



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case No. 677 Of 2007

AZIZ ABBA ABDULLA PLAINTIFF

- VERSUS -

PETER KAMAU KAIGOYADEFENDANT

RULING

[1] The applicant herein filed before the Chief Magistrate Mombasa Civil Case No. 1024 of 1985. The plaintiff claimed specific performance and a declaration that the applicant herein is the owner of parcel No. 613/III/Mainland North measuring 120 x 80 ft against the respondent herein.

The case was heard and determined on 15th November 2001. The applicant was declared the owner of the said plot subject to the payment of the balance of the purchase price Kshs. 100,000 which she paid through her lawyer E.T. Waiyaki & Co on 19th November 2001 by depositing The same in Court.

On 11th December 2007 she filed Miscellaneous application No. 677 of 2007 in which she appealed to court for a vesting order, vesting the subdivisions number 4292 and 4694 from original plot no. 613/III/Mainland North to her.

[2] In the mean time the respondent herein had filed an appeal number High Court Civil Appeal No. 53 of 2002 against the decision of the Chief Magistrate Mombasa in CMCC 1024 of 1995 aforesaid.

That appeal was dismissed in Mombasa Civil Appeal No. 53 of 2002 on 5th May, 2003.

On 10th November 2008 the applicant entered into a consent with the respondent. In that consent HCCC. NO. 667 (OS), High Court Civil Appeal No. 53 of 2002 and CMCC No. 1095 were marked as settled upon the respondent herein paying a sum of Kshs. 85,000/- to the applicant. Further the prohibitory order or court order dated 19th May, 2003 in MCC No. 1024 of 1995 was lifted forthwith. The consent was signed by B.W. Kenzi & Company for the applicant and Omondi Waweru & Company for the respondent. The same was filed in Court on February 2009. It was adopted by the Court on 7th

February 2009 and order issued on 8th February 2009.

This is the consent order the applicant now seeks to set aside claiming that the consent did not encompass all pertinent agreed issues by the parties.

This consent in as far as it related to High Court Civil Appeal No. 53 of 2002 had nothing to consent except costs. The appeal having been dismissed by P.W. Tuitui Commissioner of Assize on 5th May 2003. The only thing that can be inferred is that the costs were compromised by the aforesaid consent.

[3] There was a judgment in CMCC 1024 of 1995 in which the applicant herein was entitled to get land parcel No. 613/111/Mainland North measuring 120'/80'. She filed the miscellaneous application in this case no. 667 of 2007 for vesting order of the aforesaid land. Instead of pursuing that application she compromised the suit by entering into a consent order aforesaid. This suit was completely compromised. It was settled.

Can an application arising from a compromised suit be alive? On that score alone this application must fail. This application died a natural death when the applicant entered into a consent on 10th November 2008 to compromise HCC. no. 677 of 2007 in which suit the application is hinged.

M.K. Mulei & Company filed a notice of appointment of advocate on 23rd November 2011. This notice of change is after a final judgment of this case. That notice of appointment does not comply with order 9 rule 9. There is no leave of the Court to do so. The appointment is improper and the notice is struck out. Any pleadings drawn by the said advocates including this application are not properly before the court and are therefore struck out. This application equally fails on that score.

[4] Even if all the above defects were satisfied, the applicant would still have to satisfy the court that the consent was entered by mistake, fraud or misapprehension of the facts¹. This has not been proved before me at all.

The end result, is that this application must fail as an abuse of the process of court. I dismiss it with costs to the respondent. This suit was compromised by the applicant and the respondent themselves. The matter commends itself for an order that the suit be marked as settled.

Dated and delivered in open Court at Mombasa this 18th day of June 2013.

S.N. MUKUNYA

JUDGE

In the presence of:

Miss Kayatta and Mr. Mutiso Advocate for the plaintiff'

¹ Hansard Shah v Westland General Spares (1965) EA. 542

Brookbond Leiberg (T) Ltd v Mallya (1975) EA 226

Diamond Trust Bank of (K) Ltd v Ply & Panel Ltd (2004) 1 EA 3C