



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 58 OF 2017**

**KWENA ATOGO.....APPLICANT**

**VERSUS**

- 1. FRANCIS OKUMU AMBOYE.....1<sup>ST</sup> RESPONDENT**
- 2. CLEOPHAS CHESA OKUBASU.....2<sup>ND</sup> RESPONDENT**
- 3. BONFACE KUYADI OUMA.....3<sup>RD</sup> RESPONDENT**
- 4. MARY ACHIENG' .....4<sup>TH</sup> RESPONDENT**
- 5. JANEROSSY LWABIA.....5<sup>TH</sup> RESPONDENT**
- 6. FRANCIS OKUMU NYANGWESO.....6<sup>TH</sup> RESPONDENT**
- 7. FRANCISCA AUMA MAKOKHA.....7<sup>TH</sup> RESPONDENT**

**R U L I N G**

1. The application before me is a Notice of Motion dated 6/6/2016, seeking essentially that the consent judgment entered on 10/3/2016 be “revised” or set aside. The Application is filed under Section 3A of the Civil Procedure Act. It is based on the grounds that the aforementioned Consent Judgment did not provide for payment of the Plaintiff’s costs by the Defendants contrary to his instructions and allegedly as a result of collusion between the Plaintiff’s former counsel and the Defendants/Respondents.

2. The application is opposed vide the Defendants’ grounds of opposition dated 8/7/2016 in which the application is faulted for not meeting the threshold for review or setting aside of a consent judgment and for being an abuse of court process. Parties canvassed the application by way of written submissions.

3. As per the Court record, the consent judgement that was recorded and adopted by the trial court on the hearing date of the main suit, 10/3/2016 states as follows:

**“Judgment is entered as against the Defendants for a perpetual injunction restraining the Defendants, their agents and assignees from trespassing on the Plaintiff’s land parcel No. MARACHI/ELUKONGO/46. No order as to General Damages in trespass”**

Counsels for the Plaintiff and Defendant, James Namatsi and Bogonko Advocate appended their names and signatures thereto, signifying the accuracy of its terms and the intention of their clients to be so bound.

4. I have considered the submissions by the rival parties. It is clear that all parties and their respective counsels were present in court when the matter was scheduled for hearing. The Plaintiff however claims that he was within the court precincts but had waited outside with his witnesses on his advocate’s instructions. He was then only informed of the outcome of the case afterwards but only sought the Court’s intervention three months later. Moreover, the Plaintiff has no problem with his main prayer, the permanent injunction that was the subject matter of the suit. He only takes issues with the aspect of general damages and costs which are discretionary remedies.

5. As per their submissions and coram, both parties were represented. The law on review of consent judgments is well documented.

Advocates have ostensible authority to act on behalf of their clients and to make such binding pronouncements. In the case of **Samuel Mbugua Ikumbu Vs Barclays Bank of Kenya Limited [2015] eKLR** the Court of Appeal while quoting the case of **Kenya Commercial Bank Ltd Vs Specialised Engineering Co. Ltd (1982) KLR P. 4851** observed thus:

**“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 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”.**

In the same case the court further held that:

**“An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding”.**

6. In the case of **Ndirangu Vs Commercial Bank of Africa [2002] 2KLR 603**, the parties entered into a consent judgment. The Applicant later made an application to have the consent judgment set aside. The court declined to set it aside and held, *inter alia*, that it is well settled in 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.

7. The legal position has always been that a consent judgment or order cannot be set aside when there is nothing to show that the counsel for the Applicant had entered into it without instructions. Even if the counsel has no specific instructions to enter a consent but had general instructions to steer the case in court, the position would not change so long as the instructions have not been terminated. And this is because he has full control over the conduct of the trial and has apparent or implied authority to compromise all matters connected with the action. **(See the Ugandan case of BM Technical Services Vs Francis X Rugunda [1997] HCB 75)**

8. The Plaintiff alleges fraud and collusion on the part of his counsel and the Defendants. It is trite law that he who alleges must prove. The Plaintiff states that he was informed by the Defendants and some of their close relatives that his advocates received a bribe of Kshs.100,000 from the 1<sup>st</sup> and 6<sup>th</sup> Respondents to compromise the suit. However he has not presented an iota of evidence to justify his claims. He has also not made any formal complaint against the advocate to the requisite authorities.

9. The application is challenged by the Defendants both in substance and in form. It is premised solely on Section 3A of the Civil Procedure Act which provides for the inherent power of the Court to make orders necessary for the ends of justice. Order 45 of the Civil Procedure Rules that sets out the procedure for review has not been invoked. I agree with the Defendants that the application is incurably defective.

10. The Application herein lacks merit and is hereby dismissed with costs to the Defendants/Respondents.

**Dated, signed and delivered at Busia this 11<sup>th</sup> day of December, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: Present

1<sup>st</sup> Respondent: Absent

2<sup>nd</sup> Respondent: Absent

3<sup>rd</sup> Respondent: Absent

4<sup>th</sup> Respondent: Absent

5<sup>th</sup> Respondent: Absent

6<sup>th</sup> Respondent: Absent

7<sup>th</sup> Respondent: Absent

Counsel of Applicant: Absent

Counsel of Respondents: Absent

Court Assistant: Nelson Odame