



REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ELC CASE NO. 159 OF 2015**

RISPER MAENDE OLANDOPLAINTIFF/RESPONDENT

VERSUS

PRAXIDIS A. OSALE1ST DEFENDANT/APPLICANT

CAREEN N. OKANGA.....2ND DEFENDANT/APPLICANT

LINUS O. JUMA3RD DEFENDANT/APPLICANT

LIVINGSTONE A. MURUNDA4TH DEFENDANT/APPLICANT

STEPHEN O. OPELLI.....5TH DEFENDANT/APPLICANT

LAND REGISTRAR, KAKAMEGA 6TH DEFENDANT

ATTORNEY GENERAL.....7TH DEFENDANT

RULING

The notice of motion dated 3th April 2018 seeks orders inter alia

1. Setting a side of the so called consent orders dated 14/1/2012 The same lacking the mandate of the defendants.
2. A variation of the said orders so that the case can proceed on merit
3. An order on costs.

The application is premised on the grounds on the application as well as theannexed affidavit.The grounds are that the so called consent did not have the input of the applicants. That on 20th February 2013, there was a purported consent for orders. That the 1stand 2nddefendants do surrender the title deed issued in respect of LR No. NORTH WANGA/MAYONI/449 and any other documents, title deeds created therefrom to their respective advocates on record for onwards transmission to the 6th defendant for cancellation.

This order is unenforceable and incomplete for a number of reasons: the two cited parties did not give authority to their counsel (and there have been several) over the said instructions.Two parties cannot jointly be in possession and neither have they ever been in possession of the said title deeds.The defendant land Registrar having been challenged repeatedly, has failed to confirm that the two parties have the said title deed.The so called "other subsequent title deeds" is incomplete andlacking in specification.The case should proceed on merit for the real issues to be canvassed.

A consent order envisages the full input of the consenting parties and full possession of the facts in question. The defendants assert that they never gave any written, oral or other instructions on the alleged surrender of the undisclosed title deeds.The parties in this case and vide this application which was served on former counsel Mwebi and which elicited no response have shown that there was no instructions and or participation in the so called 'consent'. Therefore the consent order was defective.

The Hon. Court of Appeal stated the conditions of setting aside a consent order. Quoting Justice Gicheru as he then was, it was stated that a consent order is like a contract. In Wasike -vs- Wamboka, the High Court at Kakamega Gicheru J as he then was held, a consent judgment or an order has contractual effect and can only be set aside on grounds which would set aside a contract or if certain conditions remain to be fulfilled which are not carried out.The civil procedure Act Cap 21 S. 67 (2) is not an absolute bar to challenging a decree passed with consent of the parties where a party proves that the decree is invalid ab initio and should be rescinded or that there exist circumstances to warrant varying of the decree.

The respondent submitted that, they have had several other correspondences with the applicant herein through his advocates on record until 10th May, 2018 when the firm of M/s. C.M. Mwebi & Co. Advocates ceased acting for the applicant herein. That in view of the foregoing the consent herein of 20th February, 2013 was voluntarily made by the applicant herein through his counsel whom he had given unconditional authority to execute the same. That the said consent judgment entered herein is thus binding on all parties and cannot thus be varied or discharged. That the applicant has not demonstrated the existence of any conditions or grounds for setting aside a consent judgment. That this application is an afterthought, an abuse of the due process of court, unmeritorious, baseless, vexatious, scandalous and malicious having been brought after over five (5) years ago and is a futile attempt to frustrate the contempt proceedings herein.

This court has considered the application.

This court relied on the case of *Hirani vs Kassam* (1952) 19 EACA 131 quoting a passage from *Seton on Judgments and Orders*, 7th Edition, Vol. 1 at page 124 stating thus:

“... Although an advocate has ostensible authority to compromise his clients case employing such authority cannot be upheld where counsel consents to orders, which are diametrically opposed to the express instructions, which a client has given him... And it is shown to the court that the client was not even aware of the application that gave rise to those consent orders leave alone having consented to the recording of the orders, in the absence of any satisfactory explanation ... a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent order issued”. (Emphasis added)

In *Flora N. Wasike vs Destimo Wamboko* (1988) eKLR the Court stated:

"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: see the decision of this Court in *J M Mwakio vs Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983."

In *Purcell vs F C Trigell Ltd* (1970) 2 All ER 671, Winn LJ stated at page 676;

"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons..".

In *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* (1982) KLR 485, Harris, J correctly held, *inter alia*, that -

"1. 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 an agreement contrary to the 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 an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side."

In the court of appeal cases of *S M N v Z M S & 3 others* (2017) eKLR the following conditions for setting aside a consent order were listed;

- i. "Where the consent was obtained fraudulently
- ii. In collusion between affected parties
- iii. Where an agreement is contrary to the policy of the Court
- iv. Where the consent is based on insufficient material facts
- v. Where the consent is based on misapprehension or ignorance of material facts
- vi. Any other sufficient reason."

In the instant case it is on record that, the 3rd defendant herein was duly represented by the firm of M/s. C.M. Mwebi & Co. Advocates since 11th June, 2012. That the 1st, 2nd, 3rd, 4th and 5th defendants were represented by the firm of M/s. Shitsama & Co. Advocates who file a defence for all of them herein. That the 3rd defendant was thus represented by two counsels whom he had duly authorized to represents him in this case including drafting and executing pleadings herein. That the consent herein was initiated by the firm of M/s. Shitsama & Co. Advocates on 9th July, 2012 and both counsels on record were notified. That her counsel did a draft consent and served it upon all counsels on record. That after various correspondences between counsels on record a consent was signed by all counsels and filed by the 3rd defendant's counsel M/s. C.M. Mwebi & Co. Advocates on 14/1/2013. That the costs of Ksh. 35,000 was paid by the 3rd defendant herein who is the applicant herein as per the various correspondences attached hereon. That a receipt of Ksh. 35,000 was issued by her counsel on record to the applicant's counsel M/s. C.M. Mwebi & Co. Advocates on 4th June, 2014. Nothing has been shown to suggest that the advocate entered the consent without instructions. None of the conditions above have been satisfied.

In the Ugandan case of *Lenina Kemigisha Mbabazi Star Fish Limited vs Jing Jeng International Trading Ltd* (HCT-00-MA-344-2012) which

was quoted in the case of *S M N v Z M S & 3 others* (2017) eKLR (Supra) the Court stated:

“The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”

From the circumstances of this case I find that the applicant’s advocate had full instructions to represent his client and hence enter the consent. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE