

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 4 OF 2001

DR. H.W. WAWERU.....1ST PLAINTIFF

NANCY MUTHANJE WAWERU.....2ND PLAINTIFF

V E R S U S

PETER NGWAYI OCHIENG.....1ST DEFENDANT

CHARLES NGIGI MANYARA.....2ND DEFENDANT

JULIUS EMBUDE AGUDAH.....3RD DEFENDANT

PETER NGIGI KIRUTU.....4TH DEFENDANT

JORINE AWOOR GAGA.....5TH DEFENDANT

R U L I N G

This application brought under Order L Rule 1, Order XLIV Rule 1, XXXIX Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and All Other Enabling Provisions of the Law was filed in this Court on 6th June, 2001 and in it the Applicants who are also the Defendants in the suit seek to vary, set aside or review the consent order of this court dated 8th February, 2001. That order directed the Applicants/ Defendants to vacate the suit property known as L.R. NO. 209/12901 (I.R. 69472) or in default thereof be evicted. Their grounds are that the said Order should not have been given at that stage; that the Advocate (Mr. Okach) had no instructions to consent to the order, that the Order technically determines the substantive suit and they would suffer irreparable loss and damage.

It is trite law that a consent order has contractual effect as between the parties and can only be set aside on grounds of fraud, collusion or for any reason by which the Court would set aside an agreement. That was the holding in the case of **Brooke Bond Liebig (T) Ltd v. Mallya (1975) E.A. 266**. This decision was followed by the Court of Appeal in Civil Appeal **No. 83 of 1992 John Agina v. Abdulawamad Sharif Alwi** (Unreported). On the issue of lack of authority to consent, the Judges of Appeal stated that the advocates on record:-

“had authority to do such act or take such action on behalf of the Appellant at the time he instructed them to act for him.”

The Learned Judges of Appeal continued: -

“There is no allegation that the advocates had been specifically instructed not to ta ke [a] certain course of action”– **John Ngima v. Abdulawamad Sharif Alwi** (supra) at p. 2. In the present application, there is no evidence that Messrs Okach & Company, Advocates were instructed specifically not to consent and they had such authority till they were removed from the record by a Notice of Change of Advocates dated 10th April, 2001 and filed in this Court on 11th April, 2001. The delay in coming to Court since 8th February, 2001 when the Defendants must have known about the order till 6th June, 2001 has not been explained nor can it be excused. Further, the Applicants / Defendants have not pleaded nor shown the existence of fraud or collusion or other grounds that would entitle them to have the order reviewed, varied or set aside. In fact, the application cannot be entertained under Order XLIV for review. For the above reasons, the Applicant’s application dated 6th June, 2001 is dismissed with costs.

DATED and DELIVERED at NAIROBI this 26th day of July, 2001.

ALNASHIR VISRAM

JUDGE.