



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**

**Civil Case 265 of 2002**

**FANNY MORAA CHWEYA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**OSORO OMARACHI.....DEFENDANT/APPLICANT**

**RULING**

On 2<sup>nd</sup> March 2010, Mr. Minda for the applicant and Mr. Oguttu for the respondent recorded the following consent:

“By consent the chamber summons dated  
3<sup>rd</sup> February 2010 be and is hereby allowed  
on the following terms:

1. The defendant/applicant do enter appearance and file a statement of defence, if any, within 14 days henceforth.
2. Judgment entered in favour of the plaintiff/respondent on 21<sup>st</sup> February 2006 be and is hereby set aside.
3. The defendant/applicant do pay the sum of Kshs. 7,000/= only being thrown away costs to the plaintiff within 14 days from the date hereof.
4. In default of either limb of the consent, the judgment on record do revert.”

The defendant failed to file the statement of defence within the stipulated period of time. On 8<sup>th</sup> April 2010 he filed an application under Order XLIX rule 5 of the Civil Procedure Rules and prayed, *inter alia*, that the time limited for entering appearance and filing a statement of defence in terms of the aforesaid consent be extended for such period as the court may deem just and expedient.

In the supporting affidavit sworn by Mr. Minda, he stated that the statement of defence ought to have been filed by 16<sup>th</sup> March 2010 but it was filed a day later, on 17<sup>th</sup> March 2010. He stated that the delay arose out of inadvertence on his part.

The respondent filed grounds of opposition and stated, *inter alia*, that this court did not have jurisdiction to entertain the application in view of the express terms of the aforesaid consent orders.

I have considered the submissions that were made by counsel on 20<sup>th</sup> April 2010. This application can simply be determined by reference to the Court of Appeal decision in BROOKE BOND LIEBIG (T) LTD –VS- MALLYA[1975] E.A. 266. It was held that a consent judgment may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement.

In this application counsel for the parties entered into an express consent which had an automatic default clause. The same took effect immediately the defendant failed to file his statement of defence. There is already a judgment on record. It has not been demonstrated that there was any fraud, collusion or misrepresentation as could enable this court to set aside the consent. In the circumstances, this court lacks jurisdiction to interfere with the consent orders above. I therefore dismiss the defendant's application with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF JUNE, 2010.

**D. MUSINGA**  
**JUDGE.**

**28/6/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Ochwangi for the Plaintiff

Mr. Minda for the Defendant

**Court:** Ruling delivered in open court on 28<sup>th</sup> June, 2010.

**D. MUSINGA**  
**JUDGE.**