



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**LAND AND ENVIRONMENT COURT**  
**CIVIL CASE NO.21 OF 2008**

**PAUL NGOBIA NJOROGE & 88 OTHERS.....PLAINTIFF**

**VERSUS**

**KENYA NATIONAL ASSURANCE CO. (2001) LTD..... DEFENDANT**

**RULING**

On the 22nd October 2010, the parties herein agreed to terminate the proceedings by consent signed by a representative of Gathara Mahinda & Company advocates for the defendants on one part and Paul Ngobia Njoroge, James Maina Weru and Francis Gitonga Kimeria on their behalf and on behalf of the other plaintiffs.

The court considered the consent and gave judgment in terms of the consent and issued a decree on the 9/1/2012.

On the 4/9/2012, the defendant filed an application in the High Court for the Honourable Court to make a provision for costs to the defendants together with interest thereof.

On the 14/9/2012, the court received a written consent signed by Gathara Mahinda & Company Advocates for defendant and Ng'ang'a Munene & Company Advocates for the plaintiffs/ respondents whose import was that the application for costs was allowed by consent of the parties. The consent order was made on the 21st of September 2012.

On the 11th of October 2012, the firm of King'oo Wanjau, prepared Notice of Motion under the provisions of section 3A of the Civil Procedure Act and Order 22 rule 25 and Order 45 of the Civil Procedure Rules whose ultimate prayer was to review and vacate the consent order dated 21/9/2012. The grounds of the application are as follows:-

1. **That the consent order dated 21st September 2012 was entered into and filed by the firm of Ng'ang'a Munene & Co. Advocates and that of Gathara Mahinda & Co. Advocates without the plaintiffs' consent or knowledge.**
2. **That the firm of Ng'ang'a Munene & Co. representing the plaintiffs/applicants did not have the consent of the applicants to enter into the said consent.**
3. **That the consent order dated 21st September 2012 is extremely prejudicial to the plaintiffs.**
4. **That there is on record a consent judgment and a decree that doesn't bear an order for cost.**

**The said consent judgment has not been reviewed and no application for review was ever brought.**

- 5. That no party on earth can consent to pay money just like that and this clearly shows that the said firm of advocates compromised the application dated 4th September 2012 without the plaintiffs being consulted or even informed.**
- 6. That lack of consent or instructions by the plaintiffs to the said firm of advocates is sufficient cause for this court to vacate the said consent order.**
- 7. That unless the said consent order is vacated the plaintiffs stand to suffer irreparably.**
- 8. That it is the interest of Justice that this application be granted.**

The application is supported by the affidavit of Paul Ngobia Njoroge on behalf of all the plaintiffs/applicants. The defendant responded by filing a replying affidavit sworn by Tabitha Mwaniki the Principal Legal Officer who is well versed with facts of this case and authorised and competent to swear the affidavit. Both parties filed submissions and highlighted the same before court.

I have read the application, supporting affidavit, replying affidavit and the written submissions of all parties and having listened to the submissions of counsel on record I do frame the issues for determination as follows:-

- 1. Who is on record in the matter for the plaintiffs/applicant.**
- 2. Whether an advocate can be appointed to act alongside another advocate.**
- 3. What is the difference between change of advocate and appointment of advocate.**
- 4. Whether the consent judgment entered on 21/9/2012 was binding.**
- 5. Whether the applicant has satisfied the principles of reviewing a consent judgment.**

On the first issue, it is clear from the pleadings that the plaint was drawn and filed on 5/3/2008 by the firm of Peter Muthoni & Co. advocates. The same was to be served upon K.N.A Company (2001) Ltd.

The Memorandum of Appearance was filed on the 19/3/2008 by the firm of Gathara Mahinda & Co. on behalf of the defendant. On the 10th of April 2008 the plaint was amended without leave pursuant to order VI A Rule 1 of the Civil Procedure Rules as it then was and the amended plaint filed on 15/4/2008. A defence and reply to defence were filed accordingly by the defendant and plaintiffs respectively. Another amendment was made with the courts leave given on 15/10/2008. The re-amended plaint was filed on 22/10/2008 upon which the defendant amended his defence on the 31/10/2008 and filed the same on the said date. The plaintiffs were until the 13th of September 2010 represented by the firm of Peter M. Muthoni & Co. Advocates whilst the defendant were represented by Gathara Mahinda & Co. advocates when the plaintiffs withdrew instructions from his advocate and opted to act in person.

On the 19/10/2010, the plaintiffs appointed M/s Kiget & Co. Advocates to act on their behalf however the latter did not last long as the firm of Kingori J. Theuri was later appointed to act on behalf of the plaintiffs. King'ori J Theuri likewise did not stay on record long enough as the instructions were withdrawn from them on the 7th of October 2012 when the firm of Ng'ang'a Munene was appointed to act for the plaintiffs and a Notice of change of advocates filed accordingly.

On the 17th of October 2011 the plaintiff, applicants appointed the firm of King'oo Wanjau & Co. to act on their behalf alongside the firm of Ng'ang'a Munene & Co. The above facts have been deliberately analysed by the court to answer the question as to who is on record in this matter.

Order 9 rule 1 provides that application, appearances or acts in person, in court should be done by recognised agent or by advocate duly appointed on act on behalf of a party.

Order 9 rule 5 provides for change of advocate while order 9 rule 7 provides for appointment of advocate. The former applies to complete replacement of the advocate while the latter provides for appointment of advocate when the party is acting in person.

This courts finds serious procedural irregularities in the appointment of King'oo Wanjau advocates on 17/10/2011 as the advocates of the plaintiffs when the plaintiffs had an advocate on record in the name of Ng'ang'a Munene and Company advocates. The appointment was an abuse of the process of the court and likely to prejudice the parties and embarrass the court because of the confusion it has caused in terms of the advocate on record.

The Civil Procedure Rules do not recognise an advocate acting alongside another advocate and therefore any such purported appointment is a nullity. The court finds that in the proceedings before it, the plaintiff did not clearly explain the role of King'oo Wanjau and therefore it can only be assumed that he was the lead counsel who does not necessarily need to file papers but can be allowed to lead the advocate on record. On the first issue, the firm of Ng'ang'a Munene is and has been on record at all material times and therefore had instructions to take any legal action in the suit ,including compromising the same on behalf of the plaintiffs.

On the second issue, the court has already found that there is no provision for appointment of an advocate to act alongside another advocate and likewise, this court has explained the difference between change of advocate and appointment of advocate.

On the 4th issue, this court finds that the consent made between the parties on the 21/9/2012 was properly entered into upon an application dated 4th September 2012 and filed in court on the same date.

The last issue for the court to determine is whether the applicant has satisfied the principles of reviewing or setting aside a consent judgment.

It is now trite law that a consent judgment or consent order can only be set aside on the same grounds as would justify the setting aside of a contract. A consent judgment or order just like contract can only be set aside on grounds of **mistake, fraud or misrepresentation**.

I do not see any evidence of fraud, misrepresentation or mistake in the supporting affidavit. The order impugned was made with the consent of the advocates on record hence binds all parties in the proceedings and cannot be discharged or varied.

The upshot of the above is that the plaintiff/applicant has not discharged on a balance of probabilities the burden of proving that there exist evidence on the basis of which the consent can be discharged.

The application appears to be a complaint against the firm of Ng'ang'a Munene & Company Advocate for failing to exercise due diligence in regard to the issue of costs which complaints does not reach the threshold of setting aside a consent judgment. The application is ultimately dismissed with costs.

*Dated, signed and delivered at Nyeri this 13th day of June 2013.*

**A. OMBWAYO**

**JUDGE**