REPUBLIC OF KENYA

<u>IN THE HIGH COURT OF KENYA</u>

<u>AT KAKAMEGA</u>

<u>Civil Appeal 36A of 2000</u>

HUSSEIN MUNYENDO NANJIRA ………….……. APPELLANT

V E R S U S

PETER NAMBIRO MUVATSI ………………….….. RESPONDENT

(Appeal against a Ruling of MS. JENNIFER THUITA, SRM in Kakamega Chief Magistrate's Court in Civil Case No.123 of 1997)

<u>J U D G M E N T</u>

This is a judgment from a decision made in a Ruling of the learned trial magistrate, Ms Jennifer Thuita, Senior Resident Magistrate, in Kakamega Civil Case No.123 of 1997 in which the learned trial magistrate dismissed an application dated 9/3/2000 seeking to set aside an order dated 22-2-2000. The court held that the order was a consent order and dismissed the application.

In the application by Notice of Motion dated 9.3.2000, the appellant who was the applicant/plaintiff in the trial court contended inter alia, that the order of 22-2-2000 was not by consent, and that only one counsel was in court when the oral consent was recorded. The lower court record of 22-2-2000 shows that the matter came up before the said trial magistrate and that Mr. Amasakha appeared for the plaintiff. There was no written consent handed over to the court. Mr. Amasakha is not recorded as having said anything to the court. However, the court recorded an order to the effect that the application dated 11-1-2000 was allowed by consent and costs of the application and of the suit awarded to the Defendant, such costs to be agreed on or assessed by court.

Mr. Kaburi, learned counsel for the Appellant, urged the court to allow the appeal which was not defended as there was no attendance during the hearing by or for the Respondents who had been served. Mr. Kaburi argued all the 4 grounds of appeal as one. The 4 grounds stated:-

(1) THAT the learned trial magistrate erred in law and fact in disallowing the appellant's application without addressing her mind to the position that the consent order made on 22-2-2000 was improperly made in the absence of the parties and or counsel.

(2) THAT the learned trial magistrate erred in law and fact in disallowing the appellant's application without perusing the proceedings and prior Rulings made in another court and therefore failed to make a finding that the matter was not re judicata.

(3) THAT the learned trial magistrate erred in law and fact by entertaining the application leading to the consent made on 22-2-2000 when the matter that had been course listed for court No.5 had been dealt with and this was contrary to the rules pertaining to hearings and or mentions of cases in court.

(4) THAT the learned trial magistrate erred in law and fact in disallowing the appellant's application on the main ground that a consent is like a contract without having had proper recourse as to how the said consent was arrived at in the absence of the concerned parties and whether or not counsel attested to the fact that, if both were present which is denied, they had instructions from their respective clients and that each counsel had to concede to the consent order to that effect.

A consent can only be made by parties to a matter or their counsel. One party to a matter cannot alone record a consent without the other unless the consent is in writing and is signed by all counsel bound by it. No party can commit the other party or other parties in an oral consent unless the other party or other parties or their counsel are present and do consent to it. A written consent is required to be duly signed by all the parties bound by it or by their counsel.

In the instant case, there is no evidence that the Appellant or his advocate both of whom were not in court consented to the consent order. It seems to have been made suo moto and was clearly wrong.

The reasoning by the learned trial magistrate that a consent order cannot be set aside unless it was obtained by fraud or unless factors exist such as would entitle a court to set a contract aside can only hold good if there was a consent in the first place. It is my finding in this case that there was no consent by the parties and the order made on 22-2-2000 purporting to be by consent was in fact not a consent. It seems to have been an invention by the trial magistrate. I allow the appeal and grant the costs to the Appellant.

Delivered, dated and signed at Kakamega this 22nd day of November, 2007

G. B. M. KARIUKI

J U D G E