REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 27 OF 2011 (OS)

TIMOTHY ATAMBA ABOKI ……..…..…….…… APPLICANT

VERSUS

ELIZABETH MMBONE MUSA ……..……. 1ST RESPONDENT
BENSON TOY MBULIKA ……..…….. 2ND RESPONDENT

RULING

The Notice of Motion dated 26th April 2011 is by the first applicant, **ELIZABETH MMBONE MUSA**, who is seeking basic orders that the consent order made on the 6th April 2011 be set aside and that this suit be fully heard. The grounds for the application are that the applicant did not instruct her advocate to record a consent on her behalf and neither was she informed that the consent would be recorded when to her knowledge the matter was due for hearing. Further, the consent made on that 6th April 2011 gave the respondent exclusive authority to utilize land parcel No. **NANDI/KAMOBO/1056** to the applicant's detriment and if the consent is not set aside, the applicant will suffer irreparably.

In her supporting affidavit, the applicant avers that she is one of the administrators of the estate of her late husband Azenga Mahenzi who was the owner of the said parcel No. **NANDI/KAMOBO/1056** which the respondent seeks to acquire by adverse possession together with another portion of land No. **NANDI/KAMOBO/358** vide an Originating Summons filed herein on 21st February 2011 (not 18/2/11) but dated 18th February 2011. The applicant avers that she was informed by her former advocate that the matter was fixed for hearing on 6th April 2011 but unknown to her, the advocate went ahead and recorded a consent without her instructions. The Court gave the respondent exclusive authority to utilize the said parcel No. **NANDI/KAMOBO/1056** much to her detriment.

The applicant contends that her family planted tea, vegetable and trees on the parcel of land but the respondent is now plucking the tea and vegetables and is planning to cut down the trees.

The applicant further contends that as a result of the consent her family is suffering and will continue to suffer if the consent is not set aside. She contends that the application is made in good faith and would not prejudice the respondent.

The applicant appeared in person at the hearing of this application and opted to rely on the supporting grounds and the facts contained in the supporting affidavit. She contended that the respondent is misusing the consent order.

In opposing the application, the respondent, **TIMOTHY ATAMBA ABOKI**, filed a replying affidavit dated 26th May 2011 in which he avers that the application is an abuse of the Court process as he filed this suit vide the Originating Summons filed herein on 21st February 2011 which was served upon the applicant on 7th March 2011 and as a result, the applicant appointed the firm of **KIPKOSGEI CHOGE AND COMPANY ADVOCATES** to act on her behalf. The said Advocate filed a Replying Affidavit opposing the respondent's claim for ownership of the material parcels of land by adverse possession. The respondent goes on to aver that the Originating Summons was set down for hearing before this Court on 6th April 2011 on which date the disputed consent was recorded by the Counsels representing both sides and in the presence of the applicant and the respondent.

The respondent goes on to aver that it was agreed by consent that since the respondent was already in occupation of land parcel No. **NANDI/KAMOBO/1056** measuring 2.0 acres he should continue to use the same exclusively and that the applicant utilizes part of land parcel No. **NANDI/KAMOBO/358** whereon they have constructed a house, planted maize and vegetables.

The respondent also contends that the applicant is in breach of the consent order by plucking, cutting and uprooting the respondent's tea. Further, the allegations made by the applicant in this application are baseless and a gross misdirection.

The respondent fears that if the consent order is set aside he would be thrown out of his residence and cultivation. Hence, the application is not made in good faith and is vexatious.

The respondent avers that to facilitate the truth and for the facts surrounding this matter to be fully heard and determined, the suit should be set down for hearing in open Court.

Learned Counsel **M/S. MUGURE**, in arguing the respondent's opposition to the application reiterated more or less the contents of the replying affidavit by the respondent and contended that the consent order was made with the knowledge and in the presence of the applicant.

Learned Counsel submitted that a consent order can only be set aside if it was obtained by fraud, collision or misapprehension or ignorance of material facts.

Learned Counsel contends that the consent was signed by the applicant's Advocate on behalf of the applicant. Therefore, the applicant cannot deny that the Advocate was her agent and had authority to make the consent.

Learned Counsel submitted that the applicant has not shown that there was fraud in the recording of the consent neither has she demonstrated that she is entitled to the orders sought herein.

In urging this Court to dismiss the application, learned Counsel contended that in any event, the consent order favoured both the applicant and defendant.

To fortify her arguments, learned Counsel relied on the decision in **AL-JALEL ENTERPRISES LTD VS. N.I.C. BANK LIMITED & ANOTHER (2010) E KLR**.

Indeed in that decision, the principles to be considered in determining whether or not to set aside a consent order were highlighted. It was therein reiterated that the principles applying in the setting aside of a contract are similar to those applicable in the setting aside of a consent order entered into by competent people with knowledge of material facts. Thus, a consent order cannot be set aside unless it was obtained by fraud or collusion or by an agreement contrary to the policy of the Court or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the Court to set aside an agreement (See also **FLORA WASIKE VS. DESLIMO WAMBOKO (1982-88) 1 KAR 625, BROOKBOND LIEBING LTD VS. MALYA (1975) CA 266**).

Herein, it is apparent that the applicant has failed to demonstrate any of the aforementioned principles for the Court to exercise discretion in her favour. Her bone of contention is that she was not aware of the consent order nor did she authorize her former Advocate to enter into any consent.

While it is true that an advocate without authority cannot enter into a consent as doing so will be a nullity and good reason for setting aside the same, the applicant has not denied that the consent was recorded in the presence of all the parties and their respective Advocates in open Court.

It is generally accepted that advocates have ostensible authority to reach a compromise on behalf of their clients. It is instructive to note that the consent herein was entered in Court on 6th April 2011 but it took almost a month for this application to be filed. Although the application is dated 26th April 2011, it was filed on 5th May 2011. This of course, raises suspicion that the application is an afterthought and was filed after the applicant decided to renegade on the consent order.

Since a party cannot be considered aggrieved by an order made with his consent and in his presence, the inherent jurisdiction of the Court under S. 3A of the Civil Procedure Act cannot be exercised to reverse an order which the parties had previously treated as meeting the end of justice (**See, NGURE VS. GACHOKI GATHAGE (1979) KLR 152**).

Indeed, the subject consent order was not intended to be final as the parties were to return to Court on 18th May 2011 for further consents from the parties or further orders of the Court.

However, the parties did not appear in Court on 18th May 2011 and instead this application was presented in Court by the applicant.

As it were, the applicant pre-empted any further consents expected from the parties. The consent entered on that 6th April 2011 was interlocutory in nature since it was a consent to resolve the respondent's application for a temporary injunction dated 18th February 2011. It is not a final consent such that the applicant would have reason to worry. It is a temporary consent so as to maintain the 'status-quo" prior to the hearing and determination of this suit.

Since both parties have expressed their respective desire to have the suit heard and determined expeditiously, it would be in their own interest to have the matter fixed for direction and probably the fixing of a hearing date.

In the meantime, the consent order remains intact and must be obeyed by all the parties.

In the end result, this application is dismissed with costs to the respondent.

J. R. KARANJA
JUDGE

[Read and signed this 28th day of June 2011]
[In the presence of Mr. Ngala for M/s. Mugure for respondent)