



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 163 OF 2011

TEAM CONSTRUCTION LIMITED.....PLAINTIFF

V E R S U S

REGINA NYOKABI KURIA.....1ST DEFENDANT

SIMON NDEGE trading as S. NDEGE & COMPANY ADVOCATES.....2ND DEFENDANT

R U L I N G

INTRODUCTION

1. The **Notice of Motion** before the court is dated **17th June 2014** and is filed on 18th June 2014 by the 2nd Defendant under Section 1A, 1B and 3A of the Civil Procedure Act, Order 32 Rules 22, Order 45 Rule 1 and Order Rule 1 of the Civil procedure Rules. The application seeks the following orders:-

- a. *The application be certified urgent and heard ex-parte at the first instance.*
- b. *This Honourable court be pleased to order stay of hearing of Bankruptcy Cause No. 13 of 2014 pending the hearing and determination of this application or further orders of this court.*
- c. *There be stay of execution of the decree of this court pending the hearing and determination of this application.*
- d. *The court be pleased to review and set aside the consent judgement made herein on 26/09/2011 and all consequential orders.*
- e. *The 2nd 2nd Defendant be granted leave of court to file his statement of defence to the Plaintiff's suit.*
6. *Any other suit relief that this Honourable court deem, apt to grant.*

2. The application is premised on the grounds set out therein and is supported by the affidavit of **Simon Ndege** sworn on **17th June 2014** with annexures thereto.

3. The brief history of the application is that judgement was by consent entered herein against the 2nd Defendant allegedly without the consent of the 2nd Defendant, who is an advocate. It was alleged that the 2nd Defendant's firm received Kshs.6,500,000/= from the Plaintiff in the cause of land transaction

which was never completed. The person who was involved in the sale, and who finally negotiated the consent therein, was one Stephen Mose, who was at that time an associate in the 2nd Defendant's law firm. It is alleged that it is that Mose who entered into the consent herein, binding the 2nd Defendant, allegedly without the 2nd Defendant's knowledge or authority, hence this application to set aside the said consent. Arising from the said consent, the decree holder has initiated bankruptcy proceedings against the 2nd Defendant being Bankruptcy Cause No. 13 of 2014, and it is now urged that if the said consent is not set aside the 2nd Defendant will be adjudged bankrupt with dire consequences to his practice and to his clients.

4. The application is opposed by the Plaintiff/Respondent through a Replying Affidavit sworn on 2nd December 2014 with annexures.

5. The 2nd Defendant's/Applicant's case is that in the month of November 2010, Mr. Stephen Mose Advocates who was an associate in his office informed him that he had a land situated at Syokimau whose owner was Regina Nyokabi, the 1st Defendant. The said transaction was solely conducted by Stephen Mose Advocates and at no time did the 2nd Defendant ever write a single letter to Shapley Barret & Co. Advocates who were handling the transaction on behalf of the purchaser, the Plaintiff. On a date that he cannot remember, the 2nd Defendant states that Mr. Stephen Mose Advocate informed him that the purchaser had paid the deposit of 3.5 towards purchasing the property and that he Mose had agreed with Shapley Barret & Co. Advocates that his client would utilize the deposit to pay outstanding rates and related expenses at Mavoko Municipality. Subsequently there was a further deposit of Kshs. 3 m remitted to the firm's account which Mr. Stephen Mose had negotiated with the Purchaser's advocates. The 2nd Defendant stated that the entire deposit was paid to Stephen Mose Advocates who acknowledged receipt thereof by letter dated 17/02/2010 (See annexure marked "SN 1" to the 2nd Defendant's affidavit). In the month of September 2012, the 2nd Defendant was served with a complaint filed at the Law Society of Kenya regarding this transaction and he asked Mr. Stephen Mose to respond to the same as he was seized of the matter. In response to the complaint from the Law Society of Kenya, Mr. Stephen Mose Advocate exonerated the 2nd Defendant fully from any liability (annexed and marked 'SN2' is a copy of the referred response). In sum, the 2nd Defendant blames Mr. Mose for the claim herein, and that Mr. Mose entered into the said consent without the 2nd Defendant's authority or knowledge.

The 2nd Defendant urges that in the interest of justice, the consent judgment entered into against him should be set aside to give him chance to defend himself on merit. Pursuant to the said consent Judgement the Plaintiff has initiated bankruptcy proceedings against the 2nd Defendant, and which if allowed to proceed could negatively affect his profession and practice as a an advocate.

6. The Plaintiff/s/Respondent's case is that the application is an abuse of the court process. The said Application was served upon their Advocates on 10th October 2014 yet the same was filed in Court on 18th June 2014, four (4) months' earlier. Regarding the merits of the matter, the Respondents state that the 2nd Defendant was at all times an active participant in the entire process of negotiating and finalizing the said consent and even subsequently after recording of the Consent, there is ample evidence that he has always known about its existence and acted on it yet he has never taken any steps to set it aside until now, 3 years later, and only after the Consent Decree has, with his full participation, been adopted and acted upon both by this Court and by the Advocates Disciplinary Committee. Even assuming that indeed the said Consent was entered into without his knowledge, the 2nd Defendant has chosen not to disclose when and at what point in time, the existence of the said Consent came to his knowledge and why he never moved immediately thereafter, to challenge the same. In any event, the 2nd Defendant has tried to pay part of the Decree by delivering some Banker's cheques to the Respondent's Lawyer's office although without any structured negotiations. It beats logic how the 2nd Defendant is on one hand issuing cheques in payment of the same Decree that he is at the same time also purporting to know nothing about. Giving the background to the case, the Respondent stated that this suit arose from the 2nd Defendant's act of releasing or converting funds of Kshs 6.5 Million paid as a deposit for purchase of land and to be held by his law firm as a stakeholder until completion of the transaction but which the 2nd Defendant, in an act of gross impunity, proceeded to release or convert, before completion and in blatant breach of its contractual

obligations of a stakeholder. The said transaction collapsed when the ownership documents supplied by the 2nd Defendant turned out to be forgeries and this suit was filed because the 2nd Defendant failed to refund the said deposit after the mutual rescission of the said transaction. The 2nd Defendant now alleges, three years later, that the said Consent was entered into without his knowledge, allegedly by one of his then Associates, one Stephen Mose Nyaega. The Respondent observed that at the material time, the 2nd Defendant was trading in the name and style of his said law firm as a sole Practitioner and the only Partner therein. Other Lawyers in his firm were mere Associates working under the supervision and name of the 2nd Defendant and for whose actions the 2nd Defendant was responsible and vicariously liable in law. Any and all dealings with the said Mr. Mose were in his capacity as an Associate and a representative of the 2nd Defendant on whose behalf he was acting. The Respondent also noted that by its Judgment delivered on 2nd December 2013, both the 2nd Defendant and his said Associate, were jointly convicted by the Advocates Disciplinary Committee in Disciplinary Committee Cause No. 161 of 2012 of the offence of Professional misconduct for breaching their stakeholders' obligations as aforesaid and have both since been sentenced accordingly. The said disciplinary case was commenced in June 2012 when the Respondent lodged a Complaint with the Law Society of Kenya and after which the matter was referred to the Disciplinary Committee and hearing commenced in September 2012. Throughout, the 2nd Defendant fully participated in the proceedings and as is apparent in the Judgment delivered, one of the documents that featured prominently therein was this same Consent Decree that the 2nd Defendant is now alleging to have been unaware of. Clearly therefore the 2nd Defendant is being deliberately untruthful. According to the present Application by the 2nd Defendant, his then Associate, Mr. Mose allegedly left the law firm in September 2010 (**see 2nd Defendant's Exhibit "SN 1"**). Considering that the transaction the subject of this case commenced in November 2010 and all correspondence featuring in this matter are also dated post-September 2010, there is accordingly no explanation how the said Mr. Mose got involved in the matter yet all correspondence were addressed and delivered to the 2nd Defendant's law firm after ostensibly the said Mr. Mose had allegedly already left the 2nd Defendant's law firm. The Respondent submitted that it is clear that the 2nd Defendant and the said Mr. Mose are simply engaged in a deliberate game calculated to assist each other by trying to exonerate each other and thereby assist both to avoid their liability in this matter.

7. I have considered the application and submissions of the parties. To determine the application I raise the following issues for determination-

- i. ***Upon what grounds can a consent recorded in court be set aside.***
- ii. ***Whether there is enough evidence to show that the Applicant participated in, and was aware of the consent.***

8. To answer issue number one, it is now the law that a consent order can only be set aside on the same terms a contract can be set, that is, that there was no capacity or that the same was secured by fraud and without the knowledge of one or more of the parties to it. In this matter, the Applicant is alleging that his associate entered into the consent binding him without his knowledge, the determination of issue number one then go hand in hand with that of issue number two.

9. This suit arose from the 2nd Defendant's professional misconduct act of converting or releasing an amount of Kshs 6.5 Million paid to him as a deposit for purchase of land on behalf of his client, the vendor, and to be held by his law firm as a stakeholder until completion of the transaction but which the 2nd Defendant, in an act of gross impunity, proceeded to release or convert, before completion, in blatant breach of his contractual obligations as a stakeholder. The said transaction later collapsed because the ownership documents supplied by the 2nd Defendant turned out to be forgeries and this suit was then filed because the 2nd Defendant failed to refund the said deposit of Kshs 6.5 Million after the collapse of the transaction. Indeed as aforesaid, the Advocates Disciplinary Committee by its said decision delivered on 2nd December 2013, has already convicted the 2nd Defendant of the said offence. It is relevant to note that as confirmed by the letter dated 18th January 2011 from the Law Society of Kenya, (*copy appearing at page 14 of Respondent's exhibits*) at the material time, the 2nd Defendant was trading as a

sole proprietor in the name and style of his said law firm. Other Lawyers in his firm were mere Associates working under the supervision and name of the 2nd Defendant and for whose actions the 2nd Defendant was responsible and vicariously liable in law. Any and all dealings through the said Mr. Mose were in his capacity as an Associate and a representative of the 2nd Defendant on whose behalf he was acting.

BACKGROUND TO THE CONSENT DECREE

10. As deponed in Replying Affidavit, the Summons herein were served upon the 2nd Defendant on 17th May 2011 and the 2nd Defendant's law firm duly entered Appearance for both the 1st and 2nd Defendants on 30th May 2011 and then filed a joint Defence on 16th June 2011. (*See page 37-39 of Respondent's Exhibits*). Upon close of Pleadings, the Respondents filed an Application for Summary Judgment and which was served upon the 2nd Defendant on 18th July 2011. Thereafter and as evidenced by the correspondence exhibited to our Replying Affidavit, the Defendants through the 2nd Defendant's law firm proposed negotiations, which were duly undertaken, finalized and reduced into the letter dated 26th September 2011 and filed in Court on 14th December 2011. (*See pages 26 – 36 of the Exhibits*). By the letter dated 9th January 2012, a draft decree was forwarded to the 2nd Defendant's law firm for approval and after which the Decree was formally extracted. At no point during all these procedures did the 2nd Defendant raise any objections yet he was the sole proprietor of his law firm and all correspondence were officially addressed and delivered to and received by his law firm. Further contradiction is that according to the present Application by the 2nd Defendant, his then Associate, Mr. Mose had allegedly already left the law firm by mid-December 2010. Considering that the transaction the subject of this case commenced in November 2010 and most correspondence featuring in this matter including the said consent, are dated post-November 2010, how then did Mr. Mose still continue to write and sign official letters on the 2nd Defendant's letter-head yet, if the 2nd Defendant is to be believed, Mr. Mose had allegedly already left the 2nd Defendant's law firm by December 2010?. How did Mr. Mose continue responding to correspondences which were officially addressed and delivered to the 2nd Defendant's law firm? Obviously the 2nd Defendant is underestimating this Court's intelligence. It is clear that the 2nd Defendant and the said Mr. Mose are simply engaged in a deliberate game calculated to assist each other by trying to exonerate each other and thereby assist each to avoid liability in this matter. This apparent collusion is what contributed to their joint conviction by the Advocates Disciplinary Committee as aforesaid.

DETERMINATION

11. In seeking to set aside the said orders, the 2nd Defendant alleges that the said Consent was entered into by his then Associate, one Stephen Mose Nyaega without his knowledge. However it is now clear that the said allegation is false and the Application lacks merits, is frivolous and is a blatant abuse of the Court process, only meant to frustrate and delay the hearing and determination of Bankruptcy Cause No. 13 of 2014 Nairobi. One unanswered question is, if the 2nd Defendant is genuine in this present Application, why then has it taken him 3 years to decide to challenge the Consent Order? This application is clearly an afterthought, given also that it was served upon the Respondents four months after it was filed in court. The allegations of lack of knowledge of the consent is spurious and malicious. In any event, the 2nd Defendant has already paid a sum of Kshs.700,000.00 as part-payment of the Consent Decree by delivering five Banker's cheques to the Respondent on separate dates between February 2014 and September 2014. It therefore beats logic how the 2nd Defendant is on one hand issuing cheques in payment of the consent Decree and on the other hand, feigning ignorance of the same Decree. The said Consent has already been adopted and acted upon by the Advocates Disciplinary Committee by its decision delivered on 2nd December 2013 in Cause No. 161 of 2012. Again, the said Consent has already been adopted and acted upon by this Court in the preliminary Bankruptcy proceedings, namely Bankruptcy Notice No. 8 of 2013 in which the Justice Gikonyo delivered a Ruling on 28th March 2014. (*A copy of the said Ruling appears at pages 20-25 of our exhibits*). As aforesaid, the 2nd Defendant fully participated in all the said proceedings in which one of the major documents that was upheld, adopted and featured prominently was this same Consent Decree that the 2nd Defendant is now feigning ignorance

about. One wonders why he never during all these proceedings, at any point in time sought to set aside the Decree. Further, the same Consent has also been acted upon in the ongoing Bankruptcy proceedings, namely Bankruptcy Cause No. 13 of 2014 before this court in which the 2nd Defendant has been fully participating without challenging the said consent, until now. One more glaring irony is the fact that the 2nd Defendant's law firm is still on record in this matter for the 1st Defendant but curiously, the same law firm has not seen it fit to also make a similar Application on behalf of the 1st Defendant to set aside the consent order to which the 1st Defendant is also a party and which was executed by the 2nd Defendant's law firm. Does it therefore mean that according to the 2nd Defendant, the consent remains binding upon the 1st Defendant represented by the 2nd Defendant despite the allegation that the 2nd Defendant's law firm was purportedly unaware of it? Is this not a monumental contradiction and proof of the 2nd Defendant's dishonesty?

12. From the foregoing paragraphs of this Ruling it is clear that the 2nd Defendant Applicant has lied to this court, and is perpetuating the acts of fraud. He is also abusing the process of this court. The Notice of Motion application herein dated 17th June 2014 is herewith dismissed with costs to the Plaintiff/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Wananda for the Plaintiff

Mr. Mureithi holding brief for Gitanda for the Defendants

Teresia – Court Clerk