REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 6 of 1999

DELPHIS BANK LIMITED .....PLAINTIFF/RESPONDENT

V E R S U S

NDALAVIEW SERVICE STATION…….……1ST DEFENDANT/APPLICANT

WILFRED KIPTUM KITUR KIMALAT…….....2ND DEFENDANT/APPLICANT

JAPHETH K. MAGUT…….……3RD DEFENDANT/APPLICANT

JOSIAH MAGUT…….....……4TH DEFENDANT/APPLICANT

R U L I N G

There are two applications before me, which were consolidated, and heard together.

The first application is a Notice of Motion dated 7th December, 2001 filed by M/s Singh Gitau advocates on behalf of the 1st, 3rd and 4th defendants. It was purported to be brought under the Advocates Act (Cap. 16) and the Civil Procedure Act ***(Cap. 21)***, Order 44 Rule 1, 21, 22, 35 Rule 10 3 Rule 9A, 2A rule 6 and under the inherent jurisdiction of this court. It is not clear which provisions relate to the Advocates Act, and which relate to the Civil Procedure Act. The orders sought in this application are as follows-

1. ***That the firm of Singh Gitau advocates do come on record in place of Tom Mutei & Company advocates.***

2. ***There be a stay of execution pending Determination of the application.***

3. ***That the judgment recorded in court on 7th September, 1999 be reviewed and set aside.***

4. ***Costs be in the cause.***

The second application is a Notice of Motion dated 28th April, 2004. It was purported to be brought under the Advocates Act, Section 63 of the Procedure Act, Orders 44 Rule 1, 21 Rule 22, 35 Rule 10 3 Rule 9A, 2A Rule 6 and under the inherent jurisdiction of this court. It was filed on behalf of the 2nd defendant by the same advocates. The orders sought are as follows-

1. ***That the firm of Singh Gitau advocates do come on record in place of Tom Mutei & Company***

advocates.

2. There be a stay of execution pending determination of the application.

3. That judgment recorded in court on 7th September, 1999 be reviewed and set aside.

4. That costs be in the cause.

Each of the applications was supported by an affidavit. The grounds of the application dated 7th December, 2001 were firstly, that the plaintiff had applied for warrants of arrest to issue against the defendants; secondly that the advocate then on record for the defendants did not have the applicants' authority or instructions to enter into the consent judgment; thirdly, that the defendants have a good defence; and fourthly, that the purported guarantees were null and void. The grounds for the application dated 28th April, 2004, on the other hand, are that firstly, the Plaintiff has applied for warrants of arrest to issue against the defendants; secondly, that the advocates then on record for the defendants did not have the applicants authority or instructions to enter into the consent judgment; thirdly, that the 2nd defendant has a good defence; fourthly, that the purported guarantees are null and void; fifthly, that the plaintiff has not bothered to realize its security; sixthly, that the plaintiff has credited the 1st defendant's account with monies owing from a 3rd party; and lastly, that the 2nd defendant was never served with summons to enter appearance.

On 10th May, 2004 M/s Ngigi Mbugua & Company advocates filed a notice of appointment of advocates to act together with M/s Singh Gitau advocates on behalf of the defendants. Thereafter, on 8th July, 2004 M/s Nyachiro & Company advocates filed a Notice of Change of advocates, to act for the 2nd and 4th defendants instead of Singh Gitau & Company advocates. On the same 8th July, 2004 a consent signed by M/s Nyachiro & Company advocates and M/s Singh Gitau & Company advocates, was filed and it was to the effect that M/s Nyachiro & Company advocates are allowed to come on record for the 3rd and 4th defendants. That is why I presume, I have been told that the counsel for the 3rd and 4th defendants in the application dated 7th December, 2001 are M/s Nyachirot & Company advocates, though the said application was filed by Singh Gitau advocates. It appears that between the counsel there is no objection to the representation by or between them.

In response to the application of the 1st, 3rd and 4th defendant's dated 7th December, 2001, there was filed a replying affidavit sworn on 19th February, 2002 by Kisilah Daniel Gor, an advocate. It was deposed in the said affidavit, inter alia, that the application was mischievous and misleading and an afterthought since the applicants had furnished instructions to their counsel and now purported to limit the scope of the instructions on allegations not backed by evidence. It was also deposed that the consent judgment was recorded in an application for summary judgment, and there could have been no circumstances that could have compelled the applicant's advocates to record a settlement, if they did not have instructions. It was further deposed that from the defendants' (***applicants')*** advocate's letter dated 7th December, 2001 (marked as "***KDG1"***), it was clear that the consent was entered into on the basis of evidence available. In addition, it was deposed that it was absurd for the 3rd defendant to advance the present application, when on 9th February, 2002 the same defendant wrote a letter ***("KDG2")*** to the office of Mukite Musangi & Co. advocates referring to a meeting with the Statutory Manager of the Plaintiff and a resultant agreement on the modalities of liquidating the subject consent judgment.

In response to the application by the 2nd defendant dated 28th April, 2004, the plaintiff through their counsel M/s Mukite Musangi & Company advocates filed grounds of opposition and a replying affidavit, both dated 17th May, 2004.

It is contended in the grounds of opposition firstly, that the application is incompetent and incurably defective. It was also contended that the application was mischievous and was merely meant to delay the plaintiff's access to fruits of his judgment. It was also contended that the consent judgment was

legitimate and valid in law and binds the 2nd defendant. It was further contended that no case had been made out for review or setting aside the consent judgment. This was merely an attempt by the 2nd defendant, in collusion with his counsel previously on record, to defeat the court process. Lastly, it was contended that the application was brought after an inordinate delay, and that the defendants have no defence to the claim.

The Plaintiff's counsel also filed a replying affidavit.

In the replying affidavit sworn by **PAUL MURIMA KIONGO**, an advocate, it was deponed inter alia, that at the time consent judgment was entered the 2nd defendant was duly represented by counsel who had express or ostensible authority to compromise the case on behalf of the 2nd defendant. It was deponed that it was mischievous and an afterthought that the 2nd defendant(applicant) now purports that there were some unknown limit to the instructions to his counsel. It was deposed that the consent was recorded when the matter came up for the hearing of an application for summary judgment.

It was deposed further that in terms of the letter of 2nd December, 2001 – ***("marked Exhibit MKK11"),*** the former advocates of the defendants had full instructions to act for the defendants and recorded the consent on the basis of evidence. It was also deposed that it was dishonest for the 2nd defendant to advance this application when on 9th February, 2002, the 3rd defendant who was one of the directors of the 1st defendant company, and whose other directors were the 2nd defendant and the 4th Defendant wrote a letter adverting to a meeting with the Statutory Manager of the plaintiff and to a resultant agreement on modalities of liquidating the subject consent judgment.

At the hearing Mr. Singh Gitau appeared for the 2nd defendant, Mr. Nyachiro for the 1st, 3 & 4th defendants, and Mr. Murimi for the plaintiff.

Mr. Singh argued the application of his client ***(2nd defendant)*** dated 28th April, 2004. Counsel argued that the main reason for seeking to review or set aside the consent judgment was that the 2nd defendant was not served. The other reason was that the then counsel on record did not have instructions to record a settlement. Counsel argued that under section 80 of the Civil Procedure Act (**Cap. 21)** and Order 44 of the Civil Procedure Rules, a person who has opted not to appeal could apply for review.

Counsel argued that the court had unfettered powers to do what was right and justifiable. Counsel argued that Order 35 of the Civil Procedure Rules was relevant, as the summary judgment was an ex-parte judgment, since the counsel on record did not have instructions to enter into a consent judgment. Counsel sought to rely on the affidavit of his client Mr. Kimalat sworn on 29th April, 2004, which gave the historical background of the matter. Counsel argued that there was specific security provided for the commercial transaction and that the plaintiff had not made a serous attempt to realize the security.

Counsel argued that his client the 2nd defendant, was not served with summons to enter appearance. Same was erroneously served on the 3rd defendant who instructed Mr. Mutei advocate. Counsel submitted that because of failure of service, the court has a duty to set aside an ex-parte judgment.

Counsel argued that shortly after defence was filed, an application for summary judgment was filed. Soon thereafter, an application to cease acting was filed by Mutei & Co advocates. This application to cease acting should have been served on the 2nd defendant but was merely served on the counsel for the opposing side M/s Tuiyot. The 2nd defendant was only served with a hearing notice ***(of application for summary judgment)***. The 2nd defendant endorsed (***the hearing notice)*** that he was Permanent Secretary for Education and was involved in matters relating to the Teachers Union. When the application came up for hearing on 7th September, 1999, the advocate who had ceased acting, came on record again on the same date and, without instructions from any of the defendants, recorded the contested consent judgment.

Counsel contended that the previous advocate ***(Tom Mutei)*** was never re-appointed. He submitted that he

sent a letter to the said advocate on 3/12/2001 and received a response on 5th December, 2001 that the said previous advocate did not have express instructions to enter into the consent judgment. Counsel argued that Order 3 rule 1 of the Civil Procedure Rules provides that a party can appear in person or by advocate. Counsel submitted that the previous advocate did not have authority to enter consent judgment. Counsel relied on the case of ***BROOKE BOND –VS- MALLYA*** [1975] E.A. 266 in which the court held that a consent judgment was like a contract and could be set aside on grounds that could vitiate a contract. He contended that the consent judgment entered into without instructions was not binding. Counsel also sought to rely on the case of ***FLORA WASIKE –VS- DESTIMO*** (1988) I KAR 625 in which Hancox JA ***(as he then was),*** stated at page 626 that-

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

Counsel also relied on section 177 of the Evidence Act (**Cap. 80.)**

Counsel submitted further that the issue involved an alleged guarantee, in which, the amount of guarantee was blank. Therefore, the said guarantee was uncertain and could not be enforced. This appeared to have been a guarantee; subject to contract. Therefore, the contents of the consent judgment purportedly recorded were not anticipated. Counsel also attacked the reliance by the Plaintiff's counsel on a "***without prejudice***" letter dated 9/2/2002. Counsel submitted that the plaintiffs should not have gone directly to his client, while the present counsel was already on record. Counsel emphasized that documents made on "***without prejudice"*** basis could only be relied upon with consent of the parties. In the present case, there was no such consent. Counsel asked me to strike out the said letter under Order 18 of the Civil Procedure Rules.

Counsel also submitted that there was already an attempt to sell the charged property in question under section 74(3) of the Registered Land Act **(Cap. 300).** Counsel requested the court to stay the suit, as the said property was still charged to the bank.

On delay, counsel argued that he started dealing with the matter when he was employed by Hamilton Harrison and Mathews advocates, and could not produce relevant letters from that firm now. In addition, at one point, the court file could not be traced. Once the court file was traced, they filed the present application. He asked the court to exercise its discretion, so that the 2nd defendant (***applicant)*** may file his defence, which is a strong defence. Counsel argued that the balance of convenience was in favour of the court allowing the application. Counsel stated that the 2nd defendant was willing to pay costs, including throw away costs upto today. He submitted that the plaintiffs will not suffer prejudice, if the application of the 2nd defendant was allowed

Mr. Nyachiro, for the 1st, 3rd and 4th defendants ***(applicants)*** submitted in support of the application dated 7th December, 2001. Counsel argued that the consent judgment entered on 7/9/1999 was improper as it was not signed by counsel for all parties. This was because Mr. Mutei admitted that he did not have instructions to act for the 2nd defendant. He did not therefore have instructions and could not bind the 2nd defendant or the other defendants.

Counsel argued that there was a specific order of court that the defendants be served in person. It was therefore for Mr. Mutei to show that he had instructions to compromise the suit. Counsel submitted that in fact there was a defence filed by Mr. Mutei, in which the 3rd and 4th defendants did not admit owing any money. Therefore, Mr. Mutei did not have instructions to enter a consent judgment. Counsel sought to rely on the case of ***SHAH –VS- WESTLANDS GENERAL STORES , LTD [1965] E.A. 642***, where the court held that where a party swears an affidavit that he did not instruct the counsel to compromise the suit, then the consent will be set aside. In the present case, in view of the fact that Mr. Mutei had admitted in writing that he did not have instructions to settle, that meant that his clients had suffered prejudice as they were now required to pay millions of shillings. Counsel asked the court to exercise its discretion otherwise his clients would suffer prejudice. Counsel emphasized that it was not necessary for

Mr. Mutei to file an affidavit in the application herein. Counsel sought to rely on the case of **FLORA WASIKE –VS- WAMBOKO** *(supra),* where the court stated that a consent entered into without authority may be set aside.

Counsel relied on Order 44 of the Civil Procedure Rules wherein the court has a wide discretion in reviewing judgments, even consent judgments, provided a defence has triable issues.

Counsel argued that the defence was that the guarantee relied upon in the case was faulty, which issue can only be determined after a full hearing. Counsel also sought to rely on the case of ***BROOKE BOND –VS- MALLYA*** (supra), in which the court gave the situations in which a consent judgment may be set aside. Counsel emphasized that a party was entitled to be reheard if he had come to know of new or additional information which was not with them at the time of hearing. Counsel emphasized that the defendants did not know the decision until they were addressed in writing. Counsel sought to rely on the case of ***KENYA COMMERCIAL BANK LTD –vs- AMALGAMATED LTD Civil Appeal No. 276 of 1997 (unreported)*** in which it was held by the Court of Appeal that a solicitor has authority to compromise on behalf of his client if he acts bona fide in entering a consent Judgment. Counsel argued that Mr. Mutei, who did not have instructions, did not act bona fide in entering a consent Judgment. Counsel submitted that if the contents of the letter on "without prejudice basis" are not accepted, then it cannot be used in evidence. Counsel urged the court to ignore the "***without prejudice***" letter.

Mr. Gathira supported the submissions of Mr. Nyachiro.

In response, Mr. Murimi for the Plaintiff/respondent submitted that he relied on the affidavit sworn by Kisila Daniel advocate. Counsel argued that the two applications were filed after an inordinate delay. He submitted that the 2nd defendant was served with a hearing notice of the application for summary judgment on 23/8/99 which fact was admitted in his own affidavit. The consent judgment was entered on 7/9/99. The said 2nd defendants took 5 years to file his application in 2004. On the other hand, the 3rd and 4th defendants took 2 years to file their present application in 2001. Counsel argued that Order 44 of the Civil Procedure Rules provided that such an application for review or setting aside has to be filed without inordinate delay. Counsel argued that the orders sought were equitable, and delay defeats equity. Counsel relied on the case of ***DIAMOND TRUST LTD –VS- PLY & PANELS LTD. Civil Appeal No. 243 of 2002*** where the Court of Appeal stated that where such an application is made merely to avoid the evil day, it should be dismissed. Counsel argued that the main ground of the 2nd defendant was that he was not served with summons to enter appearance. However, he admitted in his affidavit that he was served with a hearing notice on 23/8/99. He ignored to attend court for the hearing of the summary dismissal application, though in fact he was a director of the 1st defendant.

Counsel submitted that, as deponed under paragraph 7 and 10 of the affidavit of **JAPHET MAGUT**, the 3rd defendant, all the directors gave instructions to Mr. Mutei advocate to act for them in the matter. Counsel argued also that the 3rd and 4th defendants do not dispute being served, but they want a review of judgment, which is wrong.

Counsel submitted further that, if the 2nd defendant was not served he should have applied for review under Order 9A of the Civil Procedure Rules, not setting aside of judgment. In any event Mr. Singh Gitau advocate had filed a notice of change of advocates from Mr. Tom Mutei with regard to the 2nd defendant. Therefore, Tom Mutei advocate was upto then on record. Counsel argued that even if Mr. Tom Mutei did not appear in court on 7/9/1999, judgment would have been entered anyway.

On the letter by Mr. Tom Mutei advocate that he did not have instructions, counsel submitted that the said letter was prompted by M/s Singh Gitau advocate in order to facilitate the present applications. Counsel contended that the two advocates were birds of the same feather. Counsel emphasized that from paragraph 11 & 12 of the 2nd defendant's affidavit, it was deponed that he had left the affairs of the company to the other directors. Counsel submitted that the 3rd and 4th defendants, being directors could bind the other directors and the company. Counsel also relied on the book ***Principles of Company Law***

by Gower and contended that a company acted through its directors.

Counsel further argued that a consent judgment had contractual effect, and sought to rely on the case of ***FLORA WASIKE (supra).*** Counsel also argued that there was no limitation to instructions of a counsel unless such limitation was brought to the notice of other parties. Counsel sought to rely on the case of ***KENYA COMMERCIAL BANK LTD. -VS- BENJOH AMALGAMATED LTD*** Civil Appeal No. 276 of 1997 in which the Court of Appeal cited with approval what was stated in the English case of ***WELSH –VS- ROE [1918] ALLER 620 –*** that a solicitor has full implied authority unless the limitation is brought to the notice of the other party. Counsel emphasized that the plaintiff did not have any notice regarding the alleged limitation of instructions to Mr. Mutei advocate. Reliance was also placed on the case of ***RELI COOPERATIVE SOCIETY -VS- KENYA RAILWAYS CORPORATION*** Milimani Commercial High Court Case No. 155 of 1999; where the court held that a consent judgment could only be interfered with if there were good grounds for rescinding or varying a contract and the case of ***DIAMOND TRUST BANK (supra).***

Counsel submitted that, in fact, the applicants had sent to them ***(plaintiff's counsel)*** a letter of negotiations and proposals for settlement after the content judgment was entered.

Counsel also argued that the choice of remedy, in a case where there was security, was at the discretion of the plaintiff/mortgagee. The plaintiff could either go for the mortgagor directly or enforce the guarantee. Counsel sought to rely on the case of ***ABADARE INVESTMENTS LTD – VS- HFCK***, Civil Appeal No. 227 of 1998 where it was held by the Court of Appeal that the choice of the recovery of an unpaid loan under mortgage is that of the mortgagee to take such actions as may suit the mortgager.

On the alleged transfer of liability to a third party ***(Annex "WKK10"),*** counsel argued that same was a mere proposal. Even if there was a transfer it would bind the applicants as the directors of the two companies are the same.

On the contention that the guarantee is void for failure to specify the amount of guarantee, counsel argued that it was not denied that the 2nd, 3rd and 4th defendants signed the guarantee and that money was advanced on the basis of the guarantee. The amounts advanced and owing were also not in dispute. The applicants are therefore estopped from saying that the guarantee is void. Counsel sought to rely on section 120 of the Evidence Act ***(Cap. 80).*** Counsel also argued that even under Halsbury's Laws of England, paragraph 166, there was no requirement that the amount of guarantee should be stated. Even if that were so, in equity a party cannot receive a benefit and then deny the instrument on which he received the benefit.

Counsel also argued that, allowing the applications would serve no useful purpose. Counsel argued that there was no denial of the amount owing, in the defence. The defence was a sham and did not raise triable issues. Counsel sought to rely on the case of **FIRST AMERICAN BANK –VS- SHAH Civil Suit No. 2255 of 2000** where the court stated that the matter has to be arguable and deserving a day in court, to justify the courts intervention. Allowing the application would therefore be a mere waste of court's time, and delaying the court's judgment.

On the letter on "***without prejudice basis"*** counsel argued that the English Statutes did not have application in Kenya.

Counsel submitted that a hearing notice for the application for summary judgment was served on all the defendants and Mr. Mutei appeared for them. This means that Mr. Mutei must have been given instructions. Counsel concluded by submitting that though the consent judgment was not signed by the defendants, it was properly recorded in court.

Mr. Singh Gitau made a response to the submissions by counsel for the Plaintiff. Counsel submitted that the suit was initially filed by M/s Tuiyot & Co. advocates, and the 2nd defendant was not served with summons. However, summons were served on a Mr. Mogut who instructed M/s Tom Mutei advocate without instructions from the 2nd defendant. In addition, the notice by Tom Mutei to cease acting was not

served on 2nd defendant as required under Order 3 rule 12 of the Civil Procedure Rules.

Counsel submitted that the fact that Mr. Magut was a director did not mean that he could accept service on behalf of other directors. He reiterated that Mr. Mutei did not have instructions to enter the consent judgment. Therefore, the consent judgment cannot bind the 2nd defendant.

On delay, counsel submitted that it depends on the circumstances of each case. He submitted that the time started running from the time of service of warrants.

On whether the application should have been for review and not setting aside, counsel submitted that there was no distinction in the context of order 44 of the Civil Procedure Rules. Counsel lastly, submitted that the 2nd defendant had a strong defence which could only be determined on merit after hearing. The issues included amalgamation of two debts, validity of guarantees and the rate of interest chargeable.

I have considered the applications, documents filed, the submissions of counsel, as well as the authorities cited to me. These two consolidated applications were primarily brought under Order 44 of the Civil Procedure Rules. They are applications for review or setting aside of judgment. I will for the sake of clarity highlight hereunder the relevant rules of Order 44. They are as follows-

1 ***(1) Any person considering himself aggrieved***

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

(1) and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.

(2) ***A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.***

(3) An application for review of a decree or order of a court upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existent of a clerical or arithmetic mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

3(1) ***Where it appears to the court that there is not sufficient ground for a review it shall dismiss the application.***

(2) Where the court is of opinion that the Application for review should be granted, it shall grant the same provided…….

5. ……

6. ……...

7. ……

8. ……..**”**

The reasons on which an application for review can be entertained are firstly, discovery of new and important matters or evidence which after exercise of due diligence, was not or could not be within the knowledge of the applicant at the time when the decree was passed or the order was made. The second reason allowed by law is a mistake or error apparent on the face of the record. The third reason is any other sufficient reasons. It is apparent that the applicants/defendants do not rely on the discovery of new matter of evidence. They do not rely on mistake or error apparent on the face of the record. They rely on any other sufficient reason.

For the 2nd defendant the first reason for his application is that he was not served with summons to enter appearance. The second reason for the 2nd defendant, which applies to the other defendants, is that the counsel who recorded the consent for them Mr. Mutei, did not have authority or instructions to do so.

I will start with the issue of the alleged failure to serve summons on the 2nd defendant. The 2nd defendant was sued as a party in the Civil case. The argument is that the service of summons was effected on another party the 3rd defendant, Mr. Josia Kiprotich Magut, who received the summons without authority, and instructed Mr. Mutei also without authority of the 2nd defendant. Indeed, under Order 5 rule 8, of the Civil Procedure Rules where there are more than one defendant, service is required to be done on each of the defendants. The said rule 8 provides-

*“**8. Save as otherwise prescribed, where there are more defendants than one, service of summons shall be made on each defendant.”***

In my view, even if the 2nd defendant was not personally served with summons, he cannot now use the same as a basis of reviewing the consent judgment. That line of argument would only assist the 2nd defendant if judgment was entered in default of entering appearance. In our present case however, appearance was entered on behalf of all the defendants by Tom Mutei advocate. The said advocate also filed a defence on behalf of all the defendants on 2nd March, 1999. Mr. Mutei advocate, by his letter of November, 2001, clearly states that he had instructions to act for the defendants including the 2nd defendant. The 2nd defendant does not state that he did not know that Mr. Mutei was acting for him, nor did he demand that Mr. Mutei files an affidavit, and possibly be cross-examined on same. Instead he has relied on the said letter to bring this application. I dismiss that ground.

The second ground covers all the defendants. This is with regard to the argument that Mr. Mutei did not have instructions to enter into a consent judgment. On this a lot of reliance has been placed on an unreferenced letter dated 5th December, 2001 from Tom Mutei advocates. I will reproduce that letter hereunder for clarity. It reads as follows-

…….. 5th December, 2001

M/s Singh Gitau & Company

P. O. Box 10070

NAIROBI.

Dear Sir

RE: ELDORET HCCC NO. 6 OF 1999 DELPHIS BANK –VS-

NDALAVIEW SERVICE STATION & 30 OTHERS

Yours dated 3rd December, 2001 refers. As for instructions to act for our mutual client we had safe for the fact that on the date of the application for summary judgment came up, we tried to contact Japhet Magut without success. It is then we proceeded to enter judgment by consent in view of the evidence we had without express instructions.

Yours faithfully

TOM MUTEI ADVOCATES.

The above letter was a letter clearly prompted by a letter from Singh Gitau & Company advocates. It states, more than a year after judgment was entered, that the counsel had general but not express instructions to enter into a consent judgment. As was held by the Court of Appeal the case of ***FLORA N. WASIKE –VS- DESTIMO WAMBOKO (1982-88) 1 KAR.***

"**1.** ***It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation.***

2. ……

3. An advocate would have ostensible authority to compromise a suit or consent to judgment, so far as the opponent is concerned."

Passionate arguments have been put to me on the strong or a viable defence that the 2nd defendant, and even the other defendants have. In my view, this is not a matter for considering whether or not the defendants or any of them have a strong defence as filed, or a proposed strong defence. The issue is whether the counsel for the defendants had authority to enter into a consent judgment. The burden is on the respondents to establish that the said advocate did not have such authority. I am afraid, in my view the defendants have not discharged that burden.

Firstly, for the 2nd defendant, there is no denying that the he was personally served with the hearing notice for the application for summary judgment. He chose not to attend court. He had his own reasons, which do not appear to be legal at all, that he was attending to Ministry of Education matters relating to the Teachers Union. Either Mr. Mutei would have attended for him or not. If no counsel attended, summary judgment would still have been given.

As regards the burden on all the defendants, no attempt has been made to get Mr. Mutei file a detailed affidavit on what specifically transpired to demonstrate the merits of their present application to the court; to upset the prima facie position of a consent judgment, which was stated by Law J.A. in ***BROOKE BOND LIEBIG (t) LTD –Vs- MALLYA [1975] E.A.*** 266 at page 269 as follows-

"***The circumstances in which a consent judgment may be interfered with were considered by this court in HIRAN –VS- KASSAM (1952) , 19 EACA 131, where the following passage from section on Judgment and Orders, 7th edition, Vol. 1 page 124 was approved:***

"***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, or in misapprehension, or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."***

In my view, the letter from Tom Mutei advocate falls far short of giving reasons why I should set aside or review the consent judgment. It lacks detail, and the writer who is still alive and an advocate has not sworn an affidavit, regarding the instructions given to him, which would have stronger evidential value than the letter which was annexed to somebody else's affidavit. That is not all.

Under Order 44 rule 1(1) (b) of the Civil Procedure Rules, such an application like the one before me, has to be made without unreasonable delay. In my view, the burden is on the applicants for review, to explain the delay and demonstrate that the same is not inordinate. The consent judgment was entered on 7th September, 1999. The first Notice of Motion dated 7th December, 2001 for the 1st, 3rd and 4th defendants was filed by Singh Gitau advocates on 7th December, 2001 more than 2 years from the date of judgment. The application for the 2nd defendant was, on the other hand, filed on 28th April, 2004, more than 4 years after the judgment. It was for the applicants to explain the cause of delay, which they have not done. They merely state that, to them the time started running after they were served with execution orders. That is not the legal position. The time started running after the judgment was entered. The applicants should have explained, what Tom Mutei advocate did or did not do up to the time they were served with execution papers. Preferably an affidavit should have been filed by Tom Mutei advocate, or at least an attempt made to make him explain the action he took or failed to take. This was not done. Therefore, there is a big unexplained gap between the time judgment was entered to the time of the filing of the first application in December, 2001. Though Mr. Singh Gitau refers to a letter which he wrote to Tuiyot & Co advocates when he was in Hamilton Harrison & Mathews, that is not of assistance. There is no indication that any effort was made to get a copy of same from either of those two firms of advocates to be exhibited in court. Again, that is a failure to explain the circumstances of the delay. For the 2nd defendant there is still the delay between December, 2001, to April, 2004 when his application was filed. Again, no explanation of the factors giving rise to the said delay were given, even though the counsel who filed the application was the same Singh Gitau advocate.

Having considered all the circumstances of this matter, I am of the view that the two consolidated applications cannot succeed. They have no merits. I find no reason to exercise this court's discretion to set aside or review the consent order. I therefore dismiss both of them, with costs to the respondents/plaintiff.

Dated and delivered at Nairobi this 2nd day of June, 2009.

George Dulu

Judge.

In the presence of-

Mr. Washe for the defendants/applicants.

Kevin Court Clerk.