



CIVIL PRACTICE AND PROCEDURE

· *After judgment, any change of advocates can only be done with the leave of the court.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 145 OF 1999 (OS)

MWICHWIRI FARMERS CO. LTD PLAINTIFF

VERSUS

MIARAGE COMPANY LTD DEFENDANT

RULING

For all intents and purposes, this case was concluded when judgment was delivered on 22nd May 2003. It is important to go through the history of this case in order to consider the Notice of Motion dated 1st July 2010. The plaintiff by an originating summons dated 27th October 1999 filed this action seeking orders that it had a right to be registered as owner of L.R. No. 9835/1 by adverse possession. An affidavit in support of that originating summons was sworn by Marete Ndatho as the chairman of the plaintiff company. The plaintiff alleged to have paid Kshs. 460,000/= and Kshs. 230,000/= as purchase price to the defendant company in 1979. It was pleaded in that originating summons that from 1976 the plaintiff company was in possession of part of that parcel of land and had settled its members thereon. That the defendant then subdivided the land into two portions being L.R. No. 9835/1 and 2. The plaintiff alleged that it had been in occupation of parcel number 9835/1 as stated from 1976. A replying affidavit was sworn by Angela Nyawira as the chairlady of the defendant company. In that replying affidavit, the said chairlady acknowledged that the plaintiff company had paid for a portion of that land that they were occupying but that the plaintiff had failed to make payments for rates and other outgoings to enable the defendant transfer the land to them. The plaintiff from the commencement of this suit was represented by the law firm of Muriithi and Co. Advocates. The defendants were represented by the law firm of Wang'ondy & Co. Advocates. On 15th January 2001, this suit seems to have been consolidated with HCC Nairobi No. 478 of 2000. The parties in that Nairobi suit were **Kamua Kamunyuro Nyaga 1st plaintiff, Gitaraga Farm Ltd 2nd plaintiff vs. Miarage Farmers Ltd.** On 8th May 2002, a notice of change of advocates was filed showing that the defendants were then represented by the firm of Mwangi Kariuki & Co. Advocates. That firm of advocates took over the conduct of this case on behalf of the defendant from Mwangondu & Co. Advocates. Judgment was delivered by Kasanga Mulwa J. as he then was on 22nd May 2003. That judgment was to the effect that the plaintiff Mwichwiri Farmers Co. Ltd be registered as proprietors of parcel number 9835/1. By notice filed on 25th July 2003, the firm of Kiogora Arithi Advocates filed a notice to represent Angela Nyawira who had been ordered to show cause why the property had not been transferred to the plaintiff company as per the judgment of the court. The matter went into a lull for a while. It isn't until the year 2010 that the representation of parties in this matter went

haywire. The law firm of L. Kimathi Kiara & Co. Advocates filed a notice to act for the defendant on 23rd March 2010. This was after the judgment and no leave was granted by the court as required by the then rules order III rule 9 of the Civil Procedure Rules now amended. Again, without leave of the court and after judgment had been entered, the law firm of Meenye & Kirima Advocates filed a notice of appointment to act for the plaintiff. That notice was dated 14th June 2010. There is also on record an affidavit filed by Mutea M'Butu dated 26th March 2011. He described himself in that affidavit as the chairman of the plaintiff's company and alleged that the previous persons who had represented themselves in this matter as being directors of the plaintiff company were not directors of that company. He deponed that the plaintiff company had not authorized the suing of the defendant company. He stated in his affidavit:-

“That our wish is that status quo be maintained as it used to be prior to the judgment herein.”

There was yet another notice filed by the law firm Bwonwonga & Co. Advocates. That notice was filed on 15th October 2010. By that notice, that firm stated that it was acting for the plaintiff company. A consent was filed in this matter signed by the firms of advocates L. Kimathi Kiara & Co. Advocates for Miarage Co. Ltd the defendant and Bwonwonga & Co. Advocates for Mwichwiri Farmers Co. Ltd the plaintiff. It is worthy reproducing that letter in this ruling.

***“The Deputy Registrar
Meru Law Courts
P.O. Box 118
MERU***

Dear Sir,

***RE: HIGH COURT CIVIL NO. 145 OF 1999 (OS)
MWICHWIRI FARMERS CO. LIMITED VS. MIARAGE COMPANY LIMITED***

Kindly record the following orders by consent:-

BY CONSENT

- 1. Title Number L.R. 72276 being Land Reference Number 9835/1 as delineated on Land Survey Plan Number 108611 be registered in the names of Miarage Company Limited and all other parcels of land which have been excised from the said Title to revert back to Miarage Company Limited.***
- 2. That each party to bear their own costs.***

***L. KIMATHI KIARA & CO.
ADVOCATES FOR MIARAGE CO. LTD THE DEFENDANT HEREIN.***

***BWONWONGA & CO. ADVOCATES
FOR MWICHWIRI FARMERS CO. LIMITED THE PLAINTIFF HEREIN.”***

That consent was adopted as an order of this court on 28th February 2011. Strangely, the advocates who filed notices to appear for the plaintiff and the defendants without the leave of this court filed another consent on 21st June 2010 which was made an order of this court on 25th June 2010 by the Deputy Registrar of this court. That consent was in the following terms:-

“1. By consent, the ex parte judgment entered on 23rd may 2003 and the subsequent decree made on 27th may 2003 be and is hereby set aside.

2. Suit be heard on merit.”

The latter activities in this court file by advocates not properly on record provoked the Notice of Motion dated 1st July 2010. When that application came for hearing, although those advocates who had filed consent without leave of the court or had filed notices to appear for the parties were served, none of them appeared to oppose the application. The Notice of Motion seeks for an order:-

“The consent order dated 25th June 2010 and all subsequent orders (if any) be revised and be set aside.”

As stated before, the advocates who filed notices to appear for the parties in this action after judgment had been entered were required under the rules to obtain the leave of the court. This is as provided under order III rule 9. That rule provides as follows:-

“9 A. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record.”

The activities in this file, particularly those activities from the year 2010, makes me feel that there is a likelihood of possible fraud being perpetuated. As stated, counsels did not obtain leave as required by the law and other persons other than those that had represented the plaintiff and the defendant from the initial stages stated that they now represented those parties and sought the setting aside of the *ex parte* judgment. Undoubtedly, since the original title was subdivided and allotted to the plaintiff’s members, the consent order irregularly filed in this matter affected rights of such person who had no notice of those consents. I have no doubt in my mind that the orders that are sought in the Notice of Motion dated 1st of July 2010 are merited. I grant the following orders:-

- 1. The consent of this court of 25th June 2010 setting aside the judgment of this court is hereby set aside.**
- 2. The consent order adopted by this court on 28th February 2011 is hereby set aside.**
- 3. This court does hereby restore the judgment of this court of 22nd May 2003 and the decree made on 27th May 2003.**
- 4. All orders made or actions taken relating to the consent recorded in this file on 25th June 2010 and 28th February 2011 are hereby cancelled.**
- 5. The court awards the plaintiff the costs of the Notice of Motion dated 1st July 2010 to be paid by the law firms of L. Kimathi Kiara & Co. Advocates, Bwonwonga & Co. Advocates and Meenye & Kirima Advocates jointly and severally.**
- 6. In view of the illegalities that have taken place in this matter, I order that this file be retained in the strong room.**

Dated, signed and delivered at Meru this 30th June 2011.

**MARY KASANGO
JUDGE**