



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 456 OF 1998

MAINA MACHARIA NJANI & 15 OTHERS.....PLAINTIFFS/APPLICANTS

VERSUS

NDEFFO COMPANY LIMITED.....DEFENDANT/RESPONDENTS

RULING

1. The plaintiffs filed this suit way back on 26th October, 1998 against the defendant and sought the following orders:

- a. An order directing the defendant to allocate each of the plaintiffs 1.6 acres of land at Engashura.
- b. In the alternative the defendant be ordered to pay each of the plaintiffs a sum of money that would currently enable each of the plaintiffs to purchase 1.6 acres of land at Engashura, such sum of money to be agreed between the parties or be assessed by this Honourable Court.
- c. General damages for breach of contract.
- d. Costs of this suit.

2. The firm of Mirugi Kariuki & Company Advocates entered appearance and filed a defence for the defendant. However, before the suit could be heard, parties filed a consent letter dated the 12th April 1999. The letter was signed by the parties Advocates, Korosi & Company for the plaintiffs and Mirugi Kariuki & Company for the defendant. On the 7th June, 1999 the consent letter was adopted as an order of the court and a formal order was drawn and extracted. The terms of the consent order are as follows:

1. By consent judgment be entered for the plaintiffs against the Defendant as prayed in the plaint.
2. That the Defendant do pay each of the plaintiffs a sum of money that would currently enable each of the plaintiffs to purchase 1.6 acres of land at Engashura, such sum of money to be agreed between the parties or be assessed by the court.
3. That the Defendant do pay the plaintiffs costs of the suit. Such costs to be agreed or taxed by the Taxing Officer of the court.

3. By an application dated 23rd June, 2011, the Defendant through its Advocates, having filed a change of advocates and appointed Waiganjo & Company Advocates to act for it, sought the following orders:

1. That this application be certified as urgent and be heard on priority basis.
2. That this Honourable court be pleased to set aside and or vary the consent judgment entered on the 7th June, 1999 arising from a consent letter dated 12th April, 1999.
3. That this Honourable court be pleased to order the plaintiffs/Respondents to appear in court in person.
4. That costs of this application be provided for.

4. The grounds upon which the application is based are stated that the said consent judgment was entered into by fraud, misrepresentation and/or mistake, that the advocate then acting for the Defendant did not have authority from the defendants Board of Directors to record the said consent and that the Respondents colluded with former directors of the defendant to record the consent without authority. It is further stated that the Respondents were not shareholders, had no known claim in law against the defendant and that the company/applicants former secretary one Stephen Maina Muchiri, a close relative of the respondents had been pursuing the matter in court for his personal gain.
5. In opposing the application, the Respondents filed a replying affidavit sworn by one Zipporah Wanjiku Wachira one of the Plaintiffs(Number 9) on the 8th September, 2011 and another by Stephen Maina Muchiri on the 5th September 2011. He describes himself as having been a director and Secretary of the defendant company between 1997 and 2001.
6. The main ground upon which the application is brought as can be adduced from the supporting affidavit of Kenneth Ndung'u Wang'ombe sworn on the 23rd June, 2011, and filed on 24th June, 2011 is that instructions given to the defendants/applicants Advocates Murugi Kariuki & Company Advocates to file the consent Judgment were based upon fake Directors meeting minutes Resolutions authored by one Stephen Maina Muchiri who was not a director of the company. To demonstrate this allegation, two of the directors alleged to have been in attendance of the Directors meeting held on the 30th October 1998 swore affidavits stating that they did not attend the said meeting, where the said Stephen Maina Muchiri was secretary to the board. Learned counsel for the applicant Mr. Waiganjo submitted that as at 30th October, 1998 the said Stephen Maina Muchiri was not a director or secretary of the company and produced a letter dated 18th September, 1998 from the Registrar of companies listing the co-directors as at 1st September 1998 pursuant to a meeting held on the 25th July, 1998, and therefore the alleged Directors meeting could not have been convened by the said Stephen Maina Muchiri, and therefore the minutes and resolutions that this case be compromised and the instructions given to the advocates to file the consent were a misrepresentation, and fraudulent and hence the consent judgment ought to be set aside.
7. The Respondents through their able counsel Mr. Morintant - relied on the replying affidavit and submitted that proper instructions were given to the applicant and minutes and resolutions of the meeting of its Directors held on the 30th October, 1998 were proper, that the consent letter signed by both counsel for the plaintiffs and the defendants was proper and no fraud, misrepresentation or mistake were demonstrated to persuade the court to set aside the consent judgment. The court has not been told whether the court order above was set aside before the 30th August 1998. It was his submission that Stephen Maina Muchiri, who swore an affidavit on the 5th September, 2011 was indeed the Secretary and Director of the company. He annexed as exhibit, a Notification of Change of Directors of the Defendant company dated the 20th August, 1997 that shows with effect from 16th August 1997 he was a Director and also the Secretary the Company.
8. He disapproved the applicants allegation that he had been removed as director and secretary in a meeting held on the 25th July, 1998 was illegal and of no effect and produced a court order

(annexture No. SSM 4) to his affidavit in **HCCC No. 295 of 1998** – a case between the same parties, pending hearing, (Justice D.M. Rimita) in the following terms -

1.

2. That pending the hearing and determination of this application the Respondent be and is hereby restrained by himself, his agents or servants from convening a special and Extraordinary meeting of the applicant company on the 25th July, 1998 or thereafter.

3. That the application be served on the respondents for hearing on the 12th August, 1998.

9. The above court order stopped the Defendant company from holding any meeting on the 25th July, 1998, to the effect that if such meeting was held where the said Stephen Maina Muchiri was removed as director and secretary on the 25th July 1998, then the same was null and void. It was submitted therefore that the letter from the Registrar General dated 18th September, 1998 was therefore in contravention of the court order as it purported to list Directors elected on the meeting held on the 25th July, 1998 which meeting had been stopped by the court.

The Respondent further submitted that the directors who swore affidavits that they never attended the the meeting of 30th August 1998 did nothing to prove their allegations and therefore they remained as such;

10. This court has considered the background of the case as stated, the application and affidavits in support and in opposition thereof. Counsel submissions have also been taken into account. The issues that arise from the above in my view are:

1. Whether there was indeed a directors meeting on the 30th October, 1998 from which a resolution was made that a consent judgment, be recorded, was made, and if so, whether the directors were properly in office and in particular whether one Stephen Maina Muchiri was a director and the secretary of the Board of Directors.

2. Whether the consent judgment entered on the 7th June, 1999 was so done through fraud, misrepresentation or mistake.

3. Whether the applicant is entitled to the prayers sought.

In the case **Samson Mumikah t/a Munikah & Company Advocates -vs- Webube Estates Ltd (2007) KLR** the principles that a court ought to consider to be persuaded to set aside a consent judgment were well settled. These are fraud, collusion, illegality, undue influence, mistake, misrepresentation and public policy.

11. Analysis of the background leading to this application shows that the firm of Mirugi Kariuki & Company Advocates who were severally referred to in the Directors meeting held on the 30th October, 1998 were duly instructed to compromise the case. I have no doubt that the letter executed by both Advocates for the parties on the 12th April, 1999 and adoption of the consent judgment by the court on the 7th June, 1999 were legally done. I have considered the court order in HCCC No. 295 of 1998 stopping the Defendant from holding a General or special meeting to elect officials scheduled for the 25th July, 1998. I find that the letter allegedly written from the Registrar of Companies listing newly elected directors on a meeting already prohibited the court as having been illegal following which the list of directors therein cannot be termed as a genuine list. The applicant did not attempt to comment or fault the notification of change of directors and secretaries dated the 20th August 1997. By not doing so, I hold that the same was a true reflection

of directorship of the defendant company hence, as at 30th October, 1998 the said Stephen Maina Muchiri was a Director and Secretary of the Board of Directors, to the extent that, then, the Directors meeting held on the 30th August, 1998 was properly convened and the minutes and resolutions resulting therefrom, which formed the basis of the consent letter and the consent judgment were with full authority of the Board of Directors.

12. As stated in the **Case Wasike -vs- Wamboko C.A No. 81 of 1984**, a consent Judgment or order has contractual effect on the parties and can only be set aside on grounds which would justify setting aside an agreement.

In **David Ongiro Sare -vs- Municipal Council of Mombasa HCCC No. 433 of 1990** the court held that an advocate would ordinarily have authority to compromise a suit, and would be so with authority of the instructing party.

The above sediments could be imported into the present case. The consent judgment was entered in 1998. No issues were raised as to its validity or illegality until 2011, a period of about four(4) years, a situation that can only be said to have been an afterthought. Reasons for the delay as stated by the applicant, cannot be taken seriously. This is more evident in that application herein was filed under certificate of urgency in June 2011. It took another four years to be finally prosecuted. I have not found any fraud or collusion as alleged by the applicant between former directors of the company and the plaintiffs.

13. Fraud must be proved to the satisfaction of the court. I dare conclude that none was proved, either by the plaintiff or the former directors. Having so found, it therefore follows that the Defendants Directors meeting held on the 30th October, 1998 from which the resolutions to instruct its advocates to file a consent judgment was properly done and therefore the consent Judgment was by authority of the company/the applicant.

14. In its totality, and after due consideration of the issues and submissions, this court has come to the conclusion that the prayers sought by the applicant are far fetched and cannot be granted.

The application dated 24th June, 2011 is therefore dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 18th day of June 2015

Ruling read and signed in the open court.

JANET MULWA

JUDGE

In the presence:

Waiganjo for Applicant

Mr. Mwalo for Respondent

Court Clerk – Lina.