



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 197 OF 1992

GEORG A. ODHIAMBOPLAINTIFF

VERSUS

JOTHAM O. INDIRI1ST DEFENDANT (DECEASED)

CHARLES O. INDIRI2ND DEFENDANT

RULING

The defendants' application is dated 23rd June 2006 seeking the following orders:-

(i) That this suit be and is hereby marked as wholly compromised and the order given on 18th October 2006 be substituted directing the District Land Registrar Siaya to proceed with the subdivision and the plaintiff to hand over the original title deed failure to which the two title deeds to be deemed as cancelled and the now two title deeds be issued.

(ii) Costs of the application

Both the plaintiff and the Defendants put in their respective affidavits and submissions. The plaintiff however is acting in person. The genesis of this application is a letter dated 8th April 2008. It's worthy to note also that this suit had been concluded vide the judgment of Justice Mwera on 18th day of October 2006 wherein he ordered that the 2nd defendant do vacate the suit property number 736 within the next ninety (90) days or he be evicted inter alia.

No appeal or judgment was ever preferred in respect to the said judgment as the application by the defendant seemed to have not proceeded anywhere. However by a letter purportedly written by the plaintiff dated 8th April 2008, the plaintiff according to the defendants compromised the aforementioned judgment of the court and consequently the same cannot be effected. In other words the evictions orders granted by Justice Mwera have been compromised. That is the gist of the defendants' application.

The applicant has further attached the copy of the mutation form for Land Parcel number **EAST GEM/NYAMNINIA / 736** dated 10th May 2008. According to the defendants affidavit dated 23rd June 2009 by signing the said mutation form the plaintiff had compromised the said Orders / Judgment and therefore he should be compelled to surrender the original title deed for cancellation. What is evident from the said mutation is that although there is a signature by way of a thumb print allegedly by the plaintiff the same has never been registered. Ordinarily though, for the said mutation to be effective the same ought to be registered at the respective land Registry.

The plaintiff has however opposed the application by way of grounds of opposition filed on 30th

September 2009 and the replying affidavit dated 19th November 2010. I have gone through both documents and the subtotal of it is that the plaintiff opposes any compromise of the suit by whatever nature. In fact from the grounds of opposition he opposes the fact that he thumb printed the mutation form.

The question for this court to ask itself is whether indeed the letter dated 8th April 2008 emanated from the plaintiff and whether the contents thereof compromised the judgment of my brother Justice Mwera.

The said letter is first of all addressed to the **District Officer Yala Division**. It of course refers to the present case. It refers further to one **Mr. Owala**. It says in part:-

”.....Mr. Owala is having large family and so I restrain from evicting him, have the home of our late father be plotted out by the surveyors at his cost for him on parcel number EAST / GEM /NYAMNINIA / 736.

(i) He should stop destruction of trees.

(ii) His son should stop grazing, cultivating and molested me on the said plot”

The above details don't mention the 2nd defendant in any way. Mr. Owala whoever it is doesn't feature as a party in this case. Equally, nowhere does it mention that he shall not evict the said Owala. The word used here is **“restrain”** meaning in a plain understanding that he may have the liberty of evicting him. The said letter doesn't therefore refer to the 2nd defendant.

In regard to the 1st defendant widow the plaintiff seemed to have been magnanimous enough to permit her perform burial rites of her husband and thereafter move to her parcel number 734. The said parcel number 734 is materially different from the suit land namely 736 belonging to the plaintiff.

The other point to ponder is if indeed there was such a compromise why did the plaintiff renege on the undertaking? Why didn't the parties proceed to the end? The answer is well known to them. However, as far as this court is concerned the said letter was never reduced into a formal written consent by the parties so as to give it the needed legal efficacy. As far as I am concerned the judgment of my brother Justice Mwera still stands. If the parties had reached a compromise, then there would be no need on the part of the plaintiff to oppose the application.

I have further read the able submission of the said defendants local but for the reasons stated above I don't think the judgment has been compromised.

Black Law Dictionary 8th Edition has defined compromise as **“An agreement between two or more person to settle matters in dispute between them, an agreement for the settlement of a real or supposed claim which each party surrender something in concession to the other”**.

There must be an agreement between the parties. In the instant case, there is no agreement. The court cannot force parties herein to agree. In short there is no contract among the two parties.

My attention is further drawn to the defendants' copies of written witnesses statements and exhibits. With due respect, the same are irrelevant at this level. The provisions of Order 3 (Rule 2 (c)) of the Civil Procedure Rules 2010 are explicit and clear. The filing of such documents / pleadings should be done at the time of filing suit and not at the current situation. The suit has been finalized and in the premises the same are irrelevant.

The upshot is that the 2nd defendant's application must fail. The judgment of this court has to be enforced. I therefore dismiss the said application with costs to the plaintiff / respondent.

Ordered accordingly

Dated, signed and delivered this 26th day of October 2011.

H. K. CHEMITEI

JUDGE

HKC/aao