IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 205 OF 2014

BETWEEN

S M N ……..... APPELLANT

AND

Z M S ……...…….....…. 1ST RESPONDENT

M WS …….....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS …... 3RD RESPONDENT

CHIEF MAGISTRATE COURT AT NAKURU ....…4TH RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Lenaola, J) signed on 16th May, 2014 and delivered (Majanja, J) on 23rd May, 2014

in

Petition No. 529 of 2012)

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JUDGMENT OF THE COURT

1. This appeal is limited to a challenge on the refusal by the High Court, **Lenaola, J.** (as he then was) to *'review, vacate or set aside'* a consent order recorded by the court on 11th July, 2013 in ***Constitutional Petition No. 529 of 2012***. The consent was a culmination of a matter variously characterized by the court and the parties as *"highly emotive"* and *'traumatic episode'*. It commenced in Nakuru Chief Magistrate's Court on 8th November, 2012 when the appellant before us, S M N **(S)** filed ***Misc. Criminal Application No. 117 of 2012*** seeking leave to commence private criminal proceedings against the 2nd respondent herein, M S **(M)**. The allegation he made was that M had abducted and concealed his son, one **'S W'** who went missing at their home in Subukia at the age of 3 years some 34 years earlier on 31st August, 1988. According to S, Z M S **(Z),** the 1st respondent before us, was their lost son. When the Director of Public Prosecutions **(DPP),** became aware of the application, he ordered investigations in the matter and the results were filed with the 4th respondent, Nakuru Chief Magistrate's Court **(CM).**

According to the report by the DPP S W was not one and the same person as Z. In the pursuit of his claim before the CM, and before the High Court where he was enjoined as an interested party, S was represented by learned counsel, **Mr. John Hari Gakinya** of M/s Hari Gakinya & Company Advocates.

2. In the meantime, Z and M went before the Constitutional and Human Rights Division of the High Court on 16th November, 2012 and took out a Petition seeking to stop S from falsely alleging and publishing the information that S W and Z were one and the same person. They asserted that Z was the son of M and the late G S since his birth on 8th September, 1983 and narrated his upbringing and educational history. They dismissed the paternity claim as a frivolous and scandalous charade actuated by ulterior and improper motives. They sought an order to stop the CM from entertaining the application for private criminal prosecution; an order for dismissal or stay of the application for private prosecution; and an order directing the DPP to investigate the claims of S and to prosecute him if the claims are established to be false. Throughout the proceedings, M and Z were represented by **Mr. Fred Ngatia** instructed by M/s Ngatia & Associates while the DPP and the CM were represented by **Mr. Mungai Warui**, instructed by the Attorney General.

3. Before the petition could be heard, the parties compromised it and recorded a consent before Lenaola, J. on 11th July, 2013. Present in court that day was Mr. Ngatia and Mr. Warui but notice of the hearing date had been issued and served on all counsel and Mr. Gakinya had informed the other counsel that he was held up elsewhere but agreed to the recording of the consent since he had signed it. Mr. Ngatia presented before the court the consent letter dated 8th July, 2013 and signed between M/s Ngatia & Associates and M/s Hari Gakinya & Company Advocates to be adopted as an order of the court. Mr. Warui expressed no objection to the consent and it was adopted as the final order of the court determining the petition as follows:-

> ***"(1) That the motion filed by the Interested Party namely, Nakuru Chief Magistrate?s Court, Miscellaneous Criminal Application No. 117 of 2012 seeking leave to institute private criminal proceedings against the 2nd Petitioner (M S) arising from or related to the paternity of the 1st Petitioner be and is hereby dismissed and/or struck out.***
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> ***(2) That an order be and is hereby issued directed to the 2nd Respondent and/or any other Court, subordinate to the High Court not to entertain and/or suffer and/or allow its process to be used by the Interested party and/or any other person to file any private criminal prosecution against the 2nd Petitioner arising from the paternity of the 1st Petitioner and/or parentage of the 1st Petitioner.***
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> ***(3) That an order of prohibition be and is hereby issued to permanently debar the Interested Party, whether by himself or his previews, nominees, emissaries, surrogates, family members or whosoever from contacting the Petitioners whether directly or indirectly in respect of the allegation that the Interested Party and his wife are the 1st Petitioner?s parents.***
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> ***(4) That each party to bear their costs."***

4. Those are the orders S sought to set aside through his new Advocate **Mr. Laban Osoro,** instructed by Kituo Cha Sheria on the assertion that they were entered into fraudulently since Mr. Gakinya had no instructions to enter into such consent. According to S, he learned of the consent through the media whereupon he obtained details of the consent from the court file. He was not privy to any negotiations to abandon his application before the Nakuru Court and therefore the contents of the consent were strange to him. When he confronted his lawyer, the lawyer strangely advised him that the consent was in his best interest after the investigations made, and findings filed in Court, by the DPP. S proceeded to report Mr. Gakinya to the Law Society for acting without his express or implied instructions and entering into an *'unholy and evil agreement with the antagonist's lawyers'*. Mr. Gakinya responded to those accusations giving a lengthy background of his dealings with S and the advice he gave in the matter culminating in the decision made with the authority of S to terminate the proceedings. He called for the dismissal of the LSK complaint.

5. In the matter before the High Court, Mr. Gakinya strongly denied the allegation that he acted without instructions and deposed that he had instructions from S to file and conclude the Nakuru case and to represent him and conclude the Nairobi matter. That is why he entered into the consent in the interests and benefit of his client to cushion him against further expenses and imminent prosecution for the false allegations made against the S. Counsel swore that S was fully informed and involved in the settlement of the matter and he was surprised that he would swear an affidavit stating untrue, baseless and unfounded allegations against him.

6. Lenaola, J. examined the affidavit evidence on record, the submissions of counsel and the law placed before him and was not persuaded that there was any merit in the application which he dismissed with no order as to costs. In so holding, the learned Judge found that the account of events as narrated by Mr. Gakinya was more credible as he had a general authority to act and to compromise the matter in the best interests of his client. The Judge stated:

> ***"I believe Mr. Gakinya for the simple reason that the Interested Party has failed to demonstrate to the Court that there was fraud or collusion in the recording of the consent as between the Petitioners and Mr. Gakinya. I say so with tremendous respect because fraud is a serious matter and a mere statement that there was fraud cannot suffice in a matter of such seriousness as the one before me. That is why in Abdul Rehman vs Fredrich Delfer & Anor. C. A. No. 112 of 1992 the Court of Appeal stated that the burden of providing fraud especially against an advocate is very heavy and fraud must also be specifically pleaded and proved strictly.***
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> ***In the event, where is evidence of fraud or even collusion? Not one aspect of it has been cited in this case and I am not satisfied that I have been given sufficient evidence to lead me to a conclusion that Mr. Gakinya acted fraudulently."***

7. The learned judge went further and examined whether in principle there was any sufficient reason to reopen both the Nakuru application and the Nairobi petition in the light of the affidavit evidence on record and stated thus:-

> ***"In that regard, I have watched the Interested Party in Court and I have read his Affidavits and letters on record. There is no doubt that the issue of his kidnapped son has gnawed his mind for over 25 years. The issue is also emotive and haunting. Having said so however, what purpose will reinstatement of the Petition serve? The DPP has investigated the matter and his report is on record. He has declined to accept the Interested Party?s version of events. The Interested Party?s former advocate has sworn on oath that the Interested Party knew and knows that he has no evidence that the 2nd Petitioner kidnapped his son and that all proceedings were filed to put „pressure? on the latter and Mr. Ngatia has submitted that the „pressure? included a possible financial settlement and benefit to the Interested Party. Mr. Gakinya has alluded to the same fact.***
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> ***The Interested Party?s evidence on the other hand is this;***
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> > ***(i) That some people informed him that the 1st Petitioner is his son.***
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> > ***(ii) That the 1st Petitioner resembles his other children.***
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> ***No other evidence has been placed before me and so the question is, would reinstatement of the Petition serve any useful purpose? My mind is clear that it will not."***

8. Finally, the learned judge found that S's case was weak and fell outside the principles for setting aside a consent judgment. His remedy and therapy for healing the emotional wounds caused by the loss of his son lay elsewhere, he concluded.

9. S was aggrieved by those findings which he now challenges on 16 grounds laid out in the memorandum of appeal, all gravitating around the irregularity of the consent order recorded before

Lenaola, J. Learned counsel for him **Mr. Paul Ng'arua** urged the grounds in written submissions as one ground submitting that the learned judge was in error when he failed to apply sufficient caution to a matter that deserved it. In his view, the Judge ought to have required the presence of S in court to confirm the instructions. S may have been characterised as an 'interested party' in the petition but he was a necessary party who should not have been ignored. His submissions and affidavit evidence of fraud and collusion were not seriously considered although he had made it clear that the instructions he had given Mr. Gakinya were to challenge the report of the DPP in the Nakuru case. He contended that there was no factual basis for the Judge trusting the assertions of Mr. Gakinya who had abused the trust placed on him, over those of S who was forthright and honest. At any rate, urged counsel, the consent was not properly executed because the first page of it was not signed, and it was therefore invalid.

10. Counsel relied on the case of ***Hirani vs Kassam (1952) 19 EACA 131*** for 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)***

He also cited the Court of Appeal case of ***Kasmir Wesonga Ongoma & Another vs Ismael Etoicho Wanga, Civil Appeal No. 25 of 1986;*** and the High Court case of ***Republic vs District Land Registrar Nandi & Another Ex-parte Kiprono Tegerei & Another [2005] eKLR.***

11. In his written submissions in response, Mr. Ngatia cited a different portion of the

Seton treatise stating thus:-

> ***"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 arrangement contrary to the policy of the court … or if consent was given without sufficient material facts or in misapprehension or ignorance of such material facts, or in general for a reason which would enable the court to set aside an agreement."***

12. He cited several other authorities among them ***M & E Consulting Engineers Limited vs Lake Basin Development Authority & Another [2015] eKLR***; ***Kenya Commercial Bank Ltd vs Specialised Engineering Company Ltd [1982] KLR 485***; ***Gateway Insurance Company Ltd vs Aries auto Sprays [2011] eKLR*** and the Ugandan case of ***Lenina Kemigisha Mbabazi Star Fish Limited vs Jing Jeng International Trading Ltd [HCT-00-MA-344-2012]*** before summarising the grounds upon which a consent may be varied or set aside as follows:

> ***"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."***

13. As regards the issue of the authority of Mr. Gakinya to enter into the consent and his absence in court when it was recorded, Mr. Ngatia submitted that Mr. Gakinya had faithfully attended before the same court on four previous occasions which confirmed his instructions to handle the matter and his absence on the last ocassion was explained and was not an issue. Indeed, counsel noted, Mr. Gakinya had, in his lengthy response, made it clear that he had instructions throughout.

14. Finally counsel submitted that there was no useful purpose to be served by setting aside the consent and reinstating the petition. That is because the orders sought in the petition were principally directed at the DPP and the DPP had consented to the compromise since he had carried out investigations which eliminated the allegations made against the S as lacking any foundational basis. There was no issue of paternity raised in the petition, which in any event had been fully explained, and the continued assault on the privacy and integrity of the petitioners ought to be terminated.

15. In oral highlights Mr. Ngatia observed that 15 out of the 16 grounds of appeal were directed at Mr. Gakinya but he was not served with the record of appeal. Only one ground related to the application but it falls short of the minimum standards acceptable in setting aside consent orders. Mr. Warui agreed with all the submissions made by Mr. Ngaia and confirmed that the DPP had completed his investigations in the matter and filed the final results in court.

16. We have given due consideration to the appeal as ***Rule 29*** of this Court's Rules commands by reappraising the evidence on record, the submissions of counsel and the law in order to arrive at our own conclusions. As stated earlier, the crux of the appeal focuses on the validity of the consent entered into by the parties on 11th July, 2013 compromising the petition before the trial court. The subsequent application to have the consent reviewed, vacated or set aside called for the exercise of the trial court's discretion which we cannot lightly interfere with save on principle and the guiding principle is that an appellate court will not ordinarily interfere with the exercise of discretion by the trial judge unless it is shown that the trial judge misdirected himself in some matter and as a result arrived at a wrong decision, or it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion, thereby occasioning an injustice. See ***Mbogo & Anor vs Shah [1968] EA 93.***

17. There is now dearth of authorities on the law governing the setting aside of consent Judgments or orders, and we are grateful to counsel for citing some of them before us. Generally a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High Court that he was involved in fraud or colluded with another advocate or person to subvert the cause of justice in a matter pending in Court is certainly one of utmost gravity. It destroys the advocate's honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charges.

18. We may highlight a few of the authorities to illustrate the approach attendant to the issue at hand:-

In ***Flora N. Wasike vs Destimo Wamboko [1988] eKLR*** 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 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*** said at ***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..".

See also ***Hirani vs Kassam* (1952) 19 EACA 131**, at Page 134; ***Brooke Bond Liebig Ltd vs Mallya* [1975] EA 266** at **269** and ***Seaton on Judgments and Orders*** **(7th Edn), Vol 1,** at Page **124.**

19. 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."

20. In ***Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another* [1998] eKLR** this Court cited a passage in The Supreme Court Practice ***1976 (Vol. 2)*** paragraph 2013 page 620 stating:-

"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."

21. Finally in the Ugandan case of ***Lenina Kemigisha Mbabazi Star Fish Ltd (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."

22. In this case, the findings on liability depended mainly on the credibility of Mr. Gakinya and S. The advocate deposed that there were no written instructions given to him by his client and the client was unable to show otherwise. It must therefore be assumed that instructions from the client and the advice given by the advocate were oral throughout. Why they chose that mode of communication which is clearly prone to abuse and says little about accountability, is a matter between the advocate and client. The trial court was inclined to believe the advocate's account of events and having looked at the record and assessed the evidence ourselves, we find no reason to fault that finding. The advocate had ostensible authority to compromise the petition and did in fact do so before Lenaola, J. on 11th July, 2013 in the interest of his client. We find no proof to the contrary to impeach the advocate's *bona fides*.

23. Having so found, it follows that the appeal is bereft of merit and we order that it be and is hereby dismissed with no orders as to costs.

Dated and delivered at Nairobi this 9th day of June, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

……..…….

JUDGE OF APPEAL

P. O. KIAGE

……...

JUDGE OF APPEAL

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

DEPUTY REGISTRAR