



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 206 OF 2012

MWANDAWIRO MGHANGA.....PETITIONER/ RESPONDENT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT/APPLICANT

RULING

1. This Petition was filed on 16th May 2012 and in it, the Petitioner is claiming a number of reliefs for alleged breaches of his fundamental rights and freedoms by agents and/or servants of the Republic of Kenya in circumstances that are not relevant at the moment.
2. On 20th December 2012, Mr. Nyamu, Learned Counsel for the Petitioner and Mr. Opondo, Learned State Counsel, representing the Attorney General, appeared before this court and recorded a straight -forward consent in the following terms:

"By consent

1. **Judgment is hereby entered in the favour of the Petitioner in the sum ofKshs.45 million.**
2. **Each party are to bear its own costs "(sic)**
3. The matter should have come to an end thereafter but the Attorney General apparently changed his mind and filed an application dated 26th July 2013 seeking to set aside that Consent Judgment but withdrew it on 17th December 2013. On 20th December 2013, a fresh application, seeking the same orders was filed and in addition, orders for stay of execution of the decree and for the Respondent to be allowed time to file grounds of opposition in answer to the Petitioner, are also sought.
4. What are the reasons for seeking that the Consent Judgment should be set aside? According to Mr. Opondo, and relying on the supporting Affidavit of Police Superintendent Titi Ayiera, sworn on 20th December 2013, whereas the Attorney General had indeed entered into the said Judgment in good faith, the Office of Inspector General of Police had not given him instructions to do so neither was that office consulted prior to the recording of the Consent Order. That in the circumstances and in the wider public interest, the Consent Judgment should be set aside.
5. In submissions, the other point made by the Attorney General is that a consent order can be set aside if one party was mistaken in recording it and relying on the decision in **Greater Kansas City Laborer Pension Fund Vs Paramount Industries Inc.U.S. Court of Appeals Seventh Circuit Case No.86 - 2503 of 17.9.1987**. he also submitted that a consent order recorded without authority ought to be set aside.

6. In response, Mr. Nyamu submitted that the Application is a delaying tactic if the history of the matter is looked at.
7. In that regard, it was his argument that since the filing of the Petition, the Respondent has filed no response to it and instead offered to settle the Petitioner's claim.
8. Pursuing that offer, the Petitioner and the Attorney General exchanged correspondence and held meetings leading to the Consent Judgment. That therefore, to purport that the Attorney General had no authority to record the impugned consent was an after-thought and a belated reaction to the Petitioner's threat to execute the decree arising from the Consent Judgment.
9. Further, that the Inspector General of Police has no role in the Petition and it is the Office of the President that should have reacted in any way to the Consent Judgment.
10. In any event, that there was no mistake in the recording of the said consent and the Petition, undefended as it is, should not be reopened. That the Application should instead be dismissed with costs.
11. What is the law on setting aside of consent orders recorded before court by Parties? The Parties have submitted the following authorities in answer to that question:

i) **Wasike vs Wamboko. [1988] KLR 429** where the Court of Appeal held that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify the setting aside of a contract

ii) **Bhupinder Singh Dogon vs Coast Development Authority. H.C.C. 158/2003 (Msa)** where Kasango J. followed the principles laid down in **Wasike**(supra) and set aside a consent order on the ground that there was a mistake in its recording.

iii) **Purcell vs F.C. Trigell [1970] 3 All.E.R 670** where Lord Denning stated that having regard to the intolerable and inexcusable delay by the Defendants which had prejudiced the Plaintiff, the Defendants were "**not entitled to ask the court to exercise its discretion not to enforce the consent order.**"

iv) **Jacob Juma vs Rosaline Wanjiru C.A 288 of 2002** where the Court of Appeal quoted with approval the statement in **Halsbury's Laws of England. 4th Edition** that "**mistake nullifies consent when the parties reach an agreement but that agreement has no legal effect because it is based on a fundamental mistaken assumption. A mistake will not negative a consent under it [unless] it is material to the formation of the agreement in the sense that if the party mistaken had realized his mistake, he would not have entered the agreement**"

12. I agree with the findings in all the above cases and applying them to the present Application, a consent order can only, generally, be set aside, like any other contract, if it can be proved that;

- i. It was obtained by fraud or collusion.
- ii. There was a mistake in recording it.
- iii. It is against the policy of the court.

13. In the instant case, it is urged that the Attorney - General and his representative, Mr. Opondo, were under the mistaken belief that they had authority to record the impugned consent order when in fact they had no such authority.

14. In the **Greater Kansas City** Case supra, Dumbauld, Senior Judge, in concurring with the opinion of Wollman, Circuit Judge, stated as follows on authority by counsel to record a consent:

"Parties employing counsel in litigation are subject to normal rules of the law of agency. They should know that settlement by the assent of the parties themselves is a favoured method of disposition of cases, better than submission to a third party such as a judge or jury, who though objective and impartial, may not understand the concerns of the parties as well as they do themselves. Hence the parties should know that their counsel must be

authorized at all times to make an appropriate settlement. Litigants must keep their counsel currently informed of the terms upon which they are agreeable to the disposition of pending litigation. This is especially true in the case at bar, where the settlement was sanctioned by a proceeding in open court. The Holts should have been present at this important stage of their case, rather than absent, if they thought their counsel incapable of conveying with precision the terms of their authorization to settle. As a consequence of their indifference they are inflicting an imposition on the district court to thresh old straw."

15. I agree with the above decisions and their ratio decidendi and before me, I have an express statement from Mr. Ayiera that it was the Office of Inspector General of Police that was directly affected by the Consent Judgment and by letter dated 10th July 2013 in answer to one by the Attorney General dated 2nd April 2013, that Office stated that it was never consulted before the Judgment was recorded. That letter also specifically stated that the said Office was uncomfortable with the figure of Kshs.45 million in comparison with other awards in similar cases in the past and that it ought to have had a say in the final figure forming the Judgment.

16. I accept that evidence as an expression of the fact that while the Attorney General as legal adviser to Government as is the law under Article 156(6) of the Constitution, is obligated to advise Government generally, and all its departments in particular, but by its very nature, such advise is not authority to act without instructions and without the entity that he is advising being aware of his intended action. It was therefore a mistake for the Attorney General or his representative to enter into a consent judgment and binding the Office of Inspector General of Police without the express instructions of that Office.

17. I am satisfied therefore that on the law and the facts, there is considerable merit in revisiting the Consent Judgment of 20th December 2013. I also say so because, a huge sum out of public funds may be expended in favour of an individual without the individual's claim being tried on its merits. I also say so well aware that the Petition has been pending unheard for about two years because of the negotiations leading to the consent and there may be a measure of prejudice to the Petitioner. Such prejudice can however be assuaged by costs.

18. In the event, I will allow the Application dated 20th December 2013 and the following orders are hereby granted;

a. That the Consent Judgment recorded in Court in favour of the Petitioner on the 20th day of December 2012 be set aside.

b. That the execution of the Decree dated 11th day of January 2013 be set aside.

c. That the Draft Grounds of Opposition by the Respondent be deemed to have been duly filed and served.

d. That Petition dated 26th April 2012 be set down for hearing on its merits and on a priority basis.

e. That the costs of this Application should be paid to the Petitioner by the Respondent.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10th DAY OF OCTOBER.2014.

ISAAC LENAOLA

JUDGE

In the presence of:

Miss Mogire holding brief for Mr. Nyamu for Petitioner

Mr. Opondo for Applicant