



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 292 OF 2008**

**HEXEKIAH W. GICHOHL.....PLAINTIFF/APPLICANT**

**VERSUS**

**UHURU HIGH WAY DEVELOPMENT LTD.....1ST DEFENDANT/RESPONDENT**

**CENTRAL BANK OF KENYA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**LIBYAN ARAB AFRICAN INVESTMENT CO. LTD T/A GRAND**

**REGENCY HOTEL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

By an amended Chamber Summons dated 22<sup>nd</sup> June, 2017 the plaintiff/applicant seeks several orders contained on the face of the application and based on the grounds set out therein. The application is opposed and there are replying affidavits sworn on behalf of the defendants. Parties have also filed submissions and cited several authorities. There has been a multiplicity of applications in this dispute which may cloud the real issues involved in the present application. What is clear however is that, the applicant seeks a stay of execution of the defendants' costs already taxed in the matter, and a review of the order made on 18<sup>th</sup> December, 2014 concerning the release of Kshs. 5 million deposited in court by the applicant so that it is converted to security for stay of execution.

There is also a prayer that time be enlarged for filing a reference against the decision of the taxing officer on the defendants' bill of costs made on 28<sup>th</sup> October, 2011 and also vary or set aside the decision of the taxing officer aforesaid. This application is opposed for many reasons, but the thrust of the opposition is that the orders being sought come too late in the day and above all, the matter is *res judicata* the same having been compromised by a consent order recorded by the parties herein.

I have looked at the record to confirm the respective positions of the parties herein. In a ruling dated 9<sup>th</sup> April, 2014 Onyancha J made a determination on the applicant's application, where he sought the transfer of the sum of Kshs 5,000,000/= which had been deposited in court to a joint interest earning account of the advocates involved in the case. There was also a prayer that the taxing officer's ruling delivered on 28<sup>th</sup> October, 2011 be set aside and a fresh taxation be conducted by a different taxing master.

The Judge dismissed the said application with costs for reasons contained therein. Thereafter the 3<sup>rd</sup> defendant asked for the release of the said sum of Kshs. 5,000,000/= in part satisfaction of the taxed costs. Subsequently, on 21<sup>st</sup> October, 2014 the parties recorded a consent relating to the said sum of Kshs. 5,000,000/= in the following terms,

**“That the 5 million Ksh. lying in court custody to be and is hereby ordered released to the 3<sup>rd</sup> defendant with agreement among the defendants to divide it among themselves in equal shares.”**

This consent order was followed by several letters from the defendants' advocate addressed to the applicant's advocate for the release of the original court receipt in respect of the Kshs. 5 Million to facilitate the release of the money in line with the consent order. This was not done and the advocates for the 3<sup>rd</sup> defendant were compelled to write to the Deputy Registrar expressing their frustration and asking for a certified copy of the duplicate court receipt to facilitate the consent order.

With that background, the present application would be termed as incompetent for challenging the consent order and also for being *res judicata*. Above all, it is submitted that the delay in filing the same has not been explained, and in any case, the money having been ordered to be released to the defendants, cannot act as security.

The record shows that after the taxation on 28<sup>th</sup> August, 2012 the applicant filed a reference, which was dismissed on 9<sup>th</sup> April, 2014. No application was filed to enlarge time within which to file a fresh reference neither was any appeal lodged to challenge the dismissal made on 9<sup>th</sup> April, 2014. On the contrary, the applicant filed a constitutional reference on 23<sup>rd</sup> July, 2014.

It will be noted that after the dismissal of the reference, the consent order cited above was recorded. It has not been alleged that the said consent order was procured by fraud, misrepresentation or concealment of material facts. It is binding on all parties including the applicant herein because, counsel had ostensible authority to compromise the application.

It is trite law that a consent order is binding on the parties and cannot be set aside unless it was obtained by fraud or collusion or by an agreement contrary to the policy of the court. Reported cases have expanded some of those grounds to cover mis representation, mistake or undue influence, and the fact that such grounds should be sufficient so as to be relied upon for setting aside a contract.

It is also established law that counsel on record and holding instructions on behalf of a party has ostensible authority to compromise an action. **In Civil Appeal No. 276 of 1997 Kenya Commercial Bank Limited Vs. Benjoh Amalgamated Limited & Another.** The Court of Appeal citing the case of **Brook Bond Liebig (T) Limited Vs. Mallya [1975] EA 266** stated,

**“Prima facie, any order made in the presence and with the 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 consent was given without sufficient material facts, or in mis-apprehension or in ignorance of material fact, or in general for a reason which would enable the court to set aside an agreement.”**

In the same judgment the Court of Appeal cited the judgment of Hancox JA (as he then was) in the case of **Flora Wasike Vs. Destimo Wamboko (1988) 1 KAR 625 at page 626** as follows,

**“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 not carried out.”**

The extent of authority of an advocate on record to compromise a suit is set out in the Supreme Court Practice 1976 (Vol 2) paragraph 2013 page 620 and cited in the **Kenya Commercial Bank case** as follows,

**“Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts *bona fide* and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power....No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice.”**

In the recent case of **Board of Trustees of NSSF Vs. Michael Mwalo (2015) eKLR at page 35** it was held,

**“1. A consent order entered into by consent is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material, fact or mis apprehension or ignorance of such facts in general for a reason which would enable a court to set aside an agreement.**

**2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”**

The procedure to be followed in the event a party is dissatisfied with the decision of the taxing master is known and the applicant was in safe hands of counsel. It is not clear as observed above, why no appeal was filed or a second reference sought. The decision of the taxing master made on 28<sup>th</sup> October, 2011 had been tested by way of reference and time cannot be enlarged to revisit what does not exist. In any case, there is no account for the delay of close to six years to the time such an order is being sought.

Whatever reasons that have been given by the applicant are not persuasive enough to grant the orders sought and therefore this application is dismissed with costs to the defendants.

**Dated, signed and delivered at Nairobi this 10<sup>th</sup> Day of April, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**