



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 110 OF 2004**

CHARLES MORACHA ONSARIGO ..... 1<sup>ST</sup>  
PLAINTIFF

KIAMOKAMA FARMERS CO-OPERATIVE SOCIETY LIMITED ..... 2<sup>ND</sup>  
PLAINTIFF

VERSUS

PHILIP ONYANGO OKINDO ..... 1<sup>ST</sup>  
DEFENDANT

FLORENCE NYANCHOKA OTIENO ..... 2<sup>ND</sup>  
DEFENDANT

MARY MOKEIRA NYAKUNU ..... 3<sup>RD</sup>  
DEFENDANT

LUTAFALI RAJWAN T/A QUASAR LIMITED ..... 4<sup>TH</sup>  
DEFENDANT

**RULING**

1. The plaintiffs brought this suit on 13<sup>th</sup> July 2004 claiming that, at all material times, the 2<sup>nd</sup> plaintiff was the registered proprietor of all that parcel of land known as **LR No. Kisii Town/Block II/23** (hereinafter referred to as “**the suit property**”) and that on or about 30<sup>th</sup> August 2001 the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants without lawful authority from the 2<sup>nd</sup> plaintiff, illegally, fraudulently and through collusion sold the suit property together with the developments standing thereon to the 4<sup>th</sup> defendant. The plaintiffs claimed that through the said illegal and fraudulent sale of the suit property by the defendants, the 2<sup>nd</sup> plaintiff lost a sum of kshs. 4,822,751/=. The plaintiffs sought judgment against the defendants for; a declaration that the sale of the suit property by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the 4<sup>th</sup> defendant is null and void and an order for cancellation of the title in the name of the 4<sup>th</sup> defendant so that the ownership of the property reverts to the 2<sup>nd</sup> plaintiff.
2. This suit was fixed for hearing on 14<sup>th</sup> March 2006, 29<sup>th</sup> January 2008, 30<sup>th</sup> September 2008, 1<sup>st</sup> October 2009 and 16<sup>th</sup> February 2010 when the hearing did not take off for one reason or the other. On 30<sup>th</sup> August 2010, the plaintiffs’ advocates fixed this suit for hearing on 3<sup>rd</sup> November 2010. When the matter came up for hearing before Makhandia J. on that day, the advocate who appeared for the plaintiffs Mr. Nyariki informed the court that he wished to withdraw the suit.

The advocate who appeared for the defendants, Mr. Soire informed the court that he had no objection to the withdrawal provided the defendants are paid the costs of the suit. The court made an order marking the suit as withdrawn with costs to the defendants. On 25<sup>th</sup> April 2012, the 2<sup>nd</sup> plaintiff brought an application seeking the review and setting aside of the said court order made on 3<sup>rd</sup> November 2010 withdrawing this suit with costs to the defendants. This is the application before me for determination.

3. The application was supported by the affidavit of one, Nyambane Sagini sworn on 23<sup>rd</sup> April 2012. The 2<sup>nd</sup> plaintiff's application was brought on the ground that the firm of Nyariki & Co. advocates caused this suit to be withdrawn without instructions from the 2<sup>nd</sup> plaintiff to do so. The 2<sup>nd</sup> plaintiff contended that the withdrawal of the suit was undertaken fraudulently and through collusion. The 2<sup>nd</sup> plaintiff contended that it was not notified by the firm of Nyariki & Co. Advocates that this suit was coming up for hearing on 3<sup>rd</sup> November 2010 and that the said firm of Nyariki & Co. Advocates neither consulted it nor obtained instructions from it to withdraw this suit. The 2<sup>nd</sup> plaintiff contended further that even after withdrawing the suit as aforesaid, the firm of Nyariki & Co. Advocates did not notify the 2<sup>nd</sup> plaintiff of the said action. The 2<sup>nd</sup> plaintiff contended that its attempts to obtain information from the firm of Nyariki & Co. advocates regarding the progress of this suit did not bear fruit and as such they opted to obtain information from the court registry.
4. It was upon applying for and obtaining copies of the typed proceedings from the court that they came to learn that this suit had been marked as withdrawn on 3<sup>rd</sup> November 2010 at the request of Mr. Nyariki advocate of the firm of Nyariki & Co. Advocates. Upon receipt of the said proceedings, the 2<sup>nd</sup> plaintiff confronted Mr. Samwel Nyariki advocate of Nyariki & Co. Advocates to obtain information from him regarding his source of instruction to withdraw this suit but the said advocate became evasive and non committal on the issue. The 2<sup>nd</sup> plaintiff contended that it was constrained in the circumstances to lodge a complaint against the firm of Nyariki & Co. Advocates with the Advocates Complaints Commission on 21<sup>st</sup> November 2011 for appropriate disciplinary action to be taken against the said firm of advocates. The 2<sup>nd</sup> plaintiff contended that this suit was withdrawn by the firm of Nyariki & Co. Advocates unilaterally and without express mandate or authority from the 2<sup>nd</sup> plaintiff and in collusion with the 1<sup>st</sup> plaintiff. The 2<sup>nd</sup> plaintiff contended that as a result of the said irregular withdrawal of this suit the 2<sup>nd</sup> plaintiff has been denied its right to be heard on its claim against the defendants.
5. The 2<sup>nd</sup> plaintiff's application was opposed by the defendants. The firm of Nyariki & Co. Advocates was served with the application but did not respond to the same. The defendants opposed the application through grounds of opposition dated 25<sup>th</sup> June 2012. The defendants contended that the application is an abuse of the process of the court and that the same was brought unprocedurally and contrary to the provisions of the law. The defendants contended that the issues raised in the 2<sup>nd</sup> plaintiff's application do not concern the defendants and would be better dealt with in another forum between the 2<sup>nd</sup> plaintiff and its former advocates, Nyariki & Co. Advocates. The defendants contended further that the 2<sup>nd</sup> plaintiff's application was not brought timeously and/or with promptitude and that the same lacks merit.
6. On 30<sup>th</sup> May 2013, the court directed that the 2<sup>nd</sup> plaintiff's application be heard by way of written submissions. The 2<sup>nd</sup> plaintiff filed its submissions on 31<sup>st</sup> January 2014 while the defendants filed their submissions in reply on 26<sup>th</sup> June 2013. I have considered the 2<sup>nd</sup> plaintiff's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the defendants in opposition to the application and the written submissions by the respective advocates for the parties. The 2<sup>nd</sup> plaintiff's application was brought principally under order 45 rule 1, 2 and 5 of the Civil Procedure Rules. The 2<sup>nd</sup> plaintiff has sought the review and setting aside of the order made herein on 3<sup>rd</sup> November 2010 by which this suit was marked as withdrawn. In the case of **Nairobi City Council –vs- Thabiti Enterprises Ltd, Court of Appeal, Civil Appeal No. 264 of 1996** (unreported), the court stated that;

**“The current position would then appear to be that the court has unfettered discretion to**

**review its own decree or order for any sufficient reason”.**

7. What I need to determine in the present application therefore is whether the 2<sup>nd</sup> plaintiff has given sufficient reason to warrant the review of the order made herein on 3<sup>rd</sup> November 2010. The ground on which the 2<sup>nd</sup> plaintiff has sought review of the said order is that the 2<sup>nd</sup> plaintiff did not instruct its previous advocates, Nyariki & Co. Advocates (hereinafter referred to only as “the previous advocates”) to apply to court for the withdrawal of this suit. As I have stated above, the 2<sup>nd</sup> plaintiff’s previous advocates did not respond to the application herein which was duly served upon them. It would therefore be difficult to know what actually transpired between the 2<sup>nd</sup> plaintiff and its previous advocates. The court will have to make inferences from the circumstances prior to and after the making of the subject court order to determine whether the 2<sup>nd</sup> plaintiff’s previous advocates acted on instructions or not. The 2<sup>nd</sup> plaintiff is a Co-operative Society established under the Co-operative Societies Act, No.12 of 1997. At all material times, the 1<sup>st</sup> defendant was the chairman of the 2<sup>nd</sup> plaintiff while the 2<sup>nd</sup> defendant was its treasurer. The 3<sup>rd</sup> defendant on the other hand was the manager/secretary of the 2<sup>nd</sup> plaintiff.
8. The 2<sup>nd</sup> plaintiff was at the material time the registered proprietor of LR No. Kisii Town/Block II/23 (“the suit property”). The 2<sup>nd</sup> plaintiff brought this suit against the defendants following an inquiry into the affairs of the 2<sup>nd</sup> plaintiff by the Registrar of Co-operative Societies in the year 2003 the report of which inquiry concluded that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants had unlawfully sold and transferred the suit property to the 4<sup>th</sup> defendant. The said report noted that the whole process of selling the suit property was fraudulent, irregular, null and void and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were the main actors in the said process. The said report recommended that the suit property be recovered from the 4<sup>th</sup> defendant. It was on the strength of this report that the 2<sup>nd</sup> plaintiff instructed its previous advocates to file this suit against the defendants with a view to recovering the suit property. I have noted from the record that this suit was listed for hearing five (5) times before it was withdrawn on 3<sup>rd</sup> November 2010 by the 2<sup>nd</sup> plaintiff’s previous advocates. There is no indication from the record that this suit was adjourned on those occasions due to the fault on the part of the plaintiffs or that the parties were considering an out of court settlement. There is also no indication that the 2<sup>nd</sup> plaintiff’s previous advocates had any difficulty with the 2<sup>nd</sup> plaintiff or its witnesses.
9. It is very difficult as I have mentioned above to know what informed the decision of the 2<sup>nd</sup> plaintiff’s previous advocates to withdraw this suit. The application by Mr. Nyariki advocate before Makhandia J. on 3<sup>rd</sup> November 2010 to withdraw this suit was not prompted and the advocate did not give any explanation of whatsoever nature as to why he had decided to withdraw the suit. He did not even inform the court whether he had been instructed to proceed in that manner. The 2<sup>nd</sup> plaintiff has contended that it was not notified by its previous advocates of the withdrawal of the suit and that it only came to know that the suit had been withdrawn in November 2011 upon applying for and receiving the typed court proceedings. These averments by the 2<sup>nd</sup> plaintiff are not controverted and they are supported by the record. There is on record an application for typed copies of proceedings that was made on 24<sup>th</sup> November 2011 by the 1<sup>st</sup> plaintiff against which a deposit was made of kshs. 200/-. The proceedings were collected on or about 11<sup>th</sup> November 2011 when the balance of the court fees for the same in the sum of kshs. 1,000/= was paid. The 2<sup>nd</sup> plaintiff’s letter of complaint against its previous advocates to the Advocates Complaints Commission dated 21<sup>st</sup> November 2011 coincided with the date of receipt of the proceedings.
10. I am satisfied from what I have set out above that the 2<sup>nd</sup> plaintiff was not aware that this suit had been withdrawn until November, 2011 and that the 2<sup>nd</sup> plaintiff did not instruct its previous advocates to withdraw this suit. I am unable from the circumstances of this case to see the reason why the 2<sup>nd</sup> plaintiff would have wanted to withdraw this suit that it filed on the recommendation of the Registrar of Co-operatives to recover the suit property before the said property was recovered. I do not also see the reason why the 2<sup>nd</sup> plaintiff would lodge a complaint against its

previous advocates with the Advocates Complaints Commission if it had instructed the said advocates to withdraw the suit. Finally, Mr. Samuel Nyariki advocate is an officer of this court. The 2<sup>nd</sup> plaintiff has in the present application attacked his professional conduct and accused him of fraud and collusion. The 2<sup>nd</sup> plaintiff took the liberty to serve him with the present application so that he may come forward to defend his name if he so wished. He failed to rise to the occasion.

11. The only inference the court can make in the circumstances is that all that has been alleged against him is true. I am fully in agreement with the decision of Musinga J. (as he then was) in the Case of **Republic –vs- District Land Registrar Nandi & Another ex parte Tegerei & Another [2005] 1 KLR 521** where he held that;

**“Although an advocate has ostensible authority to compromise his client’s case, employment of such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which he has been given by a client in the matter. Where a consent order completely negate the interests of an instructing client and it is shown to the satisfaction of the court that the client was not even aware of the application that gave rise to the consent order, in the absence of any satisfactory explanation by counsel who is accused of entering into the consent order in question, a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent order issued.”**

12. I am satisfied that the 2<sup>nd</sup> plaintiff has shown sufficient reason to warrant the setting aside the order made herein on 3<sup>rd</sup> November 2010. A right to a fair hearing is a constitutional right. Article 50 (1) of the Constitution of Kenya, 2010 provides that;

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.”**

In exercise of its constitutional right aforesaid, the 2<sup>nd</sup> plaintiff brought the dispute that it had with the defendants before this court for resolution. The dispute has not been resolved because the 2<sup>nd</sup> plaintiff’s previous advocates decided to unilaterally terminate the suit. The 2<sup>nd</sup> plaintiff has now asked the court to reinstate the suit so that it may realize its constitutional right of having his claim heard and determined by the court. I am of the view that the court can only deny the 2<sup>nd</sup> plaintiff the enjoyment of this right for very compelling reasons. I am not convinced that there are compelling reasons that would justify the refusal to set aside the order issued herein on 3<sup>rd</sup> November 2010 and the reinstatement of this suit for hearing. The duty of the court is to do justice to the parties. I am of the view that although this case has been pending in court since the year 2004, justice can still be done.

13. I am in agreement with the submission by the defendants that the 2<sup>nd</sup> plaintiff’s application was brought after inordinate delay. The delay has however been adequately explained to the satisfaction of this court. In the circumstances, the said delay cannot be a good ground for refusing the present application. In conclusion, it is my finding that the 2<sup>nd</sup> plaintiff’s application dated 23<sup>rd</sup> April, 2012 has merit. The same is allowed in terms of prayers 1 and 2 thereof. The 2<sup>nd</sup> plaintiff shall pay to the defendants the costs of this application and thrown away costs assessed at Kenya Shillings Twenty Five Thousand (kshs. 25,000/=) forthwith and in any event within thirty (30) days from the date hereof in default of which the order made herein on 3<sup>rd</sup> November 2010 shall stand reinstated automatically without any further reference to the court.

**Delivered, signed and dated at KISII this 21<sup>st</sup> of November, 2014.**

**S. OKONG’O**

**JUDGE**

**In the presence of:-**

..... for the 2<sup>nd</sup> plaintiff

..... for the defendants

..... Court Clerk

**S. OKONG'O**

**JUDGE**