



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

**AT BUNGOMA**

**CIVIL CASE NO. 24 OF 1999**

**WILLIAM I. IKAPEL ..... PLAINTIFF**

**VS**

**RICHARD BUSURU T/A BUSURU R.M. PARTNERS .....  
DEFENDANT**

**R U L I N G**

The applicants herein by a motion dated 28.3.2003 seeks to have the consent Judgment recorded on 19.1.2000 set aside on the ground that the same was obtained by fraud by strangers whom he had not instructed to do so. This court is being beseeched to exercise its inherent power under Section 3 A of the Civil Procedure Act. The application is supported by the affidavit sworn by the applicant on 28.3.2003 and a further affidavit he also sworn on 8.10.2003.

It is admitted by the defendant that summons to enter appearance plus the plaint was served upon him and he subsequently instructed the firm of Asike Makhandia & Co. Advocates to defend him. The aforementioned firm of Advocates dutifully filed a memorandum of appearance, a defence, set-off and counter-claim on behalf of the Defendant. It is shown by the plaint dated 25.3.99 that the plaintiff is claiming a sum of Ksh.1,134,000/= from the defendant in respect of professional services contracted for a fee. The firm of Mohammed Muigai Mboya Advocates appeared for the Plaintiff.

The plaintiff filed an application by way of chamber summons dated 14th July 1999, in which the plaintiff sought to have the defendant's defence, set-off and counter-claim struck out pursuant to the provisions of order VI rule 13 (I) (b), (c), and (d) of the Civil Procedure rules. The plaintiff also prayed for Judgment in terms of the plaint. It would appear the application was served upon the firm of Asike Makhandia & Co. Advocates. The same came up for interpartes hearing on 19th January 2000 in which the disputed consent Judgment was recorded by Mr. Majanja on behalf of the plaintiff and Mr. Sichangi on behalf of the defendant before the Hon. Mr. Justice Mbiti. It is this consent Judgment which the defendant disputes that he did not give instructions for it to be recorded. The effect of the consent Judgment is that the defendant is required to pay the plaintiff a sum of Kshs.1,134,000 plus interest at the rate of 26% p.a. from 20th January 1997 until full payment.

The defendant denied having instructed the firm of J.S. Khakula & Co. Advocates to appear for him in this matter hence the defendant avers that the consent was entered without instructions. The defendant further pointed out that the firm of J.S. Khakula & Co. filed a Notice of change of Advocates which shows that they had taken over the matter from the firm of Mohammed Muigai Mboya Advocates on behalf of the plaintiff. However the defendant admits that he had approached Mr. J.S. Khakula with a view of his firm appearing for him in his suit in place of M/s Asike Makhandia & Co. Advocates.

The defendant now completely disowns having instructed the firm of J.S. Khakula & Co. Advocates to appear for him. In fact he now makes allegations of fraud against the above mentioned firm of Advocates. The plaintiff opposed this motion by filing a replying affidavit sworn on 7th May 2003 and a supplementary affidavit sworn by Mr. J.S. Khakula. The plaintiff denied having instructed the firm of J.S. Khakula & Co. Advocates to appear for him in this matter in place of Mohammed Muigai Mboya advocates. The plaintiff stated that he and the defendant were both present in court on 19.1.2000 when the consent Judgment was recorded. This fact was also confirmed by Mr. J.S. Khakula in his supplementary affidavit. Mr. Khakula avers that the defendant accompanied Mr. Sichangi who was an employee in his firm to attend court on 19.1.2000. Mr. Khakula also exhibited in his affidavit correspondences between his firm and the defendant and the plaintiff's advocate to show that his firm was fully instructed to handle this matter and deny the allegations of fraud leveled against his firm.

The plaintiff further avers that the defendant has proposals on how to settle the decretal sum by annexing correspondences between him and the defendant. It was the submission of the plaintiff that the consent Judgment entered herein cannot be set aside in the absence of fraud, mistake or misrepresentation.

The dispute in this motion is simple. It is a matter which revolves the question as to whether the firm of J.S. Khakula was instructed by the defendant to appear for him and if the answer is yes, whether the consent Judgment was obtained by fraud. It is not disputed that there is a defect in the Notice of change of Advocates dated 10th December 1999 and filed in court on 14.12.99 by the firm of J.S. Khakula & Co. Advocates. It shows that the aforesaid firm had been instructed him in place of the firm of Mohammed Muigai Mboya advocates. It would also appear that the name of the firm of Mohammed Muigai Mboya advocates was crossed out and replaced with an hand written name of Makhandia & Co. Advocates. The defendant avers that on 27.3.2003 instructed the firm of C.O. Samba & Co. Advocates to act alongside the firm of J.S. Khakula with a mistaken belief that the latter firm was appearing for him. It is clear that the firm of C.O. Samba & Co. Advocates filed a notice to that effect. The defendant further admits that he had approached the firm of J.S. Khakula to appear for him in place of the firm of Asike Makhandia & Co. Advocates. He now wants the court to believe that the firm of J.S. Khakula & Co. Advocates betrayed him by acting on behalf of the plaintiff. In my humble view the defendant is not being candid. I am prepared to accept the view that the mistake in the notice of change of advocates dated 10.9.99 is a typographical error. I can only discern from the material placed before me that the firm of J.S. Khakula & Co. Advocates filed a notice of changer of Advocates to replace the firm of Asike Makhandia & Co. Advocates for the defendant. It has been submitted at length that the consent Judgment of 19.1.2000 was fraudulently obtained because Mr. Sichangi acted without express instructions from the defendant. It is no denied that Mr. Sichangi was an employee of the firm of J.S. Khakula & Co. Advocates. It is not also dispute that both the plaintiff and the defendant were present in court when the consent Judgment was recorded. Finally, the defendant has not denied that he has made frantic efforts and proposals to have the decretal sum liquidated by installments notwithstanding the existence of the consent Judgment. I am not convinced that there was fraud on the part of the defendant's counsel. I think the defendant gave his counsel his blessings to record the consent.

The law on setting aside of consent Judgments or orders is well settled. The court of appeal adopted the Judgment of **HARRIS J. R** the case of **KENYA COMMERCIAL BANK LTD VS SPECIALISED ENGINEERING CO. LTD (1982) KLR P. 485.** In this case it was held inter alia

*(i) That a consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud, collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.*

*(ii) That a duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.*

*(iii) That an advocate has general authority to compromise on behalf of his client as long as he is acting bonafide not contrary to express negative direction in the absence of proof of any express negative direction, the order shall be binding.*

*(iv) That the fact that a material fact within the knowledge of a client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes that he would not have given his consent had he known these facts.*

*(v) That the making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocate and when made such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.*

Applying the above decision to this instant, I am of the view that this motion must fail. In the circumstances of this case and for the reasons already stated this motion is dismissed with costs to the plaintiff.

**READ AND DELIVERED THIS 22nd DAY OF January 2004**

**J.K. SERGON**

**JUDGE**