



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**

**CIVIL CASE NO.426 OF 1995**

**SIMITI NYANGAGA MAHENDE ..... PLAINTIFF**

**VERSUS**

**LUCAS MASESE NYANSAHO ..... DEFENDANT**

**RULING**

Applicant/plaintiff sued the defendant/Respondent through an originating summons seeking an order that he is entitled by way of adverse possession of land No.BUKIRA BWISABOKA/179 and the same be registered in his name. He was then represented by M/S. J. O. Soire & Co. Advocates. The suit was filed on 29th August 1995. Defence was filed on 14th September 1995. The Plaintiff took no steps to fix the case for hearing. On 4th February 2000 the defendant/Respondent made an application for the suit to be dismissed for want of prosecution. On 2nd May 2001 Mr. Onjala for defendant/applicant and Mr. Soire for plaintiff appeared before Justice Wambilyangha (as he then was) and the following order recorded.

**“Court: By consent the suit is dismissed for want of prosecution with costs.”**

This is the order the plaintiff wants to be set aside. The plaintiff has now ditched Mr. Soire Advocate. Mr. Minda argued the application on behalf of Mr. Ochieng who is for the applicant/plaintiff. He told the court that the plaintiff/applicant did not instruct his Advocate on record then to enter into the consent order to have the suit dismissed.

He was not aware of the order until when the Respondent sought to have him evicted. He therefore asked the court to review and set the order aside. Application was opposed. Mr. Lebu told the court that there was counsel on record and present when the consent was recorded and he must have had instructions to enter into the consent. Over 4 years have elapsed since the order was recorded.

I have carefully considered the application. Though the issue was not raised by the counsel for respondent I find that Charles Ochieng Advocate is not properly on record and therefore could not have filed a valid application.

The suit was dismissed on 2nd May 2001. That dismissal Order was a final judgment in the matter. Thus by the time the Advocate filed the application judgment had already been entered. Order 3 rule 9A CPR requires where a party wants to act in person or change Advocate after judgment has been entered to do so only with leave of the court. An application has to be made to court. Mr. Ochieng Advocate should therefore have first made an application to be allowed to come on record instead of M/S Soire & Co. Advocate. It was only after that he could have filed the application to set aside the court orders. He did not do so and the application therefore is incompetent and for that reason would be struck out.

Above aside I find the application has no merit. There is no evidence that Mr. Soire had no authority to enter into the consent which was recorded. There was an application to have the suit dismissed for want of prosecution and I believe this is what they consented about. If one look at the history of the case he would understand why there was the consent.

For five years since the suit was filed in 1995 no steps had been taken by the plaintiff. He had no answer to the application for dismissal.

The law is now well settled about setting aside consent orders or judgment. There must be proof that the consent order was entered into either through fraud mistake or misrepresentation. There was no claim of fraud. The applicant is therefore bound by the consent entered into by his Advocate on record then.

Lastly the consent order dismissing the suit was entered in 2001 whereas this application was made over years. The explanation given for the delay is not plausible. Record shows that Mr. Bosire continued appearing for the plaintiff. He cannot say that for 3 years he was never in touch with his counsel.

The delay is inordinate.

From the above therefore I find application has no merit and is dismissed with costs.

I would perhaps comment on what has been happening. It seems that the Respondent defendant appeared before the Deputy Registrar seeking execution of the judgment by having the plaintiff evicted from the suit land and the Deputy Registrar granted the same. This is wrong. The judgment was only for dismissal of the plaintiff's suit. Court did not order his eviction and neither was eviction pleaded. The defendant in his defence only prayed for plaintiff's suit to be dismissed with costs which the court did. There was no counterclaim seeking the plaintiff to be evicted from the suit land.

There was therefore no basis for the Deputy Registrar to issue Order of eviction.

Dated at Kisii this 12th day of April 2005

**KABURU BAUNI**

**JUDGE**

**cc. Mobisa**

**Mr. Lebu for Respondent**

**Mr. Nyakongo for Ochieng for Applicant.**