



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

Civil Suit 1037 of 2000

PETER G. NG'ANG'A PLAINTIFF

V E R S U S

STANDARD CHARTERED BANK OF KENYA LTD 1ST DEFENDANT

KEZIAH WANJIKU NG'ANG'A 2ND DEFENDANT

R U L I N G

By an application brought by way of a Notice of Motion under a Certificate of Urgency the Plaintiff herein sought orders **inter alia** that there be a stay of execution of the orders by consent entered into between the firm of Munene & Co. Advocates, and the firm of Gatheru Gathemia & Co. Advocates filed in court on 7-02-2002, pending the hearing and determination of the application.

The Plaintiff also sought an order that the consent orders and the judgment sum of Kshs.575,000/= be set aside, and that the Bill of costs dated 8-10-2001 be taxed afresh.

In support of the Application, the Plaintiff in his Affidavit on 12-02-2002 depones that the sums taxed by consent is punitive and that the same was procured by fraud, collusion and without instructions from the plaintiff/Applicant.

Mr. Ngogi who urged the application on behalf of the applicant told the court that by the time the consent order as to costs was recorded the Advocates then on record Gatheru Gathemia & Co. Advocates had ceased acting for the Applicant and a new firm (F.N. Wamalwa & Co.) were already on record and that a Notice of change was filed and served on the said Advocates on 12-11-2001. They were aware, of the change, and ought not to have acted further in the matter. The first Defendant's costs were taxed at Kshs.40,000/= while the 2nd Defendant's were taxed by consent at Kshs.575,000/= very large difference. For all these reasons Mr Ngogi prayed that the application be allowed.

On his part, Mr. Munene Counsel for the 2nd Defendant argued in opposition to the application, and attempted to separate the issue of the Bill of Costs, and secondly the Consent Order. On the issue of costs he submitted that the Bill of Costs was taxed on 1/11/2001 and explanations were duly given. The Applicant attended court in person and took part in the discussions between them and his counsel then on record failed to protest or demur when the consent was recorded. He changed his mind 100 days, later.

These are wild allegations, and in any event the consent order was filed before the new Advocates came

on record, and that there had been no service of Change of Advocates. The issue of the Bill of Costs and the Consent Order were different, the consent order relates to Kshs.800,000/= deposit lying in court, and that it should not be used to raise matters which are not related to it. These were matters between the Applicant and his client, and had nothing to do with the Defendant. Counsel relied on the cases of

1. **Kenya Commercial Bank Ltd Vs. Specialized Engineering Co. Ltd [1982] K.L.R. 485 and**
2. **Gachiri – Vs- Republic [1987] K.L.R.I.**

In the case of **Gacheri –Vs- Republic** the Court of Appeal held that the consent of a client is not needed for a matter which is within the ordinary authority of counsel. Thus if in court and in the absence of the client a compromise is entered into by Counsel whose authority has not been expressly limited, the client is bound.

So in the case of **Kenya Commercial Bank Ltd –Vs- Specialized Engineering Company Ltd**, in what the Editors of the Kenya Law Reports described as an **unprecedented move** the Court of Appeal (**Law, Miller & Potter JJA**) adopted as its judgment the High Court decision of Harris J. held **inter alia** that-

- (1) **A consent order entered into by Counsel is binding on all parties to the proceedings and cannot be set aside unless it is proved that 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 material facts or in misapprehension or ignorance of such facts 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 attention 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 of proof of any express negative direction the order shall be binding.**

These principles are binding upon this court. The issue is however that the consent concerns not the other side, but the Advocate and his client. The correspondence attached to the Affidavit of Peter G.N. Ng'ang'a in support of the Application clearly shows a fall-out and lack of understanding between counsel and his client. Such expression as **"I will engineer all moves to get you evicted immediately"** between Advocates and his client does not show a good relationship at all.

Bad blood between the Advocate and his client is not in my view sufficient ground for setting aside a consent order. It is also not sufficient to allege collusion and fraud between the Applicant's Counsel and the Respondents' Counsel. For such charge to hold, the Applicant must demonstrate and show some evidence of a clandestine or secret and illegal cooperation between his then Advocate, and the Respondents' Advocates to defraud or steal from the Applicant. The Applicant must show incidents of such illegal understanding and cooperation between him, and the other counsel.

In a letter dated 1/11/2001 by Gatheru Gathemia of that firm's name, and attached to the Applicant's own Supporting Affidavit to the Application and marked **"PGN3"** his counsel says-

"The Bill of costs drawn by the 2nd Defendant was taxed by consent and subject to your request and confirmation at Kshs.575,000/=

The Applicant states that he neither requested nor confirmed the taxation at Ksh.575,000/=. While admitting on my part that this is one possible line of attack against the said letter and calls for the writer to show when the request was made, and when it was confirmed by the Client Applicant, it seems to me clear from the submissions of Counsel for the 2nd Defendant that as both the Applicant and his Counsel were present and appeared before the taxing officer, the greater probability is that the Applicant was consulted by his counsel and advised on the recording a consent for the 2nd Defendant's Bill of Costs.

That is probably the true meaning and intent of the expression “**at your request and confirmation**” as used in Mr. Gatheru Gathemia’s letter of 1st November, 2001. It cannot be a foundation and basis of the allegation of collusion and fraud.

For these reasons, the Plaintiff/Applicant’s application dated 13-02-2002 and urged before me on 12/02/2005, fails, and the same is dismissed with costs to the Defendants. There shall be orders accordingly.

Dated and delivered at Nairobi this 7th day of March, 2006.

ANYARA EMUKULE

JUDGE.