IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 32 OF 2014

BETWEEN

THE HON. ATTORNEY GENERAL……APPELLANT

AND

ORBIT CHEMICAL INDUSTRIES LIMITED…….. RESPONDENT

(Being an appeal from the ruling and decree of the High Court of Kenya at Nairobi (Nambuye, J.) read and delivered by (Majanja, J.) dated 12th October, 2012 in sH.C.C.C. No. 876 of 2004)

****

JUDGMENT OF THE COURT

This is an appeal against the ruling of **Nambuye, J.** (as she then was) read and delivered by **Majanja, J**. on 12st October 2012. A brief background of the matter is that **ORBIT CHEMICAL INDUSTRIES LIMITED**, the respondent herein, and the then plaintiff filed an amended plaint dated 11th October, 2004. The **HON. ATTORNEY GENERAL,** the appellant herein, was named as the then defendant. The gist of the respondent's claim was that on or about 28th September, 1987 the Registrar of Titles lodged a caveat on Land Reference Number 12425 (the suit land) comprising of 95.2 acres, the property of the respondent. It was alleged that the lodgment of the caveat was tantamount to expropriation of the respondent's rights as the resultant effect was that squatters invaded the suit land. The respondent sought the following orders:-

> ***"(a) A declaration that the Registrar of Lands had no right in law to enter and register a Caveat over LR. No. 12425 AND THAT the Registrar?s conduct in entering and registering a Caveat over LR. No. 12425 was null and void and was a taking of private property without following the laid down procedures and without compensation contrary to Section 75 of the Kenyan Constitution and Land Acquisition Act Cap 295 Laws of Kenya***.
>
> ***(b) Loss of income, rent and/or mesne profits at the rate of Ksh.3,489,550 per month from the date of the registration of Caveat until the date of its removal.***
>
> ***(c)General damages for trespass over LR. No. 12425.***
>
> ***(d)Removal of the Caveat and squatters from LR. No. 12425 and delivery of vacant possession of LR. No. 12425 to the plaintiff.***
>
> ***(e)Interest on prayers b and c above.***
>
> ***(f) Costs.***
>
> ***(g)Such further or other relief as to this Honourable Court may deem just."***

The appellant filed a defence dated 23rd May, 2005 and admitted the placement of the caveat. It however denied having caused squatters to invade and occupy the suit land. It averred that the respondent has ***"…at all material times been in occupation and control of the premises."***

The pleadings having closed the respondent filed a Chamber Summons application dated 10th June, 2005 seeking, *inter alia*, an order "***that defendant?s defence to the plaintiff?s claim be and is hereby struck out."***

The Chamber Summons application was heard by **Ojwang, J.** (as he then was). In a ruling delivered on 22nd September, 2006 the learned Judge made the following orders:-

> ***" (1) The defendants? statement of defence dated 23rd May, 2005 is hereby struck out.***
>
> ***(2) Judgment is entered for the plaintiff in the terms of the prayers set out on page 4 of the amended plaint of 11th October, 2004.***
>
> ***(3) The plaintiff shall have this matter set down for formal proof and a date shall be given on the basis of priority before a Judge in the Civil division of the High Court.***
>
> ***(4) Any such application as may arise from this ruling and any such motion as may relate to the cause herein shall be heard and determined before a judge of the civil division of the High Court.***
>
> ***(5) The plaintiff?s costs in this application shall be borne by the defendant."***

As directed by Ojwang, J. the matter was listed for formal proof. However, this was adjourned severally, prompting the filing of an application dated 23rd July, 2008 in which the respondent sought the following reliefs:

> ***"(1) Spent***
>
> ***(2) That the plaintiff/Applicant?s Formal Proof Application be marked as wholly adjusted or settled in terms of the compromise Agreement reached between the parties on the 4th March, 2008 and evidenced by the compromise Report prepared by the defendant/respondent on the 4th March, 2008.***
>
> ***(3) That in terms of the said Agreement, judgment be and is hereby entered against the defendant/Respondent in the sum of Kenya Shillings six billion, fifteen million one hundred and thirteen thousand (Ksh.6,015,113,000.00) net of tax together with further interest on the same at the rate of fourteen percent (14%) per annum from the 4th March, 2008, until payment in full.***
>
> ***(4) That the defendant/respondent do pay to the plaintiff/applicant the costs of the suit as shall be agreed between the parties failing which the same should be taxed by the Deputy Registrar.***
>
> ***(5) That the Defendant/Respondent do pay to the plaintiff/applicant the total decretal amount including the costs together with further interests on the same at the rate of 14% per annum until payment in full within thirty (30) days from the date hereof and in default the plaintiff/applicant be at liberty to proceed with execution forthwith.***
>
> ***(6) That there be liberty to apply.***
>
> **(7)** ***That the costs of this application be provided."***

The said application was heard by **Nambuye, J**. who in a ruling delivered on 12th October, 2012 ordered as follows:-

> ***"1. Prayer 2 of the application dated 23rd July, 2008 and filed on the 24th day of July, 2008 be and is hereby allowed and ordered that the plaintiffs formal proof application presented herein be and is hereby marked as having been wholly adjusted or settled in terms of the compromise agreement reached between the parties on the 4th day of March, 2008 in terms of annexture 20.***
>
> 2. ***By reason of what has been stated above, an order be and is hereby made and ordered that Judgment be and is hereby entered against the defendant in the sum of Kenya shillings six billion and fifteen million,onehundredandthirteenthousand (Ksh.6,015,113,000.00)"***

The appellant was aggrieved by the said outcome and duly filed a Notice of Appeal dated 16th October, 2012 and a memorandum of appeal dated 10th March, 2014 containing 13 grounds of appeal, the gist of which was that the learned Judge failed to find that there was no valid consent amounting to a contract. The rest of the grounds are the basis for the contention that there was no valid consent. These were:-

> i) "The amount claimed was inflated, it had been rejected by the instructing clients (Ministries of Lands and Finance), the purported representative of Government in the negotiations, Mr. Tuamwari who was not an authorized officer in terms of the Government Contract Act, Chapter 25 of the Laws of Kenya.
>
> ii) erred in finding that the purported compromise gave rise to the doctrine of estoppel,
>
> iii) erred in finding that there was no proof that the officers from the

Attorney General's Office and the Chief Land Economist had no instructions to hand over the resulting quantification before the necessary approval."

On 4th July, 2018 the appeal came before us for plenary hearing. Learned State Counsel, **Mr. Waigi Kamau** appeared for the appellant and learned counsel, **M/s Oseko** appeared for the respondent. In highlighting their submissions, the appellant relied on their written submissions filed on 15th November, 2017 and its digest and list of authorities dated 3rd July, 2018. In opposing the appeal, the respondent relied on its written submissions filed on 8th February, 2018 and its case digest and list of authorities dated 23rd May, 2018.

In urging the appeal, the appellant clustered their grounds of appeal and reduced them into two, namely:

(i) What constitutes a valid consent?

(ii) Authority to bind the Government of Kenya.

In urging the appeal, the learned State Counsel urged us to find that it was erroneous for the Judge to want to impose an agreement between the parties, the purported consent having been denied by the Ministry of Lands and Treasury and hence there was no valid consent. The appellant contended that "***whereas an advocate has the ostensible authority to bind his client to compromise a suit, the rules are markedly different when it comes to Government transactions."*** Counsel relied on **Section 2** of the Government Contracts Act which provides that:-

> "***Subject to the provisions of any other written law, any contract made in the colony on behalf of the Government shall, if reduced to writing, be made in the name of the Government of the Colony and Protectorate of Kenya, and shall be signed either by the accounting officer or by the receiver of revenue of the Ministry or for the department of the Government concerned, or by any public officer duly authorized in writing by such accounting officer or receiver of revenue, either specially in any particular case or generally for any contracts below a specified value in his department or otherwise as may be specified in such authorization.***"

Hence, Counsel urged us to find that section 2 of the Government Contracts Act requires that the contract be signed by the accounting officer of the Ministry or Department to be bound, or someone authorized by such accounting officer.

It was therefore the appellant's contention that in the absence of the Ministry of Lands approving the alleged consent, the same was null and void and that the expert opinion on the valuation of the claim by an economist from Treasury who had no authority could not bind the government. Further that the authority to enter consents must be with the express instructions of a client whose interests must be taken into consideration and that an advocate cannot act contrary to express and/or negative direction. For this proposition counsel relied on the cases of ***SAMSON OLE TINA VS CLERK, TRANSMARA COUNTY COUNCIL [2010] eKLR*** and ***REPUBLIC VS. DISTRICT LAND REGISTRAR NANDI & ANOTHER EX – PARTE KIPRONO TEGERI & ANOTHER [2005] eKLR.*** Relying on the authority ***ISMAIL SURNDERJI HIRANI VS NOORALI ESMAIL KASSAM [1952] 19 EACA (3)*** counsel contended that a further condition for any consent is that it should not be contrary to the policy of the court which is to render justice at all times.

In opposing the appeal, the respondent relied on Order XXIV rule 6 of the then Civil Procedure Rules that provided that:-

> "***Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall on the application of any party order that such agreement compromise or satisfaction be recorded and enter judgment in accordance therewith.***
>
> ***(2) The court on the application of any party, may make further order necessary for the implementation and execution of the terms of the decree."***

The respondent contended that in its application filed on 24th July, 2008 it had sought the following orders:

> "***1. …***
>
> ***2. That the plaintiff/applicant?s formal proof application be marked as wholly adjusted or settled in terms of the compromise Agreement reached between the parties on the 4th March 2008 and evidenced by the compromise Report prepared by the Defendant/Respondent on the 4th March, 2008.***
>
> ***3. That in terms of the said Agreement, Judgment be and is hereby entered against the defendant Respondent in the sum of Kenya Shillings Six billion, fifteen million one hundred and thirteen thousand (Ksh.6,015,113,000.00) net of tax together with further interest on the same at the rate of fourteen percent (14%) per annum from the 4th March, 2008, until payment in full.***
>
> ***4…***
>
> ***5…***
>
> ***6…***
>
> ***7…"***

In furtherance of their opposition, counsel relied on the decision of the full bench of the Bombay High Court in the case of ***CHANBASAPPA***

GURUSHANTAPPA HIREMATH VS. BASLINGAYYA GOKURNAVA HIREMATH [1927 AIR BOM 565] wherein the court stated;

> "***Doubtless any parties litigating in court have perfect liberty to compose their differences amongst themselves by entering into any lawful agreement, compromise or satisfaction, and when this is done they have only to apply to the court to act under O. 23 R. 3."***

In interpreting Order XX111 Rule 3 of the Indian Civil Procedure Code 1908, which mirrors our Order XXIV Rule 6 (since renumbered O.25) counsel contended that the parties had made a valid agreement on 4th March, 2008. On counsel's authority to enter into a settlement, the respondent relied on this court's decision of **KENYA COMMERCIAL BANK LTD. VS. SPECIALIZED ENGINEERING CO. LTD [**1982] KLR 485 where it was held 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 its proved that it was obtained by fraud or collusion or by an 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 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.***
>
> ***3. 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.***
>
> ***4. The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes he would not have given his consent had he known these facts.***
>
> ***5. The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds."***

The second limb of the respondent's contention is that once a consent has been entered into by counsel, then it is binding on all the parties. Several cases were cited in proposition of the respondent's contention that a consent entered into by counsel is binding on all the parties. They include, **M & E CONSULTING ENGINEERS LTD VS. LAKE BASIN DEVELOPMENT AUTHORITY & ANOTHER [2015] eKLR; SAMUEL MBUGUA IKUMBU VS. BARCLAYS BANK OF KENYA LIMITED [2015] eKLR** as well as SMN **VS. ZMS & 3 OTHERS [2017] eKLR** wherein this Court held:

> ***"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."***

In this Court's decision of ***SAMUEL MBUGUA IKUMBO*** *(supra)* it was stated***:-***

> ***"Authority of Solicitor - a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen, [1903] 1 Ch. pp 817, 818; Little vs Spreadbury, [1910]2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice-see Welsh vs. Roe [1918 – (9] All E.R. Rep 620."*** *(Emphasis by underline)"*

There was also reliance on the South African case of ***DIGOEREGOERE BUSINESS PROJECTS CC VS. MALUTI A PHOFUNG LOCAL MUNICIPALITY (4400/2004) [2011] ZAFSHC 186*** where the court in considering an allegation of counsel exceeding the mandate stated:-

> "***After summons was issued the parties were engaged in extensive and protracted negotiations. There is no indication that the plaintiff?s legal representative/s did not have an express mandate to enter into agreements of the nature that it did. If that was the case, one would in any event expect the plaintiff to say so and distance itself from such agreements. It did not do so. I must therefore assume that the plaintiff?s attorneys had the required mandate.***"

On estoppel, the respondent contended that ***"…it is the appellant who made the first suggestion of settlement and invited the respondent to lengthy negotiations that culminated in concessions and mitigation leading to the compromise made on 4th March 2008".*** It was the respondent's further contention that the appellant is estopped from reneging from this freely negotiated settlement and that counsel representing the appellant had the apparent or ostensible authority to bind the Government.

Finally, the respondent was of the view that the compromise arrived at on 4th March 2008 is not a contract as envisaged by Section 2 of the Government Contracts Act.

We have considered the record, the grounds of appeal, the oral and written submissions, the oral highlighting made before us, the authorities cited and the law.

As can be discerned from the record, the appellant's defence having been dismissed, the suit was set down for formal proof and as the respondent's claim was not a liquidated claim, it had to prove (during the formal proof) the loss it had incurred. As stated earlier, the respondent's claim was based on ***"…Loss of income, lack and/or mesne profits…"*** on account of the Registrar of Lands entering a caveat on the suit land.

However, the pendency of the formal proof notwithstanding, the respondent filed the application dated 23rd July, 2008 on 24th July, 2008. The application was premised on O.XXIV Rule 6 of the then Civil Procedure Rules. The application sought to have the formal proof marked as:

> ***"…wholly adjusted or assessed in terms of the compromise agreement reached between the parties on the 4th March, 2008 as evidenced by the compromise report prepared by the appellants on 4th March, 2008"***

The respondents relied on the Indian decision of **CHANBASAPPA GURUSHANTAPPA HIREMATH** *(supra)* in the interpretation of Order XX111 Rule 3 of the Indian Civil Procedure Rules which had similar provisions as our then Order XXIV Rule 6 in which the court concluded that:

> ***"Doubtless any parties litigating in court have perfect liberty to compose their differences amongst themselves by entering into any lawful agreement, compromise or satisfaction. And when this is done they have only to apply to the court to act under Order XX111 Rule 3"***

It is the respondent's argument that the application dated 23rd July 2008 was premised on Order XXIV Rule 6 of the old Civil Procedure Rules which allowed parties to record an agreement, compromise or satisfaction arrived at by the parties. In our view, Order XX111 Rule 3 of the Indian Civil Procedure Rules which is similar to our then Order XXIV Rule 6 allowed parties to move to court to record an agreement or a compromise arrived at. Accordingly, we do not find fault with the respondent invoking the provisions of the then Order XXIV Rule 6 of the Civil Procedure Rules in filing the motion seeking to have the suit between it and the appellant as having been settled. However, the genesis of the alleged settlement is a letter dated 6th March, 2008 written on the letterheads of Ministry of Finance and addressed to:

> ***"Antony Ombwayo***
>
> ***Attorney General?s Chambers,***
>
> ***P.O. Box 40112 -00100***
>
> ***NAIROBI***
>
> **HCCC No. 876 of 2004**
>
> **ORBIT CHEMICALS INDUSTRIES LIMITED VS. THE ATTORNEY GENERAL**
>
> **As agreed during our meeting with the representatives the Orbit Chemical Industries Ltd., at your office on 4th February, (should be March) 2008. I have revised the valuation figures and are herewith delivered for your necessary action.**
>
> **J.P.G. Tuamwari**
>
> **For: Permanent Secretary."**

On receipt of this letter it would appear that in a letter dated 19th March, 2008 the addressee, Mr. Ombwayo wrote to Mr. Kinyua, the then Permanent Secretary Ministry of Finance, advising of Mr. Tuamwari's letter of 6th March, 2008. On receipt of Mr. Ombwayo's letter, in a letter dated 14th April, 2008, Mr. Kinyua raised the issue with the then Attorney General, Hon. Amos Wako pointing out that;

> ***"You will appreciate the subject matter of the letter is a very serious one as it proposed to commit slightly over Ksh.6.6billion of Public resources."***

Hon. Amos Wako responded vide a letter dated 30th April, 2008. He was equally unaware of the alleged settlement. He stated;

> ***"I was not aware of the letter referred to in your letter and it was not written with my authority. I thank you for bringing it to my attention."***

For a start the letter dated 6th March, 2008 and the undated report by Mr. Tuamwari are not copied to the respondent's counsel and neither are they copied to the Ministry of Lands (who in this case was the instructing client) and neither were they copied to the Ministry of Finance. Suffice to state that they were internal memoranda between officers of two Government Ministries.

In an affidavit sworn on 23rd September, Miss Dorothy Angote, the then Permanent Secretary Ministry of Lands depones;-

> **"4. That at no time has the Ministry of Lands been consulted by Mr. J.P.G.Tuamwari on the plaintiff?s claim nor has the Ministry of Finance ever agreed to settle the claim in the sum of Ksh.6,015,113,000 or any other sum or at all.**
>
> **5. That the Ministry has all along requested the Hon. Attorney General to defend the claim.**
>
> **6. That the opinion of Mr. J.P.G. Tuamwari required to be presented to the Ministry of Lands and the Permanent Secretary Ministry of Finance.**
>
> **7. That under Section 8(1) of Government Contracts Act, Cap 25 Laws of Kenya, no contract entered for or on behalf of the government shall bind it unless such contract is signed or countersigned by the Permanent Secretary, Deputy Permanent Secretary to the Treasury or a person or persons specially or generally authorized by either of them in writing in that behalf.**
>
> **8. That Mr. J.P.G. Tuamwari, an Economist of Job Group „R? not being an authorized officer cannot bind the Government.**
>
> **9. That further, the estimates for the Ministry of Lands, in the year 2008/2009 for recurrent expenditure is Ksh.1,440761,140.00 while its development expenditure is Ksh.574,375,000. Therefore, entry of judgment against it in the sum which is three times above its allocation will greatly prejudice the operations of the Ministry which will not be able to render any service to the public. Annexed hereto and marked DAI are copies of the said estimates."**

There was also the affidavit of Joseph Kanja Kinyua sworn on 22nd September 2008 in which he deponed that;

> **"6.That the said Economist initially prepared an opinion for Ksh.851,424,000 but did not present the same to my office.**
>
> **7. That the Ministry of Finance did not agree with the subsequent opinion of Ksh.6,015,113,000 because the figure was highly inflated.**
>
> **8. That the Ministry of Finance has not agreed to settle this matter for any sum.**
>
> **9. That Mr. J.P.G. Tuamwari is not an authorized officer in terms of section**
>
> **8(1) of Government Contracts Act and hence cannot bind the Government for any contract.**
>
> **10. That the alleged settlement of the matter in the stated sum is illegal, unsupported by any economic data or basis and would cripple the affairs in the Ministry of Lands whose estimated recurrent expenditure is Ksh.1,440,761,140.00 and development expenditure is Ksh.574,375.00. Annexed hereto and marked JKK are copies of the said estimates.**

From the above two affidavits, it is clear that Mr. Tuamwari did not have instructions from the Ministry of Lands and the Ministry of Finance to enter into any negotiations. Further we are at a loss as to how the sum of Ksh.6,015,113,000 was arrived at by Mr. Tuamwari. We say this because the placement of a caveat may hinder transactions touching on title but not the operations on the ground. What was the nexus (if at all) between squatters and the caveat? Whereas it is not disputed that the Lands Registrar had placed a caveat, that was not the same as saying the Government had encouraged squatters to move onto the suit land. If anything, the obligation to ward off squatters never shifted to the Government but remained the responsibility of the respondent. We also note that the respondent's **"loss of use"** was not based on failure to transfer or charge the title but on loss of use of land. Who prevented the respondent from using the land? Further, in the event that the respondent suffered losses on account of invasion by squatters, such a loss would not be attributed to Government but to the squatters themselves. The learned Judge did not interrogate how the sum of Ksh6,015,113,000 had been arrived at and she justified this astronomical sum on the basis that this had been reduced from the sum of Ksh.18billion. She stated;

> ***"a) The defendants cannot claim to hide under an allegation of the figure being inflated when in fact it has been greatly reduced from the initial figure of 18 billion. Secondly the mere allegation that the figure is inflated does not hold in the absence of any mention that the defendants were going to take steps to have another group of agents work on the said figure. Allowing this assertion to stand will amount to leaving not only the plaintiff but the proceedings in an embarrassing position contrary to the rules of the game of litigation whose ultimate aim is to assist parties resolve their disputes signified by the litigation being brought to an end. 3rdly there has been no suggestion of any suitable alternative figure to justify compensation to the plaintiff."***

With all due respect, the learned Judge failed to consider that apart from the initial figure of Ksh.18billion (proposed by the respondent) Mr. Tuamwari had initially recommended Ksh.851,424,000.00. In our view, it was incorrect for the learned Judge to justify the sum of Ksh.6,015,113,000 on the basis that this had been reduced fromKsh.18 billion.

The learned Judge proceeded to state:

> ***"with regard to lack of authority in Tuamwari to bind the government in terms of the provisions of the Government Contracts Act Cap 25 Laws of Kenya, it is the finding of this court that this does not hold because the agreement arose from a court proceeding and not negotiations of a government contract as such the provisions of the said law does not apply.***
>
> ***Secondly there was no limitation placed on the capacity of Mr. Tuamwari to negotiate a settlement, 3rdly there is nothing to show***

that he exceeded his mandate considering that he is the one who made the first assessment of Ksh.851,424,000.00. 4thly he was paraded as an expert being the Chief Land Economist in the ministry of Lands. 5thly there has been no demonstration that he was disciplined for any misconduct in the line of duty arising from his endorsement of the compromise reached. 6thly no good reason was given by the defendant as to why him Mr. Tuamwari and the participating counsel Mr. Anthony Ombwayo never deponed replying affidavit in order for them to be availed to the court and the plaintiff?s for cross-examination. The defendants failure to field these two crucial persons is clear indication that the two would not have been mean enough to depone to falsehood. They would have told the court the truth to the detriment of the defendants. It therefore follows that this is a clear demonstration that the defendants withheld material evidence from court and this conduct will be construed against them."

Further, the learned Judge stated:

"Case law assessed is to the effect that failure of the parties to endorse an alleged compromise does not rob that compromise of its validity so long as the court can determine that indeed a compromise was reached. It has been shown that exchange of correspondence and conduct of parties are pointers. Herein parties exchanged correspondences on their desire to reach a compromise."

From the above, the learned Judge was of the view that the Government Contracts Act Chapter 25 of the Laws of Kenya did not apply as the contract between the parties herein was as a result of court proceedings and not a negotiated Government contract. With profound respect, we do not agree. In **FLORA N. WASIKE VS. DESTIMO WAMBOKO [1982-88] IKAR 625** this 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 the setting a contract aside,…"

To put it in context, a consent order arrived at is as good as a contract.

As stated in the **Flora N. Wasike V. Destimo** case *(supra),* a consent judgment has a contractual effect. We understand this to mean that as a consent has a contractual effect, the persons entering a consent must be those with authority to bind the government in a contract. In our view without the authority of the accounting officer of the respective ministry, the report of Mr. Tuamwari was not binding on the Government. As stated above, the letter forwarding the report is addressed to Mr. Ombwayo and is not copied to the respondent. On receipt of the letter, Mr. Ombwayo writes to the then Permanent Secretary, (Ministry of Finance) Mr. Kinyua, who is shocked by its contents. Mr. Kinyua then writes to then Attorney General, Amos Wako who is equally shocked by the contents of the letter and who had no prior knowledge of its contents. Given the above scenario, how did the court come to the conclusion that an agreement had been arrived at? Again, it bears repetition to state that the report and the letter to Mr. Ombwayo was done by Mr. Tuamwari, the Government Economist. Mr. Tuamwari was not the appellant's legal counsel and his letters/reports could not bind the appellant as he was not the appellant's counsel, even if we were to accept that a duly instructed counsel has an implied general authority to settle a claim on behalf of a client. In any case, Tuamwari's letter was not a compromise agreement to settle the claim at Sh.6,015,113,000. As the terms of the letter show, Tuamwari only revised the valuation figures. Further, a reading of Order XXIV Rule 6 of the then applicable Civil Procedure Rules provide that proof must be made ***"… to the satisfaction of the court…".*** We understand this to mean that courts of law will not act as robots and merely endorse consents even if they be unlawful. We are fortified by this finding as in interpreting O.XXIIII Rule 3 of the Indian Civil Procedure Code in the decision of CHANBASAPPA GURNSHATAPPA HIREMATIT VS. BASLINGAWA GOKURNAVA (*supra*) the court stated that the words: "***proved to the satisfaction of the court that a suit has been adjusted***" as appears in the Civil Procedure ***"… is a safeguard to either party who questions the validity of an award, if that is the adjustment relied on"***. Here is a situation where the appellant is saying there was no agreement and/or compromise. On the other hand, the respondent is frog-marching it to accede to a purported agreement. In our view, it was not shown to the satisfactory of the court that a compromise had been arrived at and it is our duty to safeguard a party who neither having entered a consent, is being coerced into one.

The other argument raised by the respondent is that the parties herein had reached a compromise/consent on 4th March, 2008. It was the respondent's position that the appellant cannot in law resile from the contract entered into. The respondent relied on the decision of **KCB LTD Vs. SPECIALIZED ENGINEERING CO. LTD.** *(supra)* for the proposition that a consent order entered into by counsel is binding on all parties.

It is important to point out that in the appeal before us, one of the parties is a public entity while the other is a private entity. None of the authorities relied by the respondent for the proposition that a party cannot renege from a consent, involved a public body. In the particular circumstances of this appeal the ministry concerned was the Ministry of Lands. It therefore follows that if any instructions were to be forthcoming to legal counsel, the same would emanate from the Ministry of Lands. There were no such instructions to counsel representing the appellant from the said ministry. Indeed, the then Permanent Secretary Miss Dorothy Angote was at a loss when she got to know that her Ministry was to pay a sum of Ksh.6 billion. In her affidavit, as the accounting officer of the ministry and in the affidavit of Mr. Kinyua, the Permanent Secretary Ministry of Finance, both deponed that the expenditure for the year 2008 for the Ministry of Lands was about 2billion, and hence there is no way they could have consented to pay Ksh.6,015,113,000/-

Although the respondents' argument was that there was a consent arrived at by the parties, we find that there was no such consent or compromise. In the case of **SAMUEL MBUGUA IKUMBU** *(supra)* relied on by the respondent this court stated:

"The extent of authority of a solicitor to comporomise is set out in a passage in the *Supreme Court Practice 1979 (Vol. 2) paragraph 2013 at page 620, as follows:*

„Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen, [1903] 1 Ch pp 817,818; Little vs. Spreadbury, [1910]2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their Notice see Welsh vs Roe [1918- (9) All E.R.

Rep.?" *(Emphasis supplied)*

It is clear that there is a qualification to the general rule that a solicitor has general authority to compromise on behalf of a client. The qualification is that the solicitor had to act bonafides ***"… and not contrary to express negative direction".***

In the case of the case of **SAMUEL OLE TINA (***supra***)** this court stated:

> ***"Whereas an advocate had general authority to compromise on behalf of his client, he can only do so if he acts bona fide and not contrary to express and/or negative direction".***

Can it be said that a solicitor who commits his client to pay a sum not within the clients reach is acting bona fides? We do not think so. As stated elsewhere in this judgment the Land Registrar had placed a caveat on the suit land. The suit land had been sold to the respondent by National Bank of Kenya (NBK). The former sought exemptions from the application of the Land Control Act. This although was initially granted, was later waived. In a plaint dated 25th June, 1992 filed at the High Court (HCCC No. 3463 of 1992) NBK had raised the issue that there was no waiver of the application of the Land Control Act by H.E. the President under S. 24 of the Land Control Act. It was on this basis that a caveat was placed on the suit land.

In the suit filed by the respondents the claim was for general damages. Mr. Tuamwari initially recommended a sum of Ksh. 851,424,000/=, a sum less than a billion. On 4th March, 2008, the sum recommended by Mr. Tuamwari in his report is a sum of Ksh.6,015,113,000.00. This is in spite of the fact that the annual budget of the Ministry of Lands was less than Ksh.2billion. In a certificate of costs against the Government under the hand of the Deputy Registrar of the High Court dated 30th March, 2017 the figure (inclusive of interest) had risen to Ksh.19,750,178,069.00. Clearly this was against public interest and financial probity and is against public policy which a court should neither entertain nor allow. We are fortified in our conclusion in this matter by the recent Supreme Court decision of ***Narok County Government vs Livingstone Kunini Ntutu, & Ol Kiombo Limited & Another S C Petition No. 3 of 2015*** wherein that Court held that the validity of a consent order can be questioned. The Supreme Court stated:

> ***"We are in agreement with the conclusion made by the High Court only, to the extent where, in the present matter, it stated thus:***
>
> ***„…allegations of unconstitutionality and illegality of a Consent Judgment are a serious policy issue that this court must have regard to…?"***

The upshot of the above is that we find merit in this appeal. It is hereby allowed with costs. Consequently, the ruling of the High Court delivered on 12th October, 2012 is hereby set aside and the application dated 23rd July, 2008 is dismissed with costs to the appellant.

Dated and delivered at Nairobi this 22nd day of March, 2019.

E. M. GITHINJI

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR