



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**Civil Case 208 of 2008**

**STAT PAPER SUPPLIES LIMITED.....PLAINTIFF**

**VERSUS**

**MANHARBA JAIVIRSINGHJI NARSHINGJI RAOL.....DEFENDANT**

**RULING**

This ruling relates to an application for review and setting aside of a consent order and subsequent judgment under the provisions of Order XLIV rule of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

Order XLIV rule 1 allows a review of a judgment or order on the grounds set out thereunder. These grounds are:-

- (a) *discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the decree was passed or order made;*  
or
- (b) *on account of some mistake or error apparent on the face of the record, or*
- (c) *for any other sufficient cause.*

In this matter the applicant has deponed at paragraph 4 of his affidavit in support that a contract can be set aside due to an understanding cross-purpose. Counsel did not urge this matter so, I did not get the benefit of the expression "*understanding at cross-purpose*" whatever it means it does not seem to fit any of the conditions of Order XLIV rule 1 set out above.

**If** and it is a **big if** it means or refers to the Advocates or an Advocate's authority to compromise matters of which he has conduct, the position in law and precedent is clear.

In the case of **HANSRAJ RANMAL SHAH vs. WESTLANDS**

**GENERAL STORES PROPERTIES, LTD & ANOTHER [1965] E.A. 642,**

the Court of Appeal for Eastern Africa held -

- (i) *the Appellant had not withdrawn his instructions from the Advocate who retained full control over the conduct of the case and had apparent authority to compromise all matters connected with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."

Similarly in **KENYA COMMERCIAL BANK LTD vs SPECIALISED ENGINEERING COMPANY LTD [1982] KLR 485**. The Court of Appeal for Kenya appeared and adopted the judgment of Haris J that -

(1) 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 policy of the court or where the consent was given without sufficient material facts or misapprehension or ignorance of such facts in general for a reason which would enable the court to set an agreement.

(2) A duly instructed Advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his Advocate unless such limitation was brought to the notice of the other side.

(3) An Advocate has general authority to compromise on behalf of his client as long as he is acting side and not contrary to express negative direction. In the absence of any express negative direction, the order shall be binding.

(4) The fact that a material fact within the knowledge of the court was not communicated to the Advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the Advocate concedes that he would not have given his consent had he known these facts and

(5) The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties that fully understand the meaning of the order either personally or through their Advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.

In this matter there is no dispute about the debt of Shs 3,000,000/=. The Defendant's defence was struck out and judgment entered for the Plaintiff/Applicant by a ruling delivered on 3<sup>rd</sup> March 2009. Thereafter the defendant by an application dated and filed in court on 4<sup>th</sup> June 2009 that he liquidate the sum in equal instalments of Kshs 100,000/=. So for the defendant/judgment debtor has paid Shs 1,300,000/= at the said rate and has not defaulted.

No material was placed before me to show either the discovery of new matter or important evidence which would not have been discovered or made available after exercise of due diligence, nor was there any material showing any mistake on the face of the record, fraud or collusion. Understanding at cross-purpose is an expression which is unclear - what were the

instructions and how were they crossed? As held in the above cited cases, an Advocate has full and implied authority to compromise all matters connected with the action. The instructions were not withdrawn from the Advocate and he had the full control over the conduct of the case, and had full authority to enter the consent order.

For those reasons I find no merit in the application dated 10<sup>th</sup> August 2009, and the same is dismissed with costs to the defendant.

There shall be orders accordingly.

**Dated, delivered and signed at Nakuru this 21<sup>st</sup> day of May 2010**

**M. J. ANYARA EMUKULE**  
**JUDGE**