IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NOL. 199 OF 1977

WILLIE KIRITU…….....…….....PLAINTIFF

VERSUS

BATHOLOMEW MURULI …….....…….1ST DEFENDANT

ADDISON KURIA…….....……..…2ND DEFENDANT

ESTHER MUTHONI KURIA & HELIMAH

WANGARI KURIA (in their capacities as administrators

of the estae of the late Addison Kuria Morris the

2nd defendant herein)……..……..……...INTERESTED PARTIES

RULING

The Notice of Motion dated 23/10/2013, is brought pursuant to **Order 45 Rule 1(1), Order 51 Rule 1** and **Sections 1A, 1B** and **3A** of the **Civil Procedure Rules** and **Act**, Willie Kiritu, the plaintiff/applicant seeks an order that the court be pleased to review and set aside the consent dated 20/6/1978 and adopted by the court on 14/10/1986. The application is premised on grounds found on the face of the application and a supporting affidavit dated 28/10/2013. A supplementary affidavit dated 11/3/2014 was withdrawn on 26/6/2014 because it had not been served on the respondents. The application was opposed by the 3rd party and administrator of the 2nd defendant's estate.

A background of this case is that the plaintiff with the 1st and 2nd defendants Batholomew Muruli and Addison Kuria bought the parcel of land LR 8679/2 in 1973. The purchase price was shared amongst the three. According to the plaintiff, he contributed 90% of the purchase price, the 1st defendant 5.5% and 2nd defendant 4.5%; that a dispute arose amongst the partners over the partnership as a result of which the plaintiff filed this suit; that a consent dated 20/6/1978 and adopted in court on 14/10/1986 drawn by his advocate Mindo & Mindo Advocates and defendant's advocate, Khaminwa & Khaminwa Advocate purported to have the land subdivided equally between the 3 parties (Anex) but that the consent was recorded without his authority or instructions and in effect he has been denied his rightful share; that the consent amounts to a mistake and amounts to defrauding the plaintiff. Mr. Murimi, counsel for the plaintiff relied on the decision of **Flora Wasike v Destimo Wamboko** (1982-88)1 KAR and Delphis **Bank Ltd v Ndalaview Service Station & Others** HCC 6/1999 (ELD) in which the courts held that consents can be set aside on grounds of fraud, mistake or misrepresentation. Counsel also submitted that the law does not give limits on the time frame within which a contract based on fraud can be challenged,

fraud being in the nature of a criminal lact.

In response to the respondent's allegation that the counsel is not properly on record, counsel submitted that **Order 9 Rule 9** of the **Civil Procedure Rules** only applied where there is a final judgment but that in this case, the issue of accounts was still outstanding. Counsel argued that they have not filed a notice of change and a party has a duty to instruct as many advocates as they wish. Mr. Murimi also urged that this suit may have been discontinued before J Tunoi on 8/10/1987 but the consent still stands and since it still subsists, it can be challenged.

In opposing the application, the respondents filed a notice of preliminary objection which was three pronged; that the application offends provisions of **Order 9 Rule 9** of the **Civil Procedure Rules;** that it offends **Order 45 Rule 1(1)** of the **Civil Procedure Rules** and that it is misconceived, frivolous, vexatious and an abuse of the court process as this court is ***functus officio*** this matter.

In addition, Esther Muthoni Kuria and Helimah Wangui Kuria jointly swore an affidavit dated 6/11/2013. They are the administrators of the estate of Addison Kuria who died on 21/9/07 (Ex.1). They deposed that the plaintiff is telling court half truths; that the plaintiff and defendants formed Batholomew Muruli & Partners (Ex.2) and that when the partnership was dissolved, the three parties agreed and a consent was recorded with each partner getting equal share in the land (Ex.3); that after the consent, the plaintiff wanted the matter mentioned for purposes of arbitration on 15/10/1986 but Justice J.R.O. Masime declined (Ex.3), that thereafter on 8/10/1987, the suit was discontinued and that the plaintiff had an opportunity to set aside the consent but did not do that; that he therefore seeks to review a matter which this court is now ***functus officio***.

Mr. Kuloba, counsel for the defendants urged that Mr. Murimi's appearance in this matter offends **Order 9 Rule 9** of the **Civil Procedure Rules**; that the notice of motion having been filed by Murumi, Ndumia Mbago & Muchela Advocates, they have taken over the matter from Mindo & Co Advocates but have done so unprocedurally because there is a consent judgment which determined the suit. Counsel also urged that the application does not meet the provisions of **Order 45** of the **Civil Procedure Rules** which provides that such an application be made without unreasonable delay and this application having been made 27 years later, with no explanation for the delay is an abuse of court process. Counsel also urged that fraud or misrepresentation has not been proved and the question of how much each partner was to get does not arise because the parties recorded a consent to share the land in three equal shares. He urged the court to dismiss the application for being frivolous and vexatious.

Having considered the submissions of both counsel, the issues that seem to emerge are:-

1. **Whether Order 9 Rule 9 has been complied with;**
2. **Whether the application was brought within reasonable time;**
3. **Whether the consent was a final judgment;**
4. **Whether the orders sought can be issued.**

There is no doubt that on 20/6/1979, a consent was arrived at and on 14/10/1986, it was adopted by this court as a judgment of the court. The consent order are as follows:-

> **"By consent Ms Pannel Bellhouse Mwangi & co. Advocates, Nakuru are hereby appointed to prepare and produce accounts of partnership from the time the partnership commenced to date. Land Registration Number 8679/2 situate at Mau Narok Area the suit property, to be divided in three equal portions and each party (or partner) to be at liberty to farm his portion at his expense and pocket the proceeds therefrom."**

This consent was adopted from a letter dated 20/6/1978, signed by Khaminwa & Khaminwa Advocates for the defendants and M/S Mindo & Co., Advocates for the plaintiffs. The plaintiff contends that he did not consent to the making of that consent. The law relating to setting aside consents is settled. In the case of **Flora Wasike** (supra), the Court of Appeal cited the Supreme Court of Judicature Consolidated Act 1925 on consent orders. Section on judgments and orders (7th Ed) Vol.1 pg 124:-

> **"Prima facie, any order made on the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them… and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court…..or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."**

That court then stated that it is trite law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or mispresentation. In this case, the onus is on the plaintiff to demonstrate that there was fraud, mistake or misrepresentation in the entry of the consent. The plaintiffs explanation is that he contributed 90% of the purchase price of the suit land and that is why he alleges fraud. He has, however, not demonstrated or disclosed who defrauded him, or what the misrepresentation was. He was represented by M/S Mindo Advocate and that advocate has not sworn any affidavit to explain how the consent came to be in those terms. In the consent, it was never indicated that the mode of sharing was based on each party's contribution. The fact that the plaintiff contributed 90% and the others less cannot be a basis for setting aside the consent because the court has no idea why the parties agreed to share the property equally. There may have been other considerations.

In addition to the above, this application has been was brought about 27 years after the consent. After the consent judgment, this matter came up several times and, in my view, the applicant squandered his opportunities to apply to set aside the consent judgment if indeed there was a mistake, fraud or a misrepresentation in recording of the consent. So far there is no explanation as to why the applicant has waited for that long. This application is bought under **Order 45(1)** of the **Civil Procedure Rules**. For the court to exercise its discretion under that rule one has to demonstrate that there is:-

> **"discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desirous to obtain or render of the decree or order, may apply for a review of judgment to the court which passed the decree or made an order without unreasonable delay."**

As pointed out earlier, this application has been brought 27 years later. 27 years is not a reasonable time. There has been unexplained inordinate delay. Equity does not aid the indolent. In my view, the application is an abuse of the court process.

The plaintiff has also not demonstrated that there are any new matters or new evidence that he has come across that would warrant the review. The contention that the plaintiff contributed 90% of the purchase price is not a new matter. The plaintiff has also not pointed out to the court to any error on the face of the record nor has the plaintiff given to this court any other sufficient reason why the court should exercise its discretion to grant the orders sought. In sum, the applicant has not satisfied the requirements of **Order 45(1)** of the **Civil Procedure Rules** to be entitled to the order sought.

Whether the consent judgment determined the suit: On 15/10/1986, the matter was placed before J Masime for mention with a view of referring it to arbitration and the court observed that the judgment had been delivered in 1977 and no appeal had been preferred and the judge declined to re-open it by referring it to arbitration. In the Judge's view the case was determined. After that, on 8/10/1987, the plaintiff appeared before J Tunoi in person and asked to discontinue this case and a consent was entered that the suit was discontinued and the file closed with no order as to costs. Though other applications came up, this suit was discontinued on 8/10/1987 and Mr. Murimi's submissions that there are outstanding issues has no basis. The consent order, however, remains part of the judgment.

The question then is whether the firm of Murimi, Ndumia, Mbago & Muchela are properly on record. I have perused the file and I find no notice of change or appointment. The firm of Murimi Co. Advocates filed the notice of motion dated 23/10/2013. This was their first appearance in this matter. I do agree with Mr. Murimi's contention that a party can have as many advocates as he wishes but in this case they

came on record when the matter was determined. I do not believe that Murimi & Co. Advocates had come on record to join Mindo & Co. Advocates, the same advocate who is said to have had no authority to enter into the consent. **Order 9 Rule 9** of the **Civil Procedure Rules** is clear, that counsel coming on record after the matter is determined must do so with the leave of the court. Before leave is granted, counsel must have served the former advocate and other parties to the suit or an advocate can come on record if the parties file a consent. Murimi Ndumia & Mbago & Muchela Advocates did not comply with provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** and are irregularly on record. I find that the plaintiff's advocate is improperly on record and that renders the application incompetent.

In light of all that I have discussed in this ruling, I find that apart from the application being unmerited, it is also incompetent and it is hereby dismissed with costs to the defendants and Interested Party.

DATED and DELIVERED this 31st day of July 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Murimi for the plaintiff

Mr. Maragia holding brief for Mr. Kiloba for the defendants and for the Interested Party

Kennedy – Court Assistant