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2009**

**BISHOP REV. JOSEPH  
MEMBA SYUMA  
BISHOP ELIJA**

**MULELA**

**BISHOP JOEL**

**KIJIRU**

**JEREMIAH**

**NZIOKA NGIEMA**

**THOMAS**

**MUTUSE**

**ISACC BETT – (**

*All suing on their own behalf and*

registered Trustees and for an on behalf of

**GOOD NEWS**

**CHURCH OF AFRICA AND**

**THE GOSPEL FURTHERING BIBLE CHURCH TRUST ..... PLAINTIFFS**

**-VERSUS-**

**DARASA INVESTMENT LIMITED ..... DEFENDANT**

**RULING**

The Plaintiffs /Applicants in this case have filed a Notice of Motion dated 2nd August 2011 brought under Order 9 rule 9, Order 45 rule 1 of the Civil Procedure Rules, Order 51 of the Civil Procedure Rules, Section 80 and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, the inherent powers of the Court and all other enabling provisions of Law Seeking the following orders:

1. **THAT** the Honourable Court be pleased to review and declare that the defendant having breached the consent judgment dated 11<sup>th</sup> February 2011, clause 6 of the said consent judgment stands invoked, reading to WIT that in default of payment of any part of the sums agreed in clauses 1 and 2 the agreement contained in this consent shall be deemed to have failed due to lack of consideration and parties shall revert their positions as obtaining prior to the filing of the consent and have the suits heard in court and the sum of Kshs. 10,000,000/- paid pursuant to clause 1 (b) shall be forfeited.

2. **THAT** This honourable Court be pleased to the reinstate the preservative orders of Hon. J. Muchelule granted on 19<sup>th</sup> January 2011 reading to WIT that the defendant DARASA INVESTMENT LIMITED by themselves, the agents, servants and or employees and or any person claiming under and or from them be and are hereby restrained by an order of injunction from selling, damaging, alienating, excavating, digging, disposing and or in any other manner whatsoever, dealing with Land Reference Number 36/VII/586 and any part and or portion thereof and more particularly ALL or any of the following purported subdivisions thereof, namely:- **1.** L.R. No. 36/VII/1059 L. R. No. 123208, **2.** L.R. NO 36/VII/1060 I. R. NO 123209, **3.** L.R. NO. 36/VII/1061 I.R. NO 123210. **4.** L.R. NO. 36/VII/1062, I. R. NO. 123211. **5.** L.R. NO. 36/VII/1063 L.R. NO. 123212 **6.** L.R. NO 36/VII/1064 L.R. NO. 12313, **7.** L.R. NO. 36/VII/1065 I.R. NO. 123214, **8.** L.R. NO 36/VII/1066 L.R. NO. 123215, **9.** L.R. NO. 36/VII/1067 I.R. NO 123216 **10.** L.R. NO 36/VII/1068 I.R. NO 123217, **11.** L.R. NO 36/VII/1069 I.R. NO 123218, **12.** L.R. NO 36/VII/1069 I.R. NO 123219, **13.** L.R. NO 36/VII/1071 I.R. NO 123220, **14.** L.R. NO 36/VII/1072 I.R. NO 123221, **15.** L.R. NO 36/VII/1073 I.R. NO 123222, **16.** L.R. NO 36/VII/1074 I.R. NO 123223, **17.** L.R. NO 36/VII/1075 I.R. NO 123224,

3. **THAT** the Honourable Court be pleased to set aside and/or vacate the Further Consent Judgment dated 15<sup>th</sup> February 2011 and the Supplementary consent Judgment dated 4<sup>th</sup> March 2011.

4. **THAT** the Applicant be at liberty to apply for such other or further Orders as the Honourable Court may deem fit to grant.

5. **THAT** the costs for this application be provided to the applicant.

The applicant has grounds (a) to (p) on the face of the application. The grounds relevant to the prayer sought are;

**c. THAT** there is sufficient reasons to review the Consent judgments.

- d. THAT** despite executing the Consent dated 11<sup>th</sup> February 2011, the Defendant has failed to honour its obligation thereto in toto and the said consent as it stands has now been overtaken by events.
- e. THAT** the Defendant and the Plaintiffs former advocates later executed a subsequent further Consent dated 15<sup>th</sup> February 2011 and Supplementary Consent dated 4<sup>th</sup> March 2011.
- f. THAT** the said Supplementary and further consent agreements were entered into fraudulently without express instruction of the Plaintiffs/Applicants.
- g. THAT** as a result the said consent judgments herein are contrary to law and public policy of the Republic of Kenya.
- h. THAT** the Honourable Court has no jurisdiction to adjudicate and grant relief in aid of an illegality.
- i. THAT** the circumstances leading to the execution of the supplementary and further consent judgment amount to fraud and deceit.
- j. THAT** the Consent judgment was obtained by misrepresentation and undue influence by the Defendant and the Plaintiffs' previous advocates over the Plaintiffs.
- k. THAT** the plaintiffs did not instruct their previous advocates to execute the Further and Supplementary Consent agreements.
- l. THAT** in any event the said further and supplementary consent judgments lack a legal leg to stand upon in light of the breach of the consent judgment dated 11<sup>th</sup> February 2011
- m. THAT** the subsequent consents herein are an attempt by the Defendant to use the Court process for unjust enrichment.
- n. THAT** the Plaintiffs/ Applicants will be prejudiced if the court does not grant an order of temporary stay of execution pending the inter partes hearing and determination this application.
- o. THAT** the Orders of Hon. Muchelule issued on 19<sup>th</sup> of January 2011 be expressly stated as reinstated for the avoidance of any doubt due to the contentions nature of this suit.
- p. THAT** is in the interest of justice that the aforesaid orders be granted as prayed.

The application was supported by the supporting affidavit of Bishop Rev. Joseph Memba Syuma dated 2<sup>nd</sup> August 2011 the 1<sup>st</sup> plaintiff in this suit and his Supplementary Affidavit dated 2<sup>nd</sup> November 2011. The Affidavits are lengthy and in detail. Mr. Ibrahim Noor Hillowly Director of Darasa Investments Limited filed a replying affidavit dated 21<sup>st</sup> October 2011

Having read the affidavits filed by the parties a brief summary of on the facts are as follows;

At paragraph 3, to 17 Bishop Syuma gives a background of the history of the matter referring to other suits where the parties have been involved and the origins of the current suit. After filing this suit an application dated 23<sup>rd</sup> July 2010 was heard by Justice Muchelule and he gave injunctive orders as follows,

“that the defendant DARASA INVESTMENTS LIMITED by themselves, the agents, servants and or employees and or any person claiming under and or form them be and are hereby restrained by an order of injunction from selling, damaging, alienating, excavating, digging, disposing and or ain any other manner whatsoever, dealing with Land Reference Number 36/VII/586 and any part and or portion thereof and more particularly ALL or any of the following purported subdivisions thereof, namely: - **1.** L.R. No. 36/VII/1059 L. R. No. 123208, **2.** L.R. NO 36/VII/1060 I. R. NO 123209, **3.** L.R. NO. 36/VII/1061 I.R.

NO 123210. **4.** L.R. NO. 36/VII/1062, I. R. NO. 123211. 5. L.R. NO. 36/VII/1063 L.R. NO. 123212 **6.** L.R. NO 36/VII/1064 L.R. NO. 12313, **7.** L.R. NO. 36/VII/1065 I.R. NO. 123214, **8.** L.R. NO 36/VII/1066 L.R. NO. 123215, **9.** L.R NO. 36/VII/1067 I.R. NO 123216 **10.** L.R. NO 36/VII/1068 I.R. NO 123217, **11.** L.R. NO 36/VII/1069 I.R. NO 123218, **12.** L.R. NO 36/VII/1069 I.R. NO 123219, **13.** L.R. NO 36/VII/1071 I.R. NO 123220, **14.** L.R. NO 36/VII/1072 I.R. NO 123221, **15.** L.R. NO 36/VII/1073 I.R. NO 123222, **16.** L.R. NO 36/VII/1074 I.R. NO 123223, **17.** L.R. NO 36/VII/1075 I.R. NO 123224,”

These orders were given to preserve the suit property.

The applicant states that after protracted litigation and several meetings between the parties they agreed to comprise all suits regarding the suit premises L. R. No. 36/VII/586 together with the subsequent fraudulent and unlawful subdivisions and transfers that had been made in favour of the Defendant, by selling the suit property to Defendant as Purchaser and Plaintiffs as Vendor. The parties thereafter executed the consent dated 11<sup>th</sup> of February 2011 filed in court on the 14<sup>th</sup> February 2011. The consent filed was as follows;

a) THAT the Defendant shall pay to the plaintiffs a total sum of Kenya Shillings Two Hundred Million (Kshs. 200,000,000/-) in part settlement of this claim being value of the land.

b) THAT the first instalment of the monies in 1(a) above amounting to Kenya Shillings Ten Million (Kshs. 10,000,000/-) only shall be paid to the Plaintiff's Advocates at the signing of this consent, receipt of which the plaintiffs advocates shall acknowledge by signing this consent.

c) THAT the balance of Kenya Shillings One Hundred and Ninety Million Ksh.190, 000,000/-) only shall be paid to the Plaintiff's Advocates within one hundred and twenty (120) days from the date hereof.

2. THAT an additional sum amounting to Kenya Shillings Fifty Million (Kshs. 50,000,000/-) shall be paid to the Plaintiffs Advocates on account of expenses over and above the amount stated in clause 1(a) above within sixty (60) days from the date of signing this consent.

3 (a) THAT by this consent the Plaintiffs, personally and as officials of Good News Church of Africa and The Gospel Furthering Bible Church and their entire membership; past, present and future, shall, subject to full payments of the sums stated in clauses 1 and 2 above, disclaim any proprietary rights on L. R. Nol. 36/VII/586 I. R. 23941/4 and or to any of the resultant subdivisions.

(b) THAT Further by this consent, the Plaintiffs, personally and as official of Good News Church of Africa and The Gospel Furthering Bible Church and their entire membership; past, present and future shall, subject to payment of all the sums in clauses 1 and 2 hereof, withdraw all and any complaint pending before any court, the police or any other government agency regarding the said L. R. No. 36/VII/586 I.R. 23941/4 and all its subsequent subdivisions.

4. THAT further and subject to payment of all the sums stated above by this consent, all matters pending in court as at the time of payment of the full amount stated in clauses 1 and 2 above between the parties and in particular NRB HCCC NO. 400 of 2010 and any Notices of Appeal filed thereon shall be marked as settled with each party bearing its own costs.

5. THAT the entire consent shall be read as a whole and that breach of any one clause will render the entire consent null and void and the parties shall be at liberty to apply to the court.

6. THAT in default of payment of any part of the sums agreed in clauses 1 and 2 the agreement contained in this consent shall be deemed to have failed for lack of consideration and parties shall revert to their positions as obtaining prior to the filing of the consent and have the suits heard in court and the sum of Kshs. 10,000,000/- paid pursuant to clause 1(b) shall be forfeited.

7. THAT upon full payment of all the sums as aforesaid, the Defendant shall be at liberty to deal with the

suit land in any manner it lawfully pleases without interference by or on behalf of the Plaintiffs or anybody or anybody claiming under them.

8. **THAT** this consent shall be a preliminary consent and a final consent shall be recorded in court or filed on fulfilment of all the terms as are contained herein.

The applicants states that the consent of 11<sup>th</sup> of February 2011 which was adopted by the court were very express in its terms the effect of the consent was that; the defendant would pay plaintiffs Kshs. 250,000,000/- being the Purchase price of the suit property within 120 days from 11<sup>th</sup> February 2011 and thereafter the plaintiffs would withdraw all claims over the suit property and the Defendant would then be allowed to deal with it as deemed it. That upon executing the consent, the defendant duly paid the 1<sup>st</sup> instalment of Kshs. 10,000,000/-, but after the lapse of 60 days, the defendant failed to pay a further ksh.50,000,000/- as stipulated in clause 2 of the consent of 11<sup>th</sup> February 2011 but instead began seeking extensions and the 120 days lapsed. The defendant therefore failed the terms of the consent of the bargain and in particular clause 1 (c) and 2 and that they therefore seek to invoke clause 6 of the consent.

After the consent of 11<sup>th</sup> February 2011 was filed the applicant came to learn that two other consents, a further consent dated 15<sup>th</sup> February 2011 and Supplementary consent dated 4<sup>th</sup> March 2011, filed on the 19<sup>th</sup> February 2011 and 10<sup>th</sup> March 2011 were filed without the knowledge and authorisation. This is after they had written to CID after the matter. The applicant further states that the subsequent consents of 15<sup>th</sup> February 2011 and 3<sup>rd</sup> March 2011 were executed by their then advocate Mr. Wandago without instructions from any of them. This caused them to withdraw instruction from the firm of Okong'o Wandago & Company.

The applicants contend that the further and subsequent supplementary consent are very prejudicial as they purport to introduce a 2<sup>nd</sup> defendant by consent at a late stage after the Consent Judgment and allowing the purported 2<sup>nd</sup> Defendant (stranger) to deal with the suit property and in addition it discharges all injunctions, orders and caveats over the suit property even before a final consent order is entered into as had been provided for upon completion of the sale; That the Applicants were not made aware of this by their advocates in spite of the prejudicial nature of the orders. That the defendants through its advocates' letter dated 16<sup>th</sup> June 2011 informed the applicants that they had signed a letter of offer to obtain financing from Equity Bank Limited for a sum of Ksh. 3.85 bilion and that they were now moving to perfect the securities over the suit property. The letter was valid for 30 days from the 14<sup>th</sup> June 2011 and has since lapsed.

At paragraph 33 the applicants give grounds and reasons why they seek to review and set aside of the consent filed as follows;

- a. The Defendant is in clear breach of the consent filled in court.
- b. The Defendant misrepresented to the plaintiffs that it had the capacity to pay the compromise sum of Kshs. 250,000,000.
- c. The Defendant does not have Kshs. 250,000,000 and cannot pay the said sum thus entered into the consent by fraud.
- d. The Defendant intends to fraudulently acquire charge and dispose the plaintiffs' land without paying for it.
- e. The compromise settlement has been rendered null and void for lack of consideration.
- f. The subsequent further consent and supplementary consent were executed by the plaintiffs' previous advocates without instructions from the plaintiff's.

- g. The subsequent further and supplementary consents lack a legal leg to stand upon in light of their fraudulent nature and lapse of the Consent Judgment.
- h. The said consents are therefore invalid.
- i. The plaintiffs therefore have reason to believe that their former advocates were compromised by the Defendant.
- j. The Defendant has not shown that the interest or claim of the Plaintiffs over the suit property will be noted and honoured by Equity Bank Limited upon perfection of the charge over the suit property.
- k. The plaintiffs intend to prosecute the suit so that the transfers to the Defendant and any other third parties be nullified.

The applicant asked the court to grant the order sought in their Notice of Motion.

Mr. Ibrahim Noor Hillowly Director of Darasa Investments Limited in his affidavits he admits that a consent was filed in court on the 11<sup>th</sup> of February 2011 and the payment made of 10,000,000/- ; that he personally made it clear to the plaintiffs that his company did not have the balance of Kshs. 240M and it could only raise the same by mortgaging the suit property and involving third party investors; that in March 2011, on realization that the earlier consent of 11<sup>th</sup> February 2011 was inadequate and neither mortgagees nor investors could come in to assist with the consent as it was, the parties entered into a supplementary consent dated 4<sup>th</sup> March 2011; that it was an express provision that his company was free to deal with the land in furtherance of its primary goal of paying monies owed under the earlier consent; that after the execution and adoption of the consents the applicants resorted to putting roadblocks in the way of the company including removal of the parcels file from the Lands Office by way of a complaint at the CID Headquarters thereby eating away not only into his company's time under the consent but also frustrating its commitment to pay them and denting its credibility with investors; that this was brought to the plaintiffs counsels attention; that the company however, went ahead and obtained an offer of a facility to develop the suit property through M/S. EquityBank LTD by a letter dated 14/6/2011. Subsequently on the 27<sup>th</sup> of July 2011, the Company entered into an arrangement with a local investor M/s MercbimaInternational LTD in the place of PT Atelier Enam International of Jakarta to undertake the development works on the suit land and to pay the plaintiffs; that the said understating contained specific obligations on the part of the contractors to pay the plaintiffs and therefore it was not a case of his company dealing in the suit land without full disclosure of its liability to the plaintiffs; that the said local contractor disclosed to him that it was going to use funding sourced through M/S Trident Insurance Company Limited; that it is within his knowledge that Kshs.50M was paid to the defendants advocates then on record M/S Okongo Wandago & Co. Advocates, an insurance guarantee issued for the balance being Kshs.190M and the same were accepted and the matter closed; that he recently learnt that the plaintiffs have refused and/or neglected to avail themselves to their said advocates to collect their payment.

The 2<sup>nd</sup> Respondent filed grounds of opposition dated 27<sup>th</sup> October 2011 as follows;

1. **THAT** the 2<sup>nd</sup> defendant is a bona fide purchaser for value for all that properties known as L.R. Number 36/VII/1061 and L.R. Number 36/VII/1062
2. **THAT** the 2<sup>nd</sup> defendant is a total stranger to the Plaintiffs and has no dealings with them and purchased the suit properties from the 1<sup>st</sup> Defendant.
3. **THAT** the court has no jurisdiction to reinstate an injunction that is spend and overtaken by events. A court of equity cannot act in vain.
4. **THAT** the court has no Jurisdiction to set aside and/or vacate the consent judgment of 15<sup>th</sup> February

2011 and the Supplementary consent Judgment of 4<sup>th</sup> March 2011 on the following Grounds:-

- i. The consent was variously executed by Advocates who are on record for the parties concerned.
- ii. The Advocates were on record, with authority to compromise the suit.
- iii. No valid reasons have been advanced on why the consent judgment should be varied or set aside.
- iv. The consent orders have been executed and acted upon and can't be undone.

**5. THAT** the application before the court is a review application under Order 45. The plaintiffs have not brought before the court any valid cause on why the court should review the consent order.

**6. THAT** the application is baseless in law, *malafide abinitio* and amounts to gross of the court process.

**7. THAT** the application is unwarranted in light of the pleadings before the court.

The prayers that I have to deal with in this application are 7,8,9,10 and 11.

Parties filed written submissions which I carefully read and considered, I will not repeat the said submissions in this ruling as they are quite detailed but give a brief summary of them, they have also have cited cases to back their legal arguments.

In brief the applicants submissions are that; the consent dated 11<sup>th</sup> February 2011 was breached by the 1<sup>st</sup> Defendants as there was material misrepresentation by the 1<sup>st</sup> Defendant that they were able to meet the obligation yet they could not (see *Evan Gachoki Njuki & 3 Others V. Wilson Njuki Karukuma (2008)eKLR*); that the consent judgment of 11<sup>th</sup> February 2011 can be reviewed ,having been breached by the defendant as there was sufficient reason to do so; that it being an interim consent that was to crystallise and become final upon full performance within 120 days of the terms of the consent and that it lapsed after the 1<sup>st</sup> defendant failed to perform its terms which fact they do not deny. Mr. Kanjama for the applicants argued that the court is therefore entitled to review the consent pursuant to clause 5 of the agreement, its inherent powers under section 80 of the Civil Procedure Act to the extent necessary to hold that the said consent has lapsed and is incapable of performance, thus returning the parties to the position they were in prior to the filling of the consent; that if the court reviews the consent they should reinstate the preservative orders of Hon. Justice Muchelule. At page 6 of his submissions he gave reasons why the court should reinstate the injunction as follows;

1. The Court has inherent powers to prevent abuse of court process.
2. The suit property is still possession of one of the parties to the suit, to wit the second defendant, who is to all intents and purposes an agent of the first defendant.
3. The purported transfer to the 2<sup>nd</sup> Defendant was illegal, irregular, and null and void and executed on fraudulent title while caveats were in force and injunction orders. A nullity is a nullity and cannot receive life through a fraudulent consent.
4. No third party can obtain a better title than the plaintiffs from a fraudulent transaction, nor form a Defendant who had no power to transfer title. The remedy of any aggrieved their party would be a claim for damages against the 1<sup>st</sup> Defendant.
5. The Court can reinstate a lapsed injunction by issuing a fresh injunction in substantially similar terms. This is the common practice of the Courts when dealing with prayers of stay or injunction pending appeal, and also when dealing with applications arising out of lapse of interim or interlocutory orders within the pendency of litigation.

6. The court can issue any interlocutory and preservative orders to preserve the suit property and safeguard the integrity of the judicial process and secure the Plaintiffs' rights pending full determination of the suit herein.

On setting aside the further consent dated 15<sup>th</sup> February 2011 and 4<sup>th</sup> March 2011 Counsel states that it is a principal of our law that a consent judgment or order has contractual effect and can only be set aside on grounds which could justify setting a contract aside, such as fraud, or mistake or if certain conditions remain to be fulfilled which are not carried out, see *Kassim Mbwana Vs. Wilson Kamande Magua, HC Civil Appeal No. 15 of 2003*. He blamed the former Counsel of the plaintiffs for acting without instruction in-executing these two consents. He submitted that an Advocate has authority to compromise on behalf of his client, that he can only do so if Bona fide and not contrary to express and/or negative direction, see *Kenya Commercial Bank Limited Vs. Benjo Amalgamated Limited & Another, Civil Appeal No. 276 of 1997*; that is contrary to the Policy of the court and public policy for an advocate to act contrary to express instructions given by his client.

The 1<sup>st</sup> Defendant in their submissions submitted that the court cannot invoke clause 6 of the consent dated 11<sup>th</sup> February 2011; that the said consent was entered into with the full authority of the plaintiff by his counsel; that payments were made to the plaintiff of 10,000,000/- and 50,000,000/- to his former counsel and an insurance guarantee of 190,000,000/- was received; that the plaintiff cannot have the money and also the same time seek to walk out of the consent; that the plaintiff has frustrated the 1<sup>st</sup> defendant ability to perform terms of the contract where even engaging the CID and causing the external Investor to get out of the arrangement they had. On issue the of invoking clause 6 counsel submitted that the plaintiff is not entitled to invoke the said clause he narrated the conduct of the plaintiffs since the consent was filed and stated that the plaintiffs acted in bad faith and that the plaintiffs have placed roadblocks on every turn of the 1<sup>st</sup> defendant; the 1<sup>st</sup> defendant has been keen to perform its part of the bargain; that the plaintiff has failed to show that the consent of 11<sup>th</sup> of February 2011 was obtained by fraud, mistake, collusion or contrary to the policy of the court, but only allege that they have not been paid.

The 2<sup>nd</sup> defendant submitted that the plaintiff has failed to meet the requirements of order 45 Rule (1); that no attempt has been made by the applicant to bring the application within the confine of Order 45 Rule 1, that it therefore render the application incompetent *abinitio*; that the applicants did not allege that they had discovered a new and important matter in the evidence nor do they allege an error on the face of the record or a mistake, neither have they expound a sufficient reason on why the court should review the decree (see *Touring cars (K) Limited Vs. Mukanji East Africa Law Reports (200) EA at 261, Nairobi City Council Vs. Thabiti Enterprises Limited (1995-1998)2EA at 231*; that Hon. Justice Muchelule's order was spent and cannot be reinstated; that the order is also specific to the 1<sup>st</sup> defendant and has nothing to do with the 2<sup>nd</sup> defendant who is now a registered owner of two pieces of land; that the applicants and the 2<sup>nd</sup> defendants are total strangers to each other with no legal relationship or dealings between the, therefore the court cannot grant an injunction; that the applicant has not petition the court to set aside the mother of all consents, the consents dated 11<sup>th</sup> February 2011 which compromise the suit and brought it to an end, and further that if the applicant is not seeking to set it aside it is useless and futile to seek the setting aside of the orders of 15<sup>th</sup> February 2011 and 4<sup>th</sup> March 2011; that to set aside these orders would entail recording and taking the concerned parties to the position they were before the consent order and this is not possible in the case; that the consent orders that are being challenged were freely executed by the duly appointed agents and representatives of the parties and lawyers have authority to compromise suits; that the applicant seeks to discharge and/or vary the consent orders on very flimsy grounds, (see *Ismail sunderji Hirani Vs. Noorali Esmail Kassam, Vol XIX 1952 ECA, at 139, Prestwich Vs. Poley (18C.B(N.S) at 806 quoted in Re Newen I.CL.D (1903)812 at page 818, Little Vs. Preadbery (1910 2 K.B,Welsh Vs Roe (1918-19) Aller at 620)*

I have carefully considered the affidavits filed by the parties, the submissions made and the law applicable to the application brought by the plaintiff /applicant. In prayer 7 the applicant is seeking that the Honourable Court be pleased to **review** and declare that the defendant having breached the consent

judgment dated 11<sup>th</sup> February 2011, clause 6 of the said consent judgment stands invoked, reading to WIT that in default of payment of any part of the sums agreed in clauses 1 and 2 the agreement contained in this consent shall be deemed to have failed due to lack of consideration and parties shall revert their positions as obtaining prior to the filing of the consent and have the suits heard in court and the sum of Kshs. 10,000,000/- paid pursuant to clause 1 (b) shall be forfeited.

The application is brought under order 45 rule (1) which states and I quote:

*“Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”*

The applicant does not state that there is any discovery of new or important matter or evidence that they have that was not within their knowledge or could not be produced at the time the order was made or that there was a mistake or an error apparent on the face of the record. Their argument is that they seek the review on the ground of other sufficient reasons, and their reasons are that there was misrepresentation on the part of the 1<sup>st</sup> defendant and failure to comply with terms of the consent. As correctly submitted consent is essentially a contract between the parties and a party who enters into consent must be bound by it. What the court is being asked is, to review and declare that the defendant having breach the consent order of consent Judgment dated 11<sup>th</sup> February 2011 and thereafter invoke clause 6 of the said consent order. The applicant is not seeking to set aside the order but to review it. The question therefore that I must ask myself is that have they shown sufficient cause to do so? In deciding this am guided by what was stated by *Justice Hancox JA in the case of Flora N. Wasike V. Destimo Wamboko KAR* that *“it is now settle 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.”*

In this case it is the applicant’s submission case that the 1<sup>st</sup> defendant after paying the initial sum of 10,000,000/- did not pay the agreed balance of 120Million and that clause 5 and 6 should therefore take effect. According to the applicant the conditions are set out in clause 1 (a) and (c) were not fulfilled or carried out. The 1<sup>st</sup> defendant does admit that the sum of 10Million was paid to the applicants counsel and that subsequently the applicant frustrated their efforts in their endeavours to obtain the balance that was to be paid. Mr. Kamau did rightly submit that I have to look at the conduct of the parties. In the case of *Jackson K. Kavinda Vs. Untied Insurance Co. Ltd (Nair HCC No.1065 of 2002)* Justice Njagi stated *“that the conduct of the parties since the compromise was recorded is a relevant consideration in an application to set aside the compromise”* The applicant submits that there was misrepresentation on the part of the 1<sup>st</sup> defendant but the 1<sup>st</sup> defendant denies this. What is of importance is did the parties fulfil their terms of their consent? The terms of the consent of 11<sup>th</sup> of February 2011 were very clear. The 1<sup>st</sup> defendant was to pay certain amounts of money within a specific period. At paragraph 8 of the consent dated 11<sup>th</sup> February 2011 the parties state that:

*“this consent shall be a preliminary consent and a final consent shall be recorded in court or filed on fulfilment of all the terms as are contained herein”.*

The operative words here are that the consent was a preliminary consent and a final consent was to be recorded in court or filed on fulfilment of all the terms as contained herein. Although the 1<sup>st</sup> Defendant states that the Applicants frustrated their efforts and acted in bad faith, I find that the terms of the consent

were never fulfilled within the 120 days as agreed. This is the contract the parties had. The conditions remained unfulfilled and were not carried out. On this reason alone I find that the consent of 11<sup>th</sup> of February 2011 is subject to review as sought by the applicant. Clause 5 of this consent states that the consent shall be read as a whole and that any breach of any one clause will render the entire consent null and void and the parties shall be at liberty to apply. Clause 6 states that the said consent judgment stands invoked, reading to WIT that in default of payment of any part of the sums agreed in clauses 1 and 2 the agreement contained in this consent shall be deemed to have failed due to lack of consideration and parties shall revert their positions as obtaining prior to the filing of the consent and have the suits heard in court and the sum of Kshs. 10,000,000/- paid pursuant to clause 1 (b) shall be forfeited.

The parties in this case went further and filed two further consents in court dated 15<sup>th</sup> February 2011 and 4<sup>th</sup> March 2011. The consent of 15<sup>th</sup> February 2011 though filed was not adopted as a court order. The consent of 4<sup>th</sup> of March 2011 brought in the second defendant and gave him specific rights over the properties that he brought from the 1<sup>st</sup> defendant which are part of the suit premises. In the consent of the 4<sup>th</sup> of February the parties consented that the 1<sup>st</sup> defendant having complied with clause 1 (b) of the consent dated 11<sup>th</sup> February 2011 and filed on the 14<sup>th</sup> of February 2011 between the plaintiff and the 1<sup>st</sup> defendant the parties herein further consent as follows and they proceed to state how the 2<sup>nd</sup> defendant was to be enjoined and acknowledge the two parcels of land mentioned in it to have been sold and transferred to him. Clause 1(b) talks of the 1<sup>st</sup> instalment that was to be paid of 10 Million. That the 1<sup>st</sup> defendant complied with but subsequently the 1<sup>st</sup> defendant did not comply with the further terms of the consent of paying the balance of the agreed purchase price. An insurance guarantee was not a payment even if it were held by the applicant's former counsel. I find that the 1<sup>st</sup> defendant failed to fulfil the terms set out by the parties in their consent dated 11<sup>th</sup> February 2011 and having failed to do so then what is left is for clause 6 to be invoked. I do note that the 2<sup>nd</sup> defendant did buy the two parcels of land from the 1<sup>st</sup> Defendant as per the consent dated 4<sup>th</sup> of March 2011. However, this consent was subject to the terms that were set out in the consent of 11<sup>th</sup> February 2011 which remained unfulfilled. It was a supplementary consent to the one dated 11<sup>th</sup> February 2011 and therefore, any order made on the consent of 11<sup>th</sup> of February 2011 will definitely affect it. The 2<sup>nd</sup> defendant has bought 2 parcels of land from the 1<sup>st</sup> defendant. In reviewing the consent of 11<sup>th</sup> of February their status of ownership of the said two parcels of land will be affected. However I find that the terms of the consent of 11<sup>th</sup> of February 2011 had to be fully met first for them to have a good title.

The Applicants blamed their advocate previously on record and stated that he had no instruction to enter into the two further consents. I note that an Advocate has a duty to represent his client and in doing so he has the general authority to compromise on behalf of the client. Although the previous counsels' conduct has been questioned, what I find important is what the consent of 11<sup>th</sup> February 2011 stated. There was no affidavit from counsel on the issues raised on his conduct. In the case of ***Kenya Commercial Bank Ltd. Vs. Specialised Engineering Company Ltd***, 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 misapprehension or ignorance of such facts in general for reasons which would enable the court to set aside an agreement.*

I have found that there was sufficient cause to review the consent. Having found that the terms of the consent of 11<sup>th</sup> February 2011 were not carried out by the parties and in particular the 1<sup>st</sup> defendant I find that an order of review as sought in prayer 7 is in order. I therefore find that the defendant having breached the consent judgment dated 11<sup>th</sup> February 2011, clause 6 of the said consent judgment stands invoked, reading to WIT that in default of payment of any part of the sums agreed in clauses 1 and 2 the agreement contained in this consent shall be deemed to have failed due to lack of consideration and parties shall revert their positions as obtaining prior to the filing of the consent and have the suits heard in court and the sum of Kshs. 10,000,000/- paid pursuant to clause 1 (b) shall be forfeited

On prayer 8 I find that the preservative orders that were given by Justice Muchelule cannot be reinstated as sought. Clause 6 of the consent dated 11<sup>th</sup> of February 2011 is very clear, that the parties shall revert to their positions as obtaining prior to filling of the consent and have the suit heard in court and the sum of 10Million forfeited. The parties should set the matter for hearing.

The consent dated 11<sup>th</sup> of February 2011 has been reviewed; the consent of 4<sup>th</sup> of March 2011 was a supplementary consent to it and having invoked clause 6 of the said consent the supplementary consent judgment dated 4<sup>th</sup> March 2011 which was adopted as a court order on the 18<sup>th</sup> of March 2011 is hereby set aside. The consent Judgement dated 15<sup>th</sup> of February 2011 was not adopted as a court order.

Cost of application is awarded to the applicant.

**Dated and delivered this 14th Day of February 2012**

**R. OUGO**  
**JUDGE**

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk