



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**(Coram: Ojwang, J.)**  
**CIVIL SUIT NO. 164 OF 2010**

**IN THE MATTER OF: PLOT NO. 423/SEC.I/MN BAMBURI CR. NOS.  
35764, 35765, 35766, 35767, 35779, 35770/1, 35770/2, 35771/1, 35771/2, 35772, 35773, 35780, 35781,  
35774, 35775, 35776, 35777, 35779, 35783, 35787, 35785, 35790, 35791, 35795, 35796, 35789, 35781,  
35800, 35801, 35802, MN/I/4187.CR 17042 and MN/I/4188 CR 17044**

**-AND-**

**IN THE MATTER OF: APPLICATION FOR DECLARATION THAT THE  
PLAINTIFFS/APPLICANTS HAVE OBTAINED OWNERSHIP BY WAY OF ADVERSE  
POSSESSION**

**-BETWEEN-**

**1. KALUME MACHAKU MAVUO  
2. MARIAMU THIAKU ABDALLA  
3. HAROD KARISA KATANA & 524 OTHERS .....  
PLAINTIFFS/APPLICANTS**

**-AND-**

**1. GLADYS NJERI NJENGA KAGIRI  
2. MOHAMED ALI SAID EL-MADRY  
3. NAHIFA SALIM MAAMIRY  
4. MOHAMED AZIZI MAZRUI  
5. SALEH AZIZI MAAMUN  
6. MICHAEL GICHERU WAINAINA  
7. CLEOPHAS MANGARE ABARE  
8. NANCY NYAMBURA MWANGI  
9. JANE WANJIRU KARIGO  
10. JOHN EDWARD KARIGO  
11. MUNGAI MBURU  
12. P.C.E.A. ST. MARGARET'S CHURCH  
13. CHARLES WAINAINA NG'ANG'A  
14. KIM NJENGA KAGIRI  
15. OBEID KHAMIS LAHMAR  
16. MABEI KHALID KHAMIS  
17. SERAPHINE NJERI  
18. SALIM ABED KHAMIS  
19. MOHAMED ADIL FAZIL  
20. PWANI KIZINGO DEV. CO. LTD  
21. HARUN NJOKA IRWARE  
22. FRANCIS KARANJA MWANGI**

23. EUNICE NYAMBURA MBUGUA
24. VICTOR WAMAE MUCHERU
25. NDEGWA MUTHERU
26. JOSEPH KIOKO MUTUNGA
27. JOAN NYASI WAKIO
28. JONATHAN JOSEPH KAGIRI
29. SUSAN MUMBI KAGIRI
30. WILFRED MUGO CHABARI
31. STEVE GACHUHI
32. GRACE WAMBUA MBOTE
33. SIDNEY ANTHONY NGATIA
34. ANNAH MWIHAKI MWAI
35. PETER NJOROGI KINYANJUI
36. MOSES MWANGI KIARIE
37. SAMUEL MUCHAI KARIUKI
38. MESHILLAM NDIANGU MUTHAMI
39. JOSEPH NGUGI KIMANI
40. LOISE NJERI NGUGI
41. ALLAN MWANGI
42. MUMBU HOLDINGS LIMIED
43. SOUTH BELL PROPERTIES LIMITED
44. SAMUEL MBURU NJOROGI
45. JOHN NJENGA NJOROGI.....DEFENDANTS/  
RESPONDENTS

### RULING

The plaintiff, through new Advocates, M/s. Martin Tindi & Co. Advocates, moved the Court by Notice of Motion dated 7<sup>th</sup> February, 2011 and brought under s.67 (2) of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Orders 9 (Rule 9), 40 and 45 of the Civil Procedure Rules. The substantive prayers brought before the Court are as follows:

- (i) ***“THAT the consent orders made on 15<sup>th</sup> September, 2010 between J. C. Chidzipha, Advocate and Kanyi & Co. Advocates be set aside, and the withdrawn suit against the defendants proceed [to] full hearing and determination on the merits”;***
- (ii) ***“THAT the consent orders entered on 18<sup>th</sup> August, 2010 between Chidzipha & Co. Advocates and ....M/s. Njoroge Mwangi & Co., Advocates be set aside, and the suit against defendant No. 42 proceed for hearing and determination”;***
- (iii) ***“THAT the consent orders entered on 23<sup>rd</sup> August, 2010 between Chidzipha & Co. Advocates and Mr. William Mogaka, Advocate be set aside, and the suit against defendant No. 44.....proceed for hearing and determination”.***

The application rests on the following grounds:

- (a) ***the consent entered on 16<sup>th</sup> September, 2010 before the Deputy Registrar was made without the authority of the plaintiffs/applicants, and the said consent order compromised the applicants’ suit, as a consequence of which all their houses, huts and crops were burnt during the eviction, at the instigation of the respondents;***
- (b) ***the Advocate had misrepresented to the Court that the applicants be evicted – for, since they had claimed by adverse possession, it was “contrary to the intent of the applicants [that they would] agree to being evicted from the suit land which act is .....prejudicial to them”;***

*(c) the consent order entered on 16<sup>th</sup> September, 2010 before the Deputy Registrar compromising the applicants' suit, offends the principle of fiduciary relationship – a special relationship founded on trust and confidence, having a character that demands that every party thereto shall fully disclose all material facts; hence the Advocate is prohibited by equity from exercising such a power in a manner detrimental to the applicants; and now the applicants contend that the said consent had abused the trust and confidence vested in the Advocate;*

*(d) the applicants contend that their previous Advocates made a fraudulent misrepresentation, by confirming to the Court that they had withdrawn the suit, such withdrawal resulting in the prejudicial consequence of their eviction, without a hearing on the merits;*

*(e) the suit land, after the eviction of the applicants, is currently being disposed of by the respondents; and so the defendants should be restrained from sub-dividing and selling the land to innocent purchasers.*

**Kalume Machaku Mavuo**, one of the plaintiffs, swore a supporting affidavit dated **7<sup>th</sup> February, 2011**, deponing *inter alia*: that the plaintiffs had not instructed **J.C. Chidzipha**, Advocate to enter a consent judgment on **16<sup>th</sup> September, 2010**; nor to withdraw the suit on **23<sup>rd</sup> August, 2010**; nor to enter into a consent with M/s. Njoroge Mwangi & Co., Advocates on **18<sup>th</sup> August, 2010**. The deponent averred that, in consequence of the several consent orders made by the Court, Administration Police officers under the command of the District Officer, burned and flattened the plaintiffs' buildings on the disputed parcel of land; and that, thereafter, the respondents had the suit land subdivided for sale to third parties. The deponent deposed that the plaintiffs' suit is for adverse possession, and that "the suit land is indeed Community Land as envisaged under the new Constitution of Kenya, 2010, Article 63 (d) regarding land that is ancestral lands".

The **44<sup>th</sup>** defendant, Southbell Properties Ltd., through its director, **Sunir Doshi**, swore a replying affidavit (filed on **16<sup>th</sup> February, 2011**), averring that the application appeared to be just an afterthought, since the orders in favour of the **44<sup>th</sup>** defendant were made much earlier, on **23<sup>rd</sup> August, 2010**. The deponent deposed that the **44<sup>th</sup>** defendant had been joined in the suit only for the purpose of seeking injunctive orders against the plaintiffs who had started encroaching this defendant's land, with a view to constructing structures thereon; and because of prompt and expeditious action by this defendant, the plaintiffs' object was contained. The deponent deposed that the consent reached between the plaintiffs and the **44<sup>th</sup>** defendant was based on a common cause, resting on the principle that "a party cannot file suit and use interlocutory injunctive orders given herein as a licence to enter, trespass [upon] and encroach....the **44<sup>th</sup>** defendant's ....land so as to wrongfully and unlawfully entrench themselves with a view to supporting a claim of adverse possession". The deponent averred that "there was no squatter on the **44<sup>th</sup>** defendant's .....plot as at the time when the suit was filed and consent.....recorded save that there were attempts [at] encroachment by the plaintiffs who had started clearing the bushes with a view to putting up structures but were thwarted....." The deponent deposed that the Court's orders of **23<sup>rd</sup> August, 2010** were necessary "as against any of the plaintiffs who may have intended to [encroach/trespass] on to the plot, No. 4186/I/MN (CR 17043) measuring 17.24 hectares".

For the **41<sup>st</sup>** respondent, M/s. Njoroge Mwangi & Co. Advocates filed a notice of preliminary objection on **17<sup>th</sup> February, 2011**; the contentions made are as follows:

(i) no suit exists as between the **41<sup>st</sup>** respondent and the plaintiffs, the suit having been withdrawn by consent of the parties, as per consent letter dated **18<sup>th</sup> August, 2010** filed in Court on **19<sup>th</sup> August, 2010**;

(ii) the properties owned by the **41<sup>st</sup>** respondent were bought from **Jonathan Njoroge Kagiri** for valuable consideration and after the death of the said **Jonathan Njoroge Kagiri**, the properties were transferred by the executor of his will;

(iii) the properties owned by the 41<sup>st</sup> respondent were purchased with vacant possession and transferred on **30<sup>th</sup> August, 2002**;

(iv) the plaintiffs' application is bad in law and incurably defective.

For 1<sup>st</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, 31<sup>st</sup>, 32<sup>nd</sup>, 33<sup>rd</sup>, 35<sup>th</sup>, 37<sup>th</sup>, 38<sup>th</sup>, and 46<sup>th</sup> respondents, M/s. Kanyi J & Co. Advocates filed grounds of opposition on **15<sup>th</sup> February, 2011** contending as follows:

(i) ***the application is defective, frivolous, vexatious and an abuse of Court process;***

(ii) ***there is no suit in law before this Court, between the parties;***

(iii) ***the application is of an omnibus character;***

(iv) ***the applicants have failed to disclose a material fact: that the orders they are seeking were granted to them on 2<sup>nd</sup> June, 2010;***

(v) ***that the orders now sought by the applicants cannot defeat the consent orders entered earlier.***

These objectors also filed a notice of preliminary objection on two grounds:

(i) ***the instant application has been filed in a non-existent suit; and***

(ii) ***the instant suit is res judicata.***

The same objectors have also come with a replying affidavit, sworn by **Samuel Muchai Kariuki** (38<sup>th</sup> respondent) on **16<sup>th</sup> February, 2011**.

The deponent avers that the applicants had instituted HCCC No. 164 of 2010 on **27<sup>th</sup> May, 2010** and had obtained injunctive orders against the respondents who were the registered owners of the parcels of land in question, such orders being given on **2<sup>nd</sup> June, 2010**; and those orders **lapsed on 16<sup>th</sup> June, 2010** and were not extended – a fact that the applicants herein failed to disclose to this Court.

The deponent deposes that the applicants, sometime between **6<sup>th</sup> – 9<sup>th</sup> September, 2010** invaded the suit property and embarked upon the construction of make-shift structures; and the respondents then applied for orders, which this Court granted against the plaintiffs on **9<sup>th</sup> September, 2010**. Thereafter, on **16<sup>th</sup> September, 2010** the parties obtained a **consent order**, its terms being, *inter alia*, that the suit was thenceforth withdrawn, with no order as to costs.

The deponent believes to be true the advice of his Advocate, that ***“upon the said suit being so withdrawn by consent, there is, in law, no suit pending”***.

In another replying affidavit by **Gladys Njeri Njenga Kagiri** (1<sup>st</sup> defendant) sworn on **16<sup>th</sup> February, 2011**, facts are deposed which confirm the content of depositions by other respondents.

Urging the applicants' application, learned counsel **Mr. Tindi** submitted that the several consent orders in this case should not have been made, and that learned counsel, **Mr. Chidzipha**, in agreeing on such orders with other Advocates having conduct of the case, was in breach of a fiduciary relationship between himself as counsel and his clients, the plaintiffs/applicants herein; **Mr. Tindi** contended: ***“The Advocate acted contrary to the interests of the applicants by [leaving them to be] evicted and [by] withdrawing the suit”***. **Mr. Tindi's** argument turned on a legal argument: that since the plaintiffs had been claiming by way of adverse possession, that concept could only be compromised by the terms of the

consent. Essentially, **Mr. Tindi** was contending that his learned friend had not conscientiously advised his own client on a professional point of law; and that he, **Mr. Tindi**, was entitled to come in and have his learned friend's advice and direction to the client nullified by the Court. **Mr. Tindi** urged that "*what was done [by learned counsel, Mr. Chidzipha] was contrary to instructions.*" Counsel urged, moreover, that his learned friend had done the unusual thing of entering the said consents, and not communicating the fact to his clients — so they did not know that the suit had been withdrawn: upon that premise, **Mr. Tindi** said he was coming before the Court by virtue of ss. 1A, 1B and 3A [relating to the broad exercise of the Court's discretion] of the Civil Procedure Act, and seeking the Court's audience. It is on that basis that Counsel asked the Court to set aside the consent orders in question.

Learned counsel, **Mr. Kanyi** submitted that the applicants had obtained *ex parte* orders on the basis of a non-existent suit, a suit that had **already** been withdrawn or dismissed. In the circumstances, counsel urged, the applicants should have sought to **set aside** the consent orders, and on that basis they could then reinstate the suit: and once the suit was reinstated, then they could make their application. Therefore, it was urged, the temporary orders granted the plaintiffs should be vacated, as they rest on a non-existent suit.

One of the prayers in the plaintiffs' application is that —

***“a temporary injunction be issued restraining the defendants, their families, assigns, employees and/or any other person(s) acting under their direct instruction or supervision or otherwise from constructing, demarcating, alienating, sub-dividing and/or wasting the [suit parcels of land].....”***

**Mr. Kanyi** urged that the applicants' prayers are lumped together as an “omnibus application”, and were not, on that account, tenable. Counsel relied on a decision of this Court (**Emukule, J**), in **Rajput v. Barclays Bank of Kenya Ltd & 3 Others** [2004] KLR 393, in which the following passage occurs (p.407):

***“There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of adjudication by the Court for each of the reliefs sought; apart from being governed by different rules, it is also subject to long-established and different judicial principles which .....the Court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out”.***

**Mr. Kanyi** urged that the applicants had brought an application that was governed by different rules, and that this was fatal to the prayers made.

Counsel urged that the applicants, when they sought injunctive orders *ex parte*, had not disclosed that they had made a similar application on **2<sup>nd</sup> June, 2010**; and that on this account, the prayer herein for an order of injunction should be rejected.

Counsel also contested the prayer for a setting aside of consent orders: it cannot be done unless fraud or mistake in arriving at the order is shown.

Learned counsel contested the legality of the application, as it was impugning the **authority of counsel** to act for his clients and even to reach a consent for his client. Counsel relied on the Court of Appeal decision in **Brooke Bond Liebig (T) Ltd. v. Mallya** [1975] E.A. 266 (at p. 269, **Law, Ag. P**):

***“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani v. Kassam (1952), 19 EACA 131, where the following passage from Seton on Judgments and Orders, 7<sup>th</sup> ed., Vol. I, p. 124 was approved:***

***‘Prima facie, any order made in the presence and with the 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’.**

*No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties, who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. [A] court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”*

Counsel urged that there was no basis for impugning the consent orders made when **Mr. Chidzipha** had the conduct of the plaintiffs’ case, in particular as the applicants had not even sought a sworn statement from the Advocate, who remains in active professional practice to-date: it amounts to failing to produce a material witness, and should be construed against the applicants.

**Mr. Kanyi** urged that the plaintiffs had endeavoured to, in effect, renew a concluded case merely by changing Advocates; since there was no new matter raised, there would be no basis for **reviewing the consent orders on record**.

Counsel asked that the **ex parte** orders which had been made in favour of the applicants be discharged: for they had no suit in the background; an injunctive order cannot stand on its own; there were no grounds for setting aside the consent orders; there had been no complaint about the consent orders; no evidence had been brought from the Advocate who had the conduct of the matter, on behalf of the applicants, at the time of making the consent orders; the application has no merits.

Learned counsel **Mr. Njoroje Mwangi**, for 41<sup>st</sup> respondent, agreed with the position of other respondents, and submitted that the suit, in relation to his client, had been withdrawn on **18<sup>th</sup> August, 2010**; the suit ceased to exist; the Court became **functus officio** in relation to all the issues raised in the suit. Counsel urged that when the applicants obtained **ex parte** orders, they had failed to disclose that the suit was not in existence.

Learned counsel for the 44<sup>th</sup> respondent, **Mr. Mogaka**, submitted that the plaintiffs’ suit had been filed against **46 defendants**, and only **24** of these defendants had reached consents with counsel for the plaintiffs, leading to the termination of all the claims in relation to the 24. The effect then, counsel submitted, is that the plaintiffs’ suit remained valid in respect of the rest of the original defendants. It was urged that the terms of the consent orders of **23<sup>rd</sup> August, 2010** were quite clear: the suit against the 44<sup>th</sup> defendant **was** dismissed, as the suit land was vacant and not occupied by anyone who could bring suit for adverse possession; indeed Order No. 3 stated that the 44<sup>th</sup> defendant was at liberty to evict anyone who **may attempt** to encroach the land.

**Mr. Mogaka** submitted that it was not tenable to attack actions taken by learned counsel, **Mr. Chidzipha**, in having consent orders made: for it was not alleged that Advocate’s authority was in any way limited; and when the consents were recorded in Court, none of the plaintiffs who were in Court raised any objection.

Counsel submitted that an Advocate on record has both **ostensible and general authority** to compromise a suit, and this was a typical instance of the exercise of such authority. In **Hansraj Ranmal Shah v. Westlands General Stores Properties Ltd & Another** [1965] E.A. 542, in a similar matter, the Court of Appeal thus held (at p.542):

**“(i) the appellant had not withdrawn his instructions from the advocate who retained full control over the conduct of the case and had apparent authority to compromise all matters connected with the action; accordingly the advocate had the necessary authority to agree to the fixing of the mesne profits as appellant’s counsel and agent;**

**“(ii) the consent order made before the Deputy Registrar fixing the amount of the mesne profits was**

***binding and there was no need for the judge to hold or order any further inquiry to be held as to the amount of the mesne profits; the judge correctly ordered mesne profits to be paid in accordance with the consent order.***”

Applying the foregoing principle, **Mr. Mogaka** urged that, so long as learned Counsel **Mr. Chidzipha**'s authority had not been withdrawn, he was fully authorized **by law** to reach the consents which led to the orders now being challenged by the plaintiffs: **Wasike v. Wamboko** [1988] KLR 429; **Karani & 47 Others v. Kijana & 2 Others** [1987] KLR 557.

In matters of this kind, there is classical case law laying the governing principles. In **Neale v. Lady Gordon Lennox** [1902] 1K.B 838, **Lord Alverstone, C.J.** thus stated (at p. 843):

***“I think it is now clearly established that counsel appearing for a party in an action is held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement, and further that, notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement, unless the fact that the counsel's apparent authority had been limited was communicated to the other side.....”***

On those principles, **Mr. Mogaka** submitted that the applicants had brought no case before this Court which warrants the setting aside of the consent orders on record.

**Mr. Tindi** in his reply, did not address the specific points of law invoked by other counsel, but only made the general point that “the Court cannot allow an injustice to be done”.

On **2<sup>nd</sup> June, 2010** learned counsel, **Mr. Chidzipha** presented before this Court an application by Chamber Summons dated **27<sup>th</sup> May, 2010**, and he obtained temporary orders of injunction against a good number of the defendants.

On **21<sup>st</sup> June, 2010** the 44<sup>th</sup> defendant moved the Court by Notice of Motion dated **21<sup>st</sup> June, 2010**, seeking to be joined as defendant, and also obtained a temporary injunction against the plaintiffs, in relation to sub-division No. 4186/I/MN (CR No. 17043) measuring 17.24 hectares.

On **23<sup>rd</sup> August, 2010** this matter, as between the plaintiffs and the 44<sup>th</sup> defendant, came up before the Court, and, in the presence of **Mr. Chidzipha**, Advocate (for the plaintiffs); **Mr. Koech** (holding brief for M/s. Kanyi J. & Co. Advocates) for 13<sup>th</sup>, 15<sup>th</sup>, 21<sup>st</sup>, 31<sup>st</sup>, 32<sup>nd</sup>, 35<sup>th</sup>, 38<sup>th</sup> and 39<sup>th</sup> defendants; **Mr. Mogaka** for 44<sup>th</sup> defendant and also holding brief for M/s Nabhan Swaleh & Co., Advocates for 19<sup>th</sup> and 20<sup>th</sup> defendants; a partial decree was made in the following terms:

***“(a) The plaintiffs have no interest of whatsoever nature in respect of sub-division No. 4186/section I/MN [CR. 17043] measuring 17.24 hectares.***

***“(b) The plaintiffs' suit against the 44<sup>th</sup> defendant herein [South Bell Properties Ltd.] is hereby dismissed with no order as to costs.***

***“(c) The said defendant to be at liberty to evict any person who attempts to encroach on the same land.***

***“(d) The Orders obtained by the 44<sup>th</sup> defendant herein [South Bell Properties Ltd] [are] spent and deemed discharged”.***

By Chamber Summons application of **9<sup>th</sup> September, 2010** a number of the defendants (1<sup>st</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, 31<sup>st</sup>, 32<sup>nd</sup>, 33<sup>rd</sup>, 35<sup>th</sup>, 36<sup>th</sup>, 37<sup>th</sup>, 38<sup>th</sup> and 39<sup>th</sup>) moved the Court through their Advocate, **Mr. J. K. Kanyi**, and obtained temporary orders of injunction against the plaintiffs, in relation to named parcels of land – and the order as issued was later amended, on **13<sup>th</sup>**

**September, 2010.**

On **14<sup>th</sup> September, 2010**, on the basis of a consent letter dated **18<sup>th</sup> August, 2010** signed by the applicants' Advocate and 42<sup>nd</sup> respondent's Advocate, the Deputy Registrar recorded a consent on the following terms:

**“THAT, the plaintiffs/applicants’ claim against ALLAN MWANGI, sued as defendant/respondent No. 42 relating to CR. No. 35800 and CR. No. 35801 and any other property registered in his name is HEREBY WITHDRAWN with no order as to costs”.**

A similar consent order was made by the Deputy Registrar on **16<sup>th</sup> September, 2010** on the basis of a **consent letter** dated **15<sup>th</sup> September, 2010** between counsel for the plaintiffs and counsel for 1<sup>st</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, 31<sup>st</sup>, 32<sup>nd</sup>, 33<sup>rd</sup>, 35<sup>th</sup>, 37<sup>th</sup>, 38<sup>th</sup>, 39<sup>th</sup> and 46<sup>th</sup> respondents in respect of named parcels of land; and it was recorded that “the said defendants [were] at liberty to evict any person who attempts to encroach on the same land”.

On **7<sup>th</sup> February, 2011** learned counsel, **Mr. Tindi** for the applicants came before the Court *ex parte*, and obtained temporary Orders restraining the defendants, in relation to a good number of the suit properties. This is an order the revocation of which is being sought, on the ground that the suit in the background, in respect of many of the defendants, **had already been withdrawn or dismissed**. The argument, in effect, is that counsel for the plaintiffs when seeking injunctive relief, did not make full disclosure of material facts.

The record shows that, with a full representation of **all the parties** by their Advocates, certain consent Orders had been made, carrying the effect of Judgment and Decree, **dismissing or withdrawing the plaintiffs’ suit**, in respect of those 24 defendants represented by learned counsel **Mr. Kanyi, Mr. Njoroje Mwangi** and **Mr. Mogaka**. It is clear that the relevant consent Orders were regular in every respect, and that all the counsel involved had the authority, by virtue of the instructions emanating from their clients, to make the compromises leading to those orders. It has not been suggested that any fraud, mistake or act of dishonesty led to the presentation of the said consents, or to their formal recording as orders of the Court.

I hold, in the circumstances, that the suits dismissed or withdrawn on the basis of consent, were well and truly terminated, and they ceased to be on the record. A review of such consent orders, such as learned counsel, **Mr. Tindi** proposes could only be entertained if it was stated that they bore an error on the face of the record; but no such claim has been made.

It was, moreover, not possible to question the general and ostensible authority of **Mr. Chidzipha** as counsel, to compromise those suits as he did, in relation to particular parcels of land and particular defendants. The effect is that, in relation to those particular parcels of land, it is the **defendants** concerned, but not the plaintiffs, who could move the Court seeking injunctive relief. The plaintiffs, moreover, no longer had any suits in place to form the background to their applications for interlocutory relief.

This is the context in which this Court, acting on information brought by side-wind, issued orders on **1<sup>st</sup> April, 2011** for protection by the police, of the respondents’ properties.

I will make Orders as follows:

- (a) The plaintiffs’ application by Notice of Motion of 7<sup>th</sup> February, 2011 is dismissed.**
- (b) This Court’s earlier orders granting the plaintiffs interim injunctive relief against the defendants represented by learned counsel Mr. Kanyi, Mr. Njoroje Mwangi and Mr. Mogaka, are hereby vacated.**

(c) *The plaintiffs shall bear the costs of the defendants named in Order (b) herein, in respect of the instant application.*

**DATED** and **DELIVERED** at **MOMBASA** this 8<sup>th</sup> day of April, 2011.

.....

**J. B. OJWANG**

**JUDGE**