned, the learned counsel pointed out that, in view of prayer (c) the learned judge was right in holding the view that Civil Case No. 279 of 1998 was still pending.

In his rejoinder Mr. Marando asserted that, when the appellants went for the consent settlement the coercion was already there and would not have been considered as a discovery of new matters in a review. The learned counsel contended that, since the appellants had an option for a review or a separate suit, the choice was theirs, and there was no justification to restrict them to a review which they considered to be inappropriate.

We have carefully considered the rival submissions by learned counsel of both parties. There is no doubt that in the case at hand the appellants signed a Deed of Settlement setting out the terms of payment of the sum claimed in Civil Case No. 279 of 1998, and later

a settlement order was entered in the court file embodying all the terms of the Deed of settlement. In other words, there is no doubt that a consent judgment was entered into between the appellants and the respondent. There is also no doubt that no appeal shall lie to this court from a decree passed by the High Court with the consent of the parties without leave of the High Court in terms of section 5 (2)(a)(i) of the Appellate Jurisdiction Act, 1979. Equally there is no doubt that a consent judgment may be challenged by way of a review. The crucial issue in this case is whether a consent judgment may also be challenged by way of instituting a separate suit. We heard Mr. Marando arguing vehemently why he believed a consent judgment may be challenged by way of instituting a separate suit. He cited the above authorities in support of his submission on this. We also heard Prof. Mwaikusa's submissions on why he believed institution of a separate suit would not be appropriate in the circumstances of the instant case.

On our part, we must admit that we could not come across a provision in the Civil Procedure Code stating specifically that a consent judgment may be challenged by way of instituting a separate suit. In India it would appear the law is settled that it may be challenged by way of instituting a separate suit. We say so being guided by what **Mulla** (above) says on this at page 581. The writer states:-

> *A consent decree can be set aside on any ground which would invalidate an agreement, such as misrepresentation, fraud or mistake. This can only be done by a suit.*

The position appears to be the same also in Kenya. In the case of **Wasike v Wamboko (1976-1985) EA 625** the Court of Appeal of Kenya sitting at Kisumu considered a similar issue of how a consent judgment can be challenged. The court observed at page 627 as follows:-

> *That there are alternative procedures of how a party objecting to a judgment or order, recorded as having*

been passed with the consent of the parties or their respective advocates, is to go about setting aside or varying the consent judgment or order, namely, ***by a separate action*** *brought to do so, or it may be challenged in the same suit itself by an* ***application for review*** *under the order relating to that procedure, or by* ***an appeal****; any of these methods is possible,* ***and which procedure is adopted must depend very much on the circumstances of the case and on the manner by which the aggrieved party wishes to present his case,*** *as to what witnesses have to be called, the nature of the grounds relied on for seeking to set aside or vary the judgment, order,* ***the nature of the order sought, and so on***

(Emphasis supplied)

As indicated above, in Tanzania there is no specific provision in the Civil Procedure Code allowing a consent judgment to be challenged by way of instituting a separate suit. What is clear in the Civil

Procedure Code and the Appellate Jurisdiction Act 1979 is that such judgment can be challenged by way of a review or appeal with leave of the High Court. The case of **Brooke Bond Liebig (T) LTD v Mallya (1975) EA 266** which originated from Tanzania supports also this view, although it did not rule out completely the possibility of a separate suit. In that case, Law, Acting President, whose judgment was adopted as judgment of the court, observed at page 268 as follows:-

> *Mr. Dustur then submitted that the proper procedure to set aside a consent judgment was by separate suit and he cited a number of Indian authorities to this effect. Mr. Lakha was, however, able to cite an equal number of equally persuasive authorities to the effect that a disputed compromise can be challenged in the suit itself, and that this can be done by application in the suit and not necessarily by separate suit. My own view is that, Mr. Lakha's submission on this point must*

prevail. Even if procedure by separate suit is the proper procedure, and I am not convinced as to this, a court is not precluded from giving effect to its decisions under its inherent powers, especially where time and expenses can be saved.

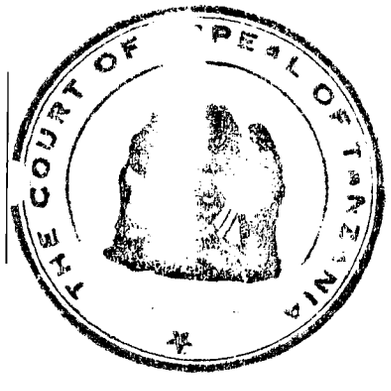
Drawing inspiration from these authorities, we are of the view that, in a proper case, a consent judgment can be challenged by instituting a separate suit. The issue here is whether the instant case was a proper one. There is no dispute that in the plaint the third prayer (c) was for an order that civil case No. 279 of 1998 may proceed from the stage it had reached before the order of settlement was recorded. This was in effect a prayer that Dr.Bwana,J. from a Commercial Division of the High Court, should order Katiti, J. from the Main Registry, to proceed with the case from the stage it had reached before the order of settlement was ordered. Both Dr. Bwana,J. and Katiti, J. were judges of the High Court with similar jurisdiction. Granting such an order would not augur with good administration of justice. Also in similar vein, for a Commercial

Division of the High Court to declare a consent settlement recorded by the Main Registry of the High Court null and void thereby vacating it as prayed for in prayers (a) and (b), would not augur with good administration of justice as it would give a false impression that a Commercial Division of the High Court can overrule a decision made by the High Court Main Registry.

For the foregoing reasons, we agree with Prof. Mwaikusa that, in the circumstances of the instant case, it was not proper to challenge the consent judgment by way of instituting a separate suit.

We accordingly dismiss the appeal with costs.

DATED at DAR ES SALAAM this 21st day of December, 2007.



S.N KAJI
JUSTICE OF APPEAL

E.M.K RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

I.P. KITUSI
DEPUTY REGISTRAR