



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 4 OF 2021 (FORMERLY ELC 115 OF 2019 (THIKA))

MARRIOT AFRICA INTERNATIONAL LIMITED.....PLAINTIFF

VERSUS

MARGARET NYAKINYUA MURIGU.....1ST DEFENDANT

MARY WANJIKU KANYOTU.....2ND DEFENDANT

WILLY KIHARA NJOKI KANYOTU.....3RD DEFENDANT/APPLICANT

KANGAITA COFFEE ESTATES LIMITED.....4TH DEFENDANT

AND

UKOMBOZI HOLDINGS LIMITED.....INTERESTED PARTY

RULING

INTRODUCTION

1. Vide Notice of Motion dated 20th September 2021 and supported by the affidavit of Willy Kihara Njoki Kanyotu, sworn on even date, the 3rd Defendant/Applicant has sought for the Orders:

a.Spent

b. That this Court be pleased to lift and or to stay the consent adopted by this Honourable court on the 14th of July 2021 pending the hearing and determination of this Application and or until further orders of this Honourable court.

c. That this Honourable Court be pleased to set aside/vary and or Discharge/Review the Consent adopted by this Honourable court, as an order of the court on the 14th of July 2021.

d. That this Honourable court be pleased to refer the affidavit allegedly sworn by the 2nd Defendant on the 1st July 2021 to the Directorate of Criminal Investigation (DCI) for Forensic Investigations to verify its authenticity.

e. That this Honourable Court be pleased to order the Plaintiff herein to honor the Discovery Notices sent to it on the 16th December 2020 and the 2nd February 2021 before this matter is set down for Pre-Trial Conference.

f. That this Honourable court be pleased to issue any other orders that it so pleases.

g. That the Costs of this Application be provided for.

2. The subject Application is premised and/or predicated on the Grounds which are contained on the Face thereof and same are as hereunder;

i. That the Honourable court on the 14th of July 2021 adopted as an order of the court a consent dated 28th June 2021 entered into

by the Plaintiff, 2nd and 4th Defendant herein.

ii. That the abovementioned consent was entered into and adopted illegally and irregularly.

iii. That this is because the individuals alleging to be the directors of the 4th Defendant herein, are not directors of the said company and have no authority to instruct the counsels who allege to be on record for the 4th Defendant and thus have no authority to enter into the consent dated 28th June 2021.

iv. That the 2nd defendant is on record denying having sworn the affidavit dated 1st July 2021 filed herein in support of the consent dated 28th June 2021.

v. That the Applicant herein has issued a notice to cross-examine the 2nd Defendant herein in regard to the affidavit sworn on the 1st of July 2021 and prays for the said affidavit to be referred to the DCI for forensic investigation to verify its authenticity. (sic)

vi. That the consent dated 28th June 2021 entered into by the Plaintiff, 2nd and 4th Defendant affects the substratum of this whole case, however, it was entered into and adopted by the Honourable Court without the notice of the 1st and 3rd Defendants.

vii. That the Applicant/3rd Defendant and 1st Defendant were not present and neither were they represented when the consent was adopted as an order of the Court.

viii. That the Applicant has issued the Plaintiff herein with discovery notices on two separate occasions, but the Plaintiff has not replied to the said notices nor provided the crucial documents requested by the Applicant.

ix. That this matter is being conducted with a lot of fraud, malice and wanton abuse of this Honourable court process by the Plaintiff and its affiliates and it is only fair that this Honourable court put it to a halt.

x. That this Honourable court has inherent powers to grant the orders sought herein.

RESPONSE BY THE 1ST DEFENDANT/RESPONDENT:

3. Upon being served with the subject Application the 1st Defendant/Respondent filed a Replying affidavit sworn on the 5th November 2021 and wherein same has averred as hereunder;

4. On the 8th November 2013, Hon. Justice Luka Kimaru rendered and/or delivered a Ruling in the Probate and Administration Cause concerning the Estate of James Kanyotu, Deceased, to the effect that the Administrators Of the said Estate shall be appointed as Directors of the Deceased Companies pending Distribution of the Estate.

5. It has further been averred that there has been no consensus on behalf of the Company to settle the suit in the manner contemplated in the consent dated 28th June 2021, and that she was surprised to learn what her co-administrator had agreed to.

6. Besides, the deponent has also stated that her co-administrator namely, the 2nd Defendant/Respondent herein, has been misguided by her counsel in an attempt to rob the Estate of its rightful entitlement over and in respect of the suit Property, namely, LR No.11261/76, registered in the name of the 4th Defendant.

7. On the other hand, the deponent has further averred that the 2nd Defendant has perjured herself and is being dishonest with the court.

8. Nevertheless, she further avers that the consent dated 28th June 2021 is illegal since she was not present when it was recorded in court.

9. Other than the foregoing, the deponent further avers that the suit property has been subdivided, developed and is being sold by the Plaintiff and the purported consent is designed to delay, defeat and/ or otherwise obstruct the conclusion of the matter.

10. Other than the foregoing, the deponent prays to the court do stop all construction, sale, transfer and subdivision of any part of original LR No. 11261/76 or any subplots therefrom.

11. Be that as it may, the deponent further avers that the Plaintiff Company, is in contempt of the court orders for the preservation of the Estate of the Deceased and in particular, the suit properties.

12. It has further been averred that on the 17th November 2021, one Christopher Ngata Kanyotu filed a Replying affidavit on behalf of the 4th Defendant. However, he later withdrew the same vide a Further affidavit Sworn on the 17th December 2021 on the basis that he had erroneously sworn the affidavit in the capacity of a director of the 4th Defendant, but had later been informed that he was in fact not a Director of the 4th Defendant.

13. Besides, he however avers that the late James Kanyotu, now Deceased, was his father and was the majority shareholder of the 4th Defendant. That as such, the 4th Defendant and its properties form the Estate of the late James Kanyotu.

RESPONSE BY THE 4TH DEFENDANT/RESPONSE:

14. Vide a Replying Affidavit sworn by Margret Nyakinywa Murigu, who is also the 1st Defendant/Respondent herein, albeit now in her capacity as a director of the 4th Defendant, same has aver as hereunder.

15. The deponent herein reaffirms that same was duly appointed and/or constituted as a Co-administratrix of the estate of one James Kanyotu, now Deceased, alongside 2 others, pending the conclusion of a Succession cause and that upon her appointment as such, same was also appointed as Interim Director of all the Companies where the Deceased was a Director including the 4th Defendant/Respondent herein

16. Besides, the deponent has averred that she has had the occasion to read and examine the Replying affidavit sworn by one Christopher Ngata Kanyotu on the 17th November 2021, as well as the further affidavit sworn on the 17th December 2021 and that the said Christopher Ngata Kanyotu is not a director of the 4th Defendant, either as contended in the Replying affidavit or at all.

17. Be that as it may, the deponent herein, has however confirmed that the averment which have been made by Cristopher Ngata Kanyotu, where same had contended that he was a director of the 4th Defendant, has however been recanted by the Further Replying affidavit sworn on the 17th December 2021.

18. It is further averred that for a consent to be adopted, all Parties to the suit must be present. However, in respect of the subject matter, the impugned consent was crafted and executed by the advocate for the Plaintiff, 2nd and 4th Defendant only and same excluded the 1st and 3rd Defendants, even though same were Parties to the suit.

19. On the other hand, the deponent has also averred that even the firm of advocates, namely M/s Muriu Mungai & Co Advocates, who prepared and recorded the consent on behalf of the 4th Defendant, had not been instructed and/or retained by the 4th Defendant.

20. It is further averred, that the 4th Defendant is the legal owner of Original Title Land Reference 11261/76 situate in the West of Ruiru township, measuring 205.0 Hectares and valued at over Kshs. 10 Billion, which is why Fraudsters are attempting to disinherit the estate of James Kanyotu.

21. Based on the foregoing, the deponent of the Replying affidavit, for and/or on behalf of the 4th Defendant, has therefore implored the Court to have the Consent dated 28th June 2021, to be set aside. For clarity, The Application is opposed.

RESPONSE BY THE PLAINTIFF:

22. On her part, the Plaintiff/Respondent has filed Grounds of Opposition and a Replying Affidavit. In respect of the Ground of opposition, the Plaintiff herein has stated as hereunder;

a. That the Applicant lacks the locus standi to challenge the consent order adopted by this Honourable court on 14th July 2021 as he is not a party to the said consent.

b. That the consent order is only between the Plaintiff, the 2nd Defendant and the 4th Defendant and does not include the 3rd Defendant and the parties to the consent have not challenged it.

c. That the Suit property was never owned by the late James Kanyotu during his lifetime and that his beneficiaries can only claim an interest in the shares held by him in the 4th Defendant.

d. That in the Upshot the application is fatally defective and should be struck out in limine.

23. On the other hand, in respect of the Replying Affidavit and Further Affidavit, the latter sworn on the 2nd February 2022, the Plaintiff/Respondent has averred as hereunder;

24. The deponent avers that the Application is fatally defective on account of the fact that the Applicant/3rd Defendant is not Party to the Consent adopted by the court on 14th July 2021 and has not demonstrated any identifiable Interest.

25. Besides it is further averred that the substratum of the suit is not ownership, but trespass by the Defendants onto the plots and subplots held by the Plaintiff.

26. Further it is claimed that the Plaintiff is the indefeasible owner of the suit property, having been so registered on 21st August 2014. That the 4th Defendant had sold the suit property to a company known as Trendsetters Invested Limited. That at the time of the sale, the property was unencumbered and the Directors thereof were not restrained from effecting the sale and transfer,

27. On the other hand, it is averred that at no time did the Suit Property form part and parcel of the Properties of the Deceased James Kanyotu nor part of his Estate, being that the deceased was merely a shareholder of the 4th Defendant.

28. It has also been claimed that the Estate of the late James Kanyotu is only entitled to the shares he held in the company, namely, the 4TH

Defendant and not otherwise.

29. Further, it is averred that the Applicant had received compensation from Trendsetters Investment Limited to the tune of Kshs. 39,000,000 Only, in full settlement in respect of any perceived/alleged claims over the suit property.

30. Besides, it is the Plaintiff's claim that the consent adopted by court on 14th July 2021 was between the Plaintiff, 2nd and 4th Defendants and as such, the Plaintiff would be proceeding with the suit against the 1st and 3rd Defendants. In the same vein, that nothing has been tendered to court to support the fact that the 2nd Defendant was unaware of the consent dated 28th June 2021.

31. On the other hand, it is averred that the 3rd Defendant/Applicant has not met the threshold for the setting aside and/ or Review of the consent order and that the Plaintiff/Respondent has never approached the Applicant requesting him to drop the case.

32. Be that as it may, on 30th November 2021, The Applicant/3rd Defendant filed a Further affidavit in response to the Replying affidavits filed by the Plaintiff and the 2nd Defendant. He avers that he is Party to the suit, by dint of having been sued by the Plaintiff.

33. Nevertheless, it is his averment that the suit property belongs to the 4th Defendant, in which his late father, James Kanyotu was the majority share holder and that in the premises, his shares Form part of his Estate.

34. The deponent further posits and/or avers that there were conservatory orders in place preserving the properties, which orders were fraudulently set aside.

35. In the premises, the Deponent further avers that Christopher Ngata Kanyotu and John Kariuki Kanyotu have never been Directors of the 4th Defendant, but are merely share holders, holding a Share each.

36. Other than the foregoing, it is contended and/or stated that the Plaintiff is related to Trendsetters Investments Limited by virtue of the fact that they share the same mailing address and physical office and have transacted on the Suit property.

37. Based on the foregoing, the deponent, on behalf of the Plaintiff, has therefore implored the Court to find and hold that the subject Application, which has been filed for and on behalf of the 3rd Defendant is Devoid of merits and that same ought to be Dismissed.

Submissions:

38. The Application herein came up for hearing on the 10th February 2022, when the Parties proposed to have same canvassed and/or disposed of by way of written submissions. In this regard, the court adopted and ratified the proposal and thereafter directions were given on timelines.

39. Pursuant to the foregoing, the 3rd Defendant/Applicant filed his submissions on the 1st December 2021. It is his submission that the consent dated 28th June 2021, albeit endorsed by the Court on the 14TH of July 2021, ought to be set aside since it was entered into by persons not authorized to act on behalf of the 4th Defendant. As such, he maintains that the consent is tainted by fraud and ought to be set aside.

40. In support of the foregoing submissions, counsel for the 3rd Defendant/Applicant has placed reliance in the Decision in the case of **Intercountries Importers and Exporters Limited & Teleposta Pension Scheme v Registered Trustees & 5 Others [2019]eKLR**.

41. As concerns the issue of the an unhonored Notices sent to the Plaintiff, counsel submitted that the purpose of Discovery is to level the playing field and that as such, the Plaintiff ought to be compelled to produce the Documents.

42. In support of the submissions pertaining to and/or concerning compulsion of the Plaintiff to honor and/or respond to the Discovery Notices, counsel relied in the case of **Rafiki Microfinance Bank Limited v Zenith Pharmaceuticals Ltd [2006] eKLR**.

43. Finally, counsel submitted that the Plaintiff herein is not an Innocent Purchaser for Value as claimed and that the same is a party to the fraudulent acquisition of the suit property and same is therefore not entitled to the protection pursuant to and the doctrine of Bona-fide purchaser for Value without Notice.

44. On the other hand, the 4th Defendant filed its submissions on 2nd February 2022 and on the question of the validity of the consent dated 28th June 2021, counsel submitted that two of the three Directors of the company were unaware of the consent and as such, the 4th Defendant cannot be said to have given her Consent.

45. It was further submitted that the purported consent offends **Order 25 Rule 5 of the Civil Procedure Rules, 2010**. Besides, counsel stated that the purported consent was concluded without a resolution authorizing its directors to reach the settlement. Consequently, the impugned consent was not only irregular but illegal.

46. In support of the foregoing submissions, counsel for the 4th Defendant relied in the decisions in the cases of **Intercountries Importers and Exporters Limited & Teleposta Pension Scheme v Registered Trustees & 5 Others [2019]eKLR; Samson Munikah practicing as Samson Munikah & Company Advocates v Wedube Estates Limited Nairobi Civil Appeal No 126 of 2005; Board of Trustees National Social Security Fund v Michael Mwalo [2015]eKLR**.

47. Vide her submissions filed on the 8th February 2022, the Plaintiff substantially buttressed the contents of its Replying affidavit and Grounds of Opposition. For coherence, the Plaintiff contended that the consent dated the 28th June 2021, was lawfully entered into and thus same is valid.

48. Pursuant to and in support of the foregoing submissions, the Plaintiff has contended that the Parties to the consent who are also Parties to the subject matter herein had the requisite authority and / or mandate to enter into a consent by themselves and that they did not need any authority of any Party, let alone the 1st and the 3rd Defendants.

49. Secondly, the Plaintiff has further submitted that the 3rd Defendant/Applicant herein, who has filed and/or mounted the Application, was never a Party to the consent and that to the extent that same was not a Party to the consent, same cannot be deemed to be an aggrieved Party to warrant the subject Application or at all.

50. In this regard, it has been contended that the Application by the 3rd Defendant/Applicant is not only premature but is also legally untenable.

51. Thirdly, it has been submitted that the actions complained of are action that are said to have affected the 4th Defendant, as a company and not any individual member of the said company. In this regard, it has been submitted, that it is only the company that can file any application and/or complain and not any individual, including the 3rd Defendant/Applicant. Simply put, the decision in the case of **Foss v Harbottle (1843) 67 ER 189 and Burland v Earle (1990) All ER 1452, has been invoked and heavily relied upon.**

52. Fourthly, the Plaintiff has also submitted that the sale between the 4th Defendant and Trendsetters Investment Limited was valid and in this regard the Application for Review of the consent in that regard, is superfluous.

53. Fifthly, the Plaintiff has submitted that even though the subject Application has been made pursuant to and under the provision of Order 45 of the Civil Procedure Rules, same however, does not meet the threshold envisaged and/or established thereunder. Consequently the Application should be Dismissed.

54. Finally, the Plaintiff has invited the Court to take note of the Decisions in the cases of **Flora N Wasike v Destimo Wamboko [1988]eKLR** and **Brooke Bond Liebig Ltd v Mallya[1975]EA 266**, which the Plaintiff contend are important decisions and which underscore the limited circumstances under which a Consent can be set aside, varied and/or rescinded.

ISSUES FOR DETERMINATION:

55. Having reviewed the Application dated the 20th September 2021, the Supporting Affidavit thereto, the Grounds of Opposition and having similar considered the Submissions which were rendered by and/or on behalf of the respective Parties, the following issues Do arise and are germane for Determination;

- a. Whether the Applicant has locus standi to challenge the Consent order adopted by this Honourable court on 14th July 2021.*
- b. Whether the Consent adopted by this Honourable court on the 14th of July 2021 is valid or otherwise.*
- c. If not, whether the Consent adopted by this Honourable court on the 14th of July 2021 can be set aside.*
- d. Whether the court is mandated to refer the affidavit allegedly sworn by the 2nd Defendant on the 1st July 2021, to the Directorate of Criminal Investigation (DCI) for Forensic Investigations.*
- e. Whether the Court ought to compel the Plaintiff herein to honour the Discovery Notices sent to it by the Applicant.*

Analysis and determination

issue number 1

Whether the Applicant has Locus standi to challenge the Consent order dated 28th June 2021, albeit adopted by this Honourable court on 14th July 2021.

56. Before venturing to address the issue herein, it is imperative to capture and/or reproduce the terms of the Consent order, which entered into between the Plaintiff, 2nd and 4th Defendant and adopted by the court on the 14th July 2021. For clarity, the consent order are as hereunder;

(1) Judgement be entered in favour of the Plaintiff as against the 2nd and 4th Defendants in the following terms:

- a) A Declaration be and is hereby issued that the sale of all that parcel of land known as Land Reference Number 11261/76 by the 4th Defendant to a company known as Trendsetters Investments Limited was procedural, valid and legal and all moneys due and owing from the said Trendsetters Investments Limited to the 4th Defendant were paid in accordance with the terms of the sale agreement entered into between the 4th Defendant and the said Trendsetters Investments Limited.*

b) A declaration be and is hereby issued that at the time of the sale of all that parcel of land known as Land reference Number 11261/76 from the 4th Defendant to Trendsetters Investment Limited, the bona fide Directors of the 4th Defendant were the 2nd Defendant herein, John Kariuki Kanyotu, Christopher Ngata Kanyotu, Sandra Gathoni Kanyotu and Kenneth Peter Njau.

c) A declaration be and is hereby issued that the 2nd Defendant and 4th Defendants have no challenge or objection to the sale of all that parcel of land known as Land Reference Number 11261/76 by the said trendsetters Investments Limited to the Plaintiff;

d) A declaration be and is hereby issued that the Plaintiff was at all material times a bonafide purchaser for value, without notice, of all that parcel of Land Known as Land Reference Number 11261/76 and any subsequent dispute relating to the sale of the said parcel of land does not affect the indefeasibility of title held by the Plaintiff.

e) A permanent injunction be and is hereby issued to restrain the 2nd and 4th Defendants jointly and severally, their servants, agents, employees or anyone authorized by them or acting on their behalf from evicting, threatening to evict, harassing or in any other manner interfering with the quiet enjoyment and use by the Plaintiff or any other parties who have purchased the parcel of land known as Land reference Number 11261/76 or any sub plot ensuing from its subdivision or any portion thereof.

f) A permanent injunction be and is hereby issued to restrain the 2nd and 4th Defendants jointly and severally, their servants, agents, employees or anyone authorized by them or acting on their behalf from registering any caveat or inhibition against the title to all that parcel of land known as Land reference Number 11261/76 or any sub plot ensuing from its subdivision or any portion thereof.

g) Each party shall bear its own costs of the suit.

57. It is imperative to note, that the suit land was originally registered in the name of the 4th Defendant. Besides, one James Kanyotu, deceased was a shareholder in the 4th Defendant company. In respect of this matter, the Applicant's claim to and/or in respect of the suit land is by virtue of inheritance, to the extent that same claims to be a beneficiary of the estate of the deceased James Kanyotu.

58. Nevertheless, a cursory reading of the consent, would show that same constitutes a transfer of all that suit land known as Land reference Number 11261/76 from the 4th Defendant to the Plaintiff. Consequently, such a transfer of the entire parcel will constitute an extinguishment of the 3RD Defendant/ Applicant's interest in the shares held by his father.

59. On the other hand, it is the Plaintiff herein who had in its suit sued the Applicant together with the 1st, 2nd and 4th Defendants in relation to its alleged ownership of the suit property. Consequently, The Plaintiff herein cannot now turn around and assert that the 3rd Defendant/Applicant has no interest at all in relation to the suit property and thus has no locus standi, to originate and/or mount the subject Application which arises from the subject suit.

60. Nevertheless, it is important to note that having sued the 3rd Defendant/Applicant herein, as concerns the suit property herein, the Plaintiff/Respondent by herself was confirming, signifying and/or authenticating that the 3rd Defendant/Applicant had a stake and/or interest in the suit property.

61. For clarity, such stake and/or interest would suffice to denote the existence of locus standi on the part of the 3rd Defendant/Applicant in the entire matter as well as the Application. In short, the Plaintiff cannot now be heard to challenge the Locus Standi of the 3RD Defendant/ Applicant to mount to the subject Application.

62. In support of the foregoing observation, I can do no better than to borrow from the Supreme Court and adopt the holding in the Decision in the case of **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR** where the Court found as follows:

“...In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population.”

63. In my humble view, I find and hold that the 3rd Defendant/Applicant herein has the requisite locus standi to mount and/or originate the subject Application challenging the consent that was entered into and endorsed by the court both in his capacity as a Party to the subject suit, as well as a Beneficiary or a person who claims to be a beneficiary of the Estate of one James Kanyotu, now Deceased, whose Estate is still the subject of Succession proceedings to ascertain and authenticate the legitimate heirs and/or Beneficiaries thereto.

ISSUE NUMBER 2

Whether the Consent dated 28th June 2021, albeit adopted by this Honourable court on the 14th of July 2021 is valid or otherwise?

64. The suit herein was filed and/or commenced by the Plaintiff as against all the Defendants, whereby the Plaintiff indicated that same had claims and/or issues that were to be settled against the Defendants.

65. Having mounted and/or lodged the suit as against all the Defendants, the Plaintiff herein though at liberty to engage and/or negotiate with either of the Defendants towards compromising the entire suit or any part thereof, could however not enter into a Compromise, without Notice to and/or involvement of all the Parties to the suit.

66. For clarity, it behooved the Plaintiff, to ensure that all the Parties to the suit, whether same were directly affected by the Consent or Compromise, to be duly notified and/or involved and that same were to play their role, no matter how peripheral the role is or would be.

67. In this regard, the Compromise which was crafted between the Plaintiff, the 2nd & 4th Defendants, for whatever is worth, needed to have the participation and/or blessing of the 1st & 3rd Defendants, insofar as same were Parties to the Suit. In any Event, the Suit Property, had something to do with them and that is the reason why same had been impleaded in the first instance.

68. In support of the foregoing observation, it is important to take cognizance of the provisions of Order 25 Rule 5 of the Civil Procedure Rules, 2010, which provides as hereunder;

Compromise of a suit [Order 25, rule 5.]

(1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.

69. My reading and interpretation of the foregoing position of the law drives me to the conclusion that where a Party wish to compromise a suit, the following ingredient must be established and/or proven;

i. The compromised must be proved.

ii. The court must be satisfied about the existence of the compromise.

iii. The court must hear all the Parties concerned.

iv. The compromise/agreement must be lawful.

v. There must be a specific order by the court adopting and/or recording the compromise.

70. From the foregoing, it is important to underscore the fact that other than proving the existence of the compromise, the Parties concerned in this matter, namely, the 1st and 3rd Defendant being such Parties were obliged and/or entitled to be heard, before the impugned compromise was recorded.

71. Secondly, there is a limb of the consent and/or compromise which is puzzling. I say that it is puzzling because it seeks to establish who are the lawful and bona-fide Directors of the 4th Defendant herein, yet the 2nd & 4th Defendants herein are aware and/or alive to the ongoing succession proceedings in respect of the estate of James Kanyotu, now deceased, wherein it is said that Hon Justice Luka Kimaru, Judge, made an order on the 8th November 2013, as concerns directorship in the interim pending the conclusion of the Succession cause.

72. It has also been stated that pursuant to the orders made by Hon Justice Luka Kimaru, Judge, on the 8th November 2013, in the Succession cause, the 1st Defendant herein was indeed constituted as one of the Directors of the 4th Defendant/Respondent. However, vide the impugned consent, she has been excluded, from those purported to be the Bona-fide Directors.

73. Other than the foregoing, there is one, Christopher Ngata Kanyotu, who has been included as a Bona-fide director of the 4th Defendant and indeed the said Christopher Ngata Kanyotu proceeded to swear an affidavit, sworn on 17th November 2021, where same purported to indeed be a Director of the 4th Defendant.

74. Nevertheless, on the 17th December 2021, the same Christopher Ngata Kanyotu swore a Further affidavit, where he now stated that he has since discovered that he is not a Director of the 4th Defendant.

75. Clearly, something is wrong. Because how can a consent be seeking to constitute Christopher Ngata Kanyotu as a director of the 4th Defendant, yet the authors and or originators of the said consent have no background documents, from the Registrar of Companies, if at all, to premise such a Statement.

76. As if that is not enough, one Mary Wanjiku Kanyotu who is the 2nd Defendant herein had sworn an affidavit on the 1st July 2021, wherein same indicated that one Sandra Gathoni Kanyotu was deceased. However, vide the Consent which is executed on the 28th June 2021 and adopted on 14 July 2021, it is still shown that Sandra remains a director of the 4th Defendant. The question that must be asked is: Whether a person can remain a director post humously.

77. Finally, the Elephant in the room; the 4th Defendant herein is a limited liability company whose Directorship is seriously in contest and therefore before any decision can be made and/or taken by and/or on behalf of the company, it must be shown that a Board meeting of the Directors was called, convened and held and that minutes were taken.

78. On the other hand, it would also be imperative to show that during the convened meeting, minutes were generated whereby instructions were issued to the Advocates giving them authority to act in a particular manner for and/or on behalf of the Company.

79. Suffice it to say, that in matters pertaining to and/or concerning a Company, whether be it commencement of suit and/or compromise thereof, there must be Resolutions of the Company as testament to the fact that the Company owns the decision to move forward.

80. In support of the foregoing position, it is appropriate to take cognizance of the holding in the case of **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000**, where it was held as hereunder;

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect. As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

81. In respect of the subject matter, a critical issue which has arisen is that the 4th Defendant neither met nor sanctioned the impugned compromise, culminating into the consent order that was endorsed by the court on the 14th July 2021.

82. On the other hand, it has been stated by the 1st Defendant and it does not appear to have been controverted, that the purported consent and/or compromise herein was actually the work of the 2nd Defendant who was misled and/or misadvised by her counsel, but not the 4th defendant.

83. In a nutshell, the impugned consent order was tainted and/or colored with illegality and hence same is vitiated.

ISSUE NUMBER 3

Whether the consent adopted by this Honourable court on the 14th of July 2021 can be set aside.

84. There is no doubt that the impugned order, which is sought to be set aside was entered into by consent between the Plaintiff, 2nd & 4th Defendant. Consequently same was therefore a consent order, even though it did not involve all the Parties.

85. Being a consent order, the court has a residual and/or inherent power to set same aside. However, the power of the court in this regard is circumscribed and/or limited to the existence of certain conditions and/or circumstances, which have been established in a legion of Decisions.

86. Without belaboring the point, it is appropriate to pay homage to the Decision in the case of **Brooke Bond Liebig vs Mallya (1975) EA 266** where Mustafa Ag. VP stated thus;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

87. On the other hand it may also be necessary to invoke the Decision in the case of **Flora N. Wasike vs Destimo Wamboko [1988] eKLR** Hancox JA cited **Setton on Judgments and orders (7th edition) vol 1 page 124**, and reiterated that;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 general for a reason which would enable a court set aside an agreement.”

88. Having referred to the foregoing leading decisions, which outline the circumstances that must be fulfilled before setting aside a consent order and/or judgment, I must now say that the circumstances under which the impugned consent was crafted and executed and thereafter endorsed, are not only suspect, but bespeak of fraud and illegality, which can neither be sanctioned nor condoned by a court of law.

89. In short, the consent order entered into on the 28th June 2021, but adopted on the 14th July 2021 be and is here set aside, vacated and/or rescinded.

ISSUE NUMBER 4:

Whether the court is mandated to refer the affidavit allegedly sworn by the 2nd Defendant on the 1st July 2021 to the Directorate of Criminal Investigation (DCI) for forensic investigations.

90. I must point out that it is not part and parcel of the jurisdiction of this court to refer any document that is filed before it for purposes of criminal investigation and thereby be seen to be assisting one or more of the Parties to carry out and/or conduct investigations of his/her own case using the court as an Investigating Forum.

91. On the other hand, I must also point out that each and every Party that comes before the court, must understand and appreciate the Burden placed upon same in accordance with the provisions of Section 107 and 108 of the Evidence Act, Chapter 80 Laws of Kenya. Consequently, if the burden of proof is on the 3rd Defendant, same must be prepared to discharge same, without the intervention and/or assistance of the Court.

92. Notwithstanding the foregoing, I must point out that the office of the Directorate of criminal investigation is a public office and if the 3rd Defendant wishes to lodge and/or present a complaint including lodging the impugned affidavit for purposes of Forensic Documents Examination, same does not require a court order before doing so.

93. From the foregoing, it must have become apparent that I am not inclined to grant the order to refer the impugned affidavit to the Directorate of Criminal Investigation either in the manner sought or at all.

ISSUE NUMBER 5

Whether the court ought to compel the Plaintiff herein to honour the Discovery Notices sent to it by the Applicant.

94. As concerns the issue pertaining to compliance with the Discovery Notices that were issued and served upon the Plaintiff herein, it is important to take note and/or cognizance of the provisions of Order 14 of the Civil Procedure Rules 2010, as read together with Order 11 of the Civil Procedure Rules, the later which deals with pre-trial directions and conferences.

95. For clarity, it is incumbent upon a Party, who is served with Discovery Notices, to respond thereto and honor same and if not, to state with clarity the reasons for Non-compliance.

96. As pertains to the importance of honoring and/or complying with Discovery notices, I beg to adopt and restate the position of the Law as captured in the Decision in the case of **Oracle Production Limited –vs- Decapture Limited & 3 others [2014]Eklr**;

“The true purpose of discovery is to level the litigation field to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial... The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for fair disposal of the proceedings, before or at trial.

Each party is therefore enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation”

97. It is not disputed that the 3rd Defendant/Applicant has sent two Discovery notices to the Plaintiff which have gone unanswered. In my humble view, the Documents sought are in relation to the alleged transfer of the suit land by the 4th Defendant to the Plaintiff.

98. Consequently and in the premises,, these documents are relevant to the effective and effectual determination of the suit. In this regard, same will ensure a level play field in the prosecution and defense of the suit.

99. Based on the foregoing, it is imperative that the Documents, sought for at the foot of the Discovery Notices be supplied within thirty (30) days from the date of the Order and/ or Ruling hereof.

FINAL DISPOSITION:

100. Having reviewed the Application dated the 20th September 2021, I come to the conclusion that same is merited.

101. Consequently and in the premises, same be and is hereby allowed in terms of prayers 3 and 5 thereof.

102. For clarity, the Plaintiff herein be and is hereby ordered to honor and/or comply with the Discovery notices which were issued and served upon her within thirty (30) days from the date hereof and in default the 3rd Defendant/Applicant shall be at liberty to apply.

103. Costs of the Application be and are hereby awarded to the 3rd Defendant/Applicant and same to be borne by the Plaintiff and the 2nd Defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mrs. Wangui Koech for the Plaintiff/Respondent

Mr. Ruiru Njoroge for the 3rd Defendant/Applicant

Mr. Ruiru Njoroge H/B for Mrs. Akedi for 1st & 4th Defendant/Respondent

No appearance for the 2nd Defendant/Respondent