



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 543 OF 2013**

**DAVID MBURU GIBSON..... 1<sup>ST</sup> PLAINTIFF**  
**NELSON MWANGI.....2<sup>ND</sup> PLAINTIFF**  
**BOTH T/A NEMKA COMMERCIAL AGENCIES**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND (NSSF)..... DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 19<sup>th</sup> November 2014 in which the Interested Parties/Applicants seek for the following orders:

1. Spent.
2. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to grant Stay of Execution of the Consent Order issued on 12<sup>th</sup> November 2014.
3. That this Honourable Court be pleased to set aside the Consent and consequential orders thereto issued on 12<sup>th</sup> November 2014.
4. That costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Alfred Ochieng, an Advocate acting on behalf of the Applicants, sworn on 19<sup>th</sup> November 2014 in which he averred that the Respondents have engaged in negotiations between themselves to the exclusion of the Applicants who are Interested Parties with a claim over L.R. No. 11895/24 (hereinafter referred to as the “suit property”). He further averred that the Respondents have in collusion entered into a consent for the refund of the purchase price sum of Kshs. 16,400,000/- within 21 days to defeat the Interested Parties’ claim to the suit property. He further averred that the Respondents misrepresented the facts to this court by failing to disclose that they never involved the Interested Parties in the negotiation of the contents of the consent and further that the Respondents did not disclose to the court the existence of **ELC No. 1331 of 2014** touching on the suit property in which there is a pending application for consolidation of the two suits. He further averred that the Applicants are apprehensive that the 2<sup>nd</sup>

Respondent may at any time proceed to pay the 1<sup>st</sup> Respondent the refund of the purchase price thereby rendering the Applicants' claim an exercise in futility. He further added that if the Consent order is not set aside the substratum of the Applicants' claim, which revolves around their contribution towards payment of the purchase price and acquisition of the suit property, will be lost.

The Application is contested. The Plaintiffs/1<sup>st</sup> Respondent filed their Grounds of Opposition dated 9<sup>th</sup> December 2014 as follows:

1. That there exists absolutely no sustainable reasons and/or grounds to set aside the consent in issue as in any event the Interested Parties were duly represented by counsel on 12<sup>th</sup> November 2014 when the consent in issue was recorded.
2. That the Application has in any event been overtaken by events as the terms of the consent have already been actualized/fulfilled and the orders sought are therefore spent and/or in vain.
3. That the Applicants have already filed suit as against the Plaintiffs and the Defendant herein being **ELC No. 1331 of 2014** and their remedy does not lie in seeking the orders sought herein but rather in prosecuting their said suit and further that the consent was on a 'without prejudice' basis and therefore does not affect or prejudice the Applicants' interests.

The Application is further contested. The Defendant/2<sup>nd</sup> Respondent filed the Replying Affidavit of Caroline Rakama Odera, its Senior Legal Officer, sworn on 14<sup>th</sup> January 2015 in which she averred that the consent order was made pursuant to the Defendant/2<sup>nd</sup> Respondent's Notice of Motion dated 19<sup>th</sup> September 2014 on grounds which were self-evident on its face and accordingly the allegations of collusion by the Applicants are ludicrous. She further averred that pursuant to the consent order, the Defendant/Respondent has since effected the refund, a fact which is confirmed by the Plaintiff's counsel and there is therefore nothing left for the court to stay. She further pointed out to the fact that the Applicants have since filed **ELC No. 1331 of 2014** in which they have sued the Plaintiff and the Defendant through which the Applicants can pursue their claim over the suit property. She therefore termed this Application as a gross abuse of the court's process.

Written submissions were filed by the Applicants and the Defendant/2<sup>nd</sup> Respondent. The Plaintiff/1<sup>st</sup> Respondent indicated that they would rely on the Defendant/2<sup>nd</sup> Respondent's submissions.

Two preliminary points must be set out. The first preliminary point is to confirm that the Interested Parties/Applicants were enjoined in this suit by consent of the Plaintiff and the Defendant on 11<sup>th</sup> December 2013 pursuant to their Notice of Motion dated 6<sup>th</sup> August 2013. The other preliminary point to confirm is that the Applicants' counsel was absent from court on 12<sup>th</sup> November 2014 when the disputed consent order was entered into. Only the Plaintiff and the Defendant were present in court on that date. The court record reveals that the Applicants had not attended court in the previous 3 court appearances. It would not appear that they had been notified of the mention date when the consent was recorded. A week later, the Interested Parties/Applicants filed this Application. The issues arising for my determination are two: whether to stay the execution of the consent order issued by this court on 12<sup>th</sup> November 2014 and secondly whether to set aside that consent order.

The principles to be considered by this court in determining whether or not to set aside a consent order are well settled. In the Court of Appeal case of **Flora N. Wasike v. Destimo Wamboko [1982-88] 1 KAR 625**, the court held that,

***"It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which could justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out".***

Further in **Purcell v F C Trigell Ltd [1970] 3 All ER 971**, Winn LJ held that,

***“It seems to me that, if a consent order is to be set aside, it can really 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 the case of **Hirani v. Kassam (1952) 19 EACA, 131**, the Court of Appeal of East Africa held that,

***“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings for action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or if the 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 a court to set aside an agreement.”***

Going by these decisions, it would appear that this court should treat the consent order complained of as a contract which is only binding upon the parties thereof, in this case the Plaintiff and the Defendant. In the circumstances, the Applicants’ contention that the consent order should be set aside for the reason that they were not consulted or involved does not appear to hold any sway. The fact that the Applicants were not involved in the negotiations and the consent order that arose therefrom does not appear to be a valid ground for setting aside the consent order and no authority or law has been placed before this court to support such an assertion. The simple reason for this is that the Applicants’ claim under this suit remains unaffected and unchanged by the consent order. The suit shall proceed to full hearing and the Applicants shall have their full opportunity to present their case after which the court shall determine the Applicants’ remedy. In the circumstances, I decline to set aside the consent. I will decline to stay the execution of the consent order for the same reason and further for the simple reason that the Defendant having refunded the monies, there is nothing left to stay and this court does not issue orders in vain.

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

**DELIVERED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF MAY 2015.**

**MARY M. GITUMBI**

**JUDGE**