REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 101 OF 2006

ANURA PERERA ……...….……...PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED ....……..…….1ST DEFENDANT

WANGETHI MWANGI…….....2ND DEFENDANT

JOSEPH ODINDO……..3RD DEFENDANT

RULING

1. Vide a consent order of the court between the parties' advocates, Honourable Waweru J did on 2nd October 2014 record as follows:-

   "Order: By consent the chamber summons dated 30th March 2006 be settled upon the following terms;-

1. *The plaintiff do deposit the sum of kshs 500,000/- as security for the defendant's costs in a joint interest earning account in the names of the parties' advocates at Equity Bank Ltd, Kilimani Branch.*
2. *The said deposit be made within 30 days of today.*
3. *In default of such deposit the suit shall stand dismissed with costs to the defendants.*
4. *Costs of the application shall be in the cause."*

2. The plaintiff's counsel did not meet the timelines given and on February 2015 they wrote to the defendant's counsel, explaining that the default to meet the timelines was due to the fact that the advocate who held brief on 2nd October 2014 omitted to note on the file that there was a timeline within which the deposit was to be made. They sought indulgence to extend the period so that payment could be regularized without the necessity of seeking out the court to extend the time.
3. The above correspondence was after the defence lawyers received a cheque late and maintained that the plaintiff's correspondence had been overtaken by events. The plaintiff only managed to send the cheque and completed bank forms and documentation to the defendant's counsels on 5th January 2015.
4. It is he above background that is the basis for the application dated 24th February 2015 by the plaintiff seeking for enlargement of time within which the order of 2nd October 2014 should be

complied with.

5. The application was brought under the provisions of Section 95 of the Civil Procedure Act and Orders 26 Rule 5(2), 50,Rule 6 and 51 Rule 1 of the Civil Procedure Rules. The applicant relied on the grounds that the delay to provide security within 30 days from the date of consent order was not as a result of the plaintiff's mistake or omission, that he was not made aware of the timelines that the order provided as the advocate who attended court omitted to record the timelines on the file, the said advocate did not inform the plaintiff's advocate that security was supposed to be deposited within 30 days, and that the delay and failure to deposit security for costs timeously was because Mr Muin Malik who was signatory to the joint account was consistently out of the office for a greater part of the second half of last year. The application was further supported by the affidavit of Henry Asugah Ongicho replicating the grounds and annexing correspondences between the parties' advocates. Mr Ongicho deposed that he was involved in the negotiations for the settlement of the defendant's application for security for costs dated 30th March 2006 and which negotiations were with Wanjiru Ngige the defendant's counsel culminating in an agreement that resulted in a consent order being recorded in court on 2nd October 2014. However, that on the material date, he send one Brenda Nziwa Nandwa a newly admitted advocate from their office to hold his brief to record the said consent as had already been agreed between the parties which she did. That regrettably, the said advocate neither noted the timelines given in the order nor did she notify the senior advocate of what had transpired and that on 15th November 2014, completely unaware of those timelines the applicants' advocates purchased a banker's cheque in the joint names of the law firms representing both parties in the suit but that for 2 months, the signatory to the joint account to be opened Mr Muin Malik was largely overseas and unavailable to sign the account opening forms and it was not until 5th January 2015 that they forwarded the banker's cheque together with those accounts opening forms duly executed to the defendants' advocates and that is when they were reminded by letter of 16th January 2015 that time had lapsed and despite indulgence sought, the defence counsels were not willing to indulge the plaintiff's counsels on the matter hence this application. The plaintiff's counsels also attributed that delay to the closure of their offices between mid December 2014 to 5th January 2015.
6. The defendants opposed the application for enlargement of time and filed a preliminary objection dated 25th May 2015 contending that the suit stood dismissed as at 3rd November 2014 and therefore the court had no jurisdiction to hear or grant the orders sought in the application.
7. The parties' advocates agreed to dispose of the application by way of written submissions. The plaintiff filed his on 10th June 2015 whereas the defendants filed theirs on 24th June 2015.
8. According to the defendant's preliminary objection, the consent stands and the parties are bound by it. In their view, the plaintiff is seeking to appeal against the consent order which is prohibited by Section 67(2) of the Civil Procedure Act. In their view the court cannot disregard the consent between the parties and enlarge time contrary to the terms agreed and contained in that consent.
9. Further, that the suit stood dismissed upon default hence no further action was required of the defendant in the event of the plaintiff's default.
10. The defendants maintained that a consent can only be set aside on the same grounds as would justify the setting aside of a contract i.e. fraud, mistake or misrepresentation, as was held in the binding authority of **Flora N. Wasike V Destimo Wamboko KAR [1982-1988].** The defendants also submitted that the court cannot enlarge time since the parties agreed on the consequences of the plaintiff's default in complying with the terms of the consent hence, since the suit stands dismissed , as there is no application to reinstate it or to set aside the consent, the court is functus officio. Further, that the plaintiff was urging the court to alter the terms of the consent contrary to the established principles of law set out in the **Flora Wasike V Destimo Wamboko** (supra) case. They also submitted that the powers of the court to extend time cannot apply where there is consent. The defendants also relied on **Gateway Insurance Company Ltd V Aries Auto Sprays [2011] e KLR** where an application to extend time set by consent was denied. The defendants urged the court to dismiss the plaintiff's application for enlargement of time as it lacked jurisdiction to do so.
11. The plaintiff's submissions mirror the supporting affidavit of Henry Asugah Ongicho and the grounds in support of the application. On the applicable law, the plaintiff's counsel submitted that

under order 26 Rule 5(1) of the Civil Procedure Rules, the suit could only be dismissed upon an application being made by the defendants that there had been default otherwise the court would not know whether the parties have complied with the order on the timelines given. He relied on **Fatuma Zainabu Mohammed V Ghati Dennitah & Others Petition No. 6/2013** where the Supreme Court considered the issue of security for costs as one of procedural justice and not substantive justice and held that the court making the order for provision of security for costs has discretionary jurisdiction to enlarge the period within which the security can be provided and stated:

> ***" It is clear therefore that in civil proceedings, extensions of time to deposit security for costs is not only possible before and after the lapse of time allowed for such deposit, but also after the dismissal of the suit in default of the security. Because of this flexibility with regard to timelines for furnishing security for costs through extension of time by the court, the time prescribed for the deposit of security for costs in civil proceedings is obviously a matter of procedure which is not cast in stone."***

12. The plaintiff's counsel submitted that the court has discretion to enlarge time where the time given for compliance has not lapsed, where it has lapsed and even where the time has lapsed and no application to dismiss suit for non compliance with the order for depositing of security for cots has been successfully prosecuted. In his view, what the plaintiff would be required is to show sufficient cause for the failure to provide security for costs timeously. He relied on **Banco Arabe Espanal V Bank of Uganda- Supreme Court CA 8/98** where the Supreme Court of Uganda expounded on the principle while interpreting the provisions of law similar to our Kenyan Order 26 of the Civil Procedure Rules.
13. The plaintiff's counsel submitted that the failure to comply with the timelines set in the consent was excusable as it was caused by omission by Miss Nandwa advocate whereby she omitted to make a note on the file of the plaintiff's advocates file showing the timelines given for deposit of security, which mistake should not be visited on the plaintiff who had already released the funds to his advocates long before the consent order was recorded. He further relied on the case of **Githere V Kimungu [1976-1985] EZ 101** that rules of procedure are intended to be hand maidens rather than a mistress and that the court should not be tied and bound by rules, which are intended as a general rule of procedure as this may lead to an injustice.
14. The plaintiff's counsel urged the court to find in his favour as the cheque dispatched to the defendants has never been returned to the plaintiff who has never made use of the money and therefore it should be assumed that it is already earning interest as agreed, since the application was brought without undue delay and that no prejudice will be suffered by the defendants that cannot be compensated by an award of costs bearing in mind the fact that the banker's cheque is still with the defendant's advocates.
15. I have carefully considered the plaintiff's application, the grounds, the supporting affidavit annextures, the preliminary objection raised and the respective parties written submissions and precedents relied on . The issues for determination in this case are:

a. *Whether this court has jurisdiction to hear and determination the application for enlargement of time sought.*
b. *Whether this court is functus officio.*
c. *If a and b above are in the negative, whether the plaintiff has made out a case for the granting of the orders sought.*
d. *What orders should this court make?*
e. *Who should be condemned to pay costs of the application?*

16. On whether this court has the jurisdiction to hear and determine the application by the plaintiff. It was contended by the defendant that the orders of 2nd October 2014 were made by consent of both parties and therefore the court cannot set aside a consent save by another consent and or unless it is proved that the said consent was entered into by mistake, fraud or misrepresentation. Further, that it would be contrary to the terms of the consent between the parties if this court was to enlarge time affecting a suit that had already been dismissed. The

defendants relied on **Flora Wasike V Destimo Wasike (supra)c**ase wherein it was held:

> ***"It is settled law that a consent judgment can only be set aside as of a contract, for example, fraud, mistake or misrepresentation. Section 67(2) does not necessarily apply where there is a dispute that the decree was passed by consent, though the burden of proving that there was no consent, or that the consent was not a valid one may be a heavy one. An advocate would have ostensible authority to compromise a suit or consent to judgment, so far as the opponent is concerned. The court would not readily assume that a judgment recorded by a judge as being by consent was not so unless it was demonstrably shown otherwise."***

17. According to the defendants, the parties having agreed to be bound by the consequences of the plaintiff's default in complying with terms of the consent, the suit would and it stood dismissed and in the absence of an application to reinstate it nor an application to set aside the consent, the court is therefore functus officio and therefore the court has no jurisdiction to alter the terms of the consent between the parties and enlarge time. Further, the defendants argued, relying on **Flora Wasike (supra) and Hirani V Kassam [1952] 19 ECA 131 page 137** that:

> ***"The mode of paying the debt then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."***

18. Thus, the defendants contended that only parties to a contract can alter it and not the court. They also found footage in the case of **Gateway Insurance Company Ltd V Aries Auto Sprays [2011] e KLR** where application to extend time set by consent was denied , citing Visram JA that :

> ***" The High Court had absolutely no jurisdiction to alter the terms of the contract between the parties, and correctly rejected the appeal before it……The consent order was made on 22nd May 2003, limiting the time for the doing of any act to 14 days from that day. The appellant herein lost its right to apply to court for extension on 5th June 2003. By that date, the default clause 1 (c) of the consent order has become operational and the orders stood vacated."***

19. On the other hand, the applicant maintained that this court has jurisdiction to hear and determine an application for enlargement of time and they found umbrage in Article 159 of the Constitution and a number of decisions including **Petition No. 6/2013 Fatuma Zainabu Mohammed V Ghati Dennitah & Others** where the Supreme Court of Kenya held that an issue of security for costs is one of procedural justice and not substantive justice and that the court in making the order for provision of security for costs has discretionary jurisdiction to enlarge the period within which security can be provided even after the lapse of time.
20. The applicant further relied on the Ugandan decision of **Banco Arabe Espanal V Bank of Uganda (supra**) where the court in dealing with a situation that arose under a provision similar to our order 26 of the Civil Procedure Act stated:

> ***(iii) Under Order 23 Rule 3 (2) of the Civil Procedure Rules, an order for dismissal of a case can be set aside for sufficient cause. The circumstances of the case showed that the appellant was prevented by sufficient cause from depositing the money for security for costs within the time allowed because it was under the mistaken belief that a guarantee would suffice as security for costs as per the advice of their counsel. The Supreme Court found that their present case was one where the error by counsel for the appellant should not be visited on the appellant, and that the circumstances amounted to sufficient cause for the purposes of setting aside the dismissal of the suit."***

21. The applicants also relied on **Githere V Kimungu (1996-1985)** where the Court of Appeal held

that Rules of procedure are intended to be handmaidens rather than mistresses and that the court should not be tied and bound by rules, which are intended as general rules of procedure as this may lead to an injustice.

22. My careful examination of the cases referred to by the applicant reveal that: in neither of those cases were the courts dealing with a situation in parimateria with the instant case. In those cases referred to, the courts were dealing with the matter of discretionary powers of the court as to enlarge time for depositing of security of costs, but not in a situation where there was a consent between the parties and endorsed by the court, which consent set the terms and timelines as well as the consequences of non compliance by the party. It therefore follows that the decisions in the **Supreme Court Petition 6/2013 and Supreme Court (Uganda) CA8/98** must be distinguished with this case where there was a consent between the parties and therefore the issue is whether the court can be asked by one party to set aside that consent, without satisfying the court on the principles applicable and as espoused in the case of **Flora N. Wasike V Destimo Wamboko** (supra) that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside of a contract for example, fraud, mistake or misrepresentation.

23. In this case, it is trite from the Order of 2nd October 2014 that the parties agreed to the terms of the consent which the learned Judge Waweru J recorded as an order of the court. In my view, an order of the court which is recorded out of or arising from a consent of the parties is a binding contract between the parties to the dispute and as such, is like any other order of the court leaving no room for the discretion of the court to set aside that order save where the complaining party shows to the satisfaction of the court that the consent was entered into by mistake, fraud or misrepresentation. Thus, a consent between the parties to the suit presents an impermissible fetters of the discretion of the court to tamper with that consent without the consent of both parties or as would a court set aside a contract between parties thereto, and enlargement of time for compliance with a consent is equally fettered where such time is fixed by the consent between the parties.

24. In addition, this court would only have the power to set aside a consent order where it is proved that the order was contrary to the policy of the court See **Samson Ole Tina V Clerk, Transmara County Council [2010] e KLR** or where it is proved that an advocate did not have the authority of his client to record that consent or he acted not in good faith and contrary to express and or negative discretion of his client . (See **also R v District Land Registrar & Another Exparte Kiprono Tegen & Another [2005] e KLR.** This court agrees that it must do justice according to law and avoid paying undue attention to abstract technical strictures and procedural snares merely for the sake of technicality which may have the effect of restricting access to justice which is itself a constitutional right and which cannot be abrogated or abridged by trazon or subtle schemes or maneuvers (See **Otieno Mak'onyango V Attorney General [2012] e KLR** per Rawal J. This court reminds itself that it cannot for one moment treat a consent between parties, which consent has not been challenged in anyway, as if it was just another elastic order capable of being set aside in the discretion of the court as was held in **Brooke Bond Liebig Ltd V Mallya [1975] EA 266** that a court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for varying and rescinding a contract between the parties. In **Kenya Commercial Bank Ltd V Specialized Engineering Company Ltd [1982] e KLR 485** the court held 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 advocates and when made, such an order is not lightly to be set aside or varied by consent or on one or either of the recognized grounds."***

25. In **Ismail Surndery Hirani V Nourali & Esmail Kassam [1952] EACA 131** the court cited with approval the passage from **"Set on Judgments and Orders 7th Edition VOL 1"** page 124 that:

> ***".....prima facie, any order made in the presence and with the consent of counsel***

is binding on all parties to the proceedings or action, and on those claiming under them……and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court…….or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts or in general for a reason would enable a court to set aside an agreement.".

26. Relying on the above decisions, I would hold without hesitation that indeed the court will not interfere with the freedom of contract and will not, merely because a man has made an improvident contract, relieve him from its consequences. I am fortified by the Court of Appeal decision in **Gateway Insurance Company Ltd V Aries Auto Sprays** (supra) wherein the facts were similar to this case and the Court of Appeal was clear that Section 95 of the Civil Procedure Act on enlargement of time, and Order 50 Rule 6 of the Civil Procedure Rules on the same subject did not apply to cases where the time sought to be enlarged was fixed by consent of both parties. The above decision, which has not been overruled, cited **Gogardhan V Barsati Dir 1972 ALL 266** dealing with a rule identical to our Order 50 Rule 6 where the Indian court held:

" Even where an order is made for doing a thing within a particular time and order further provides that the application, a suit or appeal shall stand dismissed, if the thing is not done within the time fixed, the court has jurisdiction, if sufficient cause is made out, to extend the time even when the application for extension of time is made after the expiry of the time fixed. It is not the application to grant of further time, whether made before or after the expiry of the time granted which confers jurisdiction on the court."

Nonetheless, the appellate Court found that The High Court had absolutely no jurisdiction to alter the terms of the contract between the parties and rejected the appeal.

27. I have no reason to depart from the majority decision of the Court of Appeal in the **Gateway Insurance Company Limited V Aries Auto Sprays** (supra) and find that this court has no jurisdiction to enlarge the time that was fixed by the parties' consent.
28. On the issue of this court being functus officio, I do not agree with the defendants submission for reasons that this court is given the power and jurisdiction to review, vary or set aside its own decisions and therefore it is not functus officio. My finding is that there having been a validly recorded consent order of this court setting out the terms of the compromise which included the timeframes as well as consequences for non compliance thereof, that compromise became binding contract between the parties and any party seeking to vary or review any part of that compromise had to satisfy the threshold for setting aside or varying a contract as aforesaid. In this case the applicant only alleged that they inadvertently did note the time frames, which they consider to be sufficient cause to warrant enlargement of time. That may be so, but that sufficient cause would only persuade this court if the time sought to be enlarged was set by the court and not with the parties' consent.
29. Having found that this court is not inclined to enlarge the time set by the parties in the consent recorded on 2/10/2014, I would nor belabor to determine the merits of the application for enlargement of time but in case Iam found to be wrong in my above finding, on whether or not the applicant has made out a case for enlargement of time within which to deposit security for costs, in my view, the reasons given are not sufficient to persuade this court to enlarge the time set out in the consent. The allegation that a newly admitted advocate did not note the timelines of the consent on the file cannot be the sufficient cause or reason for failure to comply with the timelines set by the parties themselves and only adopted by the court, as the terms of the consent must have been, as conceded by Mr Ongicho advocate in his supporting affidavit, negotiated terms and not imposed upon the newly admitted advocate holding brief by the adverse party's advocate otherwise it would not be a consent. This is evidenced by Annextures HAO 1, HAO 2, HAO3 and HAO 4 annexed to the supporting affidavit sworn by Mr Ongicho advocate on behalf of the applicant. It cannot therefore be that the plaintiff's advocates were not aware of the terms of the consent prior to and even after the consent was recorded on 2/10/2014. It was upon the applicant's counsel to verify the terms of the consent that they had negotiated over a period of time and it did

not have to take them until January 2015 for them to purport to implement the consent whose terms they did not know.

30. On the allegation that it was mistake of counsel which should not be visited upon the litigant, it was stated by the Court of Appeal in the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR that:**

> ***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."***

31. In **CIVIL APPEAL NO.41 OF 2014** Mombasa per: **MAKHANDIA, OUKO & M'INOTI, JJ.A.)** **TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY v JEREMIAH KIMIGHO MWAKIO &2 others it was held that-**

> ***"It** is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. The Appellate Court cited **Halsbury's Laws of England, 4th Edn, Vol 44 at p 100-101)** and also **Re Jones [1870], 6 Ch. App 497** in which **Lord Hatherley** communicated the court's expectations this way:*
>
> ***'….I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned…'***
>
> *Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client. This is to be found in the case **Ketteman & others v. Hansel Properties Ltd [1988] 1 All ER 38;** in which an application was brought for belated amendment of the defence; an amendment which had been necessitated by mistake of counsel. In his judgment, Lord Griffith stated that*
>
> ***"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings."***
>
> *Needless to say, the application to amend a defence on the basis of an inadvertent mistake by counsel was disallowed.*
>
> *To our mind, this is the most proximate way to balance out the competing interests of both parties to the suit. That the conduct complained of in this case was committed by a clerk is immaterial, for it is the law of agency that the principal should be bound by the acts of his agent. **(See Ahmed v. Highway Carriers [1986] LLR 258 (CAK)** and also (**Myers v. Elman [1939] 4ALL E.R 484)** as stated by **Viscount Maughan** in the Myer's case,*
>
> ***"…the jurisdiction may be exercised where the solicitor is merely negligent; it would seem to follow that he cannot shelter himself behind a clerk for whose actions within the scope of his authority he is liable…. My conclusion is that Elman (the solicitor) cannot***

dissociate himself from the acts and defaults of Osborn (the clerk) and in what follows, I shall generally omit any reference to him and shall treat his acts as being those of his principal."

Hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko. This takes us back to the question, was the same excusable enough to warrant court's favour?

In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit."

32. This court also refuses to be persuaded by the deposition that the signatory to the account was out of the country for close to two months as there was no evidence to support that allegation in the affidavit of Mr Ongicho. Further, the allegation that the delay was due to the closure of the plaintiff's advocates' offices from mid December 2014 to January 2015 did not assist in the explanation for the delay since by mid December, 2014, the applicant were already out of time and in any event, nothing stopped him from applying for enlargement of time immediately after reopening the offices in early January 2015.
33. For all the above reasons, I find that this being an old- 2006 case, the reasons given for failure to comply with the consent as recorded in court are not persuasive to invite the discretion of the court to enlarge time for compliance with the consent order for deposit of security for costs and the provisions of Article 159 of the Constitution would not be invoked to assist a party who in my view has sought to delay justice which in itself is contrary to the very Article 159 of the Constitution that justice shall not be delayed and which provisions on procedural technicalities that he seeks to rely on are in my view, not applicable in the circumstances of this case.
34. Accordingly I dismiss the application by the plaintiff/applicant dated 24th February 2015 with costs to the defendants/respondents.

Dated, signed and delivered in open court at Nairobi this 7th day of October 2015.

R.E. ABURILI

JUDGE