**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL SUIT NO. 65 OF 2009**

**WALTER EDWINO OMINDE..... 1ST APPLICANT/PLAINTIFF**

**SELINA ADUOL OMINDE..... 2ND APPLICANT/PLAINTIFF**

**JOHN JARED ODUOR ….....3RD APPLICANT/PLAINTIFF**

**EDITH AKINYI ODUOR.....4TH APPLICANT /PLAINTIFF**

**MILIMANI RESORT LIMITED..... 5TH APPLICANT/PLAINTIFF**

**KAMRO AGROVET LIMITED..... 6TH APPLICANT/PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT/DEFENDANT**

**RULING**

Before me is a Notice of Motion by the Plaintiffs dated 20th January, 2014. The same seeks to set aside the Consent Order recorded in this matter on 23rd November, 2011.

It is expressed to be made under sections 1**A, 1B** and **3A** of the **Civil Procedure Ac**t and **Order 51** of the Civil Procedure Rules as well as all other enabling provisions of the law.

The gist of the application as can be discerned from the affidavit of Walter Edwin Ominde- 1st Plaintiff/Applicant sworn on 20th January, 2014 and the Written submissions of the Advocate for the Plaintiffs/Applicant is that the consent was procured through fraud and innocent mistake; that it was not sanctioned by the 5th and 6th plaintiffs` Board of Directors and that the Defendant has blatantly refused to comply with clause 3 or the Consent Order whereas the applicants have faithfully and religiously met their part of the bargain under the consent. It is also premised on the ground that the consent Order is a breach of the public good and an abuse of due process.

In the affidavit the 1st Plaintiff/Applicant deposes that he agreed to the consent upon

" untramelled coercion" from his own advocate and threats from the defendant`s advocate; that he nevertheless thereafter performed all his obligations under the terms of the consent; that however, by the time of bringing this application the defendant had not furnished him with the documents as required of her in the consent; that instead when pressed by his advocate her advocate sent a bundle of documents "WEOI" which are not at all relevant. He further deposes that in **Hccc 45 of 2009** there was an order restraining **Miscera Asante** from receiving any payment from the defendant on account of the disputed letter of credit and as such the payment was made in defiance of the Court Order and was illegal. He

deposes that any subsequent instrument including the cash cover and consent are also illegal, null and void; that had he known that the alleged letter of credit had expired and no payment was capable of being made and had the advocates given him time to think through the matter he would never have consented to the signing of the Consent Order. He has annexed the subject letter of credit as " **WEO3**". He reiterates that as the consent was not sanctioned by the Board of Directors of the 5th and 6th plaintiffs it is illegal for that reason as well. He then contends that the defendant does not stand to suffer any prejudice and that the defendant has frustrated the expeditions disposal of **Hcc 45 of 2009**.

The application is opposed. The defendant/Respondent has by its Legal Counsel-Roy Akubu- deposed that this is the third time the plaintiff are seeking to review and/or set aside the consent and that therefor this application is res judicata, and ought not to be entertained. It further deposes that the defendant has instead of pursuing **Hcc 45 of 2008** chosen to file a multiplicity of applications, and that the consent followed months of negotiations and was recorded in his presence and in the presence of his to advocates then on record and hence, it is not now open for the plaintiff to seek a unilateral review of the agreement mutually entered into. It deposes that it duly complied with its part of the consent and the consent has already been enforced. It sets out the reasons why it says that the consent has been enforced – see paragraph 10 of the replying affidavit. The defendant disputes that it has frustrated the healing of **Hccc 45 of 2008**. It also contends that the authorization of the 5th and 6th Plaintiffs to enter into the consent was unnecessary since they were represented in court by their advocates; that the issue of payment to Kamoro Agrovet and Cera Sante Anima are all issues in Hccc 45 of 2008 and should be canvassed in that suit as indicated in the consent order. Further that no grounds of misrepresentation, fraud, mistake or other circumstances that would warrant the review or setting aside of the order have been demonstrated and this court cannot be called upon to rewrite the agreement between the parties as it amounts to a contract. That moreover the parties having performed on the consent letter it is now not open to the plaintiffs more than two years later, to allege that the consent was entered into by mistake and that the consent involved other parties who are not the subject suit and setting it aside would result to breach of the understandings made to those other parties.

The application was canvassed through written submissions which I need not reproduce here. Before I make a determination on this matter let me observe that I have had very little interaction and it would have been best placed before my brother Chemitei-Judge for ruling. Nevertheless since it was placed before me let me now proceed to make a determination.

An issue has been raised by the Defendant that this application is res judicata. Having perused the record and more so the rulings delivered by Chemitei-J on the two earlier applications, I am not persuaded that it is. The application dated 11th February, 2013 sought inter-alia a review of the consent so that a sum of Ksh. 16,865,565/55 held in an escrow account could be released to the 1st Plaintiff and be replaced by a bank guarantee. The grounds for that application were, inter alia, that the circumstances surrounding the procurement and subsequent recording of the consent Order had completely changed and that the Plaintiffs had become increasingly and unduly overburdened with huge monthly repayments for a loan obtained to secure the cash cover in the escrow account and which was not generating any income. Further that the defendant had no reason for refusing alternative forms of securities whereas the 5th Plaintiffs stared at imminent collapse as a result of the huge loan. Chemite-J dismissed that application because according to him the consent had already been enforced and all that remained was determination of Hccc 45 of 2008. He also observed that the 1st Plaintiff had not exhibited the bank guarantee which would have demonstrated good faith. He also held that the applicant did not meet the criteria for review in Section 80 of the Civil Procedure Act and Order 45(I) of the Rules thereunder. The second application the Notice of Motion dated 19/7/2013, sought to review the Orders/Ruling of Chemitei-Judge but that again was dismissed under **Order 45 Rule 6** of the Civil Procedure Rules. The present application seeks to completely set aside the consent Order and has raised different grounds- fraud, coercion, innocent mistake and failure on the defendant`s part to fulfil certain conditions. It is not an application for review. Accordingly it is not res judicata and I find that it is properly before this court.

On the merits both sides are in agreement that a consent being contractual in nature can only be set aside on grounds which would justify setting aside a contract. It can also be set aside if certain conditions remain to be fulfilled which are not carried out- **Flora Wasike V D. Wamboko ( 1982-88) I KAR625**.

In the instant application it is contended that the Consent Order was obtained through fraud, innocent mistakes and is a breach of the public good and an abuse of due process. It is also contended that it was never sanctioned by the Board of Directors of the 5th and 6th Plaintiffs and is therefore illegal and further that the defendant has failed to comply with clause 3 of the Consent Order. My reading of all the material placed before me suggests otherwise. The record shows that the hearing of this suit had commenced and that the plaintiff had testified at length. The consent was recorded several months since he had last been stood down. He therefore very well knew what was happening. He has not demonstrated any fraud on the part of his Advocates then on record or on the part of the defendant`s advocate. He has also not demonstrated any mistake on his part. Instead he has at paragraphs 4 of his affidavit disclosed that a draft copy of the consent was shown to him. His contention that he protested and objected to it but was coerced into agreeing with it as he risked having his properties auctioned cannot be true as by her ruling of 5/11/2010 **Ali Aroni-J** had granted him a temporary injunction to restrain the defendant from advertising for sale, selling either by public auction or private treaty the parcels of land Kisumu Municipality/Block 10/19, 20 and 560 pending the hearing and determination of the suit. In effect his properties remained safe from auction for so long as the suit was not fully heard and determined. He surely must have been aware of this temporary injunction and he cannot now be heard to say that he agreed to the consent because he risked having his properties sold at a throw away price. The advertisement annexed to his affidavit is for a Well established Hotel in Kisumu and does not specifically refer to the 5th Defendant. It does not disclose the date it was placed in the paper either and so does not support his allegation. Further his own affidavit reveals that the consent order has been substantially enforced. Indeed he contends that what remains is compliance by the defence of clause 3. The defendant has however demonstrated that they duly complied as shown by annextures BBK 4 and BBK5 to the replying affidavit. This is not controverted and so the ground that certain conditions " remain to be fulfilled which are not carried out" can also not hold. He has also termed the consent illegal for not being sanctioned by the Boards for Directors of the 5th and 6th Plaintiffs. My take on that is that that cannot be the case as the two plaintiffs have not also filed affidavits in support of this application- his own affidavit having been sworn on their behalf without authority under seal. Needless to say I am not persuaded that the consent goes against public policy

It is instructive that this application was made two years after the consent was recorded and only upon the dismissal of the two applications for review. it is even more instructive that when he made those two applications for review he did not plead fraud or mistake or any of the grounds that he now raises. Some of the issues were dealt with by my brother **Chemitei;Judge** but not under the banner of the grounds raised.

The upshot is that I find no merit in this application whatsoever and accordingly dismiss it with costs to the Defendant. It is so Ordered.

**Dated, signed and delivered at Kisumu this 12th day February, 2015**

**E. N. MAINA**
**JUDGE**

**In the presence of:**

Mr. Nyamweya for the Applicants

No appearance for the Respondent

Moses Okumu -Court interpreter