



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 42 OF 1997(OS)**

**PAUL N. NDUNGU**

**ELIUD N. NJOROGE**

**RAPHAEL K. NG'ETHE**

**P. KIHARA KARIUKI**

**All practising as**

**NDUNGU NJOROGE & KWACH ADVOCATES ..... APPLICANTS**

**V E R S U S –**

**KIRAITU MURUNGI**

**GIBSON KAMAU KURIA**

**KATHURIM M'INOTI**

**All practising as**

**KAMAU KURIA & KIRAITU ADVOCATES.....RESPONDENTS**

**MUGWE INVESTMENTS LTD .....INTERESTED PARTY**

**RULING**

1) The Respondents herein, namely Kiraitu Murungi, Gibson Kamau Kuria, Kathurim M'noti, all Practising As Kamau Kuria & Kiraitu Advocates took out the summons dated 2<sup>nd</sup> April 2014 in which they sought for the following orders:

- 1. That it be declared that further prosecution of this suit after filing on 21st February, 2001 of a purported consent order in HCCC No. 5254 of 1992: Mumwe Investments, Mr. E Kimani and Mrs Mary Kanyi Kariuki v Kenya National Capital Corporation and 2 others is an abuse of the process of the court.***
- 2. That as an alternative to 1, it be declared that the further prosecution of this suit after filing on 21<sup>st</sup> February 2001 of a purported consent order in HCCC No. 5245 of 1992: Mumwe Investments, Mr. E Kimani and Mrs Mary Kanyi Kariuki v Kenya National Capital Corporation and 2 others offends the conscience of this honourable court***

3. *That this suit be struck out with costs.*
4. *That further proceedings herein be stayed permanently.*

2) The summons is supported by the affidavit of Gibson Kamau Kuria.

3) When served with the chamber summons, Paul N. Ndungu, Eliud N. Njoroge, Raphael K. Ng'ethe, P. Kihara Kariuki all trading as Ndungu Njoroge & Kwach Advocates being the Applicants filed grounds of opposition and the replying affidavit of Raphael K. Ng'ethe to oppose the summons. When the summons came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the application disposed of by written submissions.

4) I have considered the grounds stated on the face of the summons plus the facts deponed in the supporting and replying affidavits. I have also taken into account the grounds of opposition filed by the Applicant/Respondents and the rival written submissions plus the various authorities cited by the parties.

5) It is the submission of the Respondents/Applicants that whilst this suit was pending, the firm of Wanjama & Co. Advocates behind their back negotiated for a settlement of the claim giving rise to the recording of the consent order filed in court on 21.12.2001 vide **Nairobi H.C.C. no. 5245 of 1997, Mumwe Investments E. Kimani and Mary Kimani =vs= Kenya National Capital Corporation & 2 others.**

6) The Respondents/Applicants further argued that through the aforesaid consent, the Applicants/Respondents waived their right to enforce the undertakings, the subject matter of this application.

7) The Respondents also submitted that although they deny the validity of the consent order they argue that if the same is found to be valid the Respondents are discharged from the undertaking which are subject to this action. The Respondents/Applicants are of the strong view that the consent order is both immoral and illegal and that this suit have merged and the prosecution of this action offends the conscience of the court as it has become a suit to enforce an illegal and immoral consent. The Respondents have also argued that any further prosecution of this suit is an abuse of the process of this court and enforcement of the undertaking offends the conscience of this court. The Respondents have disclosed that they filed an application seeking to invalidate the change of advocates (Wanjama & Co. Advocates taking over the conduct of the suit) and the consent order. It is said the aforesaid application was dismissed by Justice Mabeya on 28.06.2013 for want of prosecution. The Respondents have filed a notice of appeal to express their intention to challenge on appeal the dismissal order.

8) I have already stated that the Applicants/Respondents have filed grounds of opposition and a replying affidavit to opposed the summons. It is the Applicants/Respondents' submission that the summons is seeking declaratory orders which are incapable of being granted in an interlocutory application. It is also argued that the Respondents' application lacks merit and amounts to an abuse of the court process. The Applicants/Respondents have pointed out that the Respondents/Applicants are approbating and reprobating at the same time which is not acceptable in law. It is said that the Respondents/Applicants are in court challenging the consent order while at the same time they want to use the consent order to have the suit struck out. The Applicants/respondents have also urged this court to find that under the consent, there were obligations of each party, therefore if the substantial originating summons goes for trial the question as to whether or not the client complied with the obligations set out has to be determined. The Applicant/Respondent has further submitted that the originating summons raises triable issues and as such it is in the interest of justice that the originating summons goes for trial.

9) Having considered the material and submissions presented to this court by both sides, I think the following issues have arisen for the determination of this court:

10) First is whether or not the right to enforce the undertaking was waived upon the entry of the consent order? A critical examination of the consent order recorded will show that the same is detailed and elaborate in its clauses. The said consent order was filed in court on 21.2.2001 and there is no application

to have the same set aside and or discharged. The Respondents/ Applicants have admitted that they filed an application with a view of setting aside the consent order but unfortunately that application was dismissed for want of prosecution. I am of the view that the Applicants/Respondents by entering the consent have not in any waived their right to seek for the enforcement of the undertaking.

11. The second issue which also arose is whether or not the consent order is immoral and illegal. I have already pointed out that the Respondents/Applicants filed an application to challenge the consent order which application was dismissed for want of prosecution. The Respondents/Applicants have filed an appeal against the dismissal order. The appeal is pending before the Court of Appeal. It would appear the Respondents/Applicants are attempting to use this application to have a second chance to challenge the decision before this court. It is not permissible in law.

12) A cursory look at the orders sought vide the chamber summons dated 2<sup>nd</sup> April 2014 will reveal that the Respondents/Applicants are seeking for declaratory orders which can only be ventilated in a trial and not through an interlocutory application.

13) In the end and on the basis of the above reasons, I find the Chamber Summons dated 2<sup>nd</sup> April 2014 to be without merit. The same is ordered dismissed with costs being awarded to the Applicants/Respondents.

Dated, Signed and Delivered in open court this 19<sup>th</sup> day of August, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent