REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 839 OF 2006

ANN CHEPKORIR ATUYA ……………………………..……………….PLAINTIFF/RESPONDENT

HARUN KOMEN TUITOEK ……………………………...…………..DEFENDANT/APPLICANT

RULING

The Notice of Motion dated 28th July, 2011 filed by the Defendant/Applicant herein seeks to set aside the orders made by this court vide its Ruling dated 18th September, 2007. It is supported by the detailed grounds set forth on the application and the supporting affidavit sworn by the Applicant on 28th July, 2011.

The same is opposed and the Plaintiff/Respondent has filed her Grounds of Opposition dated 21st September, 2011.

I may state in brief the relevant facts which led to this application. The plaint was filed on 7th March, 2006 and the Defendant filed his Statement of Defence on 7th April, 2006. The plaint specifically averred among others that the sale agreement entered between the parties could not be enforced as the land sold was designated as the road reserve that the Government paid back to the Plaintiff the sum paid for stamp duties. That the Defendant has admitted owing the claimed sum of Kshs.5,764,270/-. The Statement of Defence merely denied the averments and averred that the land in question did not belong to him and thus he denied that he entered into the sale agreement as well as acknowledged the receipt and debt of the claimed sum, that the Plaintiff entered into the agreement with third parties and that his arrest and incarceration were maliciously instigated by the Plaintiff.

After the close of pleadings the Plaintiff filed an application dated 23rd April, 2007 to seek prayers to enter judgment on admission and/or to strike out the defence. The application was not responded by the Defendant.

The said application came for hearing before the court on 18th September, 2007 and the Defendant was represented by one Ms. Namisi. I may note here that in ground 4 of the application the Applicant/Defendant has stated that he was informed by his Advocates on record that the aforesaid counsel shall act for him when he kept on checking with them as regards progress of the matter. The two counsel recorded a consent to the effect that the Defendant agrees that there was a valid sale agreement executed between the parties and that the only issue to be determined is the amount of the sale agreement. The court was requested to grant further mention to see if the parties agreed on the sum which did not materialize and the application was argued with Ms. Namisi in attendance who relied on the defence filed.

The said application was then determined by my Ruling dated 12th October, 2007 which allowed the application.

The counsel filed written submissions on the present application.

The main issue to be determined by the court is whether consent entered on 18th September was valid. The Respondent relies on the well established principle of law enunciated by the Court of Appeal in the case of ***FLORA N. WASIKE V DESTIMO WAMBOKA (1982-88) 1KAR 625***. It is by now trite that the consent order or judgment has a contractual effect and can only be set aside on such ground as a contract can be, namely; fraud, mistake or misrepresentation and that in any case before the court, a duly appointed and instructed lawyer has an authority to compromise a suit on behalf of the client as far as the other side is concerned. The Respondent relied on the following cases:

1. ***Peter G. Nganga –vs- Standard Charted Bank of Kenya Limited and another (2006) EKLR***

2. ***HCCC No. 87/2005 (Nairobi Milimani Commercial)***

Charles Mathenge Wahome –vs- Mark Mboya Likanga and 2 Others.

3. ***HCCC No. 753/2008 (Nairobi Milimani Commercial)***

Al Jalal Enterprises Ltd. –vs- NIC Bank Limited and another.

It is thus submitted that the Applicant's counsel had the ostensible authorities to compromise the suit, that no material on fraud, mistake or misrepresentation is brought before the court, that the application is not only an abuse of the court process but is also incompetent as the present lawyers have come on record not having complied with mandatory provisions of the laws.

I shall like to deal with the last issue raised by the Respondent. It is not in dispute that the leave of the court to the present counsel has been granted on 28th June, 2011, consent having been recorded on 25th May, 2011. The application seeking such leave was dated 3rd June, 2011.

Thereafter the present application was filed on 28th July, 2011. I do note that the interparte hearing date was taken ex-parte by the Applicant's Advocates. There is nothing to show that this application was served on the previous Advocates for the Applicant/Defendant for hearing thereof either for 21st September, 2011 taken by the Applicant or for 13th October, 2011 which was given by the court in presence of the counsel for both the parties. If so, the submissions by the Respondent, to the effect that "***Being in that state, the counsel who compromised the suit and having been served with the present application ought to come out and offer satisfactory explanation as to the circumstances under which the consent orders of the 18th September, 2007 which effectively compromised the suit was recorded. In our submissions, there is no explanation satisfactory or otherwise leaving no other inference other than to conclude that there was fraud or collusion warranting that the consent orders and the ensuring judgment be set aside***", is not only unfortunate but mischievous. When the consent was given on 25th May, 2011 by the previous Advocates before the change of Advocates, did they envisage any averments by the Applicant to be merged emerged which are now made in this application so as to respond to the same? I cannot presume any of those assumptions and without their involvement in these proceedings, asking the court to conclude fraud or collusion against them is not justified and I do find so.

The Respondent has urged this court to conclude that the consent was not proper because the defence denies the averments made in Plaint in respect of the agreements and subsequent acknowledgment from the Respondent. I do note that the Defendant/Respondent has averred that till he was informed that Ms. Namisi would act for him he had kept on checking on them, but thereafter he has just averred that there was no communication from the previous Advocates and he was made aware in the week of 9th to 13th, May, 2011 when the auctioneers called on him! It is to be noted that even after the consent having obtained to change the Advocates and order having obtained as mentioned hereinbefore he files this application on 28th July, 2011, after a lapse of two months. No explanation of the delay from May, 2011 is even attempted.

Be that as it may, coming to the application of 23rd April, 2007 filed by the Respondent/Plaintiff which seeks the prayers to enter judgment or in alternative strike out the defence, it had annexed all the agreements which are shown to have been executed between the parties. There is no mention of any third parties in those documents as has been averred by the Applicant in his defence. I have noted that those agreements are stamped and accepted by the Land Registry. The acknowledgment dated 28th October, 2003 is also between the two parties and is duly witnessed by an Advocate.

The defence filed by the Applicant, as can be perused, avers only the general denials. The third parties mentioned therein, till todate, are not disclosed. In the circumstances of this case, even if the consent had any problem, which I do not agree and find it to be as per law and valid, the defence did not disclose any reasonable defence which can stand against the documentary evidence produced by the Respondent/Plaintiff.

I do tend to agree that the ostensible authority of an Advocate to compromise the suit can be challenged and revoked when the circumstances of the case and justice demands that the same be questioned. In this case I do not see any exception to the trite law as expounded by our jurisprudence. I thus find that even though I may agree with the observations made in the judgment entered in the two cases cited by the Applicant/Defendant (***HC MISC. APPLICATION NO. 240 OF 2002 AND ISMAIL SUNDERJI HIRANI V NOORALI ESMAIL KASSAM CIVIL APPEAL NO. 11 OF 1952***), the present case does not pose any factor for me to interfere with the consent entered and my Ruling under question.

The upshot of all the above is that the application dated 28th July 2011 is not allowed. The Applicant shall pay the costs of the application.

Dated, signed and **delivered** at Nairobi this 3rd day of **November, 2011**

K. H. RAWAL

JUDGE
3.11.2011