



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**ENVIRONMENT AND LAND DIVISION**  
**E.L.C CASE NO.53 OF 2014**  
**KIPSIGIS TRADERS LIMITED.....PLAINTIFF**  
**VERSUS**  
**MWANGI MUHERIA.....DEFENDANT**  
**RULING**

*(Application by Attorney General to set aside consent and to come on record; suit by plaintiff over property; defendant being on suit premises by virtue of his employment with the Government but sued in his personal capacity; Attorney General not sued; defendant instructing private counsel in the matter; averment in defence that the land was illegally allocated to plaintiff because it is public land hosting the Kericho Rehabilitation Centre; counsels for plaintiff and defendant later recording a consent that the land is private land and not Government land and that defendant should vacate; Attorney General seeking to set aside that consent; Other suits filed by plaintiff where Attorney General has filed defence and counterclaim for cancellation of title; whether consent should be allowed to stand in face of this; application allowed; consent set aside; Attorney General allowed to come on record for defendant and be enjoined as 2nd defendant)*

The application before me is that dated 15th January, 2015 filed under a Certificate of Urgency. It seeks the following orders :-

(a) Spent...

(b) That leave be granted to the Honourable Attorney General to come on record for the defendant/applicant forthwith in place of M/s Nyaingiri & Co. Advocates.

(c) That pending the hearing and determination of this application inter partes there be a stay of execution of the consent order dated 28th October 2014 and filed in court on 29th October 2014 by M/s Migiro & Company Advocates and M/s Nyaingiri & Company Advocates, eviction, and or any interference on the premises situated at Kericho Municipality Block 5/441 and 442.

(d) That pending hearing and determination of this application, the Manager, Kenya Power, Kericho and the Manager, Kericho Water and Sewerage Company re-connect electricity and water supply respectively to the premises and the order be served upon them for compliance.

(e) that pending the hearing and determination of this suit, an order of inhibition do issue prohibiting the plaintiff or his agents, servants, employed advocates or whomsoever from disposing, dealing, charging, alienating or in any way interfering with parcel Nos. Kericho

*Municipality/ Block 5/441 and 442.*

*(f) That the Honourable Court be pleased to review, vary and or altogether set aside the consent order dated 28th October 2014 and filed in court on 29th October 2014.*

*(g) That the Honourable Attorney General be joined or added as the 2nd defendant in this suit.*

*(h) That the court do issue such order as it may deem fit and just to grant in the special circumstances of this application in favour of the defendant/applicant.*

*(i) That costs of this motion be borne by the plaintiff/respondent.*

The application is based on sixteen (16) grounds but in a nutshell, the complaint is that the previous counsel for the defendant entered into the subject consent without any authority from the defendant; that pursuant to the said consent, execution has commenced to evict the defendant from the suit premises; that the properties in dispute are public properties belonging to the Government of Kenya; that the defendant is a civil servant and Manager of the Kericho Rehabilitation Centre under the Ministry of Labour, Social Security and Services; that the suit premises are occupied by the defendant by virtue of his employment; that the consent was entered into fraudulently; that there is apparent mistake and misrepresentation in the consent; that the consent is an abuse of the court process and unprofessional; that the styled consent is actually a statement of the plaintiff.

The application is supported by the affidavit of the defendant and is opposed by the plaintiff.

Before I go to the gist of these, I think it is necessary that I lay the background leading to this application.

This suit was commenced by way of plaint filed on 6th October 2014. The plaintiff's case is that it is the registered owner of the land parcel Kericho Municipality/Block 5/441 and Kericho Municipality/Block 5/442 together with all developments and improvements therein. It is pleaded in the plaint that the plaintiff purchased these two plots (the suit properties) from the previous allottees, who had been allotted the plots by the Government. It is averred that on diverse dates between February 2002 and December 2002, the defendant was informed of the change in ownership and requested to vacate the properties or pay rent of Kshs. 5,000/= to the plaintiff. It is pleaded that the defendant has refused to do so and is therefore a trespasser. It is also pleaded that the plaintiff is aware of the suit Kericho HCCC No. 11 of 2014 between the plaintiff and defendant but pleaded that it has given irrevocable instructions for its withdrawal. In the suit, the plaintiff has asked for the following orders :-

*(a) A declaration that the plaintiff is the sole registered proprietor of the suit properties.*

*(b) A declaration that the defendant is a trespasser on the suit properties.*

*(c) An order of eviction against the defendant.*

*(d) A permanent injunction to restrain the defendant from the suit properties.*

*(e) Mesne profits of Kshs. 720,000/= being the sum of rent unpaid since January 2003 to date at Kshs. 5,000/= per month.*

*(f) Interest on (d) (probably meant (e)) from the year 2003.*

On 22nd October 2014, the defendant entered appearance through the law firm of M/s Nyaingiri & Company Advocates. The said law firm filed a statement of defence on behalf of the defendant. The defendant denied that the plaintiff is owner of the suit properties. It was pleaded that the suit properties are the staff quarters for the Kericho Vocational and Rehabilitation Centre, a public institution for persons with disability, since the year 1972. It was averred that its acquisition as private property is fraudulent. It was further pleaded that the defendant is an employee of the Government of Kenya and the said house

was allocated to him by virtue of his employment. He complained that he is being sued in his personal capacity while the property belongs to the Government. It was denied that the suit properties have been alienated, for on them, stands several institutional staff houses and all tenants therein pay rent to the Government. It was averred that the defendant has never defaulted in paying his rent to the Ministry of Labour, Social Security and Social Services as an employee of the said Ministry. It was averred that if the plaintiff acquired the property, then it was an act of grabbing. It was also pleaded that the defendant was not privy to the withdrawal of the suit Kericho HCCC No. 11 of 2014.

Nothing happened in the matter until the 29th October 2014, when the parties appeared before the Deputy Registrar and stated that they have filed a consent which they wished adopted. The said consent was dated 28th October 2014 and was filed on the 29th October 2014. It was signed by N.O. Migiro of M/s Migiro & Company Advocates for the plaintiff, and Mr. T.M.O. Nyaingiri of M/s Nyaingiri & Company Advocates for the defendant. I think it is necessary that I set it out in full. It was drawn as follows :-

### **THE CONSENT**

*By consent of the parties herein it be and is hereby recorded as follows :-*

- 1. That the suit property/properties Kericho Municipality/Block 5/441 and 5/442 are registered in the plaintiff's name.*
- 2. That the leasehold interest comprised in the suit property and in terms of section... of the Registered Act the plaintiff is entitled to all rights accruing in the property.*
- 3. That the defendant's occupation and possession of the suit property is unlawful and illegal, even if he was dissatisfied with the plaintiff's acquisition of the suit property, the defendant ought to have sought the court's intervention if he or his employer wanted to challenge the plaintiff's title.*
- 4. That the Attorney General of the Republic of Kenya has never challenged the plaintiff's title and the defendant cannot purport to do so on behalf of the Republic without the authority of the Attorney General.*
- 5. That the proceedings herein are not proceedings against the Government of Kenya and the defendant is not sued a public officer.*
- 6. That the plaintiff was issued with certificates of lease which are duly approved.*
- 7. That whether the plaintiff acquired the suit property lawfully, prima facie, subsequently for valuable consideration or by an order of court, it shall not be liable to be defeated except as provided by the Registered Land Act.*
- 8. That the properties interests are held together with the privileges and appurtenance belonging thereto free from all other interests and claims whatsoever.*
- 9. That in the absence of any Court Orders or any other lawful restrictions or inhibition, the plaintiff is entitled to develop the suit property and enjoy quiet possession of the same without any interference whatsoever.*
- 10. That the property in dispute is different from the property that is occupied by the Vocational Rehabilitation Centre at Kericho.*
- 11. That if the defendant or any interested party is not satisfied with the creation of the title to the suit property, the appropriate thing would have been to move to Court and institute the appropriate proceedings. This the defendant nor the Government of the Republic of Kenya not any interested party has not moved the Court.*

12. *That if the defendant or any interested party is not satisfied with the creation.*
13. *That the defendant has trespassed into a private property that is owned by the plaintiff's title.*
14. *That there is no indication that the Government of Kenya plays any role in the act of trespass complained of.*
15. *That the plaintiff had acquired a lease of the property from the Government of Kenya and therefore it is not a property belonging to the Government of Kenya or the Ministry of Culture and Social Services or the Rehabilitation Centre Kericho.*
16. *That the Rule of Law requires that the Court/s be used to settle disputes between warring parties including the Government.*
17. *That it is plainly wrong for the defendant to occupy house/s which is private property in manner he has done and occupying the same for free.*
18. *That all the acts complained of have been undertaken by the defendant in his personal capacity and has been sued in his personal capacity.*
19. *That the plaintiff's suit is clear and in-controvertible because no proceedings have been instituted by anybody to challenge its proprietary rights to the suit properties.*
20. *That it is trite law that a party ought not to be allowed to retain a position of advantage that he entertained through a blatant unlawful act.*
21. *That a mandatory injunction do issue compelling the defendant or his representatives and/or agents to remove from the suit property any person who may be unlawful in occupation of the same immediately.*
22. *That the consent herein be adopted as an order of the Court.*
23. *That the plaintiff to bear the costs of the suit.*
24. *That we have appended our signatures freely and on our free will as Legal Counsels.*

*N.O Migiro,*

*Migiro & Co.*

*Advocates for the plaintiff.*

*T.M.O Nyaingiri*

*Nyaingiri & Co.*

*Advocates for the defendant.*

Pursuant to that consent, an order dated 7th November, 2014 was extracted. Four orders were drawn as follows :-

1. *That it be and is hereby declared that the suit properties namely L.R NOS. KERICHO MUNICIPALITY/BLOCK 5/441 and KERICHO MUNICIPALITY/ BLOCK 5/442 are registered in the plaintiff's name.*
2. *That a mandatory injunction do issue compelling the defendant, his representatives or agents to*

*move from the suit properties together with any person who may be in unlawful occupation of the aforesaid properties.*

*3. That the O.C.S Kericho Police Station to assist in the execution of this order.*

*4. That the defendant to have the costs of the withdrawn suit No. 11 of 2014 involving the same parties herein.*

In the supporting affidavit, the defendant has deposed that he is a civil servant employed by the Ministry of Labour, Social Security and Services. He is the manager of the Kericho Vocational Rehabilitation Centre. He has deposed that by virtue of his employment, he and other officers of the Rehabilitation Centre are in occupation of government houses within the suit premises. He has averred that after he was served with summons, he handed the same to Mr. Nyaingiri advocate, who happens to be the Chairman of the Management Committee of the Kericho Vocational Rehabilitation Centre. Mr. Nyaingiri then agreed to represent him as he had been sued in his personal capacity. He has deposed that he was never made aware of the progress of the matter until auctioneers descended on his premises to evict him. He called Mr. Nyaingiri who did not answer his calls. He then visited the Kericho High Court registry and he was shocked to see the consent. He has deposed that he never instructed Mr. Nyaingiri to enter into the consent and that the consent is a fraud. He has averred that the purported consent was unlawfully obtained and in glaring collusion between counsels. He has further deposed that there are other pending matters including the suit Kericho HCCC No. 80 of 2009 where the plaintiff has sued the Attorney General, which matter is still pending. He has deposed that the land is Government land and that even Mr. Nyaingiri had written to the National Land Commission about it on 22nd October 2014. He has averred that it is unfortunate that the same counsel signed the consent purporting to forfeit government land to a private developer 6 days after his letter.

The replying affidavit has been sworn by Mr. Prakash B. Patel, the managing director of the plaintiff company. He has averred inter alia that the suit properties were allocated by the Government to David Langat and John Kauria and registered as L.R No. 631/1578 and L.R No. 631/1579. The plaintiff company purchased these properties from the two individuals and thereafter converted the titles to the Registered Land Act (CAP 300) (now repealed) regime and the plaintiff was issued with the Certificates of Leases for the two properties. He has deposed that after the defence was filed, he authorized his advocate to consult with the defendant's advocate for possible settlement. It was then agreed that the plaintiff waives the demanded rent of Kshs. 720,000/= and pay the defendant's costs in Kericho HCCC No. 11 of 2014, which the plaintiff had withdrawn. He has deposed that although these terms were not favourable to the plaintiff, they agreed to the same and that is how the consent was drawn and filed. He has deposed that the terms of settlement are contractual in nature and the defendant is stopped from denying the same and is bound by it. It is also averred that the state counsel has no locus to appear in the proceedings. He has asserted that the properties belong to the plaintiff company and are not Government houses.

I allowed both applicant and respondent to file further affidavits. They both did, and much of what was deposed therein was whether the properties are Government or private properties.

At the hearing of the application, Mr. Migiro for the respondent, applied to cross-examine the defendant, which I allowed. In his evidence, the defendant stated that he instructed Mr. Nyaingiri as they prepared to raise the issue with the Attorney General. He reiterated that Mr. Nyaingiri never disclosed to him that there was a settlement. He repeated that he pays rent to the Government.

Ms. Janet Langat for the State submitted that the Attorney General should be allowed to come on record for the defendant since the property in issue belongs to the Government and that the defendant is tenant of the Government. She submitted that it was indeed the Government which ought to have been sued, an issue which she pointed out, was indeed raised in the defence filed by Mr. Nyaingiri. She further submitted that the consent was a fraud that should be set aside. She submitted that there are other cases pending over the same subject matter, including the suit Kericho HCCC No. 80 of 2009, where the plaintiff has sued the Attorney General and the former manager of the institution. She submitted that in

that case, the Attorney General has a counterclaim. She submitted that the subject consent essentially compromises the case No. 80 of 2009, without the Attorney General being heard.

Mr. Migiro in response submitted that the plaintiff acquired the suit properties after following due process and was a purchaser for value. He submitted that the plaintiff's proprietary rights stand and are protected by the Constitution. He submitted that the said properties cannot be taken away by correspondence. He referred me to various authorities on this point. As to the consent, he submitted that the same was recorded after consultation, and that in fact, it was his client who got the wrong end of the bargain in the consent. He submitted that it is a policy of the courts to have matters disposed of quickly and that the two counsels should be commended for settling this matter. He submitted that the allegation of fraud needs to be proved beyond a balance of probability.

Both counsels relied on various authorities which I have read. I take the following view of the matter.

The issue of whether or not the plaintiff is the proper owner of the suit properties was presented by both counsels, but to me, that is not the point to be argued in the application. That remains for determination after hearing the suit. To me, the application before me is two fold. The first limb seeks leave for the State Law Office to come on record for the defendant and for the Attorney General to be included as defendant in this case. The second limb is for the setting aside of the consent dated 28th October 2014.

On the first limb, I see no reason why I should deny the State Law Office to come on record for the defendant in place of M/s Nyainjiri & Company Advocates. The defendant is a Government employee and he occupies the subject houses by virtue of his employment. It is alleged that the defendant has committed the tort of trespass, but this tort, has not been committed by him independent of his capacity as an employee of the Government. It is the Government that has placed him in the premises. If any tort has been committed, it has squarely been committed by virtue of his employment with the Government, for the defendant is in occupation of the suit premises as tenant of the Government and as employee of the Government. The presence of the defendant in the suit properties cannot be separated from the claim of the Government over the same properties. Section 4 of the Government Proceedings Act, CAP 40, Laws of Kenya applies. It provides as follows :-

#### *Liability of the Government in tort*

*Subject to the provisions of this Act, the Government shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—*

*(a) in respect of torts committed by its servants or agents;*

*(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and*

*S.4(1) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:*

*(c) Provided that no proceedings shall lie against the Government by virtue of paragraph (a) of this sub-section in respect of any act or omission of a servant or agent of the Government, unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.*

The tort of trespass alleged in this case, is a tort (if proved) committed by a servant of the Government and by virtue of Section 4 thereof, the Government is squarely liable. Section 12 of the same statute further provides as follows :-

#### *Parties to proceedings*

(1) *Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.*

(2) *No proceedings instituted in accordance with this Part of this Act by or against the Attorney-General shall abate or be affected by any change in the person holding the office of Attorney-General.*

By dint of the above provision, together with Section 4 which I have quoted earlier, it is my view that the Attorney General was a necessary party to these proceedings. I therefore allow the first limb of this application which seeks the Attorney General to come on record for the defendant in place of the firm of M/s Nyaingiri & Company Advocates, and further permit the Attorney General to be come on record in these proceedings as the 2nd defendant. If the plaintiff is moved to amend his plaint, that will be well and good, but even if the plaintiff does not amend the plaint, I will deem the claims made against the defendant as claims also made against the Attorney General, as 2nd defendant, and the suit can proceed on that basis.

The second limb of the application concerns the consent. The defendant has averred that he never instructed Mr. Nyaingiri to enter into the said consent. I believe him. I in fact do not see how the defendant would have entered into the said consent, yet not move out of the house, but be evicted by an order later extracted. It has been argued that the consent can only be set aside by the same principles required for setting aside a contract. I do not contest this general hypotheses, and in applying the same, the consent is liable to be set aside on various grounds. First, the defendant had no capacity to enter into the consent. He is a tenant of the suit premises and his landlord is the Government. A tenant has no capacity to transfer land belonging to his landlord or compromise the title of the landlord. The defendant could not purport to transact on land that he does not own but which is claimed by the State. It is the State which would have had capacity to enter into the subject consent.

Ms. Langat also argued that the effect of the consent was to compromise the claim of the Attorney General made in other previous suits. I have taken the trouble of perusing the files said to be of the previous suits filed by the plaintiff. In the replying affidavit, at paragraph 20, the applicant mentioned the cases Kericho HCCC No. 8 of 2006, Kericho HCCC No. 80 of 2009, and Kericho ELC No. 11 of 2014. From my observation, Kericho HCCC No. 8 of 2006 involved different parties over a different subject matter; it has no relation with this suit. The case Kericho HCCC No. 80 of 2009 was filed on 21st October, 2009 by the plaintiff herein against the Attorney General and one Joseph Cheruiyot. The claim of the plaintiff is over the same land parcels herein, but registered as L.R 631/1578 and L.R No. 631/1579, which titles were issued under the regime of the Registration of Titles Act (CAP 281) (now repealed). This must have been before their conversion to the Registered Land Act, regime. In that case, the Attorney General has filed defence and counterclaim seeking cancellation of the titles of the plaintiff. That case is still pending, and was last in court on 14th February, 2011. The other case, Kericho ELC No. 11 of 2014 was filed by the plaintiff on 12 March 2014. The defendant is Mwangi Muheria, same as the defendant herein. The claim is over the land parcels Kericho Municipality/Block 5/441 and 442, the same parcels of land in issue in this case. The case against the defendant is for eviction, same as in this case. The defendant in the suit ELC No.11 of 2014 filed defence through M/s Nyaingiri & Company Advocates and the matter is still pending; it was last in court on 24th June, 2014. I do not know what motivated the plaintiff to file another suit, given that there were already at least two other cases, pending over the same subject matter. It may very well be that this suit offends the *res judicata* principle and its existence is an abuse of the court process. But this may be left for another day. However, the point that Ms. Langat is putting forth, that the plaintiff was trying through the subject consent, to compromise the other cases and the counterclaim of the Attorney General in the suit Kericho HCCC No. 80 of 2009, can be seen. The consent of the parties herein is therefore clearly against public policy, for it cannot be the policy of the courts, to allow parties to compromise one case to the detriment of another litigant in another suit, which litigant is not a party to the consent in issue.

It was further claimed that Mr. Nyaingiri did not have instructions to enter into the subject consent. I am quite concerned with the allegations made against Mr. Nyaingiri. If indeed it is true that he entered into

such an expansive consent without the permission of his client, that may expose him to professional misconduct. It is indeed curious that in his capacity as Manager of the Management Committee of the Kericho Vocational Rehabilitation Centre, he did write the letter dated 22nd October, 2014 (annexture MM-7 in the supporting affidavit) to the National Land Commission, where he complained that the land where the Rehabilitation Centre is built, has been illegally acquired by private developers, but a few days later, signed the consent herein, effectively nullifying any claim by the Rehabilitation Centre over the same properties. But I will not say more on this, because Mr. Nyaingiri is not on trial in this application, suffice it to say that given that context, there is enough material in my view, which seem to support the averment that Mr. Nyaingiri had no express or ostensible authority to enter into the expansive consent. A contract entered into by an agent, where such agent has no authority of the principal, may be liable to be set aside. It follows that if Mr. Nyaingiri went outside his client's instructions, as it seems to me to be the case here, then the subject consent cannot be permitted to stand.

I do not see the necessity of belabouring the point further; the long and short of the above is that I find merit in this application and I allow it. I now make the following final orders :-

- 1. The consent dated 28th October, 2014 and filed on 29th October, 2014 is hereby set aside and so too all other consequential orders and actions arising out of that consent.*
- 2. The status quo prevailing before the said consent be maintained, and if the defendant was evicted from the said premises, he be reinstated, and all other amenities, including power and water be reinstated and such accounts be operated as before.*
- 3. The Attorney General is hereby allowed to come on record for the defendant in place of M/s Nyaingiri & Company Advocates.*
- 4. The Attorney General is hereby allowed to come on record as the 2nd defendant, and whether or not the plaint is amended, the proceedings to continue as if the claim herein is made against both the existing defendant and the Attorney General.*
- 5. The defendant shall have the costs of this application.*

It is hereby ordered.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 25TH DAY OF MARCH, 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**In the presence of:**

Mr. Migiro for Plaintiff/Respondent

Ms. Janet Langat for Defendant/Applicant

Court assistant- Ruth