REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
Civil Case 33 of 2007

JOSEPH RAJULA LUNANI …………………………………….....PLAINTIFF

VERSUS

DONALD OYATSI ……………………………………………….DEFENDANT

R U L I N G

The plaintiff filed suit against the defendant seeking judgment to be entered in his favour in respect to the proprietorship of the parcel of land known as Marachi/Elukhari/2611(hereinafter referred to as the suit property). The plaintiff averred that the defendant had obtained title in respect of the suit property by fraud and without following the due process of the law. The plaintiff asked the court to have the title deed issued to the defendant cancelled, and in its place, be substituted by a title in the name of the plaintiff. From the court record, the plaintiff claimed that he served the defendant with summons to enter appearance together with a copy of the plaint. When the defendant did not enter appearance, the plaintiff obtained interlocutory judgment before having the case fixed for hearing on formal proof. The case was heard by Muchemi J. The learned judge rendered her judgment in favour of the plaintiff. The learned judge found that the claim by the plaintiff to the effect that the defendant had procured registration of himself as the owner of the suit property was by fraud was uncontroverted. The court held that the plaintiff would be registered as the owner of the suit parcel of land in his capacity as the legal representative of the estate of Lambert Obuyu Lunani (deceased).

Soon after this decision was rendered, the defendant became aware of the same. He immediately moved to court and made an application to have the ex parte proceedings and judgment set aside. The defendant claimed that he had not been served with summons to enter appearance. He challenged the affidavit of service which was filed in court by the process server. He further urged the court to grant him leave to file a defence to the plaintiff's claim, and further prayed that status quo that prevailed before the said ex *parte* judgment be restored pending the hearing and determination of the application. The plaintiff opposed the application.

At the time, the plaintiff was represented by the firm of Messrs. Ouma Okutta & Associates Advocate. On 22nd September, 2010 Mr. Okutta for the plaintiff and Mr. Manwari for the defendant appeared before Onyancha J. They recorded a consent on the following terms:

"By consent of both sides

a) Interim orders of injunction do and hereby issue restraining the plaintiff/respondent from executing the decree herein, pending the hearing and final determination of the application.

b) Pending the hearing and final determination of the application a temporary injunction be and is hereby granted restraining the plaintiff, by himself, his servants or agents howsoever from remaining on or continuing in occupation of or entering the said property L.R. No.Marachi/Elukhari/2611.

c) The Respondent be and is hereby given leave to file and serve a replying affidavit within 21 days

hereof.

d) The applicant be and is hereby granted leave to file and serve, if necessary, a supplementary affidavit within 15 days of service of the replying affidavit.

e) The process server, namely, David Manyonge do appear in court on the next date fixed for hearing to be cross examined on the contents of his affidavits of service on record.

f) Cost are in the cause."

Another consent was recorded on 8th February 2011. On that day, Mr. Ipapu and Mr. Okutta appeared for the plaintiff while Mr. Manwari held brief for Sharpley Barret advocates for the defendants. The following consent was recorded before Onyancha J:

"By consent of both parties:

1) The Chairman and Committee of Butula Disputes Land Tribunal with the assistance of District Surveyor, Busia County to visit land parcel Title No.Marachi/Elukhari/2611 and-

a) Establish boundaries

b) Establish whether there is any cultivation, occupation or other activity on the said land

c) Establish the identify occupying or cultivating the said parcel of land

d) To file their report within 60 days.

2. *Parties to dispute to share the cost of the exercise equally.*

3. Mention on 10.5.2011."

On 29th March 2011, the plaintiff appointed the firm of Abincha Mogambi & Co. advocates to act on his behalf in the place of the firm of Ouma Okutta & Associates Advocates. The said firm of advocates filed an application on behalf of the plaintiff on the same day seeking, among other orders, an order that the consent orders recorded on 22nd September 2010 and 8th of February 2011 be set aside and that the applicant be allowed to oppose the respondent's respective applications dated 26th August 2010 and 20th January 2011. The thrust of the plaintiff's application was that his former advocates did not have his authority to enter into the said consent orders. The plaintiff stated that the consents were recorded without his instructions, knowledge and information. He was of the view that the consents were recorded in bad faith. The application was supported by the annexed affidavit of the plaintiff. The application is opposed. The defendant filed a statement of grounds of opposition and also a replying affidavit in opposition to the application.

At the hearing of the application, this court heard oral rival submission made by Mr. Morara for the plaintiff and Mr. Manwari for the defendant. This court has carefully considered the said submission, including the authorities cited by both counsel. The issue for determination by this court is whether the plaintiff established a case for this court to set aside the consent orders that are the subject of the application. The principles to be considered by this court in deciding whether or not to set aside a consent order were set out by the Court of Appeal in the case of **Brooke BondLiebig (T) Ltd vs Mallya [1975] E.A. 266** at pg.269. The court held as follows:

"The circumstances in which a consent judgment may be interfered with were considered by this court in ***Hirani v. Kassam (1952), 19 E.A.C.A.131,*** *where the following passage from* ***Seton on Judgments andOrders, 7th Edn., Vol 1, p.124*** *was approved:*

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

In the present application, it is the plaintiff's case that his former advocates, Messrs Ouma Okutta & Associates advocates had no authority to enter into the said consent orders. This is because the plaintiff claims that he did not give specific instructions to the said advocate to enter into the said consent. The plaintiff went ahead and disowned some of the pleadings that were filed by the said firm of advocates, including an affidavit that was filed in reply to one of the applications that was filed by the defendant. On his part, the defendant is emphatic that the plaintiff has failed to lay any sufficient basis for this court to set aside the said consent orders. It was the defendant's case that the former advocates of the plaintiff had both the ostensible and direct authority to enter into any consents in proceedings where the advocate had been duly instructed to appear on behalf of the plaintiff.

This court has evaluated the rival arguments made by the counsel of the parties to this application. It was evident that at the time the two consents were recorded by the court, the firm of Ouma Okutta & Associates Advocates were properly on record on behalf of the plaintiff. The said firm therefore had instructions to take any action in the suit, including compromising the same on behalf of the plaintiff. It was submitted on behalf of the plaintiff that the said firm actually ceased to act for the plaintiff long before the 29th March 2011 when the firm of Abincha Mogambi & Co. Advocates came on record for the plaintiff. To support this claim, the plaintiff annexed a letter which was purportedly written by the said firm stating that it no longer had instructions to act for the plaintiff. That may be so.

The procedure by which an advocate ceases to act for a party to a civil suit is provided for under **Order 9** of the **Civil Procedure Rules**. An advocate cannot cease to act for a party in a civil suit by his say so. He must put in motion formal steps to put into effect his desire to cease acting for such party. That step requires the filing of a formal application. In the present application, it was clear that at the time of Ouma Okutta & Associates Advocates entered into the said consent orders on behalf of the plaintiff, they were still properly on record as acting on his behalf of the plaintiff. In any event, in civil cases, where an advocate appears for a party, the law is clear. Such an advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side (see **Kenya Commercial Bank Ltd. Vs. Specialized Engineering Co. Ltd [1982] K.L.R.485** at pg.493 per Harris J.)

The plaintiff would have succeeded to have the said consent orders set aside if he established that there was fraud or collusion or mistakes or that the consent was entered in ignorance of material facts. Having perused the grounds that the plaintiff put forward in support of the application, this court did not see any fraud, collusion, mistake or ignorance of material facts on the part of the former advocates for the plaintiff to entitle this court to set aside the said consent orders. What however emerged from the submission is that the plaintiff was unhappy that his former advocates had compromised the suit in circumstances where he was enjoying a judgment of the court which had been entered in his favour. It was not lost to the court that the said judgment was entered in favour of the plaintiff pursuant to ex parte proceedings. The dispute involves land. The defendant challenged service. He filed an application in court seeking to have the ex parte proceedings and judgment set aside. That was before the two consent orders were recorded. It was clear to this court that unless the dispute involving the ownership of the land that is the subject of this suit is resolved one way or the other on its substantive merits, the parties herein would continue wasting their time filing application upon application which in the final analysis does not aid in the resolution of the dispute. Enough said.

For the above reasons, it is clear that the application filed by the plaintiff seeking to set aside the two consent orders cannot succeed. The former advocates of the plaintiff had authority to enter into the said consent orders on behalf of the plaintiff. The parties to this suit are advised to agree on a way forward that would enable the dispute between them to be resolved once and for all on its merits. The application lacks

merit and is hereby dismissed with costs to the defendant.

DATED AT BUSIA THIS 25TH DAY OF JULY 2012.

L. KIMARU
J U D G E