REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1355 of 2000

KRISHA KUMAR KAPOOR……....……PLAINTIFF/APPLICANT

VERSUS

BARKLAYS BANK KENYA LIMITED

THE HON ATTORNEY GENERAL…..…DEFENDANTS/RESPONDENTS

BENARSTE IN SHARI…..…….DEFENDANTS/RESPONDENTS

HERBERT CHAROH…...……...DEFENDANTS/RESPONDENTS

RULING

The plaintiff has moved to this court, seeking reliefs in the manner sought vide a plaint dated 17th day of August 2000 and filed on 2nd August 2000. A summary of the complaint as contained in paragraphs 6,7,8,9,10,11,12,13 and 16 are as follows:-

- It is contended that the 1st defendant, is servants, employees, and or agents unknown to the plaintiff, maliciously laid false information before, the banking fraud investigation department of the Central Bank, against the plaintiff that the plaintiff, had obtained money from them by false pretence to the sum of Ksh. 12,620,000/=, the property of the 1st defendant, contrary to section 313 of the penal code.

- By reasons of the afore set out false allegation, the banking fraud investigation department officers, arrested the plaintiff and arraigned them in the chief magistrates' court, in criminal case No. 2023 of 1998 police reference No. 142/266/98.

- The plaintiff was arrested and falsely imprisoned on 8th day of September 1998 and taken and arraigned before the chief magistrate on 10th day of September 1998.

- Thereafter the 1st, 2nd, 3rd and fourth defendants jointly maliciously and unlawfully and without any reasonable or probable cause, proceeded to prosecute the said charge of obtaining money by false pretences contrary to section 313 of the penal code in the said CMS criminal case number 2035 of 1998 **REPUBLIC VERSUS KRISHA KUMAR KAPOOR.**

- Thereafter the plaintiff was released on bond, and was bonded to appear in court, after the defendant had committed him to attend court for trial which trial he attended.

- The plaintiff was acquitted of the said charge, vide a ruling dated and signed by the learned Senior

Resident Magistrate, the Honourable G.N. Ombongi on 3rd March 2000, which ruling acquitted the plaintiff under section 210 of the CPC

- Particulars of malice and absence of or any reasonable and probable cause are set out in paragraph 9 of the plaint and in a summary form and for purposes of the record these are:-

(a) The 1st defendants knew that the information laid before the Banking fraud was false.

(b) The Banking fraud investigation department ought to have known that the information given to them was false, they laid charges against the plaintiff without carrying out any or any proper investigation, and to hood wink as to happenings in the 3rd party being the Reliance Bank limited and to canceal the filings of the Central Bank in its supervisory role, they proceeded to arrest the plaintiff without proper investigation, and thus treated him as a pawn, which arrest was motivated by extraneous reasons and not legal reasons.

(c) Purported unknown culprits were never arrested and prosecuted.

(d) The prosecution was meant to assist in the recovery of civil debts.

(e) Acts and omissions of third parties, corporate and individuals were disregarded by the defendants to act in haste.

(f) The arrest and prosecution of the plaintiff was a smoke screen for the failures of other banking and government bodies.

By reason of mattes afore said, the plaintiff asserts that he was falsely imprisoned, and maliciously and without any or any reasonable cause prosecuted, deprived of his liberty, greatly injured in his credit, character, and reputation and has suffered considerable, mental and bodily pain anguish, considerable trouble, inconvenience, anxiety and expense and has been greatly injured in his business and has thereby suffered loss and damage in relation to:-

- Legal costs of defending the plaintiff –Kshs. 800,000.00

- Traveling costs of the plaintiff from Mwanza, Tanzania, from time of arrest to the acquittal on all dates when required in court, Kshs. 650,000.00.

- Loss of income by the plaintiff, Ksh. 3,500,000.00.

- Advertising charges for notice to mitigate damages Ksh. 26,881.50.

TOTAL KSHS. 4,976,881.50.

Inconsequence thereof the plaintiff prays for special damages of Kshs. 4,976,881.50 being amount of damages particularized and claimed in paragraph 10 above.

(b) Interest on (a) above

(c) General damages for false imprisonment.

(d) General damages for malicious prosecution

(e) Exemplary and aggravated damages.

(f) Costs of this suit and interest thereon.

(g) Any other or further relief this honourable court, may deem fit.

Summons to enter appearance were taken out and served. The 2nd, 3rd and 4th defendants entered appearance dated 4th day of September 2000 and filed on the 13th day of September 2000. The defence on behalf of the same is dated 27th day of October 2000 and filed on 30th October 2000. The salient features of the same in a summary form are as follows.

- The plaintiff is put to strict proof with regard to malice.

- The arrest of the plaintiff was done lawfully following complaint that had been made against the plaintiff.

- That in arresting the plaintiff, they had reasonable or probable cause to believe that an arrestable offence had been committed and were at all material time acting within the course and scope of their duties under the police Act.

- They have no knowledge as pertained to the particulars of special damages set forth in paragraph 10 of the plaint, and they make no admission whatsoever as regards the alleged loss and the plaintiff is put to strict proof.

- Make no admission to the alleged loss as set out in paragraphs 11,12, and 13 and will contend at the appropriate time that the plaintiff is not entitled to any of the reliefs sought in the plaint.

The 1st defendant on the other hand entered appearance dated 13th November 2000 and filed on the 14th November 2000, followed by a defence and counter claim dated 13th day of November 2000 and filed on 15th day of November 2000. The salient features of the same for purposes of the record are as follows:-

- Plaintiff put to strict proof on his allegation in paragraphs 3, 4, 5, 7, 8, 10, 11, 12 and 13.

- Denied having made any malicious report to the police or given to the 2nd third or fourth defendants and or their agents any information which was in any sense whatsoever false, malicious or unjustified and puts the plaintiff to strict proof.

- That if any report was made or information given to the Banking Fraud, Department of the Central Bank of Kenya, it was so made or the information so given was given in discharge of the 1st defendants' civil and legal duty to report a possible offence and to lay such information in respect thereof as would facilitate the investigation thereof by the police.

- That if indeed the plaintiff was indeed committed by an order of the court for trial, this was a matter outside the capability of the first defendant and cannot thus be liable for such orders if any.

- Denied particulars of malice and absence of or any reasonable and probable cause and puts the plaintiff to strict proof thereof.

In their counter claim, the 1st defendant stressed the following:-

- Claims from the plaintiff the sum of Kshs. 3,800,800/= plus interest, charges, expenses, and costs thereon, which claim arises by virtue of an instrument of guarantee and indemnity dated 18th April 1995, signed by the plaintiff and made between the first defendant and the plaintiff herein after called the guarantee. The plaintiff unconditionally and irrevocably undertook and agreed with the 1st defendant that, in consideration of the first defendants' granting or continuing to make available banking facilities or other accommodations or granting time for so long as it may think fit to veleo (Kenya) limited, a limited liability campany registered and carrying on business in Kenya (herein after called, the company) the plaintiff would pay on demand such sum or sums as would be due at the time of demand, subject to the

limit provided for in the guarantee..

- That it was an express term of the guarantee, that the plaintiff, as, a primary obligator, and not merely as a surety would on demand pay to the first defendant all money and discharge all obligations whether actual or contingent, due, owing or incurred to the first defendant by the company together with interest to the date of payment at such rate and upon such terms, as may from time to time be payable by the company and including all commission fees and other charges and all legal and other costs and expenses incurred by the first defendant in relation to the sum due.

- That any statement of account of the amount due, signed as correct by any duly authorized officer of the 1st defendant, shall be conclusive evidence against the plaintiff of the indebtedness of the company to the first defendant.

- That the total amount receivable under the guarantee shall be limited to principal sum, stated in the schedule to the guarantee plus all interests thereon, fees, commission costs, charges and expenses referred to in the guarantee, which shall have accrued or shall accrue to the first defendant before or at any time after any demand made pursuant to the provisions of the guarantee.

- That the guarantee, is a continuing security and shall secure the ultimate balance from time to time, owing to the first defendant by the company in any manner whatsoever not withstanding interalia the bankruptcy, liquidation or any other change in the constitution of the company or the name or style thereof or the death, bankruptcy or other in capacity of the plaintiff.

- That the liability of the plaintiff shall not be affected and the guarantee shall not be discharged or dismissed by reason of inter alia the first defendant, compounding with discharging, releasing or varying the liability of or granting any time indulgence or concession to the company.

- The principal sum secured was Kshs. 5,000,000.00 plus all interest, fees, commissions, charges, and expenses referred to in the guarantee.

By reason of matters afore set out, the 1st defendant counter claimed from the plaintiff Kshs. 3, 800, 8000/=, interest on (a) at the rate, from time to time ruling on overdrafts, further charges, expenses and costs on (a) as per the Guarantee, costs and any other relief that the court, may deem fit to grant.

The plaintiff put in a reply to defence and defence to counter claim dated 4th day of December 2000 and filed the same date. In its reply to defence, the plaintiff reiterated the content of the plaint and stressed that:-

- The report to the police was false, unjustified and made without any or any reasonable cause and which report basis was founded upon malice and ulterior motives.

- Paragraph 4 of the defence is a feeble and devious attempt by the 1st defendant to justify its malicious act and as such the 1st defendant was not discharging its civil and legal duty as prior to the report, it had stopped payment of the cheque.

- Contended that the defendant did not only report a possible offence but continued to be involved in the proceedings as the complainants.

- Maintain that the 1st defendant knew or ought to have known, that the complaint, it filed with the police was totally false and unjustified. It was also in a position to advise the relevant authority of the intention to withdraw the complaint which it did not due to the malicious nature of the complaint.

In the defence to the counter claim, the plaintiff/defendant reiterated the following:-

- That the 1st Defendant/Plaintiff is estopped from claiming the said amount from the

Plaintiff/Defendants as he had claimed the same amount from the principal debtor vide Milimani HCCC NO. 1483 of 2000 which was still pending in Milimani Commercial Court.

- That the 1st Defendant/Plaintiff should have joined the plaintiff herein to that suit, and as such, it is estopped from proceeding herein against the Plaintiff/Defendant.

- By reasons of what has been stated above the Defendant /Plaintiff contended that there is a wrong joinder of parties herein and the counter claim filed is an abuse of the due process of the court.

- Made no admission of the existence and or validity of the Guarantee instrument, and indemnity dated 18th April 1995, and the 1st Defendant/Plaintiff is put to strict proof.

- Without prejudice to the foregoing the Plaintiff/Defendant contended that the alleged veleo (k) limited, the alleged principal debtor, does not owe the Defendant/Plaintiff any money as alleged. In the alternative that any money owed was tendered to the 1st Defendant/Plaintiff by the principal debtor thereby discharging the plaintiff from any liability whatsoever.

- The rest of the averments in the counter claim are denied and the 1st defendant/plaintiff is put to strict proof.

For the reasons given above, the Plaintiff/Defendant prayed for the counter claim to be dismissed with costs.

It is against the afore set out background information, that the plaintiff moved to this court, and presented an application by way of notice of motion dated 14th June, 2007 and filed the same date. It is brought under order X rule 20 and order IXA rule 3 of the CPR (cap 21) laws of Kenya, and pursuant to the consent order dated 31st January 2007. Five prayers are sought namely:-

1. *"That the 1st defendant statements of defence, and counter claim dated 13th November 2000 and filed in court, on 15th November 2000 be struck out.*

2. *That the plaintiffs do have the costs of the counter claim.*

3. *That judgement be entered for the plaintiff against the 1st defendant for the sum of Kshs. 4,976,881.50 plus interest*

4. *That the plaintiff be at liberty to set down the rest of his claim for hearing and assessment of damages.*

5. *That cost of this application be awarded to the plaintiff in any event.*

The grounds in support are set out in the body of the application, supporting affidavit, annextures and written skeleton arguments and the major ones are as follows;-

- The 1st defendant vide a list of 1st defendants' list of documents, dated 23rd day of May 2006 vide item 1 and the 1st schedule thereof, the first defendant intimated to the court, that they had in their possession.

1. *Instrument of guarantee and indemnity signed by the plaintiff in favour of the first defendant.*

2. *A copy of a demand notice dated the 10th day of March 2000 addressed to the plaintiff.*

3. *The statement of the account of Veleo Kenya limited in the first defendants books.*

- The said list of documents was filed in a suit filed by the plaintiff applicant, against the first Defendant/ Respondent among others.

- Following that revelation, the Plaintiff/Applicant duly presented to court, an application by way of notice of motion under order X rules 17 of the CPR Cap21 laws of Kenya. It was dated 5th day of September 2006 and filed on the 6th day of September 2006. it sought the following reliefs:-

"(a) *That the 1st Defendant/Respondent do within ten (10) days produce for the Plaintiff/Applicants inspection the following documents:-*

1. *Original instrument of guarantee and indemnity signed by the plaintiff in favour of the 1st defendant.*

2. *Demand notice dated 10th March 2000 addressed to the plaintiff.*

3. *Copies of statement of accounts of Valeo Kenya limited in Barclays Bank books.*

(b) That the costs of this application be borne by the 1st Defendant/Respondent in any event.

- The said application was not opposed and it gave rise to consent orders made by Mugo J on the 31st January 2007. They read:-

"*By consent*

(1) The 1st defendant/respondent do within 30 days of today produce for the plaintiff/applicants' inspection the documents in prayer (a) of the application dated 5/9/2006.

(2) *The costs of the application be in the cause*"

-That the application to compel the 1st defendant to produce the said documents was brought because the 1st defendant had failed to comply with the notice to produce, dated 3rd day of August 2006 and filed the same date addressed to the 1st defendants' counsel and issued under order X rule 14 and 15 of the CPR demanding production of the said documents.

- There is no dispute that the orders of 31st January 2007 were made in the presence and with the consent of not only of the 1st defendant counsel, but indeed also counsels for the 2nd, 3rd and 4th defendants.

- That since the said consent orders have not been set aside, the 1st defendant is obligated to obey the same.

- Concerning the affidavit of one Faith Majiwa, the court, was invited to take note of the following

(i). The deponent failed to disclose that the firm of Messers Gathuru took over the conduct of the case from Messer Kaplan and Stratton

(ii). Failed to explain how Messer Kaplan and Stratton managed to draw up such a detailed defence, and counter claim without the relevant documents.

(iii). Failed to note that the plaintiff is not responsible for the loss of any documents being sought.

-The court, is invited to, apply the provisions of order X rule 20 CPR and strucke out the defendants' defence and counter claim as the 1st defendant has failed to respond to the request for interrogations.

- The court, to hold that the 1st defendants' conduct is a will full disregard of the courts orders of 31st January 2007.

- It will be an abuse of the due process of the court, for the 1st defendant to file a list of documents allegedly in their possession and when called upon to produce them for inspection, they turn round and state that they cannot lay hands on them.

- Even if the court, is minded not to invoke the provision of order X rule 20 CPR, it is called upon to invoke its inherent powers enshrined in section 3A of the CPA and strucke out the same for ends of justice to be met to both parties and allow the plaintiff to proceed on the basis of default of the filing of a defence and counter claim.

The first defendant has opposed the application on the basis of the grounds set out in the replying affidavit sworn by one Faith Majiwa, arguments in the written skeleton arguments, filed herein. A summary of the same are as follows:-

- That the deponent has personal knowledge of matters pertaining to the case and she was competent to depone on the same.

- She has personal knowledge that the plaintiff guaranteed a company by the name Valeo (Kenya) limited in respect of sums advanced by the 1st defendant.

- The said company defaulted and the 1st defendant issued a demand notice to the plaintiff but did not keep a copy.

- Upon failure to respond to the demand is when Messer Kaplan and Stratton were invited to file suit against the plaintiff, where upon the said firm of advocates, demanded to be given all the documents relating to the said indebtedness, to enable them defend the 1st defendants interest effectively, whereupon the 1st defendant forwarded all its documents to the said firm of advocates, which documents were misplaced in unclear circumstances.

- There after the case was taken over by the firm of Oraro and Company advocates, which firm also requested to be availed all the relevant documents which the 1st defendant could not avail as it did not have them.

- By reasons of the explanation given above, the 1st defendant will be greatly prejudiced in the defence, if its defence and counter claim were to be struck out.

In the written skeleton arguments the 1st defendants' counsel reiterated the content of the replying affidavit, and stated that non compliance arises because the defendant has been unable to locate the documents requested.

- The court, is urged to apply the test of whether or not to grant the order sought which is a determination as to whether the failure to supply the same was willful or not.

- That since the documents, sought to be produced, are relevant only to the counter claim, and not the defence, there is no justification as to why the defence should be struck out.

In reply the plaintiffs counsel reiterated their earlier submissions and stressed that:-

- The 1st defendants' submissions cannot hold because their notice of motion is premised on a consent order, recorded willingly and consciously by the parties on 31st January 2007.

- 9 months earlier to the said consent, the 1st defendant had filed a mandatory list of documents, saying that it had the said documents which it intends to rely upon in support of its case.

- The court, is reminded that it is now trite law, that a court, cannot interfere with the terms of a consent

order, which is effectively a contract between the parties, exception on grounds which would justify the setting aside of a contract such as fraud, mistake, misrepresentation or collusion or any other ground that would justify the setting a side of an agreement.

- The court, is urged to note that the consent order of 31/1/2003 still stands and is irrelevant that the 1st defendant now finds itself in a difficulty in fulfilling what it agreed and undertook to do.

- The court, is urged to uphold the consequences of failure to comply with an order of inspection as set out in order X rule 20 CPR and strucke out the defence and the counter claim.

The court was also referred to case law. The case of **BROOKE BOND LIEBIG (T) LIMITED VERSUS MALLYA (1975) EA 266** in which the CA held interalia that, a consent judgement may only be set a side for fraud collusion, or for any reason which would enable the court, to set aside an agreement.

The case of **MUNYIRI VERSUS NDUNGUYA (1985) KLR 370** also, a court of appeal, decision in which it was held inter alia that:

1. "The parties had entered into what amounted to a consent from which NO appeal is allowed by section 67 (2) of the CPA.

2. The remedy that was open to the parties, was to set a side the consent order, either by review or by the bringing of a fresh suit, as a court, can only interfere with a consent judgement in such circumstances as would afford a good ground for varying or rescinding a contract between parties.

*The case of **WASIKE VERSUS WAMBOKO (1988) KLR 429** also a decision of the CA where it was held interalia"*

***(i).** " That a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a side a contract or if certain conditions remain to be fulfilled which are not carried out.*

***(ii).** The CPA section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties,where a party seeks to prove that the decree is invalid, abinitio and should be rescinded or that there exist circumstances to warrant varying the decree."*

The case of **KENYA COMMERCIAL BANK VERSUS BENJOH AMALGAMATED LIMITED AND ANOTHER CA NO. 276 OF 1977** decided by the CA on the 10th day of March 1998. The brief facts are that the applicant lent a sum of Kshs. 23,175,000/= which was secured by a charge over 2 parcels of land namely **LR NO. 1211/1 and 12411/2 Kiambu**. Upon default, the applicant moved to realize the security, where upon the respondent filed a suit to forestall that process. The applicant did not file a defence but entered a consent marking the suit settled on the following terms:-

***(a)** "The plaintiff to pay the total out standing sums, principal, and interest to the defendants on or before 31st July 1992.*

***(b)** In default the defendant, to be at liberty to proceed with the realization of the two securities.*

***(c)** The plaintiff to pay to the defendant the costs of this application to be agreed or taxed by the taxing master of this honourable court.*

***(d)** The plaintiff to pay the auctioneer charges on the arbotive sale to be agreed"*

It is further observed at page 2 of the judgement, that the court file disappeared without a trace soon after the consent judgement was entered. What transpired between the parties in the intervening period is said

not to have been clear what is however clear is that on 4th April 1997, almost five years later the respondents applied by way of chamber summons under order 44 rule 1 of the CPR and section 3A of the CPA for the consent order entered into by the parties on 4th May 1992, to be reviewed and in the alternative that it be set aside. It was duly heard and set aside.

On appeal at page 8 of the judgement, line 3, from the top, the court, made the following observation: -*"The respondent took five years before bringing the application. During that period they were busy filing frivolous suits to ward off the appellant, one of which was filed as far field as Nyeri, quite obviously to exasperate the appellant and drive it to despair."*

At page 9 line 1, from the top, the court, quoted with approval a passage that it had quoted with approval in the case **of BROOKE BOND LIEBIG (T) LIMITED VERSUS MALLYA (SUPRA)** Thus'

" *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 ignorance of material facts, or in general for a reason which would enable the court, to set aside an agreement.No such circumstances, have been shown to exists in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties who consented to the compromise in terms, so clear and unequivocal as to leave no room for any possibility of mistake, misapprehension…….. a court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties"*

At page 10 of the judgement quoted with approval a passage by Hancox JA as he then was, in the case of **FLORA WASIKE VERSUS DESTIMO WAMBOKO (SUPRA**) THUS;

" *It is now settled law that a consent judgement or order has contractual effect and can only be set a side on grounds which would justify setting a contract a side, or if certain conditions remain to be fulfilled which are not carried out"*

The case of **JIWANI VERSUS GOING OUT MAGAZINE AND ANOTHER (2002) IKLR 856** where it was held inter alia, that "*the court, has no express or inherent power to extend time limited by the consent of the litigants, however unfair such limitation may turn out to be to one of the parties only a subsequent consent by parties could enlarge such time."*

The case of **VELEO (K) LIMITED VERSUS BARKLAYS BANK OF KENYA LIMITED NAIROBI MILIMANI COMMERCIAL COURTS HCCC NO. 1483 OF 2000** decided by Azangalala J on 6th day of December 2006 and read on the same date by Kasango J. In this ruling, the brief facts, are that, the applicant presented an application by way of chamber summons seeking an order under order X rule 20 CPR to strucke out the defendants defence, set off and counter claim, and to have liberty to set down its claim for assessment of damages as the defendant had failed, refused and or neglected to comply with an order for discovery made on 3/3/2004 when it come up for hearing, the defendant was given 7 days within which to comply with the order for discovery. The defendant failed to comply and an application was made to strucke out the defence set off and counter claim under order X rule 20 CPR, which application was not opposed, either by filing papers in opposition of the same, or by attending court, to oppose the same on that ground the same was allowed.

The defence on the other hand referred the court, to the case of **MENZE AND OTHERS VERSUS MATATA (20030 IEA 151** where Mwera J held inter alia that "*although a litigant who has failed to comply with a court, order, for discovery, should not be precluded from pursuing his claims or setting up his defence, where the failure to comply is due to willful disregard of the order of the court, and is a great impediment in the course and cause of justice in the matter, the litigant may be precluded from setting up his defence."*

The case of **EASTERN RADIO SERVICE VERSUS TINYTOTS (1967) EA 392** a court of appeal

decision, where it was held inter alia (per incuriam) that "*a litigant who has failed to comply with an order for discovery, should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a willful disregard of the order of the court.*

(ii) The appellant had shown a willful disregard of the order of the court."

On the courts assessment of the facts herein, considered in the light of case law cited, the following facts do not seem to be in contest:-

(i) That it is the Plaintiff/Applicant who has filed this suit against the first defendant and others.

(ii) That the 1st defendant was invited to participate in these proceedings and duly responded to that invitation by filing a defence and counter claim.

(iii) Upon close of pleadings, the plaintiff made the first move by complying with the rules on discovery when they filed their list of documents dated 21st day of August 2002 and filed the same date.

(iv) The 1st defendant followed suit, by filing theirs dated 23rd day of May 2006 and filed on the same date.

(v) Indeed the defence and counter claim were drawn and dated 13th November 2000 by Messers Kaplan and Stratton, advocates. The notice of change of advocates to Messer Muthoge Gaturu and company advocates from Messer Kaplan and Stratton, is not traced on the record. But there is a notice of change of advocates to Oraro and Company advocates from Muthoga Gaturu and company advocates is on record, dated 18th June 2004 and filed the same date.

(vi) On 23rd May 2006 the incoming counsel complied with the rules on discovery by filing its list of documents dated the same date.

(vii) The complying with discovery by the 1st defendant paved the way for the plaintiff to file a statement of own issues dated 9th May 2006 and filed on 23rd May 2006, along side a list of authorities dated 23rd May 2006 and filed the same 23rd May 2006.

(viii) On 3rd August 2006 the plaintiff served notice to produce documents for inspection under order X rule 14 and 15 of the CPR.

(ix) There appears to have been no response from the 1st defendant to that notice, to produce documents, for inspection. This non response is what prompted the plaintiff to file the application dated 5th September 2006 and filed on 6th September 2006 in a bid to compel the 1st defendant comply with the notice to produce.

(x) There appears to have been no affidavit filed by the first defendant in response to the said application.

(xi) There is no dispute that this is the application which gave rise to the consent orders of 31/1/2007 sought to be vindicated herein.

(xii) There is no dispute that the said consent orders are still in place and have not been varied and or set aside.

(xiii) There is also no dispute that there is no application in place by either participating party seeking to upset the said consent order.

(xiv) There is also no dispute that there was no default close in respect of non compliance of the said

orders.

(xv) There is no dispute that the 1st defendant has not complied with the said consent, which non compliance led to the filing of the application subject of this ruling.

(xvi) There is also no dispute that the law, on consent orders has now crystalized and it is to the effect that a consent can only be set aside by another consent of the same parties, failing which it can only be set aside upon application of one of the participating parties on the same grounds, that would justify the setting aside of a contract namely on grounds of fraud, collusion, in addition to misrepresentation and mistake.

(xvii) There is no dispute that the 1st defendant's inability to comply is not premised on the above grounds set out in XVI, but on misplacing and or loss of the documents sought to be discovered in unclear circumstance.

(xviii) There is no dispute that loss and in availability of the documents have featured for the first time in the replying affidavit in opposition to the application for enforcement.

(xix) There is no dispute that it is not indicated when this loss was discovered, as there is no affidavit from the firm of Messer Kaplan and Stratton to the effect that indeed the said documents got lost while in their custody. Neither is there an affidavit from the firm of Oraro and company advocates explaining on what basis they drew the lists of documents which was sought to be enforced.

(xx) There is no dispute that default is not absolute and the court, has a discretion to allow the default to stand or to disallow the same and this is what this court, has been called upon to decide.

(xxi) There is no dispute that the plaintiff has urged this court, to hold that there has been willful default where as the 1st defendant pleads justifiable inability to comply and that if penalized they will greatly suffer prejudice.

Due consideration has been made of the above, by this court, in the light with the relevant principles of case law set out herein and the relevant provision of law relied upon by the applicant and the court, proceeds to construe the said provisions. Order X rule 20 CPR provides:-

"*Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents he" shall" if a plaintiff be liable to have his suit dismissed for want of prosecution, and if a defendant to have his defence if any struck out and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court, for an order to that effect and an order may be made accordingly"*

This courts', construction of that provision is that, there are three commands there in.

1. The first command is addressed to the party, sought to be interrogated. In this courts', opinion, the command is mandatory or obligatory, signified by the use of the word "shall" meaning there is no election. Applying this to the argument herein, it means that upon receipt of the notice to produce for inspection, of the affected documents, the first defendant had no option but to comply and in default face attendant consequences for default.

2. The second command is addressed to the party seeking inspection. It is electional signified by the use of the word "may" This election is limited to the election to choose to apply for an order to compel the defaulting party to comply with discovery or not to apply for such a compelling order.

3. The 3rd command is directed to the court. It is also electional or discretionary as it is usually known in judicial terms, signified by the use of the word "may". In this courts opinion, existence of the judicial discretion, means that the court, has a discretion on the facts before it, to grant the orders sought, or not

to grant the same. The primary consideration in the exercise of that discretion is that the exercise is wide with the only fetter to it, being that it has to be exercised judiciously and with reason.

Applying the afore set out construction of that provision to the facts herein, and considering it in the light of the principles of case law cited and the rival arguments, this court, is inclined to grant prayer 1 and 2 of the Plaintiff/Applicants' application dated 14th June 2007 and filed on the same 14th June 2007 for the following reasons:-

1. There is no affidavit from the firm of Messer Kaplan and Stratton who were allegedly handed the documents and who drew up the defence, deponing to the fact that indeed their file containing documents was misplaced in unclear circumstances.

2. There is no affidavit from the advocates on record confirming that they never received any documents, on the case from the out going advocates in the first instance. In the second instance giving an explanation as regards the basis on which, their list of documents was drawn and filed.

3. When the notice to produce documents was served on to the 1st defendant, there was no communication from them to the effect that they had misplaced the documents and were in the process of tracing them.

4. When the application to compel the 1st defendant comply with the notice to produce was filed and served, the same was not opposed.

5. When the application to compel compliance came up for hearing, the 1st defendant quickly consented to having time frame within which to comply fixed for it. There was no mention of any difficulty to comply.

6. The consent orders are still in place and have to be given effect.

7. There is no deponent in the replying affidavit alleging collusion, fraud mistake on misrepresentation against the entry of the said consent.

8. All that the first defendant is saying in its replying affidavit is that it has no evidence to support its defence, and counter claim, and that being the case, then it will be a waste of judicial time to allow the 1st defendant attend court, and attempt an uphill task of proving orally contents of documents which have allegedly been misplaced in un explained circumstances.

The foregoing not withstanding there is another alternative angle to the argument, which though not taken up on argument by both sides, there is no harm in raising it under the courts inherent powers under section 3A of the CPA, for ends of justice to be met to both parties. A reading of the salient features of the plaint set out herein reveals that, the plaintiffs cause of action against the defendants with the 1st defendant included, arises from the alleged false reporting, arrest, prosecution, and acquittal. It would then follow naturally that any defendants' counter claim on that cause of action, must also arise from the same set of facts. Herein the 1st defendants' counter claim arises from the set of facts which appear to have been in existence before the on set of the alleged false reporting arrest, prosecution, and acquittat. In that regard, the 1st defendant claim appears to be misplaced. It should form a distinct cause of action against the plaintiff in a different suit. This is another ground favouring the striking out of the counter claim.

The 3rd aspects of the case is that, case law cited show clearly that a litigant in default faces penal consequences if proved to be in willful neglect of the request to comply with discovery. The said case law does not however state that the willful neglect has to be express. It can be inferred, from the conduct. In the opinion of this court, the reason given for allowing prayer 1 and 2 set out above can safely give rise to an inference of willful neglect to comply.

There was also argument advanced by the defence, that even if the counterclaim is struck out, the defence should be left to stand to enable them participate in the trial. The salient features of the defence are already set out herein. A reading of the same leaves no doubt that they are hinged on the very documents forming the basis of the counter claim. This being the case it therefore follows that there is no way such a defence can survive.

Turning to prayer 3 of the application, it is clear that, it is anchored on the provision of order IXA rule 3 CPR. Due consideration has been made of the same and applied them to the plaintiffs' claim herein, and the court, is of the opinion that, all the items of the plaintiffs' claim as set out in paragraph 10 of the plaint, require proof and as such they are not a fit material for entry of judgement under order IXA rule 3. They are fit for a formal proof to be held in order to prove those claims.

For the reasons given in the assessment, the court, proceeds to make the following orders in respect of the plaintiff /applicants' application dated 14th June 2007 and filed the same 14th June 2007.

1. Prayers 1 and 2 are allowed as prayed.

2. prayer 3 is dismissed and or declined for the reason given

3. Payer 4 allowed with a modification to the effect that it is the entire claim which is to be set down for formal proof.

4. Plaintiff/ Applicant will have costs of the application in any event paid by the 1st defendant.

DATED, READ AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2009.

R.N. NAMBUYE

JUDGE