



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 46 of 2007**

SAMUEL KITHOME KITONYO.....PLAINTIFF/APPLICANT

VERSUS

PAUL WANDERI.....1ST DEFENDANT/RESPONDENT

OBADIAH MWANGI GITAU.....2ND DEFENDANT/RESPONDENT

JAMES MUSYOKA MUNGUTI.... 3RD DEFENDANT/RESPONDENT

CHARLES WAWERU.....4TH DEFENDANT/RESPONDENT

DAVID IRUNGU.....5TH DEFENDANT/RESPONDENT

NJERI.....6TH DEFENDANT/RESPONDENT

KINYUA.....7TH DEFENDANT/RESPONDENT

RULING

On 6th July, 2007 the advocate for the plaintiff and that of the defendants filed a consent order in the following terms;

“CONSENT ORDER

The parties herein wish to record the following consent order;

1. That the case herein be and is hereby withdrawn with no order as to costs.

Dated at Nairobi this 6th day of July, 2007.

Signed

Moses Bosire & Company

Advocates for the plaintiff

Signed

Anya Kalwa & Company

Advocates for the defendants”

There evidence is on record that an order was extracted and issued on 31st August 2007 and signed by the Deputy Registrar to that effect. There is now before me an application by way of Notice of Motion under Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that the consent order entered on 6th July, 2007 and issued on 31st August, 2007 be set aside, and that the costs of the application be provided for.

The grounds set out on the application are;

1. The applicant’s former advocate had no instructions to withdraw the applicant’s suit.
2. That the applicant had no knowledge of the withdrawal of the suit.
3. That the withdrawal of suit was against the applicant’s interest and unjust; and

4. The withdrawal of the suit by the said consent order will cause great and irreparable loss and damage to the plaintiff/applicant.

In addition to the said grounds, there is an affidavit sworn by the plaintiff in support thereof. Both learned counsel have filed submissions which I have noted.

The law is now well settled. In *Kenya Commercial Bank Ltd. –vs _ Specialized Engineering Co. Ltd (1982) KLR 485* it was held:

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 it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in mis- apprehension or ignorance of such facts in general for a reason which would enable the court to set aside 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 *bona fide* and not contrary to express negative direction. In the absence for prove of any express negative direction, the order shall be binding.
4. The fact that a material fact with the knowledge of the client 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 known these facts.

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 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.

See also Flora Wasike – vs –Destimo Waboko (1982-88)1KAR 625.

It is settled law that a consent judgment can only be set aside on the grounds that would justify the setting aside a contract e.g fraud, mistake, or misrepresentation. *See also BrookBond Tea Ltd vs – Mallya (1975) E.A 266.*

In the present case, the plaintiff has not dislodged the above principles neither has he shown any fraud, collusion or misrepresentation on the part of his then advocate who compromised this suit. The consent was clear and unequivocal. I have no reason whatsoever to doubt that the learned counsel had full authority to compromise the suit.

Accordingly, the application is hereby dismissed with costs to the defendants.
Orders accordingly.

Dated, signed and delivered at Nairobi this 14th day of October, 2010.

A. MBOGHOLI MSAGHA
JUDGE