**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL SUIT 1622 OF 2001**

**SKYVIEW PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1ST DEFENDANT**

**THE PRINCIPAL REGISTRAR OF TITLES**

**(NAIROBI CENTRAL LAND REGISTRY)…….……2ND DEFENDANT**

**THE COMMISSIONER OF LANDS…….…….....3RD DEFENDANT**

**R U L I N G**

**The Application**

1. The application that is before me is the Notice of Motion dated 30/05/2008. The application is filed by the Plaintiff who prays for orders

***1. THAT the Consent Order entered on 28th November, 2007 be vacated, varied and reviewed and set aside and all consequential orders.***

***2. THAT the Notice of Motion application dated 24th July 2007 be reinstated and be heard on merits.***

3. ***THAT the Respondents be granted leave to file a Replying Affidavit to the Notice of Motion application dated and filed on 24th July 2007***.

2. The Application is based on three grounds appearing on the face thereof:?

***1. That a Consent Order was recorded on 28th November 2007 without the Plaintiff's instructions.***

***2. That the Plaintiff had given the Plaintiff's lead counsel, Mr. James Ochieng Oduol irrevocable instructions to oppose the Notice of Motion application dated 24th July 2007 but he acted against the instructions by entering into consent without instructions.***

3. ***The Defendant's Advocates were in want of instructions from the Defendant in moving the court in their Notice of Motion application dated 24th July 2007.***

3. The affidavit in support of the Plaintiff's application is dated 30/05/2008 and is sworn by **JOHN WACIRA WAMBUGU**, an advocate of this honourable court and a director and main shareholder of the Plaintiff company. Mr. Wambugu attests to the following matters in his affidavit:?

· ***that his law firm, M/s Wambugu & Co. Advocates retained Mr. James OChieng Oduol advocate to lead the deponent's assistants during the hearings of the application before this court and that during the hearings, the said lead counsel would take instructions from the firm of Wambugu & Co. Advocates***

· ***that the Defendants filed a Notice of Motion application dated 24/07/2007 supported by an affidavit of Mandeep Kaur Nagi seeking to have the ruling made on 22/09/2006 reviewed and that the monies paid by the Permanent Secretary of the Ministry of Lands & Settlement to an Order of the High Court in Misc. Civil Application No.1419 of 2002 dated 19/12/2003 be paid forthwith to the Permanent Secretary, Ministry of Lands and Settlement***

· ***that by a letter dated 25/07/2007, the Plaintiff's lead counsel, Mr. James Ochieng Oduol sought instructions from the Plaintiff company on how to proceed with the application dated 24/07/2007; and that by a letter dated 6/08/2007, Mr. James Ochieng Oduol was instructed to strongly oppose the Notice of Motion dated 24/07/2007. (see annextures "JWM 1" and "JWW2" to the deponent's supporting affidavit***

· ***that though he would have liked to swear a Replying Affidavit to the application, he was unable to do so because of an engagement in London on behalf of the Kenyan Government in Claim No.2006 Folio 881 in the High Court of Justice Queen's Bench Division***

· ***that later on he learnt of the consent order entered into on 28/11/2007 over the Notice of Motion application dated 24/07/2007, which consent order was entered into without instructions from himself***

· ***that prior to the said consent order, parties had engaged in consultative meetings with a view to reaching an out-of-court-settlement***

· ***that the Permanent Secretary Ministry of Lands and Settlement acted maliciously and behind the back of both the Minister for Lands and Settlements and the A.G when he (Permanent Secretary – Ministry of Lands) tried to get the Director of the Kenya Anti-Corruption Commission (KACC to impede and frustrate the settlement and release if the settlement amount;***

· ***that following protracted negotiations with the Minister for Lands and Settlement, the parties agreed to settle their dispute outside the court; but that the former Permanent Secretary of the Ministry of Lands tried to block the amicable settlement by reporting the matter to the Director, KACC, who then sought copies of pleadings from the court to enable him carry out investigations into the matter;***

· ***that the acts undertaken by the Permanent Secretary Ministry of Lands & Settlement were aimed solely at denying the Plaintiff its legal rights as the matter had already been fully investigated by KACC under file reference number Criminal Case No.141/90/2004 L.R No.209/3219 – Skyview Properties Limited in the year 2004 and the file closed, a fact which the deponent says the Permanent Secretary has withheld from the court***

· ***that by reason of the foregoing, it would be in the interest of justice to review, vary or set aside the consent orders recorded on 28/11/2007 so as to give the Plaintiff an opportunity to be heard on the application dated 24/07/2007***

· ***that the claimant herein is a purchaser for value and not an allottee as intimated by the 2nd Defendant***

· ***that evidence available on record exonerates the Plaintiff from any allegations of fraud, collusion and all other allegations made by the former Permanent Secretary for Lands and Settlement, particularly because of investigations already carried out by the Director of Criminal Investigations.***

The Plaintiff's application is brought under Order XLIV rules 1 and 2 and Order L rule 1 of the Civil Procedure Rules and Sections 3A and 80 of the Civil Procedure Act and all other enabling provisions of the law.

4. The Plaintiff's application dated 30/05/2008 is opposed by the Defendants who filed Grounds of Opposition on 16/06/2008, that is to say that::?

***1. The application is impermissible under the rules of Order XLIV of the Civil Procedure Rules***

***2. The application is an abuse of the process of this court.***

***3. In the alternative, the Plaintiff's application is fatally defective and incompetent***.

**<u>The Plaintiff's Submissions</u>**

5. In an effort to save judicial time for both the court and the parties, the parties put in written submissions. The Plaintiff's submissions, filed on its behalf by M/s **Satish Gautama Advocate** are dated 14/07/2008 and were filed in court on the same day. The Plaintiff contends that since the order sought to be reviewed varied and or set aside forms part of the court record, it is not necessary for a copy of the said order to be annexed to the application as the Defendants would want the court to find; that in any event, a copy of the said order is annexed to the application dated 27/05/2008. The Plaintiff also contends that since there was an order made by the court on 12/06/2008 (Visram J) that the Defendant's Amended Notice of Motion (with the annexed Order of 28/11/2007) be heard concurrently with the Plaintiff's Notice of Motion dated 30/05/2008, then it meant that the two applications were combined and consolidated making it unnecessary for the Plaintiff to annex a copy of the Order of 28/11/2007 to the instant application. The Plaintiff also argues that the practice requiring the court order to be annexed is for clarity only as to what order or Decree is sought to be impeached or reviewed and that in the alternative the omission is a mere irregularity which causes no prejudice to the Defendants and therefore that such irregularity should not be used to defeat justice. On this point, the Plaintiff contends that the Defendants are themselves guilty of breach of this very duty as they did not annex to their application dated 5/03/2004 a copy of the order which they sought to be reviewed, and that the order was only later "sneaked" into the court records during advanced stages of the court proceedings. With all due respect to learned counsel for the Plaintiff, I do not think that a party who seeks justice from the court should correct a wrong by committing another wrong. If that were to happen, the entire judicial process would break down and create rules of the jungle where the mighty and not the just would rule. I shall return to the issue of the missing order later in this ruling.

6. On the second ground of opposition to the Plaintiff's application, learned counsel for the Plaintiff argues that the Defendant's contention that the instant application is impermissible under Order XLIV rule 7 of the Civil Procedure Rules is mala fide and unsustainable. Learned counsel says that the consent order of 28/11/2007 emanates from the Notice of Motion dated 24/07/2007. According to the Plaintiff, there is a noticeable thread of illegality running from as far back as March 2004 which renders the entire proceedings a nullity namely:—

· ***that the Notice of Motion dated 24/07/2007 was an application for review of a ruling emanating from the Notice of Motion dated 5/03/2004***

· ***that the Notice of Motion dated 5/03/2004 was an application for review***

· ***that the Notice of Motion dated 24/07/2004 was a review application over the Notice of Motion dated 5/03/2004 which was similarly a Review Application***.

The Plaintiff contends that because of this long thread of illegality, this court should find that there is an error apparent on the face of the record and allow the instant application. The Plaintiff says that the consent order of 28/11/2007 unprocedurally reviewed the ruling of Ojwang, J of 22/09/2006. By the ruling of 22/09/2006 the court allowed the Review Application of 5/03/2004.

7. For the record, the application of 5/03/2004, which was brought by way of chamber summons on behalf of the Defendants under Orders IXA rule 10, XI and XXI rule 22(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act sought orders that:

· ***the main suit herein, HCCC No. 1622 of 2001 be consolidated with two other causes, HCCC No.387 of 1998 and H.C. Miscellaneous Application No. 1449 of 2002***

· ***that the judgment already delivered in HCCC No.1622 of 2001 and its amended decree issued on 15/08/2002 and all consequential orders be set aside and vacated.***

Again for the record, the application was filed by the Judgment/Debtor/ the Defendants on the grounds that the consent entered into between the Plaintiff and the 1st Defendant to enter judgment and the amended decree, were obtained through fraud, collusion and/or mistake. The order and decree made in this case required payment to the Plaintiff herein the sum of Kshs.42,205,485/= with interest thereon at 29% per annum from the date of filing suit until payment in full. From the record, that order for payment was made on 2/04/2003 in HC Misc. Application No. 1449 of 2002 in the following terms:—

"***That an order of Mandamus be and is hereby issued compelling the Permanent Secretary, Ministry of Lands and Settlement, to comply with the Order and Decree of this court in HCCC No.1622 of 2001, that is to say, SKYVIEW PROPERTIES LIMITED Kshs.42,205,845/= with interest thereon at 29% per annum from date of filing suit until payment in full."***

8. The court order in the above terms was not complied with and the Plaintiff filed an application for Contempt of Court as a result of which the Permanent Secretary Ministry of Lands and Settlement was produced before court under arrest on 19/12/2003. The court (Ojwang, J) made the following orders, after hearing both sides:?

***1. THAT the Permanent Secretary, Ministry of Lands and Settlement shall, within the next 30 days deposit the whole amount of money payable under the Court's Order of 2/04/2003 in an Escrow Account in respect of the claims determined in HCCC No. 1622 of 2001."***

***2. ----***

***3. ----***

***4. ----***

***5. That in respect of the first order herein, an Escrow Account shall be opened in the joint names of the Advocates for the Applicant, M/s Wambugu & Co. Advocates, and the Attorney General.***

Then on the 22/09/2006, after hearing parties on the application dated 5/03/2004, the court (Ojwang J) made the following orders:?

***1. The Judgment in HCCC No.1622 of 2001 and the amended decree issued on 15th August, 2002 and all consequential orders are hereby set aside and vacated.***

***2. The Order of Mandamus granted on 24th December, 2002 in the Judicial Review motion of that date, in H.C. Misc. Appl. No.1449 of 2002, for the purpose of giving effect to the judgment in HCCC No.1622 of 2001, is hereby set aside and vacated.***

***3. The whole of the judgment in HCCC No.387 of 1998 – Skyview Properties Ltd. & 2 Others v***

***Samvir Trustees Ltd. & 4 Others dated 1st August 2000 is hereby set aside and vacated.***

***4. Within 30 days of the date hereof, the Plaintiff shall consolidate the two cases, namely HCCC No.1622 of 2001 and HCCC No.387 of 1998 and shall set them down for hearing and disposal on the basis of priority.***

***5. All motions relating the 4th Order herein, and all such further applications as may relate to the suit or to this ruling, shall be heard and determined within the Civil Division of the High Court.***

6. ***The costs of this application shall be in the cause***.

9. The above are the orders which the Plaintiff now claims were unprocedurally set aside by the consent orders of 28/11/2007. Taking refuge in the provisions of Order XLIV rule 2 of the Civil Procedure Rules, learned counsel for the Plaintiff contends that there was an error apparent on the face of the record not only when the review order of 28/11/2007 was given, but also because, he argues, the Order of 28/11/2007 was not given by the court which passed the order of 26/09/2006. Rule 2 of Order XLIV of the Civil Procedure Rules provides as follows:-

"***An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree, or made the order sought to be reviewed."***

From the above, an application for review of a decree or order shall be made by the judge who passed the decree or order sought to be reviewed except in the following circumstances ?

- ***where there is discovery of such new and important matter or evidence***

- ***in cases where there is the existence of a clerical or arithmetical mistake***

- ***in cases where there is an error apparent on the face of the decree***

Learned counsel for the Plaintiff contends that the application of 5/03/2004 did not fall among the exceptions to the rule and therefore that the judge who should have made the orders of 28/11/2007 should have been Ojwang J and not Rawal J. It is thus contended on behalf of the Plaintiff that the Defendants have not come to court with clean hands deserving of the exercise of this court's discretion in their favour and that since both parties herein are guilty of flouting the court's rules of procedure at one stage or another, the Defendants should not be granted the orders they seek – see **Devji Meghji & Brothers Ltd. –vs- Prospectus Thika Ltd. & Others – Nrb Milimani HCCC No. 534 of 2004** (unreported) in which Ochieng J persuasively held *inter alia* that

"***---- it would be unfair to excuse one party who flouts the rules of court, and allow him to challenge the other party not complying with the rules."***

10. Learned counsel for the Plaintiff also argues that because the Plaintiff's application dated 30/05/2008 is not confined to the prayer for review, the same should be considered to be properly before court and to be competent. Rule 1 of Order XLIV of the Civil Procedure Rules requires the party seeking a review to do so without unreasonable delay. The question to ask at this stage is whether the Plaintiff's application for review of the orders of 28/11/2007 was made without unreasonable delay. I shall consider this issue later in this ruling, but for now suffice it to say that according to the Plaintiff, there are other sufficient grounds upon which this court can exercise its discretion in its favour. Relying on **Sardar Mohamed vs Charan Singh Nand Singh & Another – [1959] EA 793**, learned counsel for the Plaintiff says that this court should take a liberal view of the words "***any other sufficient ground***." This leads me to ask the question as to whether the reasons put forward by the Plaintiff in support of its application can be said to be "***other sufficient ground"*** for purposes of Order XLIV rule 1 of the Civil Procedure Rules. Learned counsel for the Plaintiff has also referred the court to section 80 of the Civil Procedure Act, which

provides that "***any person who considers himself aggrieved by a decree or order from which an appeal is allowed by the Act but from which no appeal has been preferred or by a decree or order from which no appeal is allowed by the Act may apply for review of such decree or order and that the court has unlimited discretion to make such order as it thinks fit.***" In the instant case, **Mr. John Wachira Wambugu** says that if he had been available just prior to the time when the Defendant's application dated 24/07/2007 came up for hearing, he would have sworn an affidavit in opposition to the same, and that the consent of 28/11/2007 would therefore never have been recorded.

11. For the record, it is important to look at the order of 28/11/2007 (Rawal, J). As rightly pointed out by learned counsel for the Plaintiff, this order emanates from the Defendant's application presented to the court on 24/07/2007 brought under Order L Rule 1, Order XLIV Rules 1(1), 1(2) and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21 and supported by the affidavit of **Mandeep Kaur Nagi** sworn on 24/07/2007. When the parties appeared before Rawal, J, counsel for the Defendants and counsel for the Plaintiff agreed by consent **THAT**

***1. The Ruling made on 22nd September 2006 be and is hereby reviewed.***

***2. The monies paid by the P/S of the Ministry of Lands and Settlement pursuant to an Order of the High Court in Miscellaneous Civil Application No. 1149 of 2002 dated 19th December, 2003 be repaid forthwith to the P/S, Ministry of Lands and Settlement.***

3. ***The costs of and incidental to this application be provided for by the Respondent***.

In their submissions, learned counsel for the Plaintiff contend that if the honourable Rawal J had been given the true facts and circumstances surrounding the opening and purpose of the Escrow Account, the learned Judge would not have made the consent order which learned counsel says was entered into in ignorance and without instructions of the basic facts. Learned counsel puts forward the following points in support of the Plaintiff's contention that the consent order of 28/11/2008 is a nullity and should not be allowed to stand ?

· ***that the Defendants' advocates had full knowledge that the parties herein were directly negotiating an out of court settlement***

· ***that the Defendants' advocates had no instructions to record the said consent over the Notice of Motion application dated 24/07/2007***

· ***that the Defendants advocates acted contrary to their client's instructions***

From what appears to be an internal memo dated 7/12/2007, written by Hon (Prof.) Kivuitha Kibwana, EGH, then Minister for Lands to his Permanent Secretary the Honourable Minister observed that

· ***there had been a double registration of titles on the Land Reference No. 209/3219 sitatued in Kileleshwa***

· ***the mistake had occurred in the Lands Department***

· ***the AG had agreed on an out of court settlement since the claimants were purchaser for value and not alottees***.

12. The Minister then proposed that the matter be settled out of court without further delay on condition that the claimant should forego the accrued interest and accept payment of the amount in escrow account in full and final settlement and that the Ministry would pay no further costs to the claimants. Learned counsel for the Plaintiff therefore argues that the facts leading up to the deposit of the money in the escrow account were that the Government was liable to the claimaints on issuance of two titles over the same property and that it was under a duty to indemnify the Plaintiff. Learned Counsel for the Plaintiff is of the view that these facts were not brought to the attention of Rawal J before she made the consent order

of 28/11/2007.

13. Further, learned counsel for the Plaintiff contends that the consent order made on 28/11/2007 was contrary to the policy of the court on the ground that it arose out of an incompetent and impermissible application dated 24/07/2007 brought to court by the Defendants. The main argument put forth on behalf of the Plaintiff is that the said consent order was made by a judge other than the one who should have made the order, if at all that was permissible – see **Diamond Trust Bank Limited –vs- Plyland Panels Limited & Others – Civil Appeal No.243 of 2002** and also **Brooke Bond Leibig Ltd. –vs- Mallya [1975] EA 266**.

14. In summary, the above is the Plaintiff's case. The Plaintiff has already lodged its appeal against the ruling by Ojwang J dated 22/09/2006. Learned counsel contends on behalf of the Plaintiff that it was only Ojwang J who could have made the order of 28/11/2007; that no application to that effect was placed before Ojwang J; that the true facts pertaining to the opening of the escrow account were not placed before Rawal J on the 28/11/2007, leading to the "***incompetent***" consent order of 28/11/2007.

**The Defendant's Submissions**

15. I now turn to the Defendant's submissions. Learned counsel for the Defendants has urged this court to find and to hold that the Plaintiff's application is incompetent for failure to annex to it a copy of the order or decree sought to be reviewed. The Plaintiff has argued that since the said decree or order is annexed to the Defendant's Amended Notice of Motion dated 27/05/2008, there is no need for the Plaintiff to also annex a copy of the same order to its own application. The Defendants contend that since it is the Plaintiff's instant application that seeks review of the orders dated 28/11/2007, the documents availed by the Defendants should not and cannot be said to be sufficient for purposes of Order XLIV. Learned Counsel for the Defendants contends further that despite the order by Visram J on 12/06/2008 that the two applications dated 27/05/2008 and 30/05/2008 be heard together, the court is now looking only at the Plaintiff's application dated 30/05/2008 and which application should be self-contained in terms of documents required to support it.

16. On the Plaintiff's allegations that the Defendants are themselves guilty of flouting procedures of court with regard to their application dated 5/03/2004, learned counsel for the Defendants says that the alleged flaws were rectified via an oral application made by them on 16/01/2005 and further that by an affidavit dated 16/05/2005, and filed in court on 3/06/2005, the missing order was admitted by the court on 15/06/2005 and deemed to have been properly filed. The handwritten record of 15/06/2005 confirms the position put forward by learned counsel for the Defendants on the issue of the alleged flouting of rules of procedure by the Defendants with respect to the application dated 5/03/2005. Learned counsel for the Defendants thus denies that they "***sneaked***" into court the order which their application dated 5/03/2005 sought to review. Further learned counsel for the Defendants contend that despite knowledge by the Plaintiff that it ought to have the order dated 28/11/2007 annexed to the application of 30/05/2008, the Plaintiff has not done so to date.

17. As to whether the Defendants Notice of Motion application dated 24/07/2007 was a nullity, learned counsel for the Defendants argues that the application of 5/03/2005 was not just for review, but also sought orders for setting aside and vacating of earlier orders. Learned counsel also contends that infact the orders made by Ojwang, J on 22/09/2006 did not have an order for review and that the orders made were for setting aside and vacating judgments. In this regard, learned counsel for the Defendants says that no review orders were made in respect of the application dated 5/03/2005 and therefore that the application dated 24/07/2007 was clearly not an application for review as envisaged under Order XLIV Rule 7 of the Civil Procedure Rules. Rule 7 forbids the making of an application for a review of a decree or order passed or made on a review.

18. The Plaintiff has also claimed that only Ojwang J was capable of making the consent order of 28/11/2007. In response to this contention, learned counsel for the Defendants argue that at the time when the application dated 24/07/2007 came up for hearing, Ojwang J had already left the Civil Division of the High Court to the Criminal Division and was thus no longer attached to the court (read Civil

Division) and thus any other judge attached to the court had the power to hear the application and make such orders as it deemed fit and just to do. In this regard, learned counsel referred to Ojwang J's own 4th order to the effect that ***all such further applications as may relate to the suit or to this ruling shall be heard and determined within the Civil Division of the High Court.***

Learned Counsel for the Defendants contends further that the fact that the Defendants application dated 24/07/2007 was placed before Rawal J and determined by her cannot be said to be an error apparent on the face of the record and that there is no irregularity committed under Order XLIV rule 2 of the Civil Procedure Rules. Learned counsel also argues that there is no other sufficient ground upon which the Plaintiff has made its application dated 30/05/2008. That the grounds advanced by the Plaintiff do not justify the setting aside of the consent orders of 28/11/2007. It is also contended on behalf of the Defendants that a delay of six months between the orders of 28/11/2007 and the filing of the instant application has not been explained by the Plaintiff and therefore that the Plaintiff is guilty of unreasonable delay in bringing the application. Learned Counsel for the Defendants also says that the Plaintiff's application is incompetent and impermissible by virtue of the provisions of rule 7 of Order XLIV. It is further contended on behalf of the Defendants that the Plaintiff's application which seeks to review and/or set aside consent orders is incapable of being granted unless the Plaintiff can prove that there was:-

- ***fraud or collusion***

- ***mistake or misrepresentation or***

- ***that the consent was (is) contrary to public policy or***

- ***non-disclosure of material facts***

20. Learned counsel for the Defendants contends that the above are the only grounds upon which a consent judgment may be set aside and that the rule does not provide for lack of instructions as being among the grounds – see **Diamond Trust Bank of Kenya Ltd. –vs- Plyland Panels Limited & Others** (supra). It is my view that the principles governing the setting aside of consent orders/judgments were set out in the said case and also in **Flora Wasike –vs- Destimo Wamboko [1982-88] 1 KAR 627** and **628.** In the **Diamond Trust Bank** case (above) these principles are stated in the judgment of Omolo, J.A. The summary of these principles is found in the holdings of the **Flora Wasike** case (above) where the court held that: ?

***1. It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation;***

***2. An advocate would have ostensible authority to compromise a suit or consent to a judgment so far as the opponent is concerned.***

***3. The court would not readily assume that a judgment recorded by a judge as being by consent was not so unless it was demonstrably shown otherwise.***

The above are, in essence, the principles which I shall apply to the instant application. The bone of contention in the instant application is that the lead counsel acted contrary to instructions given to him by the Plaintiff in entering into the consent and further that he ignored the fact that the parties were engaged in out of court negotiations. Learned counsel for the Defendants contends that though Mr. James Ochieng Oduol sought instructions from the Plaintiff, no such instructions were given by the Plaintiff, and that the letter of 6/08/2007 by the firm of Wambugu, Motende & Company, which letter was signed by a Mr. Wilson K. Gathoga spoke of a meeting to be arranged between Mr. Oduol and Mr. Wambugu, but that there is no evidence to confirm if such a meeting took place and if so, what instructions, if any were issued by Mr. Wambugu to Mr. Oduol. It is further contended that since no Replying Affidavit was filed to the Defendants application dated 24/07/2007, despite a period of four (4) months, it can be inferred that the Plaintiff had no objection to the said application and that it would not now turn round and say that they wished to oppose the application. In the Defendant's mind, the instant application was a mere

afterthought, particularly in view of the Defendant's amended Notice of Motion dated 27/05/2008.

21. It is also contended on behalf of the Defendants that the Plaintiff has not discharged the onerous burden of demonstrating that there was in fact no consent in this case. The learned counsel referred the court to a passage on page 7 of the **Diamond Trust** case (above) where Omolo, JA said the following:?

"***--- It is clear from the authorities with which I started this judgment that the burden on a party who alleges that there was infact no consent or that the consent was invalid is a heavy burden ---. Add to that fact the respondent came to know of the judgment almost immediately and yet they did not come to court until some five months later and that at the time when the grace period was due to run out, and it becomes clear beyond reasonable doubt that the consent judgment ought not to have been set aside. The respondent's advocates had ostensible authority to reach a compromise on their behalf. The advocates did so and it is to be noted the advocates have not complained that they were cheated or misled over anything."***

In the same **Diamond Trust** case (above) Githinji JA said that ***the conduct of the parties since the compromise was recorded is a relevant consideration in an application to set aside the compromise.*** It is instructive to note that in the instant application, there were six (6) months between the order of 28/11/2006 and the filing of the instant application and further that there were four months between the filing of the application dated 24/07/2007 and the date of its hearing on 28/11/2007. During these four (4) months the Plaintiff did not file any Replying Affidavits. What can the court infer from such conduct on the part of the plaintiff? Learned counsel for the Defendant's also contends that for as long as the instructions given to Mr. James Ochieng Oduol to act for the Plaintiff had not been withdrawn, Mr. Oduol still had full control on the conduct of the trial and had apparent authority to compromise all matters with the action.

22. Finally, learned counsel for the Defendants contends that the Plaintiff has not complied with any of the orders made by Ojwang J on 22/09/2006 one of which orders required the Plaintiff to consolidate this case with HCCC No.387 of 1998 within 30 days of the making of the order and to set them down for hearing and disposal on the basis of priority. Learned counsel for the Defendant contends that if the Plaintiff had complied with the orders, these two suits would already have been determined, and that having failed to do so, there is no longer any need to hold the money in an escrow account. Learned counsel for the Defendants also contends that even if the Plaintiff were to succeed in its appeal against the ruling of Ojwang J, it would suffer no prejudice if the money is returned to the Permanent Secretary; that the fact that the Plaintiff is dealing with the Government of the Republic of Kenya is in itself an assurance that the money can be sent back to the Plaintiff in case the appeal succeeds. The Defendants' advocates have expressed an apprehension that if the instant application succeeds, the Plaintiff is likely to make another transfer of the money from the Development Bank of Kenya Limited as it did from the escrow account in Commercial Bank of Africa to Development Bank of Kenya Limited without the Defendant's consent.

**Findings**

23. I have now considered the application as filed, the affidavits in support and the annexures thereto. I have also considered the detailed written submissions by both parties. I have considered all the authorities cited to me by learned counsel from both sides. From all the above, the issue that arises for determination is whether the Plaintiff has demonstrated to the court that it has satisfied the conditions/principles as set out in the **Flora Wasike** case (above) for the review and/or setting aside of a consent judgment/order. Has the Plaintiff shown that there was fraud, mistake or misrepresentation on the part of the lead counsel appearing for the Plaintiff on 28/11/2007? Has the Plaintiff demonstrated that the advocate appearing had no ostensible authority to compromise the suit or consent to the orders that were recorded by the court on 28/11/2007? Or has the Plaintiff demonstrated that infact there was no consent order made on 28/11/2007?

24. After carefully analyzing the pleadings, the evidence and the law, I do find and hold that the Plaintiff has not demonstrated to this court that it is deserving of the orders sought. In the first place, it is now a

widely accepted judicial practice that any application seeking to review a decree or order must have annexed to it a copy of the order sought to be reviewed. It is not disputed in the instant application that the Plaintiff did not annex to its application a copy of the order dated 28/11/2007. The Plaintiff contends that the said order is available on the file, having been annexed to the Defendants' Amended Notice of Motion dated 27/05/2008. It is not the duty of the court to turn the pages of any court file to look for documents that a party ought to have availed to it in support of any particular pleading. It is instructive to note that the Plaintiff's application and the Defendants' application were filed at different times and by different firms of advocates. The Plaintiff must have known that its application would be treated as a pleading in its own right and it was thus incumbent upon the Applicant to make his application as complete as possible for the court to consider it without having to look elsewhere to fill gaps. It was not the duty of the Defendants to do the Plaintiff's work of ensuring that a copy of the order dated 28/11/2007 was annexed to the Plaintiff's instant application. It does not matter that Visram J ordered, on the 12/06/2008, that both the Plaintiff's and the Defendant's applications would be heard together. In any event, when the parties appeared before me on 18/06/2008, learned counsel, Mr. Satish Gautama for the Plaintiff and Miss Nagi for the Defendants, agreed to have the instant application heard first. It should have occurred to the Plaintiff then that it was necessary to put its house in order on the instant application before proceeding with the hearing. The Plaintiff did not do so. It must now bear the consequence of not being vigilant.

25. I also find and hold that the Plaintiff's application cannot succeed for the reason that it is seeking to review the orders of 28/11/2007 which orders were made on an application for review. It is clear from the provisions of rule 7 of Order XLIV that the instant application is impermissible. Having heard both sides and read the provisions of Order XLIV Rule 7 of the Civil Procedure Rules I am convinced that the Plaintiff's application is impermissible because of the law. This legal bar is not capable of being rectified or lifted.

26. Thirdly, I find and hold that the Plaintiff's application cannot succeed on grounds that the Plaintiff has not met the principles for the setting aside of consent orders. I have already set out those principles that were restated by the Court of Appeal in the **Flora Wasike** case and other leading authorities on the issue. The main ground put forward by the Plaintiff for seeking an order to set aside those consent orders of 28/11/2007 is that the lead counsel appearing for the Plaintiff had no instructions to enter into the consent. I have had the opportunity to read through all the authorities cited to me by both counsel appearing. None of the said authorities cite lack of instructions as a ground for the setting aside of a consent judgment. These same authorities also clearly show that an advocate appearing has ostensible authority to conduct the case on behalf of the client including reaching a compromise on behalf of the client. I have read the various affidavits sworn by **John Wacira Wambugu** advocate and main Director of the Plaintiff and all that I can gather therefrom is that he was out of the country on other pressing assignments on behalf of the Government of the Republic of Kenya and was thus unable to swear an affidavit in opposition to the Defendants' application that gave rise to the consent orders of 28/11/2007. It is my view that in this age and era, Mr. Wambugu did not have to be personally present in Kenya to swear the affidavit. I have also not been able to discern any fraud or collusion on the part of counsel who appeared for the Plaintiff on 28/11/2007, nor has the Plaintiff alleged such fraud or collusion. In the circumstances, I can only repeat the words of **Law, Ag. President** in the now well known **Brooke Bond Liebig (T) Ltd**. case (above) which dictate against my making a finding in favour of the Plaintiff on the instant application:?

"***Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them --- and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if 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."***

27. The Plaintiff has argued that the consent order was made without sufficient material facts namely that the court was not informed that the parties were at an advanced stage of negotiation to resolve the matter amicably. To again borrow the words of **Law, Ag. President** in the **Brook Bond Liebig case** (above), it is my considered view that ?

"***No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension."***

The Plaintiff's contention is that the consent judgment was made contrary to the policy of the court. The policy of the court to which the Plaintiff refers is what is enshrined in rule 2 of Order XLIV of the Civil Procedure Rules, which is to the effect that the consent orders of 28/11/2007, if they were justified at all, ought to have been made by Ojwang, J who gave the orders of 22/09/2006. In response to this contention by the Plaintiff, the Defendants rely on the provisions of Order XLIV Rule 4(1) of the Civil Procedure Rules and argue that Ojwang J was, as at 28/11/2007, no longer attached to the Civil Division of the High Court so as to have been expected to issue the consent orders of 28/11/2007. It is not disputed by the Plaintiff that indeed Ojwang J was no longer within the Civil Division of the High Court at the material time. The judge seized of the matter then was Rawal J and it was before her that the parties recorded the consent order. On the basis of the above, and for the provisions of Order XLIV Rule 4(1) of the Civil Procedure Rules, the Plaintiff's argument that the consent orders of 28/11/2007 were made contrary to the policy of the court is not sustainable.

28. The Plaintiff made other submissions such as that the Defendants ought not to be allowed to benefit from a procedure that they themselves flouted in respect of their application dated 3/03/2004. The Defendants have placed evidence before me and the record bears them out that any irregularity touching on the application dated 5/03/2004 was rectified by the Defendants in good time. There is therefore nothing in that regard which this court can hold against the Defendants. There are other less important issues raised by the Plaintiff. I have considered all of them, but I do not find it necessary to make any specific finding on the same. I only need to state here that should the Plaintiff succeed on the appeal it has lodged in the Court of Appeal, the Government of the Republic of Kenya should be in a position to pay back the money which is the subject matter of the consent orders of 28/11/2007.

**Conclusion**

29. For the reasons above given, I have no option but to strike out the Plaintiff's application dated 30/05/1008 in its entirety. The costs of and incidental to the application shall be borne by the Plaintiff.

Orders accordingly.

**Dated and delivered at Nairobi this 5th day of February 2009.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. Gathogo (present) for the Plaintiff

Mr. Makongo for Muthoni (present) for the Defendants

Kimaru together with Mr. M. Aronson