REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 564 OF 1998

KIAMBU SERVICE STORE……..PLAINTIFF

VERSUS

MBOI-I-KAMITI FARMERS COMPANY LIMITED…DEFENDANT

RULING

The application for consideration is a Notice of Motion dated 28th September 2011.The application is brought under Order 45 of the Civil Procedure Rules, and Section 1A, 1B and 3A seeking orders that the Court be pleased to set aside the purported Consent Judgment dated 9th May 2006 issued on 10th May 2006 and all consequential Orders made against the Defendant in particular the prohibitory Order registered on 5th February 2001 against the Defendant's parcel grant No LR 16711..

The application is based on the grounds that the purported consent was recorded by an advocate unknown to the Defendant and who did not have the defendant's instructions and that the advocate who recorded the consent purportedly on behalf of the Defendant was a person not competent and or authorised to act as an advocate. That the defendant settled the decree in this matter including the amount claimed outstanding through the purported consent order.

James Kamau Njure swore a supporting affidavit to support this application. In his affidavit he stated that he was the vice chairman and Director of the Defendant Company. He stated that an advocate who was not known to the applicant by the name and style of B.N Mucira T/A B.N.Mucira & Advocates signed the consent order on behalf of the Defendant. That this advocate is unknown to the Defendant and was not given instructions to act on behalf of the Defendant.

That the Defendant instructed the firm of Mutiso & Co Advocates acting on the Defendant's behalf. That when the current advocates tried to serve B.N Mucira & Co Advocates his whereabouts were unknown and on making inquiries they were informed by the Law Society of Kenya that BN Mucira had been suspended from practice.

The application is opposed by the Respondent and in so doing he filed an affidavit in response by Maurice Otieno Omuga dated 25th January 2013.He further states that he is an advocate of the High Court of Kenya.He states that at the inception of the case the Plaintiff was represented by Gachomba & Co Advocates while Mbai&Kibuthu Advocates acted for the Defendant and it is the said two firms that entered into a consent and recorded judgment in favour of the plaintiff which the Defendant failed to pay leading to attachment on 5th February 2001 of its immovable properties which included LR No 9934/1 (Tittle Number IR 16711)whose attachment the Defendant now seeks to lift .

That however the attachment in respect of this particular property LR No 9934/1 was raised on 25th November 2011 to enable the Defendant and National Bank of Kenya Limited to whom the Defendant had charged it to sell it by private treaty meaning that the prayer relating to the particular parcel of land is superfluous. That with regard to issues touching on the Firm of BN Mucira Advocates he stated that they were served with a consent letter between B.N Mucira Advocates and the Defendants previous advocates D.Njogu& Company Advocates to the effect that they were to take over the conduct of the Defendant's case and they subsequently dealt with them on that basis including recording of the consent order which the defendant now seeks to set aside.

That he has obtained two tabulations of interest from the Plaintiff both dated 23rd October 2012 which indicate that if the consent orders were set aside then the Defendant would have been liable to pay the plaintiff Kshs 79,863,084 as at 23rd October 2012 whereas if they had been allowed to remain then the Defendant would have been liable to pay the Plaintiff Kshs 44,933,061, and that the consent orders were affirmed by the Defendants Board of Directors pursuant to the Defendants letter dated 7th August 2006.He stated that the prohibitory orders were registered pursuant to the initial decree and had nothing to do with the consent orders dated 9th My 2006 which as stated were rectified by the Defendant's Board, pursuant to the letter dated 7th August 2006, therefore the application lacks merit and should be dismissed with costs.

In reply to the response by the Respondent the Applicant filed a further affidavit on 8th February 2013.He stated that the suit commenced on 1998 as a claim for orders of Kshs 44,252,939 interest at 3% p.a, further interests at court rates and costs to the suit.That on 177th May 1999 barely year later the parties recorded consent for payment of the sum of Kshs 43,858,153 all inclusive which sum was duly paid to the Defendant fully. That the Plaintiff through collusion with some former Directors of the Defendant have conspired to claim Kshs 44,933,061 a figure larger than the original decretal sum outside the ambit of the claim in the Plaint. He stated that the then two Directors of the company could not purport to bind the company for the sums not claimed in the suit. Once the suit was concluded by the Decree of August 2000 the court became functus official and the parties could not bestow on the court jurisdiction to make additional claims not contained in the pleadings before court.

The Applicant/Defendant filed submissions on 8th March 2013.He reiterated the contents of his affidavitsand further submitted that the advocate who entered consent on behalf of the Defendant did not hold a practising certificate as an advocate and therefore his actions are null and void and that the amount consented to was improper as it offends the pleadings before court and is clearly an attempt to legitimize through court process the looting of Defendant's company assets.That after due diligence the Defendant's confirmed from the Law Society of Kenya that the said B.N Mucira Advocate was struck out as an advocate of the High Court of Kenya on 6th March 2006 and had not been reinstated and that this conduct of recording consent on 9th May 2006 offends the provisions of section 9 and 31 of the Advocates Act. He relied on the case of **Lucia Mwethya t/a KalebranEntereprises –vs- Nairobi Bottlers Limited 2012** where Justice Odunga observed that:-

"*In my view therefore documents signed by an unqualified person are in the same position as documents signed by a layman in so far as their legality is concerned .Since three said documents are executed by a person whose signature is not legally recognised they are in my view in the same position as unsigned documents*" He also relied on **Regina Kavenya Mutuku-vs- United Insurance Company Ltd**

"*An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading that authenticates the same and in an unauthenticated document is not a pleading of anybody. It is a nullity*"

He submitted that the unsigned Consent Order is a nullity together with all consequential orders made thereafter arising from the said nullity which Orders included Orders of execution through issuance of prohibitory Orders against the Defendant's property. On the issue of that the consent signed was not

founded on the pleadings filed in court .That the suit was compromised by a consent letter dated 17th May 1999, which court stamped on 11th August 2000 in the terms that the Defendant pays the Plaintiff Kshs 43,858,153and there be a stay of execution till 30th June 2000.That this Decree was binding on all parties and neither party could claim any interest on the Decree and the only option available to the Decree holder was to execute the decree if payments were not made by 30th June 2000.

That the sums were paid on 6th October 2005 and the decree was satisfied therefore there could be no claim whatsoever. That the Decree holder has now through the impugned consent Order of B.N Mucira purported to agree to a further sum of Ksh 44,252,939 as interest.Theapplicant submits that there is no way a sum of Kshs 43,858,135 which was to be paid by June 2000 would attract a whooping interest of Kshs 44Million even if there was a delay in payment upto the year 2005 applying the rates of 3% per annum as per Decree. Even if it was applicable it would translate to only ***Kshs.6,907,656***/=

That the Respondent has justified the sum on the basis that the then Chairman and Secretary of the Defendant company did approbate the consent filed on 19th May 2006 which according to the applicant cannot stand for the reasons that a party cannot approbate an illegality and a party whether by consent cannot ask the court to perpetuate an illegality and that the letter approbating the consent was not a Board resolution of the Company but a more letter signed by two persons whose authority to bind the company has been questioned.The claim of a whooping extra 44 Million on a Decree already paid of **Kshs.43Million** is just an attempt to plunder the Defendant's assets through collusion between the plaintiff and two other persons whether they were Directors of the Defendant or not. He concluded by seeking the court to set aside the consent Order of 10th May 2006 and declare that the debt that was due to the Decree holder to have been settled when the original agreed sum of **Kshs 43,858,135** was paid.

The Respondent filed submissions on 15th March 2013.He submitted that the application was misplaced in that the prohibitory order which was registered against the title LR No 9934/1 on 5th February 2001 had nothing to do with consent order issued on 10th May 2006 which the defendant now seeks to set aside. That the prohibitory order which was registered against LR No 9934/1 on 5th February 2001 was raised on 25th November 2011 to enable the defendant and National Bank Limited to sell that parcel of land.

On the issue that the advocate who recorded the consent was not a qualified person and that he was on suspension when he recorded the consent, the Respondent relied on the case of **HCCC No 10 of 2012 Lucia Mwethya t/a Kalebran Enterprises –Vs- Nairobi Bottles Ltd & Others,** and several other cases. The Respondent further submitted that it was against the principle of common sense, law and equity to benefit from its own wrong as the defendant is trying to do in this case. He relied on the case of **Alghussein Establishment –vs- Eton College (1991)ALL ER 267** where the House of Lords stated that :-

"…..it is well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of his own breach to the other party"

He further submitted that **B.N Mucira& Company Advocates** had taken over the case from **D.Njogu& Company Advocates** who had previously acted for the defendant.

The Respondent also submitted that *B.N Mucira* had been suspended and not struck off the roll of advocates meaning that the party satisfied the requirements of section 9 of the Advocates Act in the sense that he had been admitted as an advocate and his name was still on the roll of advocates. The Respondent submitted that the challenge of the Consent Judgment dated 9th May 2006 on the basis that a sum of Kshs 43,858,135 was paid on 6th October is unfounded as the resolution dated 30th January 2006 and 7th August 2006 by the Defendant's Board of Directors ratified and adopted the action of *B.N Mucira& Company Advocates* who were the agents of the Defendant ratified the actions of the advocates.

The issue for determination is whether the applicant has demonstrated to this court the whys and

wherefores for setting aside the consent. The firm of B.N Mucira & Co. Advocates came on record by consent on 19th April 2006 from the firm of D.Njogu& Company Advocates. There is also a number of consent documents .There is consent dated 15th August 2000 which stated that:-

"That the defendant do pay the Plaintiff the sum of Ksh 43,858,153 that there be a stay of execution until 30th June 2000"

The letter dated 17th May 1999 is consent by the two parties. The consent reads that

"By Consent Judgment be and is hereby entered in favour of the Plaintiffs against the Defendants for Kshs 43,858,153 all inclusive"

The consent in contention is the consent issued on 10th May 2006 by the court after the advocates signed the consent on 5th April 2006 stated that,

1. *THAT a sum of Kshs 29,792,505 be and is hereby certified as the interest which accrued on the decretal amount from 1st July 2000 to 6th October 2005 and subsequent interest thereon upto 6th March 2006.*
2. *THAT a sum of Kshs 207,495 be and is hereby certified as the plaintiff's costs for the proceedings from the date of the decree to the date of the decretal amount*
3. *THAT interest be and is hereby suspended from accruing on the said outstanding sum of Ksh 30,000,000 [that is Kshs 29,792,505+ Kshs 207,495]for a period of 3 years from the date hereof.*
4. *THAT the prohibitory orders registered against the defendant's various properties are hereby confirmed on the following terms;-*

a. *The plaintiff shall not move the court for settlement of terms and conditions for sale of the attached properties for a period of 3 (three) years from the date hereof to enable the defendant to organise for payment of the outstanding amount*
b. *The defendant be and is hereby given liberty to liquidate the outstanding amount in full at any time whether by instalment or in lumpsum whereupon a consent order shall be recorded lifting the prohibitory orders and making the suit as settled.*

Of particular contention is paragraph 4 on prohibitory orders on the defendant's properties.

The applicant herein has sought to set aside the consent Judgement. The applicant has to satisfy the grounds for setting aside the Consent judgement and later satisfy the court that the consent was signed by an advocate who was not qualified.

As was held in the case of **Hiram Vs Kassah (1952) 19 EACA 131,**

"A *Court cannot interfere with the consent judgement except in such circumstances that would afford a good ground for varying or rescinding a contract between the parties".*

In the same case, it was further stated,

*" **Prima facie,** any order made in the presence of the counsel is binding on all the parties to the proceedings or action and on those claiming under them and cannot be varied or disqualified unless obtained by fraud or conclusion or by an agreement contrary to public policy or if the consent was given without material facts and generally for a reason that would enable the court to set aside an agreement".*

There is no doubt that the Defendant herein appointed the firm of **B N Mucira & Co. Advocates** on 18th April, 2006 as their Advocate. This is evidence by a letter dated 18/4/2006 to the Deputy Registrar where

the firm **of D Njogu & Co. Advocate** and **B.N Mucira & Co. Advocates** came on record for the Defendant. Thereafter the consent in contention was entered on 10th May 2006. There is also no doubt that the Defendants was aware of the said consent and have referred to it through its letter dated 7th August, 2006. The Chairman of the Defendant referred to their letter addressed to **B. N Mucira & Co. Advocates** and confirmed that the Consent recorded in court remain and be adopted as it is.

The said Consent therefore, had the blessings of the Defendant and they cannot turn around and disown it. The Defendant were aware of the said Consent Judgement and are therefore bound by it. It was held in the case of **Ngure Vs Gachoki Gathaga (1979) KLR 152** that:-

" Since a party cannot be considered aggrieved by an order made with his consent and in his presence, the court has no jurisdiction under the Civil Procedure Rules and Order 45 to review a consent order even though there is no right of appeal against such orders ".

Again in the case of **Wasike Vs Wamboko Civil Appeal No. 81 of 1984 (Page 431** it was held :

" it is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out".

The applicant herein has not demonstrated the grounds which would warrant this court to set aside the consent Judgement that was entered on 9/8/2006. The applicant appointed **B.N Mucira advocates** as their advocates and even confirmed the Consent that had been entered by the said advocates through their letter dated 7th August, 2006. I will concur with the Plaintiff's submissions that the Defendant are trying to benefit from their own wrong. The Law firm of **B. N Mucira & Co. Advocate** took over the conduct of this case from D Njogu & Co. Advocate and that was with the blessings of the Defendant. The Defendant cannot turn around and disown their counsel five years after Consent Judgement was entered.

The Court finds that the Defendant's Notice of Motion dated 28/9/2011 is not merited. The court dismisses the same with costs to the Plaintiff/ Respondent.

Dated, Signed and delivered this 12th day of July, 2013.

L N GACHERU

JUDGE

12/3/2012

Before Gacheru Judge

Court Clerk Anne

Kariuki holding brief for Mutiso for the Defendant/Applicant

None attendance for the Plaintiff / Respondent.

L. N. GACHERU

JUDGE

12/7/2013

Court.

Ruling read in open Court in the presence of Mr Kariuki holding brief for Mr Mutiso for the Defendant/Applicant and no appearance for Plaintiff/Applicant.

L .N .GACHERU

JUDGE

12/7/2013

Kariuki: I apply for certified of the Ruling.

L. N. GACHERU

JUDGE

12/7/2013

Court.

Certified copy of the Ruling to be supplied to the Defendants upon payment of the requisite fees.

L. N. GACHERU

JUDGE

12/7/2013