



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.404 OF 2015

BRIAN YONGO OTUMBA.....PLAINTIFF

VERSUS

HON. CYRUS JIRONGO.....DEFENDANT

RULING

(1) Before this Court is a Notice of Reference dated **19th December 2018** filed on even date by **BRIAN YONGO OTUMBA**, the Plaintiff herein. In that Reference the Plaintiff sought for prayers **THAT**

(i) The Ruling and order of the Honourable Deputy Registrar (Hon S.A Opande) with regard to the Consent letter dated 16th March 2018 be set aside in so far as they refer to the Consent letter dated 16th March 2016 and especially the aspect concerning the agreed and duly applicable interest rate of kshs.750,000/= per month from the 15th March 2016.

(ii) The Honourable Court do find and direct that the Consent letter herein dated 16th March 2016 is properly on record and is the applicable judgment in execution.

(iii) That the Honourable court do remit the matter, regarding the Consent letter dated 16th March 2016 to the Deputy Registrar, excepting Hon. S.A Opande for execution to continue and/or in the alternative do proceed with the execution in exercise of its inherent jurisdiction.

(iv) The Decree Holder be awarded the costs of this Reference.”

Pursuant to directions made by the Court, the matter was canvassed by way of written submissions. The Plaintiff who was acting in person relied upon his written submissions filed on **1st February 2019** as well as the Plaintiff’s Supplementary Submissions filed on **19th February 2019**. The Defendant **HON CYRUS JIRONGO** relied on the written submissions filed on **12th February 2019** by his **Advocate Messrs Wagara, Koyoko & Co. Advocates**.

BACKGROUND

(2) By a Plaint dated **19th August 2015**, the Plaintiff herein sought judgment against the Defendant for:-

“(a) Kshs.15,000,000/= plus interest at the rate of 7.5% per month from the 1st November 2014 until payment in full as claimed under paragraph 7 of the Plaint.

(b) Kshs.6,866,000/= plus interest at Court rates from the 3rd August 2015 until payment in full as claimed under paragraph 10 of the Plaint.

(c) Costs of the suit

(d) Any other or further relief the Honourable Court may deem fit and just to grant.”

(3) The amounts claimed in the suit arose from a series of loans and cash advances which the Plaintiff had made to the Defendant. By way of a consent dated **5th October 2015**, the Plaintiff and Defendant compromised the suit in the following terms:-

1. THAT judgment be and is hereby entered for the Plaintiff against the Defendant in the sum of Kenya Shillings Twenty Five Million (Kshs.25,000,000/=) only in full and final settlement of the Plaintiff's claim herein.

2. THAT the decretal sum of Kenya shillings Twenty five Million (Kshs.25,000,000/=) against the Defendant be settled as follows:-

a) Kenya shillings Five Million (Kshs.5,000,000/=) be paid on or before the 15th of October 2015.

b) The 2nd instalment of Kenya Shillings five Million (Kshs.5,000,000/=) be paid on or before the 31st of October 2015.

c) The final instalment of Kenya Shillings fifteen Million (Kshs.15,000,000/=) be paid within Sixty (60) days of the filing of this Consent.

3. THAT in default of payment any one instalment execution to issue forthwith for the full decretal amount.

4. THAT the Defendant pay the Plaintiffs costs to be agreed or taxed in lieu of Agreement.”

(4) Pursuant to this consent which on 6th October 2015 was duly adopted as an order of the Court, the Defendant paid a sum of Kshs.5,000,000/= (Five Million only) before the date stipulated in the decree. The Defendant however failed to pay the 2nd lump sum instalment on the due date and the Plaintiff commenced execution proceedings resulting in the Defendants household goods being attached and carted away by auctioneers. Thereafter the Defendant negotiated with the Plaintiff and paid the 2nd instalment piecemeal by making a cash payment of Kshs.730,000/= and by the Defendant taking over liability for the amount of Kshs.770,000/= with Wananchi Credit Company Ltd on behalf of the Plaintiff. The auctioneer then released the Defendants household goods back to him upon receiving payment of their fees in the sum of Kshs.200,000/=. Accordingly all execution proceedings came to a halt.

(5) The parties then agreed that the outstanding balance of Kshs.15,000,000/= due to the Plaintiff was to be paid on 15th March 2016. However once again the Defendant failed to meet this deadline and instead reached out to the Plaintiff for negotiations. By way of a letter dated 16th March 2016 (annexture “BY2’ to the Plaintiff’s Supplementary Affidavit dated 25th September 2018) the Defendant made an undertaking to the Plaintiff in the following terms:-

(a) That the balance of the decretal sum now outstanding in the sum of Kshs.15,000,000/= shall accrue interest at the rate of 5% per month (Kshs.750,000/= p.m) on simple interest basis from the 15th of March 2016 until settlement in full.

(b) The decretal amount due to you shall be paid to you in priority from the proceeds realized earliest out of the following transactions now being pursued by our client through his companies:

(i) Sale of approximately 500 acres of land in Ruai to M/s SkyPower P.L.C.

(ii) A claim for compensation against the Nairobi city county for a Plot in Industrial Area.

(iii) Completion of sale of 3 plots in Eldoret.

(iv) Sale of 110 acres in Ruai to Carol Wamboi and other purchasers.

(v) Loan proceeds being processed for a company known as Shale Investments Limited from Equity Bank Limited.

It is anticipated that the first of this transactions will be completed within the next thirty (30) days.”

(6) Both parties executed this letter. However the Plaintiff did not involve his Advocates on record at the time M/S LIKO AND ANAM ADVOCATES. The Plaintiffs Advocates were not parties to the letter of 16th March 2016, and the same was not copied to them. It is also pertinent to note that the said letter was neither copied to the Court nor was it filed in Court for adoption as a consent.

(7) On 17th January 2017 the Plaintiff’s Advocates filed a Notice to Show Cause for committal of the Defendant in execution of the Decree dated 6th October 2015. The Notice to show Cause indicated that the Defendant had paid only Kshs.5 Million out of a debt of Kshs.25 Million. The Plaintiff’s Advocates represented him in the prosecution of this NTSC until 17th April 2018, when the Plaintiff put in a Notice indicating that he would henceforth be acting in person.

(8) The Plaintiff then applied for and obtained Warrants of Arrest; upon which the Defendant was arrested and brought to court to answer to the NTSC. The Defendant contended that in his replies to the NTSC he had demonstrated that the balance due to the Plaintiff was only Kshs.8,150,000/=. The Plaintiff in his first Affidavit dated 25th September 2018, claimed that the Defendant owed him the sum of Kshs.15,000,000/=. However on the Plaintiff’s second Affidavit dated 1st October 2018, relying on the letter dated 16th March 2016, the Plaintiff claimed that the Defendant owed a sum of Kshs.35,150,000/=.

(9) The NTSC was heard by the Deputy Registrar Hon. S.A. Opande who in his ruling dated 10th December 2018 rejected the decretal sum

based on the undertaking made by the Defendant in the letter dated **16th March 2018**. Accordingly the lower court invalidated the consent letter dated **16th March 2016** on grounds that the same was not properly on record.

(10) Being aggrieved by the ruling of the Deputy Registrar, the Plaintiff filed this Notice of Reference submitting that the clear intent of the letter of **16th March 2016** was to compromise the decree issued on **6th October 2015** on the basis of the consent dated **5th October 2015**. The Plaintiff argued that by **16th March 2016** the Defendant had failed to satisfy the decree dated **6th October 2015** and that as a result the Plaintiff was at liberty to proceed with execution for the full amount. The Plaintiff submitted that it was the Defendant who approached him with a proposal on how to settle the outstanding debt, by the Defendant selling off various of his properties. That in addition the Defendant accepted to pay interest at the rate of **Kshs.750,000/=** per month from **15th March 2016** on any sum that remained outstanding. The Plaintiff submitted that rather than feeling the pain of paying the full amount and in order to avoid execution, the Defendant opted to delay satisfaction of the decretal sum and to pay interest on any sum that remained outstanding.

(11) The Plaintiff further contended that the fact of charging interest on the balance of the decretal sum did not in any way invalidate the consent decree on **6th October 2015**. That the mere failure to include mention of the consent of **5th October 2015**, in the letter of **16th March 2016** did not invalidate or nullify said letter.

(12) The Plaintiff submitted further that by virtue of **Order 25 Rule 5** of the **Civil Procedure Rules 2010** the court is empowered to enforce agreements entered into by parties in satisfaction of a whole or part of the subject matter of a suit. He urged that the letter of **16th March 2016** was binding having been executed by both parties in their personal capacities and thereafter having been duly served upon the Plaintiff's advocates.

(13) Finally the Plaintiff submitted that the learned Deputy Registrar failed to appreciate that the letter of **16th March 2016** was by its nature a contract between the Plaintiff and the Defendant, which contract was separate and distinct from the consent judgment entered on **5th October 2015**. He further urged that parties under a contract were at liberty to introduce any terms and conditions mutually agreed upon and acceptable to the parties. The Plaintiff strenuously challenged the attempt by the Defendant to disown this letter of **16th March 2016**, and claimed that the terms contained therein actually benefitted the Defendant himself.

(14) On his part the Defendant submitted that the letter dated **16th May 2019** was of no consequence the same having not been filed in court for adoption, that the said letter was not paid for nor was it executed by the Plaintiff's advocates on record. The Defendant contended that this letter could not be taken to have compromised in any manner whatsoever the consent of **5th October 2015**.

(15) Counsel for the Defendant submitted that the **NTSC** proceeding before the Hon Deputy Registrar related to the decree of **6th October 2015** and it would amount to a serious miscarriage of justice for the lower court to depart from that decree and instead proceed to enforce the contents of the letter of **16th March 2015**. That the lawful court decree could not be varied by off record correspondence between the parties.

(16) Finally the Defendant urged the court to uphold and confirm the decision of the Hon Deputy Registrar as litigation must come to an end. He submitted that to date the Plaintiff has recovered more than three times the original debt and urged the court to dismiss this reference with costs.

ANALYSIS AND DETERMINATION

(17) I have carefully considered this reference, the submissions filed by both parties as well as the relevant statute and case law. The following issues arise for determination.

(i) What is the consequence of failure to comply with **Order 9 Rule 9** of the **Civil Procedure Rules 2010**.

(ii) Did the letter of **16th March 2016** compromise the consent dated **5th October 2015**.

Order 9 Rule 9, Civil Procedure Rules 2010

(18) In their written submissions counsel for the Defendant raised the fact that during the course of prosecution of the Notice to Show Cause dated **20th February 2017** the Plaintiff abandoned his counsel on record and decided to act in person. As a result the Advocates then on record for the Plaintiff being **LIKO & ANAM Advocates** only prosecuted the **NTSC** until **17th April 2018**, when the Plaintiff filed a Notice of Intention to Act in Person in which he indicated that he would thenceforth be acting in person. Counsel for the Defendant submits that said Notice was fatally defective given that it was filed without leave of the court and was filed in breach of the mandatory provisions of **Order 9 Rule 9** of the **Civil Procedure Rules, 2010**. On his part the Plaintiff did not address this issue in his written submissions.

(19) **Order 9 Rule 9** of the **Civil Procedure Rules, 2010** provides as follows:-

“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court.”

In other words **Order 9 Rule 9** provides that where a party previously appearing through counsel in a matter, decides either to change advocates or to act in person, such change is to be effected either by order of the court or through the consent of all parties to the suit. This did not happen in this case. The Plaintiff did not seek leave of the court before filing his Notice to appear in person, nor did he secure the

consent of the Defendant before doing so. The question then is whether this failure to comply with **Order 9 Rule 9** renders all subsequent proceedings fatally defective. There have been several contradictory decisions on this point.

(20) In **FLORENCE HARE MKAHA –VS- PWANI TAWAKAL MINI COACH & ANOTHER [2014]** eKLR Hon Lady Justice **Mary Kasango** held thus:-

“The question is, was the execution validly carried out on behalf of the Plaintiff. There are glaring anomalies in respect of the representation of the Plaintiff. As clearly set out above the Plaintiff was represented by Pandya & Talati Advocate up and until judgment was entered in her favour on 31st July 2012. Once judgment was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who filed the submissions in support of the Plaintiff’s Bill of Costs, and was represented by Kinyua Njagi & Co. Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the Court to take over the conduct of Plaintiff’s case. Much more Shikely Advocate was not properly on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff’s case. In this regard I am in agreement with finding of the Court in the case **JOHN LANGAT –VS- KIPKEMOI TERER & 2 OTHERS (2013)**eKLR where Justice A.O. Muchelule faced with similar circumstances stated:-

“There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates.

“without an order of the court.”

No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant and therefore the appeal and application are incompetent.”

In the above case the Hon Judge expunged all proceedings that took place subsequent to the failure by the Applicant to comply with **Order 9 Rule 9**.

(21) However in **NGITIMBE HUDSON NYANUMBA –VS- THOMAS ONGONDO [2018]**eKLR, Hon Justice **Mutungi** treated the failure to comply with **Order 9 Rule 9** as a mere technicality. In that case the Hon Judge held thus:-

“The appellant’s Notice of Motion dated 8th July 2013 was predicted on the view that the firm of Nyamori Nyasimi came on record for the respondent after judgment without leave of the court and therefore was irregular, null and void and all orders emanating and/or ensuing thereafter were a nullity and ought to be cancelled. The appellant had every opportunity to challenge the appointment but did not do so. Instead the appellant participated in the proceedings and did not raise any issue regarding the irregularity of the Notice of Change of Advocate that placed Nyamori Nyasimi Advocate on record. One may ask what injustice was occasioned to the appellant by the appointment of Nyamori Nyasimi advocate after judgment allegedly without leave? I discern none, the appellant continued to participate in the proceedings without raising any objection. The idea/objective behind amending the Civil Procedure Rules to provide that where judgment had been entered any change of advocate was to be with the leave of the court was essentially for the protection of the advocates to safeguard their fees from their clients. The amendment was aimed at preventing mischief whereafter an advocate worked tirelessly for a client upto obtaining a judgment, the advocate is not debriefed by merely another advocate filing a notice of change or the client filing a notice to act in person so that execution of the decree is by another advocate who did not participate in the trial and/or by the client directly with the object of denying the advocate his fees or costs.

20. Although I agree with the learned magistrate that there was an inordinate delay in bringing this application challenging the notice of change of advocate without leave, my view is that no leave was required as at the time and that even if it was required I would nevertheless not have been persuaded to annul the subsequent and consequential orders from the date the notice of change was filed. The appellant suffered no prejudice at all by reason of such change of advocate. The appellant participated and/or was not prevented from participating in the proceedings and there was no miscarriage of justice. The court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Sections 391) and 19(1) of the Environment and Land Court Act and Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this is such a case where the court would have been entitled to disregard the strict rules of procedure in order to do substantive justice.” [own emphasis]

(22) In this particular case the Plaintiff filed his Notice to appear in person **after** judgment had been entered in the matter. The Rule in **Order 9 Rule 9** was formulated mainly to protect an advocate representing a party from a mischievous client and to ensure that such Advocate gets his fees and costs. In this case the firm of **Liko & Anam Advocates** who were previously on record for the Plaintiff have raised no issue. It is the Defendant who is raising the issue yet the same Defendant benefitted from the absence of Plaintiffs Advocates in that he managed to persuade the Plaintiff to hold off on execution and to allow him more time to settle the debt. This is what culminated in the letter of **16th March 2016**. It is somewhat disingenuous for the same Defendant to now take issue with the Plaintiff’s failure to comply with **Order 9 Rule 9** of the **Civil Procedure Rules 2010**. In addition the Defendant is raising the issue of non-compliance with **Order 9 Rule 9** at the tail end of the proceedings. This is despite the same Defendant having fully participated in the proceedings up to this point. If the Defendant had seriously taken issue with the Plaintiffs failure to comply with **Order 9 Rule 9**, then he ought to have raised it as a preliminary point and in any case much sooner. In any event the Defendant has not demonstrated what if any prejudice he stands to suffer due to this non-compliance with **Order 9 Rule 9**. In the circumstances of this case I am inclined to hold that such non-compliance was a mere technicality and accordingly does not invalidate the subsequent proceedings.

Import of the letter dated 16th March 2016

(23) The Plaintiffs argument is that this letter of **16th March 2016** effectively varied the consent of **5th October 2015** as well as the decree arising therefrom dated **6th March 2015**. He submits that it is this letter of **16th March 2016** which ought to have formed the basis for the NTSC proceedings before the Hon Deputy Registrar.

(24) In **KENYA COMMERCIAL BANK LTD –VS- SPECIALIZED ENGINEERING CO. LTD [1982] KLR 485 Justice Harris** opined that:-

“The marking by a Court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such an order is not lightly to be set aside or varied save by consent or one or other of the recognized grounds.” [own emphasis]

(25) In the case of **SAMUEL MBUGUA IKUMBU –VS- BARCLAYS BANK OF KENYA LIMITED [2015]eKLR** the Court of Appeal in discussing variation of consent orders stated as follows:-

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.”

Hancox JA (as he then was) in the case of **Flora Wasike V Destimo Wamboko (1982-1988) 1 KAR 625**, said in his judgment at page 626-

“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.” See the decision of this Court in **J.M Mwakio V Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983.**

This court in the case of **Brooke Bond Liebig V. Mallya 1975 E.A 266** held:-

“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”

In **Hirani V. Kassam (1952), 19EACA 131**, this Court with approval quoted the following passage from **Seton on Judgments and Orders, 7th edition, Vol.1p.124** as follows:-

“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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.” [own emphasis]

(26) In this case the parties entered into a consent dated **5th October 2015**. That consent was duly recorded and was adopted as a judgment of the Court following which a Decree was issued on **13th October 2015**. Sometime later the parties executed the letter of undertaking dated **16th March 2016**. That letter was not presented to the court for adoption. The letter was **not** filed in court neither was it adopted as a judgment of the court. Can this letter of **16th March 2016** now vitiate the terms of the consent dated **5th October 2015**?

(27) As a general rule agreements and understandings made or entered into by parties to a suit are acceptable to the courts. **Order 25 Rule 5(1)** of the **Civil Procedure Rules 2010** provides as follows:-

“5(1) Where it is proved to the satisfaction of the court and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the Defendant satisfies the Plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.”

(28) This is in line with the courts mandate under **Article 159(2)** to encourage Alternative Dispute Resolution. The aim here being to compromise rather than to **“vary”** the decree of the court.

(29) In the case of **ADIEL MURIITHI PHILLIP –VS- THOMAS MAINGI [2017] eKLR** the court held as follows:-

“[16] In our view, the consent entered into by the parties, did not vary the judgment of Kasanga Mulwa J. but merely compromised the judgment by providing for acceptance of a lower sum in satisfaction of the decree in consideration of the settlement of the claim which would have otherwise still been subjected to an appellate process.

[17] In the circumstances, we find that the learned Judge (Lenaola, J. as he then was), did not err in finding that the consent

letter duly executed and on record was proper and that the failure by the Deputy Registrar to formally have the same extracted could not nullify the consent. The attempt by the appellant to distance himself from the consent letter cannot hold as the consent letter was clearly signed by his advocate, who was an agent fully authorized by him. There was also clear evidence that the appellant signed a discharge voucher.”

(30) The Plaintiff relied on this case in support of his contention that the letter of **16th March 2016** varied and in fact compromised the consent dated **5th October 2015**. However the **Adiel case** [supra] is distinguishable from the present case in the following manner. In the **Adiel Case** the parties entered into negotiations after judgment had been entered and decree issued, which negotiations involved the Advocates of both parties. Once an agreement had been reached a consent was drawn up and executed by both counsel, which consent was then duly filed in court for adoption.

(31) The facts in the present case unfolded in a totally different manner. The parties by their own admission engaged in negotiations on their own **without** the involvement of their Advocates and these negotiations culminated in the letter of undertaking dated **16th March 2016**. This letter was then prepared by the Defendants Advocate and was executed by the Plaintiff and the Defendant. At all times Counsel for the Plaintiff was kept out of the picture. It was only after both parties had executed the letter that it was forwarded to the Plaintiff’s Advocate. Most importantly as stated earlier this letter of **16th March 2016** was **not** filed in court, and it was **not** adopted by the court as a consent between the parties.

(32) In **MOHAMED BARE & 48 OTHERS –VS- KENYA RURAL ROADS AUTHORITY 2016 eKLR Hon Justice Monica Mbaru** discussed the significance and importance of filing a consent in court and held as follows:-

“16. Where there is a consent order or judgment, the same becomes binding on all the parties to the action if made in the presence and with consent of counsel on record. One cannot challenge such an order or judgment unless it is shown to have been entered into through fraud, collusion or by misrepresentation as held in *Kuwinda Rurinja Co. Ltd Versus Kuwinda Holdings ltd & 13 others* [2013]eKLR.

17. The universal practice is to record that a judgment or order is by consent by the court. In employment and labour relations matters/claims, such practice is regulated by the Employment and Labour Relations Court (Procedure) Rules, 2016 where all claims filed with the court must have an order or judgment of the court issued by the Judge of the court. Unlike in the High Court practice rules where certain powers are granted to the Registrar and or their deputies, before this court, an order is valid upon issuance by the Judge of the court. See Rule 28 of the Employment and Labour Relations Court (procedure) Rules, 2016. This was clearly set out by the court in *Kassmir Wesonga Ongoma et al versus Ismael Otoicho Wanga, Civil Appeal No.25 of 1986 [1987] KLR* thus:

“The purpose of a consent judgment is for the parties to inform the court that they have compromised all their differences in a manner suitable to themselves without asking the court to make any further decision.A consent becomes the order of the court compromising the differences to the satisfaction of parties.”

18. It is therefore a fundamental practice that even where parties have negotiated, agreed and filed a consent agreement with the court, such agreement by consent must be legally accepted by the court. The duly executed written consent of parties only becomes a court order the moment it is domesticated and approved by the court. Also when one of the parties orally addresses the court on the content of the proposed consent and thereafter the Respondent or adversary is called upon to confirm the contents, then the court must confirm and adopt the terms of such a consent as its order and allow parties to append their signatures or thumbprints. In both instances the court retains the discretion to enquire from the parties consenting to give further details if necessary and before the adoption and confirmation of the consent as a final order. See *Simon Ayiamba versus Kenya Industrial Estate Ltd Busia, HCCC Civil Appeal No.5 of 2001.*

19. I find the consent letter filed by the parties herein on 19th April 2016 has not been adopted by the court to amount to an order and or final judgment of the matter in settlement or compromise of the suit herein. [own emphasis]

I am in agreement with the above decision. I find that the mis-step of failing to file and present this letter of **16th March 2016** for adoption by the court as a consent renders it inadmissible as a means to alter or vary the consent of **5th October 2015**.

(33) I further find that the Hon Deputy Registrar correctly distinguished the **Adiel Case** from the present one. Firstly in the **Adiel case**, the consent was filed in court and was adopted by the court. In the **Adiel Case** the court observed that:-

“It is common ground that the consent was duly signed by both parties’ advocates and that at the time the consent was filed.”

(34) Secondly unlike in the **Adiel Case** where the consent only sought to compromise the decree, in this case the letter of **16th March 2015** sought to materially **“alter”** the consent of **5th October 2015** by introducing a new and hitherto unknown element of interest which had not been mentioned in the earlier consent. For the above reasons I do concur with the learned magistrate that the **Adiel case** is not applicable in the present circumstances.

(35) Finally and in conclusion I find that the basis for the execution proceedings was the consent decree dated **6th October 2015** and **NOT** the letter dated **16th March 2016**. Accordingly I find no merit in this reference. The same is hereby dismissed with costs to the Defendant.

Dated in Nairobi this 28th day of June 2019.

.....

Justice Maureen A. Odero