



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO. 30 OF 2007

OLOOLOLO GAME RANCH LIMITED APPELLANT
-VERSUS-
COUNTY COUNCIL OF TRANSMARA RESPONDENT
RULING

This ruling is in respect of the chamber summons application dated 14th April, 2010 and filed in court on the same date. In the said application the County Council of Transmara, hereinafter “*the applicant*” prayed in the main that the consent order entered into on 28th August 2007, and the resultant decree be set aside. The application was anchored on the grounds that there was a consent judgment on record, pursuant to which the Oloololo Game Ranch Limited, hereinafter “*the respondent*” had extracted a decree that is pending execution against it. The said consent was entered into by the applicant’s then advocates on record who had no express and or implied authority to do so. Thus the said consent was a total misrepresentation of material facts that the applicant wished to challenge. That the applicant was ready to expeditiously defend the suit and it would be just, fair and in the interest of justice in the circumstances for this court to grant the prayer sought as neither party will suffer prejudice. If the prayer sought was granted it will accord all parties concerned an opportunity to make out their respective cases for proper adjudication of the dispute. The final ground advanced in support of the application was that no party to a suit should be condemned unheard and that a mistake of counsel should not be visited upon a litigant.

The application was also supported by an affidavit sworn by one, **Shedd D. Simotwo**, the county clerk to the applicant. In the main he deponed that the applicant had previously engaged the services of **Messrs Kalwa & Kemboy Advocates** to act for them in this matter. By way of a chamber summons application dated 12th March, 2007, the respondent had sought as against the applicant injunctive orders. The applicant retained and relied on the advice of the said advocates in so far as the determination of the application was concerned. The said advocates however advised them to settle the matter outside court. Relying on the advice aforesaid, they duly instructed them to proceed and negotiate with the respondent for an out of court settlement. By a letter dated 3rd July, 2007 the applicant instructed their said advocates to record a consent as per what they had discussed and agreed. However there said Advocates recorded a consent drafted by the respondent which consent was in total disregard of the intentions of the applicants nor its instructions and in fact exceeded their authority. There was no council resolution to that effect and even if there was the council was not properly briefed of the import and consequence of the consent because if this had been done, the clerk to the applicant would have tabled the matter before the full council for approval. There was therefore a total misrepresentation and ignorance of material facts hence the rights and intentions of the applicant were not well reflected. The effect of the consent to the applicant has been the loss of enormous income due from the respondent as it has failed to pay any dues and fees to the applicant. The applicant too had lost control of collection of revenue from visitors and residents at the respondent’s facilities whereas the respondent has continued to amass and enrich itself at the expense of the people of Transmara. Finally, he deponed that it is a cardinal principle of law that counsel acts on the instructions of a client while entering into a consent, and if he fails to display the intentions of the client, the consent becomes a nullity and should be set aside.

The application was met with stiff resistance from the respondents. Through a replying affidavit filed in court on 7th June, 2010, one, **Samwel Kuntai Tunai**, a director of the respondent deponed where relevant that the previous advocates on record for the applicants had express instructions to record the consent

going by the correspondence exchanged between them. In deed the applicant's letter dated 3rd July, 2007 gave express and written instruction to the said advocates to **"... Proceed and record a consent a long the lines set out in the agreement in question"** Thus the issue of the said advocates committing a mistake in the execution of their duties does not arise. The belated allegations by the applicant regarding the competency of their then advocates or their appreciation of the consequences of the consent are irrelevant, immaterial, inconsequential and absolutely without any evidential basis. A party cannot evade a court judgment by changing advocates who then bring on board fresh, novel and new ideas or interpretations to effect the consent judgment. The applicant's previous advocates having received instructions from the chief executive officer of the applicant, they were not obligated to go behind their instructions to determine whether or not other organs of the applicant had considered the issue.

When the application came up for interpartes hearing, **Mr. Letangule** learned counsel for the applicant and **Mr. Oguttu** learned counsel holding brief for **Mr. Kilukumi** for the respondent agreed to canvass the same by way of written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

It is common ground that the parties in this suit were at all times represented by respective counsel. It is also common ground that parties executed a consent letter dated 29th August, 2007 addressed to the Deputy Registrar compromising the suit. The Deputy Registrar duly entered judgment in terms of the consent letter. Pursuant to the said consent letter a decree was issued.

However it is the case of the applicant that its previous advocates in entering the consent acted without instructions and or exceeded such instructions. On the other hand it is the case for the respondent that the said advocates had express authority to enter into such consent. In any event even if they had no such express instructions, they were still in law entitled to compromise the suit on the basis that an advocate has ostensible authority to compromise a suit or consent to judgment, on behalf of a client. For this proposition, the respondent relied on the Court of Appeal decision in the case of **Flora N. Wasike V Destimo Wamboko (1982-88) 1 KAR 625.**

The law on how and when a consent judgment can be set aside is I believe now well settled. As a general rule, a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. Such grounds consist of fraud, collusion, Agreement being contrary to Public policy, lack of sufficient material facts, misapprehension or ignorance of material facts, mistake, misrepresentation and finally any sufficient reason that can as a matter of law make the court set aside a contract. In the case of **Hirani V. Kassam (1952) 19 EACA 131,** it was succinctly stated quoting from Saton on judgments and orders 7th Edition: Volume 1 page 124 **"..Prima facie, any order made in the presence and with the consent of counsel is binding on all the partner 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 of consent was given without sufficient material facts or is misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement ..."**

See also **Flora N. Wasike** supra.

Despite the applicant's protestations I have not seen any evidence documentary or otherwise as would lead me to set aside the consent judgment on grounds of fraud, collusion, or that the same was against public policy, or misapprehension or ignorance of material facts, mistake, misrepresentation or any other sufficient cause. The applicants expressly and willingly gave instructions to their advocates then on record **"... to proceed and record a consent along the lines set out in the agreement in question"** That letter was authored by the chief executive of the applicant. There is no evidence that the said letter was written without authority or was obtained fraudulently by the then advocates in collusion with the said county clerk. Much as the applicants claim that their then advocates had no instructions to enter the consent, they have not disowned the said letter. There can be no other interpretation to the said letter. It is quite evident that before the said letter was authored there had been discussions between the said advocates and the county clerk much as the applicant may claim that their said advocates acted outside their instructions. I would have expected them to specifically state the terms of the consent that their said advocates were instructed to take to the respondent. No such terms of consent have been disclosed by the applicants meaning that perhaps the accusations that they have since leveled against their former advocates may be without basis. Since the letter talks of authority being given to the said advocates to proceed and record a consent along the lines set out in the agreement in question, one would have expected the applicant to bring forth those terms. They must have been in writing. One would still

expect that the applicant would be in a position to state the consent it had instructed their Advocates to enter into. That the applicant is silent on this aspect of the maker begs the question whether the applicant is candid and whether this application is indeed made in good faith. There is no evidence that the decree that ensued thereafter was different from the instructions that the applicant gave to their then advocates.

The applicants have raised the issue that the said consent was entered into without any approval from the council, which is the sole decision maker, that the advocates never sought any council approval neither did they brief the council on the effect and nature of the consent. That may well be true. However where is the evidence that the approval of the council was mandatory before the consent could be recorded. In any event the letter instructing the said advocates was authored by the clerk to the council. This is the chief officer and indeed the accounting officer of the council. I do not think that it was the duty of the said advocates to go behind the contents of the letters and determine whether or not other organs of the applicant had considered and given their seal of approval to the consent. In any case and as correctly submitted by counsel for the respondent, the applicant's advocates were in any event entitled in law to compromise the suit since an advocate always has ostensible authority to compromise a suit or consent on behalf of his client. The applicant can thus not be heard to claim that the advocates acted in total disregard, misapprehension and or ignorance of the material facts in relation to the intent of the applicant. It was the duty of the county clerk to secure the necessary approvals and if he slept on the job and failed to do so, he cannot blame their advocates then on record who acted in accordance with his instructions.

The decree complained of was issued on 4th October, 2007. However the instant application was filed on 14th April, 2010 about 2 ½ years down the line. There is no explanation for this inordinate delay in bringing the application. The delay aforesaid alone should disentitle the applicant to the prayer sought. There must be an end to litigation. Public policy and interest demand so. As correctly observed by the respondent if parties and their legal advisers are encouraged to reopen concluded litigation through legal ingenuity, litigation will never end. This is precisely what happened in the circumstances of this case.

The upshot of all the foregoing is that I find no merit in the application and accordingly the same is dismissed with costs to the respondent.

Ruling dated, signed and delivered at Kisii this 16th July 2010.

**ASIKE-MAKHANDIA
JUDGE**