



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 120 OF 2012

KIRERE ESTATE COMPANY LTD.....APPLICANT

VERSUS

HENRY MAINA NJOROGE1ST RESPONDENT

PETER MWANGI WAINAINA2ND RESPONDENT

BEN KITHINJI3RD RESPONDENT

PATRICK KARANJA MACHARIA4TH RESPONDENT

FRANCIS MWANGI CHEGE5TH RESPONDENT

MUCHOKI GITHUTHA6TH RESPONDENT

ALL T/A EIGHTY SEVEN INN

RULING

This is a ruling on an application filed by the Applicant by way of a Notice of Motion dated 19th June, 2017 under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules seeking an Order that the security deposited by the Appellant of Kshs. 58,320/= in the appeal be released to the Appellant. The Application is supported by the Affidavit of Simon Maina Kabuki a director of the Appellant company who avers that pursuant to an order issued on 28th February, 2013 for deposit of the taxed costs of Kshs. 58,320/=, the Appellant deposited the said sum and a deposit receipt of Kshs. 58,320/= is annexed to the Application.

The application for release of the funds is premised on the ground that the counsel for both parties recorded a consent on 4th October, 2016 settling the appeal.

I have read and considered the application and the Supporting Affidavit on record. The Respondents did not file a response to the Application after being served with the Application on 1st July 2017. There is on record an Affidavit of Service to that effect dated 23rd August, 2017. My perusal of the court file reveals that in deed it is true that the appeal was settled on 4th October, 2016 by a consent recorded by the counsels for the respective parties and this Court therefore marked the matter as settled.

The effect of a consent order or judgment is that it determines the issues in dispute with finality unless the same is challenged on clear grounds. The Court of Appeal in **Kenya Commercial Bank Limited vs**

Benjoh Amalgamated Limited & Another Civil Appeal NO. 276 OF 1997 [1998] eKLR cited with authority the judgment in the case of **Flora Wasike vs Destimo Wamboko (1988)1 KAR 625, Hancox JA** (as he then was) 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."

Also, in the case of **Edward Acholla v Sogea Satom Kenya Branch & 2 others [2014] eKLR** with respect to the effect of a consent, the court held that:

"Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out."

The consent recorded on 4th October, 2016 has not been challenged for any reasons whatsoever. When this matter came up for hearing on 28th September, 2017, the Respondent did not appear and this Court can only make a reasonable conclusion that once the Appeal was settled, the appellant did not have interest in the matter any longer.

The result of the foregoing is that the Application dated 19th June, 2017 is hereby allowed with no order on costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 29th Day of **September, 2017**.

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L. NJUGUNA

JUDGE

In the Presence of

..... for the Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the 3rd Respondent

..... for the 4th Respondent

..... for the 5th Respondent

..... for the 6th Respondent