



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL SUIT NO. 143 OF 2008**

ATANASIO M'EKANDI ..... PLAINTIFF

V E R S U S

ANTONY KAUNGA ..... DEFENDANT

**R U L I N G**

This application is dated 26th June, 2014. It seeks orders:-

1. ***THAT this Honourable Court be pleased to review the Consent Order made on 25.02.2014.***
2. ***THAT this Honourable Court be pleased to join JAMES KIMUMU M'THUMATIA, GITUMA MAILUTHA AND CHARLES M'ELAKU M'MUTHURI as Defendants in this suit.***
3. ***THAT the Court be pleased to issue such other or better orders as it may deem fit and just in the circumstances of this suit.***
4. ***THAT costs of this application be in the cause.***

The application is buttressed by the affidavit of Antony Kaunga. It also has the following grounds:-

1. ***The Consent made on 25.02.2014 did not cover fundamental issues necessary for determination of the matters herein.***
2. ***The Consent order needs to be reviewed to specify the correct mutation form and the Map to be used by the District Land Registrar and Surveyor in arriving at the required Report.***
3. ***The Consent Order needs to take into account other pieces of Land boundary the Suit premises.***
4. ***The parties sought to be joined are owners of pieces of Land bounding the suitlands.***
5. ***The parties to be joined are necessary in this suit for the final determination of the issues raised herein.***
6. ***No prejudice shall be suffered by the Plaintiff if the orders sought herein are granted.***
7. ***The Court has unfettered discretion to grant the orders sought herein.***

The Defendant in his Application seeks to have a review of the Consent Order made on 25/02/2014. He also seeks to enjoin James Kimumu M'Thumatia, Gituma Mailutha and Charles M'Elaku M'Muthuri as

defendants. He has not told the Court if or not the persons sought to be enjoined as defendants are aware of this application.

The Consent Order sought to be set aside is a Written Consent proffered to the Court on 25/02/2014 and which Consent was, at the parties' instigation adopted as an order of this Court. The consent was in the following terms:-

“By Consent of both parties and their Advocates may the Court record the following orders:-

1. ***That the parties forgo compliances issues.***
2. ***That the Court issues summons to the Land Registrar and the Surveyor to mark the boundary between Plot No. 1910 and 1909.***
3. ***That each party calls at least 2 witnesses if need be.***
4. ***That the parties be given an early date in Court”.***

The Consent was signed by Advocate Victor P. Gituma for the Plaintiff and Advocate Moses M. Kirima for the Defendant.

In this application, the applicant, *inter alia*, says that the Court should have clarified the Survey map and Mutation forms to be used by the registrar and the Surveyor when implementing the subject Consent Order. The applicant also says that the exercise would touch on parcels of land owned by the persons he seeks to enjoin as other defendants in this suit . He says that reviewing the Consent order and enjoining other defendants would serve the cause of justice.

The plaintiff opposes the application and says that it would prejudice him a lot as it would have the effect of delaying the hearing and determination of this suit. The Plaintiff says that the issues raised by the Defendant would be handled by the implementing officers as the Defendant would produce documents in support of his claim. Then the implementing officers would make a report to the Court having been guided by the original records held in their offices. The Plaintiff opined as follows: “ ***The reluctance by the Defendant to have the suit lands visited by government Officers is suspect and unjustified”.***

The Plaintiff submits that the Defendant had not shown to the Court that he was not party to the Consent. The Plaintiff also submits that the Defendant has not brought out his claim against the people he seeks to enjoin as other Defendants. He says that no fraud is evinced and that the Defendant does not show that he was coerced to enter into the Consent. The Plaintiff also submits that the Defendant has not alleged that the Consent Order which is the subject matter of this application is incapable of being implemented.

In this area of Consent Orders, the case of ***Hirani V. Kassam (1952) E.A 131 is the locus classicus.*** In this case the Court relied on and approved and adopted a passage from Seton on “Judgements and Orders”, 7th Edition Volume 1 page 124 and held that:-

***“A Consent Order made in the presence and with the Consent of Counsel is binding on all parties to the proceedings or action and cannot be varied or discharged unless obtained by fraud, or collusion, or by an agreement contrary to the public policy of the Court or if the Consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts or in general for any reason which would enable the Court to set aside an agreement”.***

In arriving at this decision the Court of Appeal for Eastern Africa did not reinvent the wheel. The Classic case of Huddersfield Banking Co. Ltd. V. Henry Lister and Co. Ltd. (1895) 2 Ch.D at page 23 held that a Consent Order was an order and as long as it stood, it must be acknowledged as such and was a good estoppel as any other order.

The Court of Appeal in Flora N. Wasike V. Destino Wamboko (1982-1988) KAR 925 spelt out the principles necessary to debunk a Consent Order as fraud, mistake or misrepresentation. Justice Hancox, JA, as he then was opined 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 certain conditions remained to be fulfilled which are not carried out”.***

This position is pellucidly enunciated in the English case of Purcel V.F.C Trigell Ltd, (trading as Southern Window and General Cleaning Co. and Another, [1970] 3 ALL ER 671, where Winn , L.J , opined:

***“It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”***

In Kenya Commercial Bank Ltd Versus Specialized Engineering Co. Ltd [1982] KLR 485, it was held that a consent order entered into by counsel 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 facts or in representation or ignorance of such facts or in general for a reason which would enable the court to set aside an agreement. Justice Harris at page 493 opined:

***“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 of one or other of the recognized grounds.”***

For a long time, the common law legal system has allowed a consent order or judgment to operate as an estoppel against someone trying to assert a different position from that stipulated in the agreement of the parties. This position is buttressed by the opinion of Lindley L. J in Huddersfield Banking Co. Ltd Vs Henry Lister & Son Ltd (1895) 2 ch. D 273 at page 280 where he said:

***“A consent order I agree is an order and as long as it stands it must be treated as such, and so long as it stands it is as good an estoppel as any other order.”***

This position was adopted by this Court in Kahagi Ndirangu V. Kenya Power & Lighting Company (Meru HCCC No. 34 of 2009).

I have carefully examined the Submissions proffered by the parties. Whereas I agree with the Defendant/ Applicant that this Court has wide discretion to grant the orders sought in this application, that discretion can not be exercised capriciously in an unstructured manner. It must be exercised judicially.

A consent Order adopted by the Court at the instigation of the parties' Advocates binds all the parties. Advocates are professionals. Unlike lay men, it can not laconically and casually be claimed that the Advocates did not know what they were doing. No fraud or collusion has been proved. There is nothing in the Consent that can be said is against public policy. There are no new material facts that would be unknown to the implementing government officers. No misapprehension or ignorance of material facts has been proved as all along the documents needed to implement the Consent are in the official custody of the implementing government officers. In general there is no reason that can move the Court to set aside the subject Consent Order.

I, therefore, do not agree with the Defendant that the review sought in this application is meant to prevent abuse of Consent Orders. Consent Orders, especially when entered into by Advocates, who are professionals must be taken seriously. In the circumstances, I do not find the application meritorious.

**The application is dismissed. I award costs to the Respondent/ Plaintiff.**

**It is so ordered.**

**Delivered in Open Court at Meru this 18th day of February, 2016 in the presence of:-**

CC: Lilian/Daniel

Gatari Ringera for the Plaintiff/ Respondent

M.Kariuki h/b Harun Gitonga for the Defendant/Applicant

**P. M. NJOROGE**

**JUDGE**