REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1622 of 2001

SKYVIEW PROPERTIES LIMITED..…….....….PLAINTIFF/ RESPONDENT

-VERSUS-

THE ATTORNEY-GENERAL ……..…….....…...1ST DEFENDANT/APPLICANT

THE PRINCIPAL REGISTRAR OF TITLES

(Nairobi Central Land Registry) ….....2ND DEFENDANT/APPLICANT

THE COMMISSIONER OF LANDS.….....3RD DEFENDANT/APPLICANT

RULING

I. DISPUTING THE *BONA FIDES* OF LIABILITY-ORDERS: INTRODUCTION

The defendants' application by Chamber Summons, dated and filed on *5th March, 2004* was brought under Orders IXA, rule 10, XI and XXI, rule 22(1) of the Civil Procedure Rules; and s.3A of the Civil Procedure Act (Cap.21).

The applicants prayed, firstly, 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.* They were praying, secondly, that the judgement already delivered in *HCCC No. 1622 of 2001* and its amended decree issued on *15th August, 2002* and all consequential orders be set aside and vacated.

Why this application by a judgement-debtor? It is stated that the plaintiff's claim is predicated upon the judgement entered in *HCCC No. 387 of 1998* – which judgement the defendants/applicants are seeking to have set aside. It is contended that the consent entered into between the plaintiff and the 1st defendant to enter judgement, and the amended decree, were obtained through *fraud, collusion* and/or *mistake.*

II. EARLIER JUDGEMENT AND ORDERS CREATING THE DEFENDANTS' LIABILITY

The order and decree of the Court had been made in *HCCC No. 1622 of 2001* requiring payment to the respondent of Kshs.42,205,485/= with interest thereon at 29% per annum from the date of filing suit until payment in full.

Then an order was made in Chambers by ***Mr. Justice Aganyanya*** on *2nd April, 2003* in *H.C. Misc. Appl. No. 1449 of 2002* and was issued by the Deputy Registrar on *4th April, 2003*. The order reads:

"***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 pay to SKYVIEW PROPERTIES LIMITED Kshs.42,205,845/= with interest thereon at 29% per annum from date of filing suit until payment in full."***

The 3rd defendant did not comply with the order of *Mandamus* made by ***Aganyanya, J*** on *2nd April, 2003;* and this led to a contempt application brought by the respondent herein, by way of Notice of Motion dated *28th April, 2003*. This application came before me and I made the order on *5th December, 2003* after taking note of the *non-compliance* with the order of *Mandamus*:

"***This order has not been complied with, and the situation prevailing is that of contempt of the orders of the Court.***

"***In the circumstances, I now make this Order requiring the said Permanent Secretary in the Ministry of Lands and Settlement to appear before a Judge in this Court on Thursday, 11th December, 2003 at 9.00 a.m. to show cause why he should not be committed to jail.…"***

On 11th December, 2003 this matter was before me, but the said Permanent Secretary had *not appeared in Court*. I then made orders as follows:

"***On the 5th day of December, 2003 this Court made an Order which was duly extracted by the Deputy Registrar and served upon the Permanent Secretary in the Ministry of Lands and Settlement…***

"***There is an affidavit of service …dated 8th December, 2003 and filed in Court on 9th December, 2003. This shows that the said Permanent Secretary was duly served with the said Order of the Court.***

"***On the day in question, namely Thursday, 11th December, 2003 the said Permanent Secretary in the Ministry of Lands and Settlement did not report in Court as required.***

"***As the Permanent Secretary in the Ministry of Lands and Settlement has chosen to defy the lawful Order of this Court, it is now ordered that a warrant of arrest shall issue against the said Permanent Secretary, and he shall be brought before the Court for the question of his contempt of Court to be the subject of further Orders to be made by a Judge."***

The Permanent Secretary in the Ministry of Lands and Settlement was brought before the Court on *19th December, 2003* and, after hearing counsel on both sides, I made the following orders which were issued the same day:

"***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 2nd April, 2003 in an Escrow Account in respect of the claims determined in HCCC No. 1622 of 2001.***

"***2. That within 30 days from the date of this Ruling, the Permanent Secretary, Ministry of Lands and Settlement shall formally move the Court, in accordance with standing procedures, to resolve all matters in contention regarding the rights and duties of the parties in the present application. He shall file and serve all the required documents and prosecute the attendant application and shall file and serve all the necessary affidavits in support of his application.***

"***3. That subject to the foregoing two Orders, the applicant will be at liberty to file any necessary application for the purpose of protecting his rights embodied in the orders of the Court.***

"***4. That the warrant of arrest issued by this Court, on 11th December,2003 against the Permanent Secretary, Ministry of Lands and Settlement is hereby discharged.***

"***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."***

III. DEFENDANTS NOW MOVE THE COURT TO CHALLENGE THE EARLIER CONSENT JUDGEMENT AND ORDERS

Three weeks later, on *8th January, 2004* the 1st defendant gave written instruction to two private firms of advocates: M/s. Kapila Anjarwalla & Khanna Advocates, and M/s. Kaplan & Stratton Advocates, to move to challenge the consent judgement and orders of the Court which had been in favour of the plaintiff/respondent. The Attorney-General's said letter of instruction reads in part as follows:

"***RE: NAIROBI HCC NO. 1449 OF 2002***

IN THE MATTER OF SKYVIEW PROPERTIES, THE ATTORNEY-GENERAL AND THE MINISTRY OF LANDS

"*I have been requested by the Permanent Secretary, Ministry of Lands and the Permanent Secretary, Department of Governance & Ethics to instruct you to act in the above case.*

"*I have agreed to the said request and consequently I am hereby instructing you to act on behalf of the Ministry of Lands with immediate effect. The matter is extremely urgent as a warrant of arrest may well have been issued against the Permanent Secretary for failing to comply with a Court Order*.

"*Please note that should you agree to accept the instructions, your fees and disbursements will be paid by the Ministry of Lands and they have undertaken to do so."*

It is clear then, that it *was* the decision and instruction of the Permanent Secretary in the Ministry of Lands, who was threatened with contempt proceedings for disobedience to Court orders, which led the State Law Office to out-source services from the private legal sector, for the purpose of mounting the challenge to the Court's judgment and orders, by way of the Chamber Summons of *5th March, 2004.*

IV. HOW DO THE DEFENDANTS SEEK TO SUSTAIN THEIR CHALLENGE TO THE CONSENT JUDGEMENT AND ORDERS?

For the defendants, M/s Kapila Anjarwalla & Khanna Advocates came before the Court, in effect, bringing explanation for the earlier failure by the Permanent Secretary, Ministry of Lands to comply with the peremptory Order of Mandamus made by ***Mr. Justice Aganyanya*** on ***2nd April, 2003,*** in H.C. Misc. Application No. 1449 of 2002. The explanation is this:

"*The Consent Order entered into between the plaintiff and the first defendant to enter judgment and the amended decree for damages was obtained through fraud, collusion and/or mistake, as was the judgment obtained by, inter alia, the plaintiff in HCCC No. 387 of 1998."*

Obviously, it is not permissible to contest a *consent judgment* on the basis of bare allegations; that would be an abuse of process, given the solemnities of reaching *agreement* and even more so, the finality of the encapsulating ***Court Order*** and its symbols of expression. And so the applicants must state the grounds for their claim. The applicants state as particulars of fraud, the following:

(a) "*the officer or officers within the Attorney-General's Chambers who were responsible for consenting*

to the said judgment and amended decree herein knew or should have known of the non-compliance and breaches of the Government Proceedings Act and the Civil Procedure Act and the Civil Procedure Code on the part of the plaintiff herein and its co-plaintiffs in obtaining judgment in the said ***H.C.C.C. No. 387 of 1998****, and that an application should have been made for the said judgment to be set aside as being null and void, thus resulting in no damages whatsoever being payable to the plaintiff herein. The entering of the said judgment and amended decree in this suit by consent was clearly the result of improper collusion between the said officer or officers and the plaintiff".*

(b) *"the award of damages against the defendants herein was founded upon a suit where the Attorney-General had not appeared nor entered [a] defence for lack of service with the requisite notice under the Government Proceedings Act or any summons to enter appearance or any hearing notice. The entering of a consent judgment for damages for the 2nd defendant's failure to comply with the orders of the Court issued in* ***HCCC No. 387 of 1998*** *is evidence of fraud and collusion between the plaintiff and officers of the 1st defendant herein which said officers' actions resulted in the defrauding of the Government of Kenya of substantial sums of money";*

(c) *"there was no inquiry by either the 1st defendant or the Court as to why the 1st and 3rd defendants were joined as defendants in this suit not having been parties to the seminal suit; i.e.* ***HCCC No. 387 of 1998";***

(d) *"no damages were payable in any event as the 2nd defendant herein who was the 4th defendant in* ***HCCC No. 387 of 1998*** *complied strictly with the orders made against him in the said* ***HCCC No. 387 of 1998****, and the entering into a consent judgment and [the] amended decree by the 1st defendant for damages for non-compliance with those orders in this suit constituted a mistake and an error on the face of the record."*

Affidavit Evidence in support of the Application

In support of the application is an affidavit sworn by ***Kiriinya Mukiira***, Permanent Secretary in the Ministry of Lands and Settlement, on *5th March, 2004.*

The deponent deposes that upon being appointed Permanent Secretary, on *18th June, 2003* he became aware of a dispute over L.R. No. 209/3219, situated in Kileleshwa, Nairobi. He learned that there had in relation to the said parcel of land, been a *consent judgment* to which the *Attorney-General* was a party, for the payment of damages with interest and costs, arising out of alleged failure by the Principal Registrar of Titles (2nd defendant) to comply with the terms of a judgment delivered by ***Mr. Justice Kasanga Mulwa*** in *HCCC No. 387 of 1998.*

The deponent averred that he had come to learn that the said judgment in *HCCC No. 387 of 1998* was irregularly obtained: because the *Attorney-General* had not been served with a notice of intention to institute proceedings, and neither had the *Attorney-General* been joined as a party to the suit as is required by law. The deponent averred that the Principal Registrar of Titles had not been represented in *HCCC No. 387 of 1998,* and that the judgment therein had been obtained *ex parte* without any of the defendants therein being able to give evidence.

The deponent averred that the consent judgment and amended decree were issued in the sum of Kshs.42,205,845/= with interest and costs; and that he was instructed to make the said payment on behalf of the Ministry of Lands, to the plaintiffs' advocates, by the *Attorney-General's* Chambers. But the deponent did not pay: because the Pending Bills Action Plan Committee of the Treasury held the view that the judgment and the consequent decree had been irregularly obtained, and so payment by the Ministry of Lands and Settlement was not authorised. It is averred that the said Pending Bills Action Plan Committee had requested the *Attorney-General* to seek a review of the consent judgment. The *Attorney-General,* however, took the position that *"[Attorney-General's Chambers] had acted pursuant to instructions received from the Ministry of Lands and that in their view there were insufficient grounds for*

reviewing the said judgment".

The deponent deposes that: "*the decretal amount has never been paid to the plaintiff and the plaintiff therefore obtained an Order of Mandamus to compel the Ministry of Lands and Settlement to satisfy the decree through HCCC Misc. Application No. 1449 of 2002*". It is deponed that: *"The Plaintiff subsequently took out contempt proceedings against me despite my never having been a party to H.C.C.C. Nos. 1622 of 2001 or 387 of 1998*".

The deponent avers that he has caused the appointment of *out-sourced counsel* in this matter because: "an investigation of the facts relating to the obtaining of the plaintiffs' alleged title and the manner in which judgment was obtained reveal in my opinion unquestionable fraud".

Contesting the Defendants' Application

The plaintiffs/respondents declared their opposing stand on the defendants' application by their statement of grounds of opposition filed on 10th May, 2004. They asserted that:

(i) the application had been brought under wrong provisions of the law;

(ii) no valid grounds or reasons had been stated which would justify the setting aside or vacating of the consent judgment;

(iii) there are no valid grounds for consolidating the instant suit, ***No. 1622 of 2001 with HCCC No. 387 of 1998*** *and with* ***H.C. Misc. Appl. No. 1449 of 2002*** *– because in all these suits there is no judgment pending any more; the parties involved are different in each suit; the facts and questions of law are different in each suit;*

(iv) the particulars of fraud relied on have not been substantiated;

(v) the application has no foundation or basis in law;

(vi) the judgment in ***HCCC No. 387 of 1998*** *has not been set aside;*

(vii) the deponent of the supporting affidavit is not a proper party to the suit;

(viii) the supporting affidavit is perjurious and should be struck out;

(ix) the application is an abuse of the process of the Court.

Further Depositions for the Defendants

Learned counsel ***Mr. Shah***, representing the applicants, on *14th October, 2004* sought leave to file further affidavits; and on *30th November, 2004* the 3rd defendant swore an affidavit, followed on *16th December, 2004* with the affidavit of the 2nd defendant.

Judy Marilyn Okungu, the Commissioner of Lands (3rd defendant) averred in her affidavit that the suit *HCCC No. 1622 of 2001* was "*founded upon a purported failure by the 2nd and 3rd defendants herein to comply with the decree extracted in HCCC No. 387 of 1998."* She deponed that it was her predecessor, one ***Mr. Mwaita***, who had been the Commissioner of Lands when *HCCC No. 1622 of 2001* was filed. She had *"noted from the file relating to this matter that a consent was entered into between the plaintiff and the defendant settling the suit, whereby the defendants were to pay the plaintiff herein the sum of Kshs.42,205,847/00 as damages together with interest at 29% per annum thereon"* (para.5).

The deponent has no doubts as to the origins of the said consent judgement which is now being impugned; she, quite significantly, avers:

"I verily believe that the said consent was entered into as a result of instructions received from then Commissioner of Lands" (para.6).

The deponent is *"aware that the decretal amount has never been paid to the plaintiff"*, and she acknowledges that this non-payment is what had led to *"an order of mandamus to compel the Ministry of Lands to satisfy the decree through HCCC Misc. Application No. 1449 of 2002"* (para.7).

The deponent for some reason, decided to investigate the circumstances leading to the consent judgement which the High Court was already giving fulfilment, through the order of *Mandamus.* She avers (para.8):

"I have authorized my department to carry out investigations relating to the acquisition of the plaintiff's title and the manner in which judgement was obtained which investigations have revealed fraud and/or collusion on the part of the plaintiff and/or the former Commissioner of Lands (***Mr. Mwaita***) and/or his agents…It should be noted that the plaintiff's advocates herein appeared to be communicating directly with the former Commissioner of Lands and/or his servants and agents instead of using proper channels, namely through his advocate at the time, the Attorney-General."

Mrs. Okungu also depones that she believes the plaintiffs to have been involved in some act of collusion and fraud, because her counsel has advised her that "*Skyview Properties Limited has in its possession and control confidential copies of …correspondence..exchanged between various government Ministries concerning this… matter…"*

Judy Marilyn Okungu depones (para.12) that –

"it was a term of the consent that the plaintiff would be allocated an alternative plot as part-settlement of the plaintiff's claim vide the letter of allotment Ref. 159787 dated **24th June, 2002.** I have seen the said letter of allotment and have noted that the plot purportedly being allocated to the plaintiff therein is clearly marked as having been set aside for a primary school. I can confirm that the Commissioner of Lands had no authority to allocate the said plot under the provisions of the Government Lands Act and that any such allocation would be illegal and/or void *ab initio."*

The deponent agrees with the averments made by the Permanent Secretary in the Ministry of Lands and Settlement, ***Kiriinya Mukiira***, and depones that the consent orders in question were *"entered into as a result of fraud, mistake and/or collusion."*

The 2nd defendant***, Cyrus Wambugu Ngatia*** deposes that he is familiar with both the Correspondence File and the Deed File at the Lands Registry relating to the disputed property, L.R. No. 209/3219 Nairobi. He avers that a letter of allotment for that property had been issued on *10th August, 1994* in the name of one ***Hellen Chepkwony*** who formally accepted the allotment to herself on *15th August, 1994* and paid the requisite fees and stand premium in the sum of Kshs.140,290/= on *16th August, 1994;* and on *26th August, 1994* ***Title No. I.R. 63216*** over the said property was registered in the name of the said ***Hellen Chepkwony.*** The deponent deposes that on *20th January, 1995* the said property was transferred by ***Hellen Chepkwony*** to another legal person, namely ***Proven Insurance Agency Limited***, for a consideration of ***Kshs.1 million***.

Cyrus Wambugu Ngatia depones that on *28th May, 1999* – i.e. *four years and four months later* – the Court issued a decree in *HCCC No. 387 of 1998* in favour of Skyview Properties Ltd (the plaintiff) and this decree was registered against the same property, Title No. I.R. 63216.

Cyrus Wambugu Ngatia avers that he has "seen a *second title* (and Deed File) for the property that was purportedly issued to one Sygma Developers Limited on *10th November, 1994* and registered on *11th November, 1994* as [Title No.] I.R. 63744." He depones that the said Title No. 63744 "*was purportedly transferred to Skyview Properties Limited on 15th October, 1997."*

How can two separate Deed Files be kept by the Lands Office on the *same* property? And how can two unrelated transactions take place on *one single property*, involving *different parties* — and these transactions being undertaken within a mere three months of each other, and the responsible officers of the Lands Office are completely unable to notice the remarkable irregularity? How could the 2nd defendant honestly explain? Could he sincerely aver that one of the two property transactions was proper, and the other improper? Was there a forgery? Would that be known to the responsible officers of the Lands Office? If there was fraud or forgery, who would take responsibility for it – officers of the Lands Office, or strangers?

Cyrus Wambugu Ngatia, on the forgoing issues, thus averred (para.3(vii)):

"*to the best of my knowledge and belief there are no records or file at the office of the Commissioner of Lands relating to the allocation of Title No. I.R. 63744 such as:*

(a) a letter of allotment for the said title;

(b) an acceptance of letter of allotment;

(c) any receipt for payment of fees and charges; and

(d) a Correspondence File."

The 2nd defendant further depones that he believes to be true the advice given by his advocate, that the plaintiff had sought Court orders to the effect that the only valid title for the suit property was *Title No. I.R. 63744* and not *Title No. 63216*.

The deponent avers that, on the contrary, "Title No. I.R. 63744 cannot be a legitimate title" (para.5). His reason is that he has conducted certain investigations which vindicate his position on the matter. He deposes that *"to the best of my knowledge and belief there are no other records relating to the said Title [No. I.R. 63744] either at the Office of the Commissioner of Lands or at the Registry of Titles."*

The deponent deposes:

"*The Deed Plan number 183110 dated 6th May 1994 annexed to Title No. I.R. 63744 was allegedly prepared by a licenced surveyor pursuant to a private survey as the Commissioner of Lands had never initiated any indent to the Director of Surveys requesting for such a Deed Plan. Furthermore, the Deed Plan was not submitted to the Commissioner of Lands or the Director of Surveys as is the practice but appears to have been fraudulently inserted into a forged Grant of this plot of land and then placed in an invalid Deed File. The Deed plan was not even entered into the General Survey Plan as is the normal practice."*

The deponent strikes a contrast with the other title, No. I.R. 63216. He avers:

"*a genuine Deed Plan number 188829 dated 16th August, 2004 [?] and annexed to Title No. I.R. 63216 held by Proven Insurance Agency Limited on the other hand had been properly indented for by the Commissioner of Lands, prepared and authenticated by the Director of Surveys and does appear in the General Survey Plan."*

The 2nd defendant depones that the suit property had a Government house situated in it and that, on this account, it "*is a mandatory requirement that a valuation be carried out before allocation of the property, but there are no records at the Ministry of Lands and Settlement to indicate that this was done in relation to Title No. I.R. 63744."*

Cyrus Wambugu Ngatia depones that *"there was already a legitimate title in existence over the property, which title was issued before the plaintiff's title was issued. Furthermore, this earlier title*

number I.R. 63216 has a Correspondence File, Deed File and Supporting Documents for valuation, allocation, payment, authenticated Deed Plan and issuance of title which are all absent in relation to Title No. I.R. 63744."

The deponent deposes that the plaintiff's Title No. I.R. 63744 bears certain notable discrepancies, to wit –

(i) the term of lease created by the Grant numbered I.R. 63744 commences on 1st May, 1987 and the annual rent is said to be Kshs.17,000/=;

(ii) there is no explanation for the term beginning to run seven years before registration of the Grant;

(iii) the term created by Grant No. I.R.63216 begins on 1st August, 1994 and the annual rent is expressed as Kshs.10,000/=;

(iv) the land rent reserved in respect of Grant No. I.R. 63744 was not paid by either the plaintiff or the plaintiff's predecessor-in-title until several years after the claimed issue of this Grant.

The 2nd defendant avers that he, together with the Permanent Secretary in the Ministry of Lands and Settlement and the 3rd defendant had conducted investigations, and come to the conclusion that two separate titles, Grant No. I.R. 62216 and Grant No. I.R. 63744 could not have been issued, and that Grant No. I.R. 63744 must have a *fraudulent* provenance; and that on this account the defendants have sought the *setting aside* of the judgements entered in *HCCC No. 387 of 1998* and *HCCC No. 1622 of 2001* together with all consequential orders.

It is deponed that the judgement in *HCCC No. 387 of 1998* against the Principal Registrar of Titles was set aside by ***Mr. Justice Ransley*** on *19th September, 2004.*

The deponent avers that the damages claimed by the plaintiff are for loss of profits and expenses for a project which had not received the approval of the Commissioner of Lands – and in respect of a period running to five months prior to the plaintiff's date of alleged acquisition of title. It was averred that there had been no attempt by the plaintiff to comply with Special Conditions Nos. 2 and 9 of the plaintiff's alleged title – and no damages or loss of income could have been sustained until the plaintiff's building plans under the Special Conditions had been approved by the Commissioner of Lands.

The 2nd defendant depones that the impugned consent judgement carried a term to the effect that "*the plaintiff would be allocated an alternative plot as part-settlement of the plaintiff's claim vide letter of allotment Ref.159787 dated 24th June, 2002*." He avers that the parcel of land thus marked for allocation to the plaintiff, is set aside for the construction of a primary school, and that on this account, the Commissioner of Lands had no authority to allocate the same under the provisions of the Government Lands Acts.

V. WAS THE CONSENT JUDGEMENT FOUNDED ON FRAUD? — SUBMISSIONS FOR THE DEFENDANTS

This matter first came up before me for hearing on *26th January, 2005* when the defendants/applicants were represented by learned counsel ***Mr. Ishan Kapila*** and learned counsel ***Mr. Shah,*** while the plaintiff/respondent was represented by learned counsel ***Ms. Onyambu*** holding brief for ***Mr. Ochieng Oduol.***

Mr. Kapila informed the Court that on the previous day, learned counsel ***Mr. Ochieng Oduol*** had served notice to cross-examine the several deponents on the applicants' side. He, however, doubted the necessity of such cross-examination: particularly because the consent judgement in *HCCC No. 387 of 1998* which was the *basis of the rights* being canvassed by the respondent, had already been *set aside* by ***Mr. Justice Ransley***. Learned counsel urged that *HCCC No. 1622 of 2001* which sought to give fulfilment to the consent, was founded on a mistake, fraud or error and should be set aside; *HCCC No.*

1622 of 2001 was a consent judgement for damages for failure to obey the orders in *HCCC No. 387 of 1998;* and in *H.C. Misc. Appl. No. 1449 of 2002* orders of *Mandamus* had been issued to enforce the orders in *HCCC No. 1622 of 2001.* Learned counsel's argument is that the correct position in law, to be upheld by this Court, is that there is a domino effect: the setting aside of the consent judgement in *HCCC No. 387 of 1998* inevitably leads to a setting aside of the orders in *HCCC No. 1622 of 2001* and *H.C. Misc. Appl. No. 1449 of 2002;* and that enforcing the orders in *HCCC No. 1622 of 2001* would be the same thing as "*enforcing damages for a non-existent judgement."*

Mrs. Onyambu did not reply to the foregoing submission, but instead sought adjournment, on the grounds that ***Mr. Oduol*** was involved in another matter, *H.C. Misc. Appl. No. 270 of 2004* at Eldoret. Even as he contested the application for adjournment, ***Mr. Kapila*** had his own application: that prayer No. 1 in his clients' Chamber Summons of *5th March, 2004* be amended to specifically state that the orders in question be "*reviewed and set aside and vacated;* and that in the rubric to the application, "Order XLIV" be indicated. I heard contending submissions on these issues and ruled as follows:

"***The application before the Court is the defendant's Chamber Summons of 5th March, 2004. The main prayer in that application is for a setting aside and vacating of the judgement and the amended decree issued on 15th August, 2002 and all consequential orders.***

"***Mr. Kapila for the applicants has made an informal application by virtue of O.VIA, rule 8 and O.VIB, rule 3, for amendment to [his application]. This proposed amendment adds the word 'review', but does not vary the substantive terms, 'vacating' and 'setting aside'. So he would have the relevant prayer read that the subject judgement and orders be "reviewed and set aside and vacated.***

"***Ms. Onyambu for the respondent has opposed the application for amendment, on the basis that it would be prejudicial to her clients.***

"***It is not quite clear [to me] how the word 'review' would qualify the prayers already made, which are in stronger terms.***

"***After hearing counsel for some time this afternoon, I have formed the distinct impression that the cause of justice requires the whole matter to be heard to conclusion. I do not believe such a course would be prejudicial to any genuine rights or interests of any party.***

"***Towards that goal I now make the following orders:***

(1) The applicant's first prayer in the Chamber Summons of 5th March, 2004 is hereby amended to include the words proposed by the applicant – i.e., "reviewed and set aside and vacated." Order XLIV is also to be cited in the caption.

(2) Hearing is adjourned, and the respondent to bear the applicants' costs for today in any event.

(3) Respondent to pay the Court's adjournment fees.

(4) This matter to be listed for hearing on Monday, 28th February, 2005 at 2.30 p.m.

(5) For the said hearing, the following three files shall be placed together before the Court: HCCC No. 387/1998; HCCC No. 1622/2001; H.C. Misc. Appl. No. 1449/2002."

Further hearing did not take place until *9th May, 2005* when learned counsel ***Mr. Aronson*** and ***Mr. Shah*** appeared for the applicants, while ***Ms. Onyango*** held brief for ***Mr. Ochieng Oduol,*** for the respondent.

Mr. Shah submitted that apart from the fact that *HCCC No. 387 of 1998* (which was in favour of the respondent) had been set aside by ***Ransley, J*** on *19th September, 2004* the suit land could not possibly have been allocated to the plaintiff or the plaintiff's predecessor-in-title, since it had already been

allocated to another party – ***Hellen Chepkwony*** whose title was Grant No. I.R. 63216. It was impossible in those circumstances, it was submitted, that there could be a parallel title, No. I.R. 63744 in favour of the respondents; and consequently, it was urged, Title No. I.R. 63744 was a *forgery*, was illegal and was void. Yet, learned counsel submitted, it was precisely on the basis of the *invalid title*, that the respondent had filed three different suits. In *HCCC No. 387 of 1998* the respondent had sought and obtained a *declaration***,** regarding the status of the respondent's Title No. 63744; but in the decision of *19th September, 2004* the orders made in that case were set aside.

On the next occasion of hearing, the defendants were represented by learned counsel ***Mr. Shah***, while learned counsel ***Mr. Ochieng Oduol*** represented the respondent.

I had on *26th January, 2005* allowed a limited amendment to the application herein; and on the basis of the orders of the Court, ***Mr. Shah*** had filed an affidavit as required where an order for review has been made. His oral application for the adoption of this formal affidavit was the occasion for a new contest between counsel and it became necessary for me to rule as follows:

"***The main question in these proceedings is the status of the consent orders of 1st July, 2002 and 8th August, 2002; whether they are proper and should stand, or whether they ought in the interests of justice and on the basis of legal principles, to be set aside.***

"***That ultimate decision is the task before this Court. My expectation is that both parties will conduct their matters professionally and with integrity, so as to ensure that the Court is not involved in any unnecessary technical hitches which would prevent a decision on the merits being arrived at…***

"***Therefore, even as I urge counsel to ensure strict compliance with the governing procedures, I have to state that I will attach more weight to submissions on merits than on technicalities. I have to take this position because it appears to me that this is an important matter with dimensions of merit which are as important to the parties as they are to the broader public interest***.

"***Both parties were represented before me on 26th January, 2005 when a first hearing took place on the defendant's Chamber Summons…of 5th March, 2004.***

"***On that occasion, Mr. Ishan Kapila for the applicant, made an informal application under O.VIA, rule 8 and O.VIB, rule 3 for an amendment to the substantive application***…

"***After giving the necessary hearing in accordance with the law, with Ms. Onyambu representing the respondent, I made an order allowing the applicant's informal application.***

"***Therefore that was the valid decision of the High Court, and it defines the framework within which today's hearing and future hearings must take place.***

"***Today, Mr. Shah representing the applicant has applied for leave to have an affidavit made part of the Court record. The affidavit deals with a purely incidental matter, in relation to the orders which I had made on 26th January, 2005.***

"***Mr. Shah has submitted that it is now settled practice that in an application such as the present one, where review is involved, the order or decree to be reviewed is to be attached. Consequently, on the basis of the amendment which I had earlier-on authorised, Mr. Shah wants to attach the said order – and of course, it comes along with an affidavit.***

"***Learned counsel Mr. Oduol has opposed this application on the ground that it will create a mix of procedural paths, as between the Notice of Motion and the Chamber summons; and that it will cause prejudice to the respondent.***

"***First, I have to restate the principle that must guide the Court in disposing of this matter; the***

substantive issues should be deliberated upon with expedition, and the matter laid to rest.

"***I would rule, therefore, that any technicalities of a mix between the demands of the Notice of Motion and the Chamber Summons will not be held to determine the process of hearing, in this matter***.

"***I have noted that the respondent has not yet started making submissions. I think the respondent is unlikely to be prejudiced if the applicants' request is allowed.***

"***Therefore, I now allow Mr. Shah's application, and hereby make this order deeming the affidavit by Chiraag Shah dated 26th May, 2005 and filed on 3rd June, 2005 to have been properly filed."***

Learned counsel ***Mr. Shah*** restated the point that the respondent's whole claim had been founded on the failure by the defendant/applicant to comply with the order of the Court in *HCCC No. 387 of 1998*, but in that case the judgement as against the 4th defendant (2nd defendant in *HCCC No. 1622 of 2001*) has been set aside.

The Seminal Orders of the Court in HCCC No. 387 of 1998

In that case three plaintiffs (including the plaintiff in *HCCC No. 1622 of 2001)* sued five defendants.

The facts of that case were that the 1st plaintiff had purchased the suit land, L.R. No. 209/3219 from the 2nd and 3rd plaintiffs and the same was transferred to the 1st plaintiff and the title documents were registered with the 4th defendant (2nd defendant in *HCCC No. 1622 of 2001)*. At the hearing before ***Kasanga Mulwa, J*** the 1st plaintiff produced the agreement for sale on the basis of which it claimed the suit land. For the 1st plaintiff, evidence had been given by one of its directors, ***John Wachira Wambugu,*** that the title to the suit land bore *caveats* when the 1st plaintiff purchased the same; and that upon a payment of money being made, the caveats were removed. Thereafter land rents, and City Council charges were paid. *Registration* of the property in the name of the 1st plaintiff then met with obstacles, "*as there were allegations that there were two titles to this property*" (***Kasanga Mulwa, J***). Evidence was given that summons in the case was dispatched by *substituted service*. However, the *5th defendant* who was claiming ownership of the suit land, *filed no defence*. From this state of facts the learned Judge in that case proceeded to hold that *"the plaintiff would be entitled to the declaration that he is the sole owner of the land as against the 5th defendant*." The learned Judge further held in the *ex parte* judgement:

"***The evidence supports the claim to ownership by virtue of transfer of the land to the plaintiff… There will be judgement for the plaintiffs that the 1st plaintiff is the sole registered proprietor of the suit land to the exclusion of the 5th defendant. The 5th defendant is restrained whether by itself, its servants, agents, directors or otherwise from entering or continuing to enter or selling, charging, disposing of or in any way dealing with the suit premises. The 4th defendant [i.e., 2nd defendant in HCCC No. 1622 of 2001] or its officers are restrained from registering any instrument of disposition, transfer or charge of the suit premises on presentment for registration by the 5th defendant or its agents or servants. The 5th defendant shall pay the cost of this suit to the plaintiffs."***

The foregoing judgment, which was delivered on *1st August, 2000* was challenged, leading to a ruling by ***Ransley, J*** delivered on *19th September, 2004*. There were two basic questions before ***Ransely, J:*** (i) had the plaintiffs' suit papers in *HCCC No. 387 of 1998* been duly served? (ii) did the applicant (the Principal Registrar of Titles) have a *prima facie* defence?

The holding of the learned Judge appears in the following passage:

"***The defence proposed puts facts into issue on a number of matters, which in my view raises serious issues, which should be canvassed before a Court.***

"***A great deal was said about fraud not only of the respondent but much more concerning the officers in Government who dealt with the issue of the title in favour of Skyview. This is not a proper place to deal with such allegation nor do I perceive that it is an easy question to determine. However at this stage although I accept that what the process server said was true, nevertheless I have no evidence to show that the proper person in Government received either the summons or hearing notice. I also am of the view that substantial issues need to be determined by the Court in respect of the relief sought against the applicant and set aside the ex parte judgement in so far as the applicant is concerned."***

Further Submissions for the Defendants

Learned counsel ***Mr. Shah*** restated the fundamental point in ***Ransley, J's*** ruling: there are *substantive issues* as between the parties which have yet to be determined, the main one being, whether the plaintiff herein has a *valid title*. ***Mr. Shah*** submitted: "If judgement in *HCCC No. 387* has fallen pending a full determination, then the consent in *HCCC No. 1622* which was founded on *HCCC No.387* must also, accordingly, be set aside – to await the outcome of *HCCC No. 387*. Learned counsel argued, entirely logically, I think, that there would at this stage be *"no need for any great detail on the validity of the plaintiff's title,"* and that *"that is something which the Court will address in HCCC No.387."*

However, learned counsel still urged the essential claim foreshadowed in the detailed affidavit of ***Cyrus Wambugu Ngatia;*** that there was a *previous title* already issued in respect of the suit property, at the time the respondent claims to have acquired the same property; that in these circumstances, a second title in favour of the respondent could not have been properly issued; that the records in the Lands Registry do not reveal that any of the formal procedures were ever complied with, in respect of the respondent's title.

Learned counsel also impugned the consent orders upon which the respondent had relied, as having been the product of *fraud* and *collusion*, or *mistake*. The respondent's case in *HCCC 387 of 1998* had been that the Principal Registrar of Titles (2nd defendant herein) be prohibited and restrained from registering any instrument or disposition or charge, on presentment for registration by the 5th defendant in that case; how could that be when *it is precisely the 5th defendant, in whose name the registered title had been issued?*

Mr. Shah submitted that the respondent had no valid title to the suit land, and that the respondent's claim in *HCCC No. 1622 of 2001* for damages, in the sum of Kshs.30 million and the *consent* then reached on such a claim, had no basis in law. Learned counsel urged that the question of *validity* must first be determined, before any claim for damages by the respondent could be made.

Examination of Deponents

Judy Marilyn Okungu the Commissioner of Lands appeared in Court on *18th July, 2005* and was cross-examined and re-examined on her affidavit of *30th November, 2004*.

The deponent averred that she had been appointed Commissioner of Lands on *12th February, 2003* and his predecessor ***Sammy Mwaita*** had been in office when the instant dispute arose. The deponent had no occasion to deal with the dispute before she became the Commissioner of Lands.

The deponent testified that investigations had been conducted on the instant matter during her incumbency as Commissioner of Lands, and the same have revealed that the title to the suit land claimed by the respondent had been acquired in circumstances of *fraud, collusion* and *misrepresentation.*

The deponent testified that there were *two deed files* on the suit property, and that this was "very unusual." In normal practice, she averred, every registered property has *recorded history* – which incorporates the letter of allotment, as well as correspondence relating thereto. In the absence of such history, the deponent averred, there would be evidence of irregularity. In the instant case there had been *one land reference number*, in respect of the suit property, with two different deed files. At the time the land title in favour of Skyview Properties Ltd. was registered, there was *already another title in existence* – but this fact was not apparent on the face of any record in the Lands Registry.

The deponent was familiar with the correspondence showing that some *consent on liability* had been reached between the parties; the fact that the Commissioner of Lands had given the all-clear for a negotiated resolution; the fact that the Attorney-General's office claimed not to have been consulted on such negotiations. In the deponent's view the circumstances of the dispute herein would show a *collusion* mounted from *both* the State Law Office and the Lands Office, though she could not give more details in that regard.

On re-examination, the deponent testified that as Commissioner of Lands she had no power to cancel a registered title deed, and she can only do so if ordered by the Court. She averred that the prior title to the suit property was *No. 63216* which was registered on *26th August, 1994* while the title claimed by the respondent, namely *I.R. 63744* was only registered on *11th November, 1994*; and that, consequently, Title I.R. No. 63216 would have *precedence*. She further testified that in the case of the first title, there was *correspondence* on file showing the process of title-creation; but in the case of I.R. No. 63744 though a title existed, it had no background. The deponent averred that in any situation in which a second title is found to exist for a property, the party claiming the second title ought to refer the matter to the Principal Registrar of Titles who would call up the two titles, determine the proper title, and refer the matter to Court for orders to expunge the erroneous title.

In the course of the testimony given by the Commissioner of Lands it became necessary to make orders for further affidavits to be sworn. I made orders as follows:

"***There is definitely a gap in information as to the role of the Attorney-General's office in the negotiation process that took place between the plaintiff and the Commissioner of Lands.***

"***Therefore I now order that counsel for the applicant herein shall secure the swearing of affidavits by: (a) the former Chief Litigation Counsel, Mrs. V. Onyango, and (b) the current Chief Litigation Counsel – the same to be filed and served within 20 days of the date hereof."***

Learned counsel ***Mr. Shah***, however, informed the Court on *24th October, 2005, 3rd November, 2005* and *15th November, 2004* that neither of the two Government Officers had been willing to make depositions on the matter in hand; *they were said to have been satisfied with what is already on the record.*

Learned counsel ***Mr. Oduol*** urged that adverse inference be drawn from the failure of the two officers who were serving or had served in the State Law Office, to give affidavit evidence. In his words:

"Serious allegations of fraud and collusion have been made in Court. Have these been reported to the Police? If it is true the Commissioner for Lands colluded with the Attorney-General, has this been reported to the Anti-Corruption Commission?

I made orders vacating earlier orders for the swearing of affidavits by the said officers, and directed that continued hearing do take place.

Cyrus Wambugu Ngatia the Principal Registrar of Titles (2nd defendant) was sworn on *20th June, 2006* and testified that he had taken up his appointment as such on *23rd November, 1999* and was not the occupant of that office as at *10th November, 1994* when Title No. I.R. 63744 was registered in favour of the respondent herein. He averred that he had in his possession *two original deed files* for the property in dispute, one registered as I.R. 63744 and the other as I.R. 63216.

The deponent testified that the deed file for I.R. 63744 contained the title and other documents supporting the entries on file; and Entry No. 7 (a supporting document) showed that a caveat had been entered by the Registrar of Titles; it also contained copy of a letter of allotment to Skyview Properties Ltd, by which the Commissioner of Lands was *offering an alternative plot in compensation*; Entry No.3 was caveat No.3; Entry No.2 was Caveat No. 2; then there was the withdrawal of Caveat No.3; then Transfer No.6 – which was the transfer document to Skyview Properties Ltd. On file is also a receipt – showing that some money had been paid to the Lands Office; a rent clearance certificate issued by the Lands Office; Consent of the Commissioner of Lands to transfer and charge; a rates clearance certificate. The transferor is shown as Sigma Developers Ltd, and the transferee as Skyview Properties Ltd. It is shown that stamp duty had been paid, receipt No. D921499 – in the sum of Kshs.140,000/=.

The deponent averred that apart from the *Deed File* and its contents, there were no other records relating to the title claimed by the respondent, I.R. No. 63744. He testified that each title comes from an allocation by the Commissioner of Lands – but for I.R. No. 63744 there were *no other documents supporting such allocation*. The deponent averred that the creation of land title is a process that comes with a *Correspondence File* – otherwise there would be no title created; the *root of any title* issued by the Commissioner is always found in the Correspondence File. But in the case of the respondent's title, I.R. No. 63744 the deponent had found *no Correspondence File* – and *"so we have not traced the root of the title."* The deponent averred: *"I have asked for such a file. I have been told there is no such file. When you ask for the file, you get a different title number."* He further testified: *"Apparently from 1994 we have transacted without a correspondence file. Transactions were based on correspondence in a different file. It is not supposed to happen but it did."*

The deponent averred that in practice, *"it is not possible for there to be two legitimate files."* He averred that the second title, I.R. No. 63744 *"would appear to be a forgery*"; but he added: *"I never said it was forged by Skyview. I have not accused anyone."*

On re-examination by ***Mr. Shah,*** the deponent testified that Title No. I.R. 63744 as shown on the deed file, relates to property L.R. No. 209/3219 issued with title deed No. 63216 on *26th August, 1994* and registered on *26th August, 1994* in the name of ***Hellen Jerotich Chepkwony*** – there was a Correspondence File on this, No. 159787 containing the letter of allotment and other documents; and such documents are not found with registration No. I.R. 63744. The deponent averred that a *Deed File* only relates to title and supporting documents; but a *Correspondence File* shows allocation and attached conditions.

VI. COMPROMISE HAD RESOLVED SUITS; *PACTA SUNT SERVANDA*; FEIGNED ISSUES RAISED TO CHALLENGE CONSENT; ABUSE OF PROCESS; PUBLIC POLICY ISSUES – SUBMISSIONS FOR PLAINTIFF/RESPONDENT

Learned counsel contended that the defendants' prayers that the consent decree of *15th August, 2002* be set aside should not be granted, on account of well-settled *principles* that govern the setting aside of *consent judgements*. In canvassing the said principles ***Mr. Oduol*** cited the Court of Appeal decision in *Diamond Trust Bank of Kenya Ltd. v. Ply & Panels Limited and 5 Others*, Civil Appeal No. 243 of 2002. The following are relevant excerpts from that decision (taken from the judgement of ***Githinji, J.A.):***

(i) *"**The law is that, so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full conduct over the trial and has apparent authority to compromise all matters connected with the action – see Shah v. Westlands G.S.P. Ltd [1965] E.A. 642; Florah Wasike v. Destino Wamboko (1982 – 88) KAR 625; Karani & 47 Others v. Kijana & 2 Others [1987] KLR 557…"***

(ii) ***"The Court has jurisdiction to set aside a consent judgement if it is shown to have been based on an agreement induced by misrepresentation. The representation must be shown to have in fact influenced the representee into entering into an agreement."***

(iii) *"**…the respondent satisfied the consent judgement on 11th December, 2000 by paying***

Kshs.121,482,656/40 to the bank…[The] figure of Kshs.121,482,656/40 was computed on the basis of the outstanding balance of Kshs.106,625,065/18, the amount in the disputed compromise. The respondent paid this sum despite the fact that the order of 27th November, 2000 staying execution of the consent judgement until the application for review had been determined was still in existence. That conduct amounts to an affirmation of the contract – see para.474 page 316 of CHITTY ON CONTRACTS, 26th ed; Vol.1, which states:

'***If the representee having discovered the misrepresentation either expressly declares his intention to proceed with the contract, or does some act inconsistent with an intention to rescind the contract, he is bound by his affirmation.'***

"***Moreover, where the consent judgement impugned has been executed like in the present case, the Courts are less likely to set aside the consent judgement."***

Githinji, J.A. in the *Diamond Trust Bank of Kenya* case considered that it is not the business of the Court to decide, nor to disrupt *contractual arrangements* between parties, and the Court will be inclined to hold that a contract remains in force if a proper judicial interpretation of the circumstances indicates that the parties have regarded themselves as bound by their agreement. The learned Judge of Appal accepted the principle stated by *Lord Denning,* ***M.R. in F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd*** [1967] Lloyd's Rep. 53:

"***In a commercial agreement the further the parties have gone with their contract the more ready the Courts are to imply any reasonable terms so as to give effect to their intention. When much has been done, the Courts will do their best not to destroy a bargain. When nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed."***

Githinji, J.A., in the common position of the Court, agreed with the appellant's counsel that –

"***the whole suit is exhausted and nothing more remains to be done. By making the disputed payments which are the subject-matter of the suit…the substratum of the suit is gone…."***

Learned counsel ***Mr. Oduol***, relying on the *Diamond Trust Bank case,* submitted that the defendant/applicant herein could not rely on the decision of ***Ransley, J*** in *HCCC No. 387 of 1998* to obtain the setting aside of the consent decree in question (in *HCCC No. 1622 of 2001*). He urged that in *HCCC No. 387 of 1998* the respondent herein had sued the 2nd holder of title to the suit property, and had sought declarations that the respondent's title was the better title; and so, it was urged, the 2nd holder of the title was the *primary target* of the suit and not the Principal Registrar of Titles whose role was only nominal — the role of registering the Court order. ***Mr. Oduol*** contended that the plaintiff's suit in *HCCC No. 1622 of 2001* was not premised on *HCCC No. 387 of 1998* and so the fact that the Court had set aside the judgement in that case, in respect of the 2nd defendant in *HCCC No. 387 of 2001* was of no significance. And so, counsel maintained, the Attorney-General who had been duly notified of the suit in *HCCC No. 1622 of 2001* had had authority to participate in the compromise which was made between the parties and which was now being challenged by the defendants/applicants. In the words of learned counsel, "the *Attorney-General* in consultation with the Commissioner for Lands having considered the matter, undertook negotiations and this came to the *consent letter* signed by the Chief Litigation Counsel; and this was a valid compromise of the suit." ***Mr. Oduol*** contended that it was no longer open to the defendants to reopen this matter for the purpose of questioning the compromise reached."

Learned counsel urged that the *defendants had agreed to the negotiations* leading to the compromise, for the reason, which emerges from the depositions in support of the application, that the Lands Office system of effecting registration had not operated well. He urged that "the decree [in *HCCC No. 1622 of 2001*] sought to be set aside was negotiated and a compromise reached, over a period of time." It was ***Mr. Oduol's*** contention that the deponents of the supporting affidavits, when examined in Court, had failed to show "*the fraud so loudly pleaded in the application and the affidavits"*, and that even the collusion alleged, or the mistake complained about, had not been proved. In the words of learned

counsel: *"We went step by step; they all admitted this was a valid title; they were unable to show any forgery."* ***Mr. Oduol*** submitted that the applicants had not discharged the burden resting upon them, of proving fraud, collusion or mistake in the creation of the title No. I.R. 63744 which is being claimed by the respondent herein.

Learned counsel submitted that it was proper to draw adverse inference against the applicants, from the fact that more light would have been shed on the collusion claim if depositions had been made by both ***Mrs. V. Onyango*** the Chief Litigation Counsel in the Attorney-General's Office at the time of the making of the impugned compromise, and ***Ms. M. Kimani*** the current holder of that office at the time of the hearing of this matter; but *both failed to respond* when given an opportunity in Court to file affidavits. When the Court creates such an opportunity for a party, the same is naturally to be expected to be taken up, in a situation in which good faith prevails. The Court of Appeal in *Kenya Commercial Bank Limited v. Benjoh Amalgamated Limited & Another*, Civil Appeal No. 276 of 1997 had thus stated the relevant principle guiding the Court as follows:

"***The Judge also said that it was not known whether or not Mr. Meenye had filed a notice of change of advocate or whether he was holding Mr. Kinyua's brief…We are told D.M. Kinyua died in 1993 but Mr. Meenye is alive and well and is still practising as an advocate. The easiest thing would have been for the respondents to ask him to clarify the matter by way of an affidavit. They chose not to do so, and the only inference we can draw…is that Mr. Meenye's response would have been adverse to their case."***

Mr. Oduol's main argument rested on the status of the impugned consent decree, as founded on *consultations between the then Commissioner of Lands and the Attorney-General*. Counsel urged that the said consent superseded the original cause of action that was contained in the plaint, in view of the chronology of the relevant events: the impugned title was issued on *10th November, 1994*; the suit was filed on *25th September, 2001*; and the consent decree was issued on *15th August, 2002*. All original claims, it was urged, had resolved into the *consent,* and what was now in force was the new agreement represented by the consent. Counsel urged: "Once a consent is entered into agreeing on compensation, then the original claim based on title can no longer be revisited for any anomaly; and the applicant having entered into the consent, cannot now revisit the original claim based on title."

Learned counsel ***Mr. Oduol*** submitted that in the instant matter the Government had issued a title in respect of a property; when it is discovered that there had been double-titling, the Government decides to compromise, negotiate and agree on terms of settlement; the compromise is crystallized in judicial orders; and then the Government fails to honour the compromise; thereafter an order of *Mandamus* is issued which the Government dishonours; and then, upon the threat of imprisonment for the Permanent Secretary for Lands and Settlement, the Government undertakes to pay the decretal sum into an escrow account; and then the defendants come up with an application alleging fraud, mistake and collusion in the consent. Such a scenario, learned counsel submitted, was an abuse of the process of the Court.

Mr. Oduol submitted that the compromise which led to the impugned consent order, had not been arrived at through misrepresentation, and misrepresentation had not been pleaded or proved by the applicants. From the evidence, counsel noted, there were Lands Office records on the impugned title, I.R. No. 63744; and long before the plaintiff purchased it, there had been other transactions with that very title.

Learned counsel submitted that the application coming some *two years* after the impugned consent order was made, was excessive delay such as would lead to the inference that there was an *affirmation* of the compromise. Counsel noted that the only explanation offered for the delay was that *"there was a new Government, and an Oversight Committee which was not pleased with the compromise*"; and that the instant application was only made *"when the Permanent Secretary was about to be committed to jail."*

Delay in impugning a compromise was adverted to in the *Diamond Trust Bank of Kenya* case (*op.cit*); and ***Githinji, J.A.*** thus pronounced himself:

"***The conduct of the parties since the compromise was recorded is a relevant consideration in an application to set aside the compromise. Excessive delay in making an application to set aside may be construed as an affirmation of the compromise depending on the circumstances of each case. In this case the application to set aside the compromise was made over four-and-a-half months after the consent judgement was entered and only two days before the bank became entitled to realise the securities. There is no explanation for this delay. It is apparent that the application to set aside the compromise was made to facilitate an application to stay the execution of the consent judgement and thereby buy more time."***

Mr. Oduol submitted that even the conduct of the applicants in paying the decretal sum into an escrow account amounted to an affirmation of the compromise. It was urged that the defendants had secured budgetary allocation for meeting the decretal amounts; they had an order of *Mandamus* against themselves; and they had made the payment into escrow account.

Learned counsel contended that there was a valid *agreement for compensation* to the respondent; that it was no longer possible for the respondent to say it has title, which has been surrendered to the Commissioner of Lands; that the suit *HCCC No.1622 of 2001* is now exhausted.

Mr. Oduol submitted that the instant application, in effect, constituted a *fraud* upon the Court and *contempt* of Court: because there was correspondence showing that there had been a negotiated settlement leading to the issuance of a consent decree; an unjustified claim of collusion, misrepresentation and mistake, as the basis of the consent order was now being claimed; the defendants knew that a valid land title had been issued to the *respondents*. In effect, it was urged, the defendants had decided to place before the Court a *feigned issue*, in order to set up a case to justify the setting aside of a valid compromise negotiated and entered into after consultations.

Learned Counsel drew the notion of "feigned issue" as a basis for a motion in Court, from the English case, ***R .v. Weisz & Another,*** *ex parte* ***Hector MacDonald*** [1951] All ER 408 in which the Court held (at p.408):

"…***an action to recover money which was prohibited by statute was an abuse of the process of the Court, and, although it was not necessarily a contempt of Court to bring such an action, to attempt to deceive the Court by disguising the true nature of the claim and putting forward a feigned issue was a contempt, and therefore, since the endorsement was made in the name of M's firm and he was a partner having charge of the proceedings, although he had not seen the endorsement on the writ, the matter having been left to a managing clerk, he was guilty of contempt …."***

Mr. Oduol submitted that the Commissioner of Lands and the Principal Registrar of Titles had decided to place before the Court a *feigned issue;* and the consent decree should on that ground be upheld.

Learned counsel raised a *public policy* issue in aid of the respondent's case that the application be dismissed. He urged that conflicting decisions and/or posturings between the Commissioner of Lands and the State Law Office, in a matter such as the instant one, was harmful to the public interest, since in *Kenya property title is guaranteed by the state;* and so it was impermissible for the Commissioner of Lands to come and plead that there has been duplicity in her own management of the land-title records, with the Attorney-General's office, by its conduct, both approbating and reprobating formal undertakings in respect of the respondent's title; it was unacceptable "*for one Commissioner of lands to reach a compromise, and another to seek its setting aside"*; it was wrong "*for one Government in power to agree and settle a dispute, and then a new officer in the next Government to challenge the compromise in Court* ". Counsel remarked; "*The Government through the Attorney-General entered a valid compromise and then the Permanent Secretary for Lands and Settlement overrides that compromise, and instructs advocates to challenge the act of the Attorney-General; this explains what has happened in this case*". Learned counsel submitted that the acts of the Attorney-General bind the Government; and "*to hold the contrary would be a recipe for chaos*".

VII. DEFENDANTS' REPLY

Learned counsel ***Mr. Shah*** in his reply which he made on 7th July, 2006 submitted that, the issue as to the validity of the respondent's title, I.R. No.63744 would be resolved at the *rehearing* of *HCCC No.387 of 1998* and so it is of no particular concern to this Court.

Counsel urged that the element of collusion, in the making of the impugned consent in *HCCC No.1622 of 2001* was well brought out at paragraphs 8-12 of the supporting affidavit sworn by ***Judy Marilyn Okungu.*** He submitted that the respondent, which had filed no depositions in this application, had not challenged the applicants' claim of illegality in the allocation of an alternative parcel of land to the respondent.

Mr. Shah contested ***Mr. Oduol's*** submissions that payment of decretal amounts into an escrow account by the defendants could be construed as an approbative act *vis-à-vis* the impugned consent decree – since such payment was for the purpose of complying with a Court order.

Counsel submitted that the delay in the filing of the instant application had been explained by ***Kiriinya Mukiira*** the Permanent Secretary in the Ministry of Lands and Settlement, as occasioned by the fact that it took time to carry out investigations into relevant transactions.

Mr. Shah urged that the impugned consent had been obtained through collusion and fraud, and that the conditions for setting aside the consent decree had been satisfied.

VIII. FURTHER ANALYSIS

(a) ***Identifying the Issues: Preliminary Remarks***

The defendant's Chamber application of *5th March, 2004* is ultimately concerned with a parcel of land in the Kileleshwa area of Nairobi, L.R. No.209/3219 in respect of which two persons are each holding a different registration number – the plaintiff/respondent holding registration number I.R.63744 and someone else holding registration number I.R 63216. Title document No. I.R. 63216 was registered in the name of one ***Hellen Jerotich Chepkwony*** on *26th August, 1994*, well before Title No. IR.63744 which was registered on *11th November, 1994.*

In *HCCC No.387 of 1998* the holder of title No. IR 63744 had sought redress against five persons, and only one of them, the Principal Registrar of Titles, has been retained as a party in the instant matter, *HCCC No.1622 of 2001*. In *HCCC No.387 of 1998* the respondent herein had sought *"a declaration that the 1st plaintiff [respondent herein] is the sole registered proprietor entitled to user and possession of the suit premises through its officers or agents to the exclusion of the defendants or any of them".*

It did not become clear to the Court to what extent service of the suit papers in *HCCC No.387 of 1998* was effected, but an *ex parte* judgment was given by ***Kasanga Mulwa, J*** in favour of the respondent herein, on *1st August, 2000*. The Principal Registrar of Titles then later contested the *ex parte* judgment and on 19th September,2004 ***Ransley, J*** set it aside, with regard to the 2nd respondent herein.

In the meantime, the respondent herein had already taken various courses of action, including judicial review proceedings in *H.C. Miscellaneous Application No. 1449 of 2002,* and negotiations leading to a consent decree under the umbrella of *HCCC No. 1622 of 2001.*

Some two years after the consent decree was issued, the defendants in *HCCC No.1622 of 2001* came to Court, by the instant application, averring that the said consent order was achieved through fraud, collusion, and/or mistake — and so should now be set aside.

Counsel on each side has founded his client's case on a different primary focus: the

defendants/applicants lay the greatest emphasis, firstly, on the setting aside of the Judgment in *HCCC No.387 of 1998* on *19th September, 2004* in respect of the 2nd applicant; and secondly on the validity of the process of creation of Land Title No. IR 63744 on *11th November, 1994* (which is claimed by the plaintiff/respondent) whereas already, for the same property, Land Title No. I.R. No.63216, registered on *26th August, 1994* was in existence.

The plaintiff/respondent, by contrast, focuses its case squarely on the doctrine that *consent* between the parties binds, and so the consent signed on *1st July, 2002* by both ***Ms. Onyango*** the Deputy Chief Litigation Counsel (for the defendants) and M/s Wambugu & Co., Advocates (for the plaintiff) and entered by ***Mr. Justice Rimita*** on *4th July, 2002* is the last word and the defendants must pay up.

It follows that the respondents have no interest in canvassing the linkage between the said *consent decree*, and the *title-claim judgment* in *HCCC No.387 of 1998* which has been partially set aside and, at least in principle, still *stands to be heard in Court* as relates to one of the parties. This, indeed, is the one point which counsel on both sides have appeared to overlook, yet it may be a most relevant issue in the just disposal of the instant application.

I will now analyse these focal points of concern, as a basis for arriving at a suitable determination of the issues raised.

(b) Setting Aside of the Substantive Judgement in HCCC No.387 of 1998

The question in *HCCC No.387 of 1998* was: is the 1st plaintiff therein the rightful, registered owner of the suit property? The plaintiffs were Skyview Properties Ltd (1st plaintiff); Susan Nyambura Kamau (2nd plaintiff); John Mwangi Mukundi (3rd plaintiff). The defendants were Samvir Trustees Limited (1st defendant); Karim Haiderali Teja (2nd defendant); Haiderali Popat Teja (3rd defendant); Principal Registrar of Titles (4th defendant); and Proven Insurance Agency Limited (5th defendant). ***Ransley, J*** on *19th September, 2004* set aside the *ex parte* judgement which had been given by ***Kasanga Mulwa, J*** on *1st August, 2000* — but only *in relation to the Principal Registrar of Titles*. What was the implication of ***Ransley, J's*** ruling, for the judgment as a whole in *HCCC No.387 of 1998*?

Learned counsel for the respondent herein, ***Mr. Oduol*** averred repeatedly that that ruling by no means affected the status and character of the judgment of *1st August, 2000* — because the Principal Registrar of Lands was only a *nominal defendant*. With respect, I do not agree; for all the five defendants carried equal status. Even though in a formal sense, the *ex parte* judgment still stands as against the 1st, 2nd, 3rd and 5th defendants in *HCCC No.387 of 1998,* the rights conferred upon the 1st plaintiff by that judgment – which relate to registered ownership of the suit land – could not be realised without implementing the obligations resting upon the Principal Registrar of Titles. Therefore, for practical purposes the whole of the judgment of *1st August, 2000* would have to be set aside, and indeed, an application to that effect ought to have been made. The Court acting *suo motu* may also set aside that decision.

Secondly, the effect of the setting aside of the judgment of *1st August, 2000* is that the case should then be listed for hearing. But, can such hearing take place only as between the plaintiffs, on one side, and the *4th defendant*, on the other side? That, I think, is not possible in practice – because the substantive rights which are contested appear to vest in the other defendants, rather than in the 4th defendant; and consequently the defendants ought to be *heard together*. This is another reason why the *whole* of the Judgment in *Civil Case No. 387 of 1998* ought to be set aside.

I hold that no rights can be built on applications not yet made, or on judgments or rulings not yet delivered, or on judgements which have been vacated. And therefore, there indeed is a valid legal point, that *no rights* could have been founded on the Judgment of *1st august, 2000* which can today be held to be the foundation for a consent decree.

(c) Is the Validity of Land Titles No. I.R. No.63216 and No. I.R. 63744 a Critical Issue at this Stage?

Both counsel in this matter did appreciate that it is not the main purpose of the Court at this stage to determine which of the above titles is the valid one in law; but learned counsel ***Mr. Shah***, for the applicants, went further to urge that this question is to be resolved in a *re-hearing* of *HCCC No.387 of 1998*. Such a proposition was not directly contested by learned counsel ***Mr. Oduol*** for the plaintiffs/respondent, even though he urged that the title issue had now become irrelevant; in his words: "*Once a consent is entered into agreeing on compensation, then the original claim based on title can no longer be revisited for any anomaly*".

I would say those two positions mark the fundamental difference in the positions taken by counsel on both sides**.** ***Mr. Oduol*** is, in effect, seeking to found his client's claim on the *contract* represented by the *consent*; whereas ***Mr. Shah*** implicitly rests his case upon (i) *trial procedure*; and (ii) the law relating to *land registration* and the creation of property rights. Counsel for the respondent sees new, substantive rights created by a *consent*; and to the contrary, counsel for the defendants prays for new motions of the trial process, entailing *inter partes* hearing of *HCCC No.387 of 1998***,** for the purpose of determining *who* the bearer is of valid registered title for the suit land.

Which view must prevail? In my opinion, the asserted rights of parties which will claim enforcement through the judicial process, ought to emanate from the law. *Prima facie*, therefore, it would be desirable that the Court has a chance to fully determine the *rights of parties* in *HCCC No.387 of 1998*, before enforcement can be pursued. Secondly, as between purely *interpersonal* contractual rights, and rights which emerge only from the *land registration process* conducted in public office, the latter will deserve priority, since it carries elements of the *public interest* in the due operation of public bodies. Consequently I would attach more urgency to the hearing and disposal of *HCCC No.387 of 1998* than to the effectuation of a *consent* of the nature urged by counsel for the respondent. Moreover, the subject–matter of the said consent is the very *property-rights issues* which have to be resolved in *HCCC No.387 of 1998***.** In principle, therefore, the *merits* of that case ought to be canvassed, prior to any claims based on consent such as may have been made between the parties herein.

The applicants have alleged collusion, fraud, mistake and/or misrepresentation as tainting the said consent, and so it is urged that the consent be set aside. Although evidence has been adduced regarding the said vitiating factors in the consent, learned counsel for the respondent has serious doubts as to whether there is clear proof of the allegations.

I don't think it is necessary for me to determine whether there has been adequate proof of those vitiating factors in contract, since I have already held that the consent in question is subordinate to the property-rights issue which can only be determined in the course of *inter parties* hearing in *HCCC No.387 of 1998*. No consent would have arisen in the first place if *HCCC No.387 of 1998* had not been lodged; and therefore that case must be properly and urgently litigated, as the foundation for such consent as might in future be reached.

Any possible basis of the said consent, as at the date when it was entered into, has been, I think , rendered nugatory by the Court's ruling of *19th September, 2004*; and this must be taken as the baseline from which any outstanding rights-claims may be resolved.

(d) Public Policy Issues

Learned counsel ***Mr. Oduol*** raised the public policy issue, which in my view is one of merit, that while the evidence before the Court is that two parallel files were being maintained by the Lands Office, for a single property, there was *statutory duty* placed upon the Government to offer permanent guarantee of the *sanctity of registered property titles****;*** and that there is evidence of two senior officers of the Government, namely the Commissioner of Lands and the Attorney-General, taking puzzling positions with regard to the questionable transactions in respect of the two titles (No. I.R. No.63216 and No. I.R. No.63744) – and this is in derogation from the Government's *legal obligation* to give guarantees as to the sanctity of

registered property titles.

From the state of the evidence on record, highly irregular transactions did take place in relation to the suit land. This is to be strongly deprecated, recognizing as one must do, that the whole range of the fundamental rights of the individual set out in the Constitution of Kenya stand to be greatly compromised, if the individual's rights to *private property* cannot be securely defined and preserved in a truthful and sacrosanct *official record*. I am moved to protect such a crucial public interest by putting on hold all present claims touching on the two Title Nos. 63216 and 63744, until all questions of rights have been fully canvassed, in an orderly, *inter partes* trial of the plaintiff's suit in *HCCC No.387 of 1998*.

IX. ORDERS

I have considered the prayers in the Chamber Summons of *5th March, 2004* and the depositions, the oral evidence taken from the deponents, and the submissions of counsel as well as the authorities which they relied on. My foregoing analysis of such materials leads me to make 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.

DATED and **DELIVERED** at Nairobi this 22nd day of September, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.,

Court clerk: Mwangi

For the Plaintiff/Respondent: Mr. Ochieng Oduol, Mr. Wambugu, instructed by M/s Wambugu & Co. Advocates

For the Defendants/applicants: Mr. Aronson, Mr. Kapila, Mr. Shah, Instructed by M/s A.R. Kapila, Anjaarwalla & Khanna Advocates