



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Environmental & Land Case 16 of 2012**

**GARDEN ESTATE LIMITED .....PLAINTIFF**

**- VERSUS -**

**AMIRALI AKBARALI GULAMHUSSEIN NANJI.....1<sup>ST</sup> DEFENDANT**

**FIROZ AKBARALI GULAMHUSSEIN.....2<sup>ND</sup> DEFENDANT**

**ZAHID NANJI.....3<sup>RD</sup> DEFENDANT**

**PRINCIPAL REGISTRAR OF TITLES .....4<sup>TH</sup> DEFENDANT**

**RULING**

1. I have before me the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' notice of motion dated 23<sup>rd</sup> March 2012. The defendants pray that the order of 2<sup>nd</sup> February 2012, be vacated and the plaintiff's suit be struck out. The motion is expressed to be brought under order 40 rule 7 of the Civil Procedure Rules and sections 1A, 1B and 63 of the Civil Procedure Act. There are two affidavits in support sworn on 23<sup>rd</sup> March 2012 and 10<sup>th</sup> May 2012 respectively by Zahid Nanji.

2. This suit was commenced by an originating summons. The defendants aver that they were not served with pleadings prior to the order made on 2<sup>nd</sup> February 2012. That order was purported to be by consent of the defendants' lawyers Mr. Wandugi or Mr. Oonge. The defendants' case is that they have never instructed those lawyers and that accordingly, the consent order was obtained fraudulently. The order has compromised their rights to the property known as LR 209/2069/5 and was made out of jurisdiction. The order is also challenged for contravening section 52 of the Transfer of Property Act. Lastly, the defendants submitted that there were earlier proceedings in High court case 446 of 2008 *Garden Estate*

Company Limited Vs Gulbanu D/O Hussein Jan Mohamed and 2 others between the same parties over the same subject matter. The applicants thus pray that this suit be struck out.

3. The plaintiff and 4<sup>th</sup> defendant did not oppose the motion. As the impugned consent was executed by Mr. Edward Oonge Advocate, I ordered that he files an affidavit in reply. He swore an affidavit on 9<sup>th</sup> May 2012. He depones at paragraphs 2,3,4, 6 and 8 as follows;

2. **THAT** I have a long standing professional association with Mr. Wandugi of Wandugi & Co Advocates.

3. **THAT** I assist Mr. Wandugi in handling most of his civil litigation and conveyancing briefs as he is mainly a criminal litigation advocate.

4. **THAT** on the 30<sup>th</sup> January 2012 I was called by his office to see clients who introduced themselves to me as Mr. Amirali, Mr. Firoz, and Mr. Zahid who after pleasantries showed me an application (originating summons dated 17<sup>th</sup> January 2012).

6. **THAT** I was further instructed orally by the three gentlemen that they wished that I consent in court on their behalf to the application.

8. **THAT** as is usual with matters I handle on behalf of my senior colleague Mr. Wandugi on the 31<sup>st</sup> January 2012 I filed and served a Notice of appointment of Advocates on behalf of AMIRALI AKBARALI GULAMHUSSEIN NANJI, FIROZ AKBARALI GULAMHUSSEIN NANJI and ZAHID NANJI. Copy whereof is annexed herewith and marked **EQ1**.

4. On 19<sup>th</sup> April 2012, I ordered, as a preliminary matter, that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants appear before the court and be identified. This was material because Mr. Oonge purportedly acted for them and was still on the record through the firm of Wandugi & Company Advocates. The three defendants were simultaneously represented in the action by the firm of Hamilton Harrison & Mathews. The latter firm has taken out the present motion. Mr. Amirali Akbarali Gulamhussein Nanji was identified by ID Number 1242193. He is the 1<sup>st</sup> defendant. He was emphatic that he has never instructed the firm of Wandugi & Company Advocates or Mr. Oonge to act for him. His lawyers on record, he said, were Hamilton, Harrison & Mathews. Mr. Firoz Akbarali Gulamhussein Nanji and Mr. Zahid Nanji were identified by ID numbers 7358474 and 13490715 respectively and confirmed the sentiments of the 1<sup>st</sup> defendant. By a letter dated 30<sup>th</sup> April 2012, the Ministry of state for Immigration and Registration of persons confirmed the identity cards to be genuine as per annexures at pages 12 to 18 of the supplementary affidavit of the applicant.

5. I then asked Mr. Edward Oonge to confirm whether the three gentlemen were the ones who instructed him. His answer was negative. I adjourned the motion to allow him to present to court the three people he acted for and whom he refers to in paragraph 4 of his subsequent deposition. He could not procure the attendance of his "clients" on 8<sup>th</sup> and 10<sup>th</sup> May 2012 when the matter was fixed for hearing. Ultimately, he filed the affidavit I referred to earlier. I am thus left in no doubt that Mr. Oonge or the firm of Wandugi & Company Advocates were not acting for the real 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in this matter. The two learned lawyers were thus either duped or colluded with strangers to enter a fraudulent order of consent on 2<sup>nd</sup> February 2012. Whichever the case, it remains a serious indictment on the conduct of both counsel and their phantom clients. I think in a matter relating to property, counsel should, before recording a far reaching consent like the one in this case undertake sufficient enquiries of the *bona fides* of the parties before them. By failing to do so, they have compromised the rights of the 1<sup>st</sup> to 3<sup>rd</sup> defendants over the title LR No 209/2069/5. I am also alive to the fact that the conduct of the purported parties and their lawyers reveals elements of possible criminal conduct or professional misconduct. But I do not wish to say more at this stage.

6. An order of consent can only be set aside on grounds of fraud, collusion or such other ground for

setting aside a contract. Hirani Vs Kassam (1952) 19 E.A.C.A 131, Brooke Bond Liebig (T) Ltd Vs Mallya [1975] E.A. 265. The consent order of 2<sup>nd</sup> February 2012 was obtained fraudulently and by concealment of material facts. It was a fiction because the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not represented before the court. From the affidavit of Edward Oonge, it is crystal clear that the counsel had no direct or ostensible authority to act for the defendants or to bind them. Counsel was particularly embarrassed by his failure to bring to court the persons he was allegedly acting for. Guided by the evidence and the authorities, I have no hesitation in setting aside the order of consent of 2<sup>nd</sup> February 2012 and all consequential orders flowing therefrom. As Mr. Oonge or the firm of Wandugi & Company have confirmed that the present 1<sup>st</sup> to 3<sup>rd</sup> defendants, as identified in court, are not their instructing clients, and having failed to show the “Mr. Amirali, Mr, Firoz and Mr. Zahid” referred to in Mr. Oonge’s affidavit at paragraph 4, both counsel shall personally bear the costs of this motions in as far as setting aside of the consent is concerned.

7. I am also satisfied that prior to the filing of this suit, there remained pending other proceedings in High court civil case 446 of 2008 Garden Estate Company Limited Vs Gulbanu D/O Hussein Jan Mohamed and others. The present suit thus offends section 6 of the Civil Procedure Act. That section prohibits this court from proceeding with a suit in which the matter is directly or substantially in issue in a suit that was previously instituted. If the matter is *res judicata*, then section 7 provides, in mandatory language, that this court is barred from dealing with the suit. See Greenfiel Limited Vs Baber Mawji Civil Appeal No 160 of 1997, Court of Appeal, Nairobi, (unreported). The net effect of the order of consent of 2<sup>nd</sup> February 2012 was to remove the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants as proprietors of the suit land. As there were proceedings pending in the earlier suit, it also violated the doctrine of *lis pendens* found at section 52 of the Transfer of Property Act. See Mawji Vs US International University and another [1976 – 80] KLR 229. The fact of that other suit and that it relates to this suit directly and substantially has not been controverted.

8. Granted those circumstances and the law, I would order that this suit be and is hereby struck out with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

9. In the result, I order that the order of consent entered on 2<sup>nd</sup> February 2012 be and is hereby vacated with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. For the reasons given, those costs shall be paid directly and jointly and severally by Wandugi & Company advocates or Mr. Edward Oonge advocate. This entire suit is hereby struck out with costs to be paid by the plaintiff to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

It is so ordered.

**DATED and DELIVERED at NAIROBI** this 14<sup>th</sup> day of June 2012.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Mr. Mwangi for Bosire the Plaintiff.

Mr. Kimani Kiragu for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants.

No appearance purportedly for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

No appearance for 4<sup>th</sup> Defendant.