



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1476 of 2005**

**MARGARET NYAKABI KAHIHU.....1<sup>ST</sup> PLAINTIFF**

**JOHN KAMUYU KAHIHU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMUEL MUKUHA NJUKI.....DEFENDANT**

**RULING**

On 15<sup>th</sup> April, 2008 Lady Justice Ang'awa recorded a consent judgment in this matter between the parties which was endorsed by the plaintiffs and the advocate for the defendant.

It later transpired that the defendant may not have instructed his advocate to enter into the said consent. By an application by way of Chamber Summons under Order IXB rules 3 and 8 and Order XXI Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the defendant has applied to set aside the consent judgment recorded on 15<sup>th</sup> April, 2008 aforesaid. The grounds upon which the said order is sought are:

- (a) That the consent Judgment was entered into between the plaintiffs herein and counsel for the defendant in the absence of the defendant and without his knowledge and authority.
- (b) That the former counsel for the defendant was compelled by the prevailing circumstances to record a consent because his application for adjournment had been refused and the plaintiffs were threatening to ask for the entire suit land.
- (c) That the defendant has a very good defence to the suit with high chances of success

In addition to the said grounds, the learned counsel for the defendant/applicant has sworn an affidavit in support of the application. The application has been opposed by the plaintiffs and both counsel have filed submissions in respect of the same.

The general principle in such matters is that, an advocate has ostensible authority to compromise a suit on behalf of his client. The principles of setting aside consent judgments are now well settled. In the case of *Flora N. Wasike – vs – Destmo Wamboko* (1982-88) 1 KAR 625 Hancox JA. had the following to say;

**“It is now settled 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, or if certain conditions remain to be fulfilled which are not carried out.”**

In Purcell –vs – FC Trigell Ltd. (1970) 3 ALL ER 971 Winn LJ. said at 676

**“It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”**

In the case of Kassim Mbwana – vs – Wilson Kamande Magua, HC Civil Appeal No.15 of 2003 the court said as follows;

**“A consent order/judgment assumes the character of a contract since the parties signing are deemed to have focused their minds closely to the parts forming that contract, and that being in the nature of a contract, to set it aside or otherwise make it unenforceable, the applicant to that end must convince the court that the consent order/judgment was entered into attended with a mistake, or fraud, or coercion or undue influence or misrepresentation – the usual incidents that can vitiate a normal contract.”**

In the instant case, no mistake has been alleged neither has there been any allegations of fraud or misrepresentation on the part of the defendant whose authority was pledged by his counsel then on record. With respect, I see no basis to interfere with the said consent judgment. I only wish to add that, prior to the present application, Osiemo J. while deciding another application for appointment of a guardian ad litem for the defendant and a stay of execution in respect of the same judgment had the following to say;

**“It is submitted on behalf to the plaintiff that the defendant was represented by an advocate who with full instructions from the defendant recorded a consent judgment and there is no evidence to the contrary. The suit having been concluded through a consent order which was recorded by an advocate who had full instruction to act for the defendant I agree with the plaintiff that the order sought is not tenable.”**

With profound respect, I associate myself with the observations of the learned judge and in the end find that the application lacks merit and is therefore dismissed with costs to the plaintiffs.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of September, 2010.*

**A. MBOGHOLI MSAGHA**

**JUDGE**