



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 1633 OF 2000**

**WANANDEGE CO-OPERATIVE SAVINGS & CREDIT SACCO  
LTD..... PLAINTIFF**

**=VERSUS=**

**PAUL MUSILI.....1<sup>ST</sup> DEFENDANT**

**MICHAEL NDICHU WAWERU.....2<sup>ND</sup> DEFENDANT**

**JULIANA WANJIRU.....3<sup>RD</sup> DEFENDANT**

**JAMES M. MUTHEE.....4<sup>TH</sup> DEFENDANT**

**CHRISTOPHER KPLAGAT SEREM.....5<sup>TH</sup> DEFENDANT**

**JOHN KIBITI STEPHEN..... 6<sup>TH</sup> DEFENDANT**

**AND**

**NAIROBI CITY COUNCIL.....THIRD PARTY**

**RULING**

1. This is the notice of motion dated 21<sup>st</sup> September 2017 brought under Section 3A of the Civil Procedure Act.

2. It seeks orders that:-

- 1. That the consent notice/letter dated and filed on 6<sup>th</sup> March 2012 and the order recorded pursuant to the said consent notice/letter be set aside.**
- 2. That the suit herein be reinstated for hearing.**
- 3. That costs of this application be provided for.**

3. The grounds are on the face of the application and are:-

- a. The consent herein was filed without the authority of the 1<sup>st</sup> Defendant.**
- b. The effect of the consent is to have the entire dispute settled which has prejudiced the 1<sup>st</sup> Defendant's case.**

4. The application is supported by the affidavit of Paul Musili, the 1<sup>st</sup> defendant/applicant sworn on the 11<sup>th</sup> September 2017.
5. The application is not opposed. On the 2<sup>nd</sup> May 2018, counsel for the plaintiff sought leave to put on a response. To date no response has been filed by the plaintiff.
6. On the 6<sup>th</sup> November 2018, the court directed that the application be canvassed by way of written submissions. Only the 1<sup>st</sup> defendant/applicant filed written submissions.
7. I have considered the notice of motion and the affidavit in support. I have also considered the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.
8. I have gone through the supporting affidavit of Paul Musili. In paragraph 4 he deposes thus:-

**“On 23<sup>rd</sup> November 2016, my advocate on record advised me in writing which advise I verily believe to be true that the consent order or notice above mentioned effectively compromised the suit and there is nothing to be tried. Annexed and marked A2 is a true copy of the letter.”**

**In paragraph 5 he states:-**

**“I was shocked to learn that my said previous advocates had entered into such a drastic consent order without authority, instructions or consent from me”.**

These two paragraphs seems to be the gist of this application.

9. The said consent dated 6/3/12 sought to be set aside state as follows:-

**“1. The plaintiff hereby withdraws and wholly discontinues its suit against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants with no orders as to costs.**

**2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants wholly discontinue their counter claim against the plaintiff with no orders as to costs.**

**3. The withdrawal and discontinuance of the suit by the plaintiff and the counterclaim by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall serve as a settlement of the suits between the parties herein and no party shall upon the filing of this suit institute a subsequent action against each other upon the same or substantially the same cause of action”.**

10. The 1<sup>st</sup> defendant denies giving instructions to enter into the said consent to his former advocates M/S Malonza & Co. Advocates. He has admitted that the said firm had instructions to act on his behalf in the matter.

11. In the case of **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd** Githinji J (as he then was) while relying on the holding in the case of **Hirani vs Kassam [1952] 19 EACA 131** held thus:-

**“It is now well 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.....”.**

In the case of **Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd [1982] KLR 485** it was held:-

**“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud, or collusion or by agreement contrary to policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside the agreement”.**

I find that 1<sup>st</sup> defendant/applicant has failed to demonstrate any of the grounds stated above.

12. I find that this application is an afterthought. He does not deny that M/s Malonza & Co. Advocates were acting on his behalf.

13. In conclusion I find no merit in this application and the same is dismissed with no orders as to costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 20<sup>TH</sup> day of MAY 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

Miss Wambui for Mutua Advocate for the 1<sup>st</sup> Defendant

Kajuju - Court Assistant