



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 529 OF 2012**

**BETWEEN**

**Z M S.....1ST PETITIONER**

**M W S.....2ND PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT**

**CHIEF MAGISTRATES COURT AT NAKURU.....2ND RESPONDENT**

**S M N.....INTERESTED PARTY**

**RULING**

**Introduction**

1. The Interested Party, S M N, filed a Notice Motion Application dated 5th September 2013 seeking orders *inter alia* that; this Court be pleased to review, vacate and/or set aside the consent orders recorded on 11th July 2013 and issued on 12th July 2013; that this Court be pleased to reinstate the Petitioner's Petition dated 16th November 2012 and for an order that the costs of the Application be provided for. The Application is supported by an Affidavit sworn by the Interested Party on 5th September 2013.
2. The said Application is opposed. The 2nd Petitioner filed a Replying Affidavit sworn on 31st March 2014 and there is also a Replying Affidavit on record by John Hari Gakinya, Advocate sworn on 26th September 2013.
3. To put matters into perspective, by a Petition dated 16th November 2012, the Petitioners, Z S and M S, sought orders to bar the 2nd Respondent from entertaining any private prosecution in regard to the parentage of the 1st Petitioner and orders directed to the 1st Respondent to cause him to carry out investigations into the claims made by the Interested Party relating to the 1st Petitioner's parentage. Before the Petition could be heard and determined, the parties recorded consent orders in the following terms as the final orders of the Court;

***“(1) That the motion filed by the Interested Party namely, Nakuru Chief Magistrate's Court, Miscellaneous Criminal Application No.117 of 2012 seeking leave to institute private criminal proceedings against the 2nd Petitioner (M S) arising from or related to the paternity of the 1st Petitioner be and is hereby dismissed and/or struck out.***

***(2) That an order be and is hereby issued directed to the 2nd Respondent and/or any other Court, subordinate to the High Court not to entertain and/or suffer and/or allow its process to be used by the Interested party and/or any other person to file any private criminal prosecution against the 2nd Petitioner arising from the paternity of the 1st Petitioner and/or parentage of the 1st Petitioner.***

***(3) That an order of prohibition be and is hereby issued to permanently debar the Interested Party, whether by himself or his previews, nominees, emissaries, surrogates, family members or whosoever from contacting the Petitioners whether directly or indirectly in respect of the allegation that the Interested Party and his wife are the 1st Petitioner's parents.***

***(4) That each party to bear their costs.”***

4. It is the above consent orders that the Interested Party seeks to set aside allegedly for reasons that they were entered into fraudulently by his former lawyer, Mr. Gakinya aforesaid and in collusion with the Petitioners.

### **The Interested Party's Case.**

5. Mr. Nzioka and Mr. Osoro, learned Counsel presented the Interested Party's case. It was their position that the Interested Party did not participate in any negotiations leading to the consent order aforesaid. That at the recording of the consent, the Interested Party and his advocate were not present in Court and Counsel claimed that the Advocate who signed the consent did not in any event have instructions to do so. The said consent, it was urged, terminated all the proceedings in relation to the matter to the detriment of the Interested Party.
6. Counsel submitted that under the law, a consent can be set aside if there is no satisfactory explanation as to the manner in which it was entered. That Mr. Gakinya allegedly entered into the consent in order to cushion the Interested Party against future costs and criminal proceedings while in fact the Director of Public Prosecutions (DPP) had in his report filed in Court stated that the Interested Party would not be charged with any criminal offence as a result of his actions against the 2nd Petitioner. It is also claimed that there were no discussions leading to the consent and there are no correspondences to that effect and that there was evidence that Mr. Gakinya only called the Interested Party after the consent had been recorded to inform him of its existence and that he therefore had no instructions to conclude the matter as he did. Reliance was placed on the case of ***Republic v District Land Registrar Nandi and Anor (2005) 1 KLR 521*** where it was held that a consent cannot be varied unless it was obtained by fraud or collusion and Counsel submitted that in cases where the client's interests had been negated, then the consent order ought to be set aside and that it can also be set aside to avoid further war and acrimony between parties. Counsel also relied on the case of ***Munyiri v Ndungunya (1985) KLR 370*** where it was held that it would be wiser if a Judge obtained signatures of advocates or the parties to the recording of a consent after it has been filed or recorded.
7. Counsel added that when the DPP's report was filed, Mr. Gakinya sought a hearing date and indeed a date was fixed because the Interested Party wanted to interrogate the DPP's report and further that the Interested Party had a legitimate expectation of a full hearing and he ought therefore to be given an opportunity to get a clear outcome of the Petition.
8. He thus urged that the Court ought to allow the Application and set aside the consent orders and set the Petition for hearing at the earliest.
9. Further, that the orders sought in the Petition only seek a reinstatement of the Petition and that the Application is not frivolous because the consent was entered irregularly thus occasioning injustice to the Interested Party.

### **The Petitioner's Case**

10. Mr. Ngatia for the Petitioners opposed the Application. He claimed that the Petition was filed because of intended criminal proceedings filed by the Interested Party in Nakuru over the theft of

- a child in 1988. The DPP was subsequently ordered to make a report to the Court on the issue and he filed a report in compliance thereof stating that the 1st Petitioner and the alleged lost child were two different persons and that the 1st Petitioner was not the person alluded to by the Interested Party. Thereafter, he claimed that an issue was raised as to the conduct of a forensic analysis and it was his position that the 1st Petitioner cannot be subjected to forensic analysis at the whims of the Interested Party because the former is an adult of 30 years and 7 months and that the proceedings in Nakuru were a waste of judicial time. He relied on the case of *Muchanga Investment Ltd v Safaris Unlimited (Africa) Ltd and Others Civil Appeal No. 25 of 2002* in that regard.
11. He further claimed that the consent order in this case cannot be unlawful as the DPP was involved in the entire process and the Petitioners did not derive any benefit from it and in any event that the proceedings in the consent order had all the signatures of all the parties and so it was a lawful order to all intents and purposes.
  12. He urged the Court to dismiss the Application and save the Petitioners continuing anguish as a result of its pendency.

### **The Respondents Case**

13. Mr. Warui presented the Respondent's case. He associated himself with Mr. Ngatia's submissions and added that he was present in Court when the consent was tabled before the Court and he signed it. He submitted that the Court should not vacate the consent because the Petition had been spent in any event once the DPP's Report was filed.
14. He further claimed that in the Petition, the orders sought against the DPP were *inter-alia* to cause investigations to be conducted and to institute criminal charges against any culpable party. In that regard, the DPP caused investigations to be conducted and a report was filed in Court and one of the recommendations made was that the Interested Party was to be charged with certain offences. He claimed that the consent order between the Interested Party and the Petitioner was to the clear effect that the matter should be settled and the DPP agreed with that proposal and also agreed that no criminal proceedings would be instituted against the Interested Party for his actions.
15. He added that the proceedings in the Nakuru Chief Magistrate's Court were private and a party instituting such proceedings had to demonstrate that the DPP had failed to prosecute a criminal complaint made to him but this was not done by the Interested Party. He claimed in any event that the Petition herein had nothing to do with paternity so that even if the Court were to order the Chief Magistrate's Court in Nakuru to hear the matter, nothing would come out of it as the 2nd Petitioner had no criminal culpability. He thus urged the Court to dismiss the Application.

### **Mr. Gakinya's Submissions**

16. Mr Gakinya, the advocate who had acted for the Interested Party previously, did not oppose the Application in substance but took offence with the grounds on which it was made.
17. He admitted that he had no evidence of correspondence (s) and written instructions between himself and the Interested Party and stated that to the contrary, all the instructions he received were oral.
18. He stated that his initial instructions were to commence proceedings in Nakuru and to try and have discussions between his client and the Petitioners regarding the 1st Petitioner's parentage. When no consent could be reached, he later personally signed the impugned consent order and that the Interested Party was aware and duly informed of the discussions culminating in the consent. He added that since the Petition was substantially filed to cause the DPP to investigate the matter, once the DPP's report was filed, he decided to cushion the Interested Party against future criminal proceedings by way of a settlement and exit from the proceedings, hence the consent.
19. He submitted that when the contents of the consent letter were being adopted in Court, he was not present but he had communicated to his colleagues by way of a short text message and informed them that he was held up elsewhere and since he had signed the consent, the same should be recorded in terms of the letter written to the Deputy Registrar of this Division.
20. He claimed that the consent had been recorded in the best interests of the Interested Party and in the best circumstances as at the time. That there was no need for a hearing as the DPP had already acted within his mandate and the Petition had been spent.

21. He thus claimed that for the above reasons, the Application was vexatious and frivolous and was filed in bad faith and should be dismissed.

### **Determination**

22. From the foregoing submissions, the only issue for determination in this Application is whether the Consent order can be set aside by this Court in the specific circumstances of this case.

23. It is not in dispute that a consent order was signed, recorded and filed by two of the parties herein. The consent order is reproduced elsewhere above and it is also not in dispute that while the consent order was signed by the advocate for the Petitioners and the advocate for the Interested Party, Mr. Warui, learned Counsel representing the DPP who is the Respondent in the Petition, acceded to the consent order being recorded as the final orders of the Court and was present in Court when the said consent order was recorded. The issue now is whether it was recorded with the consent of the Interested Party and what the implications of that fact should be – including whether the consent order should be set aside.

24. The circumstances in which a consent judgment may be interfered with were considered by the Court of Appeal in **Hirani v Kassam (1952) 19 EACA 131**, where the following passage from **Seton on Judgments and Orders, 7th Edition, Volume 1 page 124** was approved;

***“Prima facie, any order made in the presence and with 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”.***

25. Further in his judgment in the case of **Flora Wasike v Destimo Wamboko (1988) I KAR 625**, Hancox JA stated 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 were not carried out”.***

26. The above, in essence, are the principles which the Court should apply in determining applications such as the one before me. To my mind therefore, a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for such action and they include the following;

- (i) Where the consent was obtained fraudulently or,
- (ii) In collusion between affected parties.
- (iii) Where an agreement is contrary to the policy of the Court.
- (iv) Where the consent is based on insufficient material facts.
- (v) Where the consent is based on a misapprehension or ignorance of material facts.
- (vi) Any other sufficient reason.

27. In the instant case, it has only been argued that;

- (a) The consent order was recorded fraudulently and
- (b) In collusion between Mr. Hari Gakinya, Advocate and the Petitioners and

(c) *Without the express instructions of the Interested Party.*

28. While the Interested Party states otherwise, Mr Gakinya confirmed that he signed the consent letter after briefing the Interested Party and having obtained his approval. In that regard at paragraph 7 of his Replying Affidavit he stated thus;

***“That the Interested Party was duly informed and involved in settlement of this matter and I had no ill motives or any secondary reason to act, other than the best interests of the Interested Party, a fact that I have explained to the Law Society of Kenya as per the annexed letter dated 31st July 2013 in reply to the complaint by the Interested Party...”***

On the contrary, I have seen a letter dated 25th July 2013 by the Interested Party in which he denies instructing Mr. Gakinya to enter into *“this despicable and abhorrent agreement with [his] antagonist's lawyers.”* In the end therefore, I have two conflicting stories – who should I believe?

29. It must be remembered that an advocate has a general authority to compromise a matter on behalf of his client but he must always act *bonafides* and in the best interest of his client. Mr. Gakinya has stated under oath as well as in his submissions before the Court that he acted at all times in accordance with the instructions he received as well as in the best interests of his client. I believe Mr. Gakinya for the simple reason that the Interested Party has failed to demonstrate to the Court that there was fraud or collusion in the recording of the consent as between the Petitioners and Mr. Gakinya. I say so with tremendous respect because fraud is a serious matter and a mere statement that there was fraud cannot suffice in a matter of such seriousness as the one before me. That is why in **Abdul Rehman vs Fredrich Delfer & Anor, C.A No.112 of 1992** the Court of Appeal stated that the burden of proving fraud especially against an advocate is very heavy and fraud must also be specifically pleaded and proved strictly.

30. In the event, where is evidence of fraud or even collusion? Not one aspect of it has been cited in this case and I am not satisfied that I have been given sufficient evidence to lead me to a conclusion that Mr. Gakinya acted fraudulently.

31. In any event, while I am in agreement with the Court of Appeal's reasoning in **Munyiri v Ndungunya (supra)** that it would be wise to obtain the signatures of advocates before recording a consent, that issue would not arise in the instant case as I have already stated elsewhere above that the consent orders had been signed by the advocates even before they were adopted by this Court. In that case, it appears to me that the terms of the consent order had been known and agreed in advance by the parties before the advocates signed the consent letter written to the Deputy Registrar of this Division. It is otherwise difficult to understand why Mr. Gakinya appended his signature to the consent letter. In fact in his letter of 31st July 2013 to the Law Society of Kenya, he gave a very detailed explanation as to how he acted throughout the proceedings but that is all I can say not to prejudice the proceedings against him pending before the Law Society of Kenya.

32. In addition to the above, Mr. Osoro stated that whatever the issues in contest the Interested Party is keen on having the Petition reinstated and looking at the Petition again, it seeks the following orders;

***“(a) An order be issued directed to the 2nd Respondent and/or any other Court subordinate to the High Court not to entertain and/or suffer and/or allow its process to be used by the Interested party and/or any other person to file private criminal prosecution against the 2nd Petitioner arising from the paternity of the 1st Petitioner and/or parentage of the 1st Petitioner.***

***(b) An order be issued directed to the 2nd Respondent to forthwith dismiss, reject and/or strike out the Motion filed by the Interested Party seeking leave to institute private criminal proceedings against the 2nd Petitioner (sic Mary Saitoti) arising from and/or related to he paternity of the 1st Petitioner.***

***(c) A conservatory order do issue directed to the 2nd Respondent to stay any hearing of eh motion filed by the Interested Party in the Chief Magistrate's Court Misc. Criminal***

***Application No.117 of 2012 at Nakuru seeking leave to institute private criminal proceedings against the 2nd Petitioner (M S) and not to grant leave and/or suffer any step to be taken in relation to that motion pending determination of this Petition.***

***(d) An order do issue directed to the 1st Respondent to immediately cause an investigation to be carried out regarding the claims and allegations made by prosecutions against the Interested Party and/or any other party once investigations establish that the claims and allegations are false.***

***(e) An order of prohibition do issue to permanently debar the Interested Party, whether by himself or his priviest, agents, nominees, emissaries, surrogates, family members or whomsoever, from contacting the Petitioner whether directly or indirectly in respect of the allegation that the Interested Party and his wife are the 1st Petitioner's parents.***

***(f) Cost of and incidental to this suit.”***

33.As can be seen above, the prayers in the Petition are specifically directed at the DPP and the Chief Magistrate's Court, Nakuru. However since **Misc. Criminal Application No.117 of 2012** had been instituted by the Interested Party, any orders in the Petition would affect him hence the need to involve him in all aspects of the Petition.

34.In the cause of proceedings, the DPP sought and was granted time to investigate the allegations made by he Interested Party that the 1st Petitioner was his son who had been kidnapped sometime in 1988. A comprehensive report was filed in this Court as annexure “JMW 1” to the Replying Affidavit of Mr. Warui sworn on 28/3/2013. In that report, Mr. Martin Nyaguto who investigated the matter, concluded as follows;

***“(1) The evidence adduced from relevant witnesses and documentary analysis proves beyond any reasonable doubt that Z M S is not S W M.***

***(2) It is also a fact that [particulars withheld] family had a son namely S W born on 21st September 1985 at Subukia Health Centre, and he went missing on 31st August 1988 and since to date he has not been traced.***

***(3) That Z M's “parents” are the late P. G S and Mrs. M W S and he was born on 8th September 1983 at Park road Nursing Home.***

***(4) That Z S, between January 1987 and December 1987 he was in New Muthaiga Kidergarten, and at Westland Kindergarten between January 1988 to 1989, so it's a fact he is not the alleged S W who went missing on 31st September 1988 at Subukia Trading Centre. (sic)***

***(5) During the investigations process,investigating team did not establish any evidence from [particulrs withheld] family that justified them to single out Z M S as their lost son other than the allegations by the alleged officers which was disputed by D15 (PCIO). (sic)***

***(6) The team conducted independent and thorough investigations and did not find it necessary to subject Z M S to any forensic analysis as requested by D1 & D2.***

***(7) The purpose and value of any forensic analysis is considered in course of investigations to aid the investigators to establish the truth of matter in question. (sic)***

***(8) The evidence adduced has proved without any reasonable doubt that Z M and S W are two different children.***

***(9) Since it is a fact that the child got lost, and the [particulars withheld] family have***

***not traced him, any information they receive from various sources is pursued hoping to be true. This is what made them believe the information that was given to them by Police officers while at Nakuru Police Station and Nairobi Law Court. To them the report was true as it was coming from public officers. (sic)***

***(10) It is therefore not prudent to charge them for giving a false statement.”***

35. With the above background, the impugned consent orders were ostensibly recorded for purposes of shielding the Interested Party from further costs and possible criminal charges, according to Mr. Gakinya. Two other issues in that regard have raised my concern. They are that;

(i) Mr. Gakinya in his letter of 31st July 2013 to the Law Society of Kenya repeatedly stated that **Misc. Criminal Application No.117 of 2012** was filed to “bring pressure on Mrs. S” and that he and the Interested Party agreed that if the pressure failed, then he “had instructions to terminate and withdraw the case.” Further, that at the time, “there was no material to suggest that there was a reason to suspect Mrs. S kidnapped or was involved in the kidnapping of Mr. N's son”.

(ii) Whereas both the present Petition and **Misc. Criminal Application No.117 of 2012** seem to rotate around the parentage of the 1st Petitioner, the Interested party has tabled no evidence in either case to support his allegations. Mr. Gakinya in that regard also stated that he and the Interested Party knew that fact hence the “pressure” on the 2nd Petitioner.

36. I have raised the above issues to address the point made by both Mr. Ngatia and Mr. Warui, learned Counsel for the Petitioners and Respondent, respectively, that once the DPP's report was filed and evidence tendered that the 1st Petitioner is a different person from the Interested Party's son, then to reinstate the Petition for hearing would be a waste of judicial time and the height of frivolity.

37. The issue is important if only also to address the principle whether there is sufficient reason to re-open both the Petition and Misc. Criminal Application No.117 of 2012.

38. In that regard, I have watched the Interested Party in Court and I have read his Affidavits and letters on record. There is no doubt that the issue of his kidnapped son has gnawed his mind for over 25 years. The issue is also emotive and haunting. Having said so however, what purpose will reinstatement of the Petition serve? The DPP has investigated the matter and his report is on record. He has declined to accept the Interested Party's version of events. The Interested Party's former advocate has sworn on oath that the Interested Party knew and knows that he has no evidence that the 2nd Petitioner kidnapped his son and that all proceedings were filed to put “pressure” on the latter and Mr. Ngatia has submitted that the “pressure” included a possible financial settlement and benefit to the Interested Party. Mr. Gakinya has alluded to the same fact.

39. The Interested Party's evidence on the other hand is this;

(i) That some people informed him that the 1st Petitioner is his son.

(ii) That the 1st Petitioner resembles his other children.

40. No other evidence has been placed before me and so the question is, would reinstatement of the Petition serve any useful purpose? My mind is clear that it will not. But that is not the end of the matter because the Interest Party demands that the 1st Petitioner be subjected to DNA tests to confirm his parentage. On that latter issue, the 1st Petitioner is over 30 years old and is not a child. This Court in **Patrick Kariuki Muiruri vs Senior Principal Magistrate, Children's Court, Nairobi & Anor, Petition No.138/2012** addressed that issue and now reiterates the holding in **Bhabani Prasad Jena v Convener Sec Orissa, Civil Appeal Nos 6222-6223 of 2010** that;

***“The Court must reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity***

*of a child should not be directed by court as a matter of course or in a routine manner, whenever such request is made. The Court has to consider diverse aspects.....pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test....It has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have a roving inquiry, there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test.”*

41.I am in agreement with the above holding and I have raised the above issues cautiously and guardedly to make the point that there is no reason in law or in fact to reinstate the Petition to hearing because the main parties to it i.e. the Petitioners and Respondents have seen no reason to do so and the case for the Interested Party is weak and falls outside the principles for setting aside a consent judgment.

If the substantive parties to the Petition have seen need to compromise it, how can a secondary party, the Interested Party, strong as his interest may be, force them to revive it? I see no logic nor any law that would grant me jurisdiction to force them to relitigate a matter they consider closed at the behest of an outsider to the principal issues in litigation. I say so again quite aware of the interest the Interested Party has in the said litigation.

### **Conclusion**

42.I am aware that this matter is emotive and both the Petitioners and Interested Party are undergoing deep emotional difficulties as a result of it. However, it is clear to me that to re-open either the present Petition or **Misc. Application No.117 of 2012** would not heal their emotional wounds. Their remedy and therapy lies elsewhere and they must all be candidly told so.

43.In any event, I find no merit in the Application dated 5th September 2013 and the same is dismissed with no orders as to costs. I have had this Ruling delivered by my learned colleague because I am engaged in proceedings at the East African Court of Justice and to keep my word to the parties that the Ruling shall be delivered on the date set for such delivery.

44.Orders accordingly.

**SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY, 2014**

**ISAAC LENAOLA**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2014**

**D. S. MAJANJA**

**JUDGE**

**23/5/2014**

MAJANJA, J.

Richard – Court clerk

Mr. Ngatia for the Petitioners

Mr. Nzioka for the Interested Party with Mr. Ng'arua

Mr. Warui for the DPP

Mr. Ojwang for the A.G

**Order**

Ruling read and delivered in Open Court.

**D. S. MAJANJA**

**JUDGE**

**23/5/2014**