



IN THE HIGH COURT OF KENYA
AT HOMA-BAY
CIVIL APPEAL NO. 38 OF 2015
(FORMERLY KISII HCCA NO. 118 OF 2012)

BETWEEN

**SERFINA OKELLO OGILE (suing as the legal representative
of the estate of JOSEPH OGILE OLU (deceased).....APPELLANT**

AND

CAREN ALILA OMUTO.....1ST RESPONDENT

WALTER ACHANGO OLOO.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. B. O. Omwansa, SRM at the Senior

Resident Magistrate's Court at Ndhiwa dated 8th August 2012 in Civil Case No. 15 of 2010)

JUDGMENT

In the subordinate court, the parties to the suit filed a consent dated 21st October 2011 and signed by all the advocates on the following terms;

- 1. The judgment of this honourable court dated and delivered on 31st May 2011 be and is hereby reviewed /or set aside with no order as to costs.*
- 2. The plaintiff's suit be and is hereby re-opened and the plaintiff be at liberty to call for and tender further evidence and/or documents.*
- 3. The defendant be and are hereby at liberty to cross examine and/or tender further evidence and/or documents if any.*
- 4. The plaintiff to pay thrown away costs of ksh 15,000/= only to the 1st defendant.*

When the consent was presented for endorsement by the court, the learned magistrate declined to endorse the consent on grounds, *inter alia*, that the court was *fuctus officio*. It is the ruling declining to endorse the consent that has precipitated this appeal.

All counsels who appeared in this matter are of the view that the learned magistrate raised the issue of *fuctus officio* himself and proceeded to deal with it despite the fact that parties had all agreed to the

consent order directing how the matter should proceed. Furthermore, the consent had been agreed upon as a result of an appeal from the judgment which had been compromised by the parties.

In the circumstances, I now allow the appeal and order as follows;-

1. I set aside the judgment delivered on 31st May 2011.
2. I enter the consent agreed upon by the parties dated 21st October 2011.
3. I direct the matter to be heard before the Senior Resident Magistrate's court, Ndhiwa as agreed in the consent.
4. There shall be no order as to costs.

DATED and DELIVERED at HOMA BAY this 25th day of August 2015

D.S. MAJANJA

JUDGE

Mr Oguttu-Mboya instructed by Oguttu-Mboya and Company Advocates for the appellant.

Mr Odero instructed by Odero Osiemo and Company Advocates for the 1st respondent.

Ms Khasiani instructed by Kimanga and Company Advocates for the 2nd respondent.