

## STATE TRANSPORT LTD

v.

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## THE HOUSING AUTHORITY

[HIGH COURT, 1989 (Palmer J) 18 January]

## Civil Jurisdiction

B *Practice (Civil)- Judgment by consent- application to set aside- whether application may be made in action settled or whether fresh action must be commenced- application for stay- whether stay warranted RHC O 47 r 1.*

C Six months after Judgment was entered for the Plaintiff by consent the Defendant sought to set the judgment aside. Dismissing the application the High Court HELD: that (i) an application to set aside a consent judgment must be made in a fresh action and (ii) there were no exceptional circumstances to justify a stay of the judgment entered.

## Cases cited:

D *Ainsworth v. Wilding* (1896) 1 Ch 473  
*de Lasala v. de Lasala* [1980] AC 546  
*Emeris v. Woodward* (1890) 43 Ch 185  
*Great North-West Central Railway Co. v. Charlesbois* (1899) A.C. 114  
*Huddersfield Banking Co. Ltd v. Henry Lister & Sons Ltd* (1895) 2 Ch 273  
*Mohammed Rasul v. Hazara Singh* 8 FLR 140  
*Wilding v. Sanderson* (1897) 2 Ch 534

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*S.M. Koya* for the Plaintiff  
*K. Bulewa* for the Defendant

Interlocutory application in the High Court.

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**Palmer J:**

This is an application to set aside a consent judgment. The point it raises is an important one, nevertheless it may be disposed of shortly. The point being whether the Court giving a consent judgment may set the same aside in the same action.

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The Plaintiff, a building and engineering contractor claimed the sum of \$34173.54 from the Defendant in respect of work executed by it for the Defendant. The Writ and Statement of Claim was issued on 26.4.88. The Defendant entered Appearance on 28.4.88. On 4.5.88 the Plaintiff filed a Summons for Summary Judgment. On 14.5.88 the Defendant filed a Defence. Affidavits in support and in opposition to the Summons were filed. On 17.6.88, to which date the application for summary judgment had been adjourned, the parties appeared by Counsel before His Lordship Mr. Justice Fatiaki. They announced that the action had been settled for \$6000 less than the amount claimed and consented to judgment for the Plaintiff in the

sum of \$28,173.54 and costs. Counsel for the Defendant on this occasion was a Barrister and Solicitor employed by the Defendant. The judgment was sealed and entered on 21.6.88.

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On 20.7.88 the Defendant filed a Notice of Motion in this action asking "for an order that the consent judgment entered in this action be set aside and/or the execution of the said order be stayed" upon grounds set forth in the supporting affidavit. The plaintiff filed an affidavit in Reply and the Defendant rejoined with a further affidavit. The threshold question which arises immediately is whether this Court has jurisdiction to entertain the application to set aside the consent judgment in the present action.

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Counsel for the applicant submitted that it has. He submitted a number of grounds, supported by some affidavit evidence and cited a number of authorities including some for the proposition that a consent judgment may be set aside on the same grounds as any agreement. However, in the process there was confusion between the merits and the mechanics.

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It is clearly the law that a consent judgment is capable of being set aside, but in my view once it is passed and entered it requires a fresh action brought for that purpose - see Ainsworth v. Wilding (1896) 1Ch. 673; Wilding v. Sanderson (1897), 2 Ch 534. Counsel cited Huddersfield Banking Co. Ltd v. Henry Lister & Son Ltd. (1895) 2Ch. 273 in which a consent order was set aside on the ground of common mistake. However, there was a fresh action brought. Vaughan Williams, J. said on p. 276:-

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"When this matter was brought before me on Motion I thought that the authorities prevented me from putting the matter right on an application in that form, and I am still of the same opinion. But, now that an action has been brought and the technical difficulty has been removed, it seems to me that the clear result of the authorities is that, notwithstanding the consent order has been drawn up and completed, and acted upon. .... I may now set aside the order ....."

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Counsel also cited Great North-West Central Railway Co. v. Charlesbois (1899), A.C. 114 (P.C.) but in that case too, a fresh action had been brought.

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In Emeris v Woodward (1890), 43Ch. 185 the parties had entered into an agreement compromising the action on certain terms recorded in the agreement which was subsequently approved by the Judge. When the Plaintiff applied on Summons in the same action to set aside the agreement there was a preliminary objection that a compromise of an action cannot be set aside upon a summons.

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North, J said at p. 186:-

"In my opinion the objection must prevail. I think that the Plaintiff's proper course is to bring a new action to set aside the compromise, and that he cannot by means of a Summons set aside the agreement and

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reopen the controversy.”

A The point came before the Supreme Court of Fiji in Mohammed Rasul v. Hazra Singh, 8 F.L.R. 140.

In that case the Plaintiff brought an action against the defendant on virtually the same grounds as a previous action between the same parties which had been settled. The terms of settlement were filed in Court. The presiding Judge endorsed the record accordingly and the suit was discontinued.

B The Court held that the earlier action having been settled and discontinued the same issue could not be made the subject of a fresh action until the compromise in the first action had been set aside in an action brought for that express purpose.

C The Privy Council in de Lasala v de Lasala [1980] AC 546, 561 held that the setting aside of a consent order which is a final order on the grounds of fraud or mistake requires the bringing of a fresh action for this purpose.

In my view it is clearly the law that a consent order cannot be set aside by application in the same action. A fresh action has to be instituted for that purpose. The principal ground of appeal therefore fails.

D That being so there is no point in considering the other submissions of Counsel which go to the merits. They may fall to be considered if and when the matter is pursued to a fresh action.

E The Notice of Motion also, or in the alternative seeks a stay of execution of the order. Both in the Notice of Motion and in the supporting affidavit the matter of the stay appears much as an afterthought. However, since it is raised I should deal with it. There is nothing in the affidavit nor in Counsel's submissions to suggest any inability on the part of the plaintiff to repay in the event of the judgment being executed and later set aside. The supporting affidavit - sworn on 19.7.85 by the Counsel who consented to the judgment - deposes to the effect that an internal investigation reveals that the Certificate of Completion upon which the Plaintiff's claim was based "was mistakenly or fraudulently induced."

F He also deposes to the effect that the Plaintiff's Managing Director has been charged with Conspiracy to Defraud and with Falsification of Accounts, and that those cases were then pending in the Magistrate's Court.

G At the hearing, counsel for the Defendant did not raise the matter of the stay until his reply, when he sought a stay pending the criminal proceedings "in the public interest."

Stays of Execution are regulated by Order 47 of the High Court Rules which as far as relevant is as follows :-

- "1. (1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at

anytime thereafter, by the judgment debtor or other party liable to execution -

- (a) that there are special circumstances which render it inexpedient to enforce the judgment or order, or
- (b) that the applicant is unable from any cause to pay the money.

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Then, notwithstanding anything in rule 2, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.

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- (2) An application under this rule, if not made at the time the judgment is given or order made, must be made by summons and may be so made notwithstanding that the party liable to execution did not acknowledge service of the writ or originating summons in the action or did not state in his acknowledgment of service that he intended to apply for a stay of execution under this rule pursuant to order 13, rule 9.

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- (3) An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his."

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Nothing has been put forward with regard to Rule 1 (1) (b). The applicant is a Government instrumentality.

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With regard to Rule 1 (1) (a) the case put for a stay (the above mentioned affidavit is also in support of the application to set aside) is extremely tenuous. There is great uncertainty (a) as to whether a fresh action will be brought and if so, the result thereof, and (b) as to the final outcome of the criminal proceedings which may be a long way away, and their relationship if any - to the present case. In this context I note an affidavit sworn by the Defendant's Barristers and Solicitor on 2.6.88 - 15 days before he consented to the judgment-in which he deposes to the effect that Police and departmental investigations into alleged inconsistencies in the Plaintiff's claims were proceeding. In the light of these circumstances and the total absence of any claim of irrecoverability of the damages I am not satisfied that there are special circumstances which render it inexpedient to enforce the order. I am therefore not prepared to make any order depriving the Plaintiff any longer of the fruits of a judgment, freely consented to by the Defendant after negotiation some 6 months ago.

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Accordingly the application is dismissed. Defendant to pay the Plaintiff's costs to be taxed.

*(Application dismissed.)*