



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

**HCCC 1065 OF 2002**

**JACKSON K. KIVINDA.....PLAINTIFF**

**-V E R S U S-**

**UNITED INSURANCE CO. LTD.....DEFENDANT**

**R U L I N G**

This application is brought by way of a Notice of Motion dated and filed in court on 30<sup>th</sup> July, 2004. It is expressed to be brought under O.III Rule 9A of the Civil Procedure Rules, Sections 3, 3A and 63 of the Civil Procedure Act, the inherent jurisdiction of the court and all other enabling provisions of the law. The applicant seeks from the court the following orders-

1. That this application be certified as urgent
2. That leave be granted to the counsel for the applicant to come on record for the applicant
3. That in the first instance prayer 4 herein below be heard ex parte
4. That execution of the preliminary decree issued on 22.9.03 and a further judgment for Ksh.3,883,178 together with costs and interest entered on 17.06.04 and any subsequent orders of this court in the suit herein be stayed pending the hearing and determination of the application to set aside in paragraph 5 hereunder.
5. That the consent judgment entered on 23<sup>rd</sup> March, 2003, for Ksh.1,840,000/= and a further judgment for Ksh.3,883,178/= plus costs and interest on 17<sup>th</sup> June, 2004 and all consequential orders made therein be set aside on grounds of fraud on the defendant by counsel for the plaintiff who were acting at the same time as advocates for the defendant when in the employment of Hudson Wafula & Company, Advocates.
6. That all the amount of money paid to the plaintiff's counsel, KINYANJUI NJUGUNA & Co., ADVOCATES, pursuant to the judgment so fraudulently obtained be refunded to the defendant/applicant and in default execution to issue against the said Advocates.
7. That the costs of this application be provided for.

The application is premised on some 9 grounds, which are set out at length on the face of the record. In a nutshell, it is alleged that there was a conflict of interest inasmuch as the plaintiff's advocates also acted as the defendant's advocates. It is further the applicant's case that it did not give instructions authorizing the consent judgment, and also that the proceedings for the assessment of general damages and loss of profit proceeded without the knowledge of the defendants. The application is further supported by the

annexed affidavit of EUNICE MATHENGE, an advocate and a legal officer in the employment of the applicant company.

In opposition to the application, Mr. JOHN THEURI KINYANJUI, an advocate in the firm of Kinyanjui Njuguna & Company, who have the conduct of this matter on behalf of the plaintiff, swore a lengthy, 40 paragraph affidavit. He avers that the suit herein was filed by the firm of Muriuki Ngunjiri & Company. The firm of Kinyanjui Njuguna & Co. came on record on 20<sup>th</sup> March, 2003 and not on 13<sup>th</sup> March, 2003 as alleged in the affidavit of Eunice Mathenge. By the time they came on record, the parties had already reached a consent, which was recorded on 20<sup>th</sup> March, 2003. Thereafter, the defendant/applicant made payments for a period for over one year before liquidating the amount agreed upon in the consent judgment, and the payments were effected without any execution levied or even threatened. As for subsequent proceedings in the assessment of general damages and loss of profit, Mr. Kinyanjui avers that the firm of Hudson Wafula & Company for the defendant were notified by registered post while the defendants were notified directly. The defendants chose not to attend court and have only themselves to blame. He concludes by stating that the application is an afterthought and an abuse of the court process and that it ought to be dismissed with liberty to the plaintiff to proceed with execution.

The application was canvassed orally by Mr. Mariaria for the defendant/applicant while Mr. Mwangi appeared for the plaintiff/respondent. Mr. Mariaria argued that at the inception of this suit, the partners in the firm of Kinyanjui Njuguna & Company, Advocates, were employees in the firm of Hudson Wafula & Company, who were acting for the defendants/applicants. Kinyanjui Njuguna & Company filed Notice of Change of advocates on 13<sup>th</sup> March, 2003, implying that when the consent judgment was recorded on 20<sup>th</sup> March, 2003, they were acting for both parties and therefore there was a conflict of interest. In any event, the applicant had not given instructions authorizing the recording of the consent judgment. In the premises, the judgment ought to be aside, the matter proceed afresh, and the moneys paid to Kinyanjui Njuguna & Co., returned to the applicant. Mr. Mariaria further argued that the proceedings touching upon the general damages and loss of use and profit were undertaken ex parte without the applicant's knowledge and should be set aside as well.

Opposing the application, Mr. Mwangi for the respondent referred to and adopted the replying affidavit sworn by Mr. Kinyanjui, an advocate in the firm of Kinyanjui Njuguna & CO., and further replying affidavits sworn by Mr. Charles Wambugu Wamae and Mr. John Kinyanjui Theuri. He submitted that as prayer 2 of the application has never been granted, counsel for the applicant has not yet come on record. The application is therefore filed without authority and is irregular and incompetent. In addition, the application addresses three judgments or orders without citing provisions of the law which would give the court jurisdiction, and this renders the application more incompetent.

As regards the consent judgment, Mr Mwangi argued that there was really no basis for arguing that Kinyanjui Njuguna & Co., Advocates, were acting for the defendants at the same time. They took over on 20.03.03 and not 13.03.03 contrary to what the applicant says, and the previous firm on record was not an employee of Hudson Wafula & Co., and therefore there was no conflict of interest per se. Beyond that, there is the sworn evidence of Charles Wambugu Wamae, a former employee of the applicant company in which he states that the applicant had given instructions for the consent judgment. Counsel further submitted that to set aside a consent judgment, one would have to apply for a review, and this application was not for review. He then cited MUNYIRI v NDUNGUNYA [1985] KLR as authority for that proposition. He also submitted that the judgment has already been fully honoured and there would be no propriety in setting aside such a judgment as the substratum of the suit regarding that matter is gone. He cited DIAMOND TRUST BANK OF KENYA LTD. v PLY & PANELS LTD. & ORS. Civil Appeal No.243 of 2002 in support of that proposition.

As for prayer 6 seeking a refund of money from the plaintiff's advocates, Mr Mwangi submitted that there was no basis for this prayer as the advocates were not party to the suit and they only acted for the plaintiff. He finally invited the court to note the delay in this matter, citing the 20<sup>th</sup> March, 2003, as the date of the consent judgment, and the date of this application being 30<sup>th</sup> July, 2004. He then submitted that even if the application was appropriate, it would fail for inordinate, unexplained and inexcusable

delay. He thereupon urged the court to dismiss the application.

In his reply, Mr. Mariaria said that from the affidavit of Kinyanjui Theuri, the mode of service on the firm of Hudson Wafula was by registered post which was improper as there was no leave of court for such service, and therefore the service was improper. Finally, on prayer No. 2, counsel requested the court to allow counsel for the applicant to come on record otherwise the plaintiff/applicant will be prejudiced. He then asked the court to grant the orders as prayed.

I have considered the application and the attached documents, and also the rival arguments of both counsel. Having done so, it is my considered opinion that the issues arising for adjudication are (a) whether the application is properly before the court in the light of O.III Rule 9A of the Civil Procedure Rules; (b) whether the consent judgment entered on 20<sup>th</sup> March, 2003 is vitiated by want of instructions to record the same and for fraud allegedly perpetrated by the plaintiff's advocates; and (c) the propriety of the ex parte proceedings and judgment on the general damages for loss of user and profits.

As observed at the beginning, this application is dated 30<sup>th</sup> July, 2004, and is expressed to be brought under, inter alia, O.III Rule 9A of the Civil Procedure Rules. The tenor and scope of this Rule are clear. So far as it is relevant to this application, that Rule states –

“When there is a change of advocate ... after judgment has been passed, such change ...shall not be effected without an order of the court upon an application with notice to the advocate on record.”

When this application was filed, it sought as one of its prayers an order that leave be granted to the counsel for the applicant to come on record for the applicant. It follows that the application was filed before counsel for the applicant came on record. This attracted comment of Hon. Justice Azangalala when on 30<sup>th</sup> July, 2004, he stated that “the advocate should urgently come on record to enable her prosecute this application.” At the hearing of this application, the advocate for the applicant had still to come on record as the prayer for his/her coming on record was still pending. To make it worse, counsel for the applicant canvassed all the other prayers save and except that one for coming on record. He therefore canvassed his application while he was not on record. Indeed, it was not until after counsel for the respondent had raised the issue in his response that counsel for the applicant requested, in his reply, that the court grants the order to come on record for otherwise the plaintiff/applicant would be grossly prejudiced. In my view, the procedure adopted by the applicant was irregular. He should have sought to come on record in the first instance, and that would have given him a foothold and the necessary locus to prosecute the application. As it stands now, the application was prosecuted by counsel who was not on record and, in my view, that was fatal.

The second issue relates to the consent judgment. One of the grounds upon which the Applicant seeks to have it set aside is that the Applicant did not authorize its being recorded. The issue as to whether there were instructions finds a ready answer in paragraphs 5 to 11 of the further replying affidavit of CHARLES WAMBUGU WAMAI, formerly an Assistant Claims Manager with the Defendant company. The sworn evidence emerging from those paragraphs is that the initial negotiations were done by Mr. Maurice Ombachi, then legal officer with the Defendant company, and with the then Plaintiff's advocate on record, Mr. Ngunjiri. At that time, the Plaintiff was claiming Kshs 6 million in damages and since this was a huge amount, it was necessary to try and resolve the issue without going to trial. Owing to the seriousness of the matter, the issue became a subject of meetings of the senior officers who comprised the then claims manager, Anne Zawadi, the Legal Officer, Mr. Maurice Ombachi, Mr. Hudson Wafula who was then a legal consultant to the company and the Defendant's advocate on record, and Mr. Wamae, the deponent. The initial amount suggested by the committee for the settlement of the claim was rejected by the Plaintiff's advocate. Mr. Wamae was thereupon instructed to give an opinion.

On 19<sup>th</sup> March, 2003, the day before the hearing date, owing to the urgency of the matter, Mr. Wamae met the then assistant general manger who authorized him to instruct the Defendant/Applicant's advocates to record a settlement for the value of the motor vehicle that had been sold and to take a mention date when a further consent would be recorded on the remaining part of the claim. This position was communicated to the Applicant's advocates with instructions to obtain a scheme to have the money

paid in monthly instalments of Kshs 200,000/= each with an initial payment of Kshs 300,000/=. Thereafter the applicant received communication that the consent had been recorded and immediately prepared a budget for the amount to ensure compliance with the court order. Subsequently cheques were issued towards settlement of the matter.

From this account, it does not lie with the Applicant now to deny the instructions for the consent judgment. They were given as plainly as can be, and on that score the consent judgment is above reproach.

The second limb of the applicant's attack of the consent judgment is that it was recorded fraudulently by the Plaintiff's new advocates on record. The Applicant's case is that the Plaintiff's new advocates, M/S Kinyanjui Njuguna & Co., came on record on 13<sup>th</sup> March, 2003. At the time of institution of this suit, the partners in this firm were employees in the firm of Hudson Wafula & Co., who were acting for the Defendant. By recording the consent herein on 20<sup>th</sup> March, 2003, the said firm of advocates was therefore acting for both the Plaintiff and the Defendant, which gave rise to a conflict of interest and this was fraudulent. The Applicant relied heavily on the fact that the Plaintiff's new advocates came on record on 13<sup>th</sup> March, 2003. As a basis for their argument, this is not factual, and when it is not factual, their argument cannot stand to logic.

In paragraphs 19 of 20 of Mr. John Kinyanjui Theuri's affidavit, the deponent avers that the firm of Kinyanjui Njuguna & Co. came into the proceedings on 20<sup>th</sup> March, 2003 and not on 13<sup>th</sup> March, 2003 as alleged in the supporting affidavit of Eunice Mathenge. He further states that by the time the said firm came on record, the parties had already reached a consent which was consequently recorded on 20<sup>th</sup> March, 2003. In paragraph 5 of her supplementary affidavit, M/S Eunice Mathenge avers that she is advised by the Defendant's advocates on record, which advise she verily believes to be true, that the firm of Kinyanjui Njuguna & Co., Advocates came on record in the matter on 13<sup>th</sup> March 2003 and not on 20<sup>th</sup> March, 2003 as alleged in the Replying affidavit. I find it strange that a matter which could have been cleared by reference to the Court file, which is accessible to both sides, should be subjected to different interpretations. The truth of the matter, according to the record, is that the Notice of Change of Advocates was effected vide a notice dated and filed in Court on 20<sup>th</sup> March, 2003 and not on 13<sup>th</sup> March, 2003 as stated in paragraph ( c) of the grounds upon which the application is premised, and paragraph 9 of Eunice Mathenge's supporting affidavit as well as paragraph 5 of her supplementary affidavit. The record speaks for itself. And in paragraph 11 of Mr. Wamae's further supporting affidavit, the decision to have this matter settled out of Court was reached by the senior officers of the Applicant company on 19<sup>th</sup> March, 2003, a day before the hearing date, and a day before the Plaintiff's present advocates came on record. The accusation that these advocates acted for both parties therefore lacks both truth and merit and cannot be sustained. It cannot also support the allegations of fraud.

The other point raised by the Applicant is that the assessment of general damages for loss of profits and user was done ex parte, and that the Applicant's Advocates on record were served by registered post without leave of the Court. The background to this is that the Plaintiff's application by chamber summons dated 25<sup>th</sup> February, 2003, seeking orders that the Defendant's defence herein be struck out and judgment be entered as prayed for in the plaint. The same was listed for hearing on 19<sup>th</sup> March, 2004 and, according to the record, a hearing notice was sent to the Defendant's advocate by registered post on 1<sup>st</sup> March, 2004. Another hearing notice was served on the Defendants personally, and their date stamp shows that they received it on 3<sup>rd</sup> March, 2004, at 9 0'clock. On the appointed date, Mr. Kinyanjui appeared for the Plaintiff but there was no attendance for the Defendant. In his ruling, Hon. Ibrahim J. said, *inter alia*:-

*"...The defence is a bare denial of liability and does not raise a single triable issue in the light of the partial judgment herein.*

*I do hereby strike out the defence and enter interlocutory judgment on the question of liability. The Plaintiff is to proceed on formal proof to prove his claim for damages..."*

Pursuant to this ruling, the Plaintiff fixed the matter for the hearing of the formal proof on 12<sup>th</sup> May, 2004. The record shows that the Defendants were served personally with a copy of the hearing notice, and their date stamp indicates that they received the notice on 26<sup>th</sup> April, 2004, at 2.00 O'clock. Another notice was sent to their advocates on 29<sup>th</sup> April, 2004, by registered post. On the hearing date, Mr. Kinyanjui appeared for the Plaintiff and there was no attendance by or on behalf of the Defendant. After Mr. Kinyanjui said that he had served the Defendant's Counsel by registered post and the Defendant directly, which information is supported by the record, the Court proceeded ex parte as it was entitled to do. Since the Defendant was served with the hearing notice, it is misleading for it to take the position that "...the claim on loss user/profit proceeded without the knowledge of the Defendant hence the judgment to the tune of Kshs 3,883,178/=..." as stated in paragraphs (e) and (g) of the grounds upon which the application is predicated. The fact and truth of the matter is that the Defendant was served and has not offered any explanation as to why it did not attend court on the hearing date.

The applicant's last prayer seeks an order that all the money paid to Kinyanjui Njuguna & Co., Advocates for the Plaintiff, pursuant to the judgments fraudulently obtained be refunded to the Defendant/Applicant. In as much as the alleged fraud is founded upon a perceived conflict of interest, which conflict has been shown to be non-existent, an order for this prayer is not merited. The Advocates received the sums in question on behalf of their client and there is no rational basis on which they can be called upon to refund the moneys in question.

Another issue raised by Mr. Mwangi is that the consent judgment for Kshs 1,800,000/= has already been fully paid, and that if there were no instructions to record the consent, the Applicants would not have paid all those moneys. I respectfully agree. At the expense of belaboring the point, Mr. Wamae's affidavit is very clear and to the point. He says in paragraph 11 thereof that after receiving communication from their advocates that the consent had been recorded, they immediately prepared a budget for the amount to ensure compliance with the Court order. Thereafter the Applicant paid the amount agreed upon over a period of one year until the entire sum was liquidated. Two points arise from this state of affairs. The first one relates to delay. Whereas the consent order was recorded on 20<sup>th</sup> March, 2003, the application to set it aside was filed on 30<sup>th</sup> July, 2004. This was well over one year since the date of the consent judgment. In DIAMOND TRUST BANK OF KENYA LTD v PLY & PANELS LTD & OTHERS. Civil Appeal No.243 of 2003, unreported, Githinji J.A. said:-

*"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 the matter before Githinji JA, there was a delay of four and a half months which he found unreasonable. In the matter before this Court the delay was for more than one year. Such a delay was inordinate and unconscionable.

The second point is that the entire sum agreed upon has already been paid. In the Court of Appeal decision herein above referred to, Githinji J.A. , continued -

*"...where the consent judgment impugned has been executed like in the present case, the courts are less likely to set aside the consent judgment. In the case of Mukisa Limited v West End (1970) E.A. 469 AT 472(D) the Court cited a passage from Lord Denning MR. In F & G. Skyes (Wessex) Ltd v Fine Fare Ltd (1967) Lloyds Re.53:*

*"In a commercial agreement the further the parties have gone on 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."*

In this application, as between the parties and the consent judgment, all has been said and done, and the conduct of the parties clearly points to an affirmation of the contract. It is too late and unconscionable to

challenge that judgment. And even if the consent judgment had fallen foul of the law, and necessitated a challenge, such a challenge should have been mounted on the proper provisions of the Civil Procedure Rules, which has not been done in this case.

In sum, I find that this application must fail as it has not passed any test to which it has been subjected. It is accordingly dismissed with costs to the Plaintiff.

DATED AT NAIROBI THIS 3<sup>rd</sup> DAY OF February 2005

**L.NJAGI**

**JUDGE**

Read and delivered at Nairobi by Kasango J. this 3<sup>rd</sup> day

of February 2005

**M. KASANGO**

**JUDGE**