REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 4 of 2007

SAMSON OLE TINA.....PLAINTIFF/RESPONDENT

VERSUS

THE CLERK, TRANS-MARA COUNTY COUNCIL.....1ST DEFENDANT/APPLICANT
TRANS-MARA COUNTY COUNCIL.....2ND DEFENDANT/APPLICANT

RULING

The defendants' application dated 20th April, 2010 seeks the following orders:

(a) Review and/or setting aside of this court's judgment dated 20th November, 2009.

(b) A review and/or setting aside of the consent order recorded in court on 16th October, 2007 and extracted on 27th November, 2007.

(c) Enlargement of time within which the defendants should do discovery and file a list of documents.

(d) Costs of the application.

The application is supported by affidavits sworn by **James Sairowua, John Kisirkoi**and **Sheik Rajab K. Omar**. The application was filed through the firm of Onchari Otiso & Company advocates who came on record in place of Kemboy & Company, the defendants' former advocates.

James Sairowua, the Deputy Clerk of the 2nd defendant, stated that he had been given authority by the defendant to swear an affidavit in support of the application. He stated that the defendants were not aware of the judgment that was delivered by this court on 20th November, 2009 until 3rd March, 2010 when the 2nd defendant was served with the decree issued on 25th February, 2010. The plaintiff's suit that gave rise to that judgment was uncontested because the defendants' defence had been struck out due to the defendants' failure to do discoveries in time in terms of a consent that had been recorded on 16th October, 2007. The suit proceeded to formal proof on 29th September, 2009. The plaintiff had sought a declaration that he is the registered proprietor of **L.R. No. Transmara/Olalui/15**. He had further sought a permanent injunction to restrain the defendants from trespassing, fencing, dumping garbage or in any other manner

interfering with the said parcel of land. The court granted the orders as prayed.

The main grounds upon which the application was made and which are canvassed in the affidavits filed in support of the application are that:

- The ex-parte judgment has adversely affected the 2nd defendant in that it has been restrained from dumping waste at its designated site and Muslims within the council's jurisdiction have been unable to bury their dead in the designated cemetery on L.R. No. Transmara/Olalui/15 (**the suit land**).
- There are several errors apparent on the face of the record.
- The consent order of 16th October, 2007, the formal proof, the judgment and/or the consequential orders emanating therefrom were irregularly obtained.
- The defendants did not give any instructions to Katwa & Kemboy advocates to enter the drastic consent of 16th October, 2007 consequent upon which the defendants' statement of defence was struck out.
- The said firm of advocates acted recklessly, negligently and in excess of instructions in purporting to enter into that consent.
- The firm of Kemboy & Company Advocates was never instructed by the defendants to act for them and/or file a notice of change of advocates to replace Katwa & Kemboy who were the duly chosen advocates vide the council's tender.
- The suit land has never been surveyed and hence the plaintiff does not know the boundaries of his land.
- The suit land is still within Olalui Group Ranch which has never been surveyed. The 2nd defendant knows the boundaries and extent of his land which is not under the Olalui Group Ranch.

The plaintiff filed a replying affidavit and stated that he is the registered proprietor of the suit land. He annexed to his affidavit a certificate of official search. It shows that he was registered as the proprietor of the suit land on 29th July, 2005 when he was issued with a title deed. The suit land boarders a parcel of land owned and registered in the name of the 2nd defendant which land has been reserved and designated as a cemetery. He alleged that the 2nd defendant decided to extend the cemetery land by 2 hectares into the suit land. Upon delivery of the judgment he took possession of the disputed portion of land and fenced the same. However, the council still retains the entire portion of the cemetery which is still in use. The council has been dumping garbage on the suit land which is an act of trespass, the plaintiff added.

With regard to the issue of consent and the ex-parte judgment, Mr. Joseph Mboya Oguttu, the plaintiff's advocate, swore an affidavit and stated, ***inter alia***:

- M/s Katwa & Kemoby advocates entered appearance and filed defence on 15th February 2007 and 1st March 2007 respectively.
- The plaintiff filed his set of documents on 30th March, 2007 which were then responded to vide the defendants' notice of non admission dated 4th April 2007.
- The defendants failed to file the corresponding list of documents and the plaintiff was constrained to file an application to compel the defendants to file their list of documents and/or make discoveries.
- The said application was fixed for hearing on 16th October 2007. The defendants' counsel conceded to the same culminating in recording a consent.

- At the time of entry of the consent the defendants' previous advocates had been duly retained by the defendants and consequently the defendants are bound by the actions of their counsel.

- The said consent is not amenable to variation and/or review.

- The application for review has been made with unreasonable delay.

- The formal proof was done following striking out of the defendants' statement of defence in terms of the consent.

- There is no error and/or mistake on the face of the record to warrant a review.

- The defendants' application is bad in law.

The respective advocates for the parties filed their written submissions on the said application and also addressed the court briefly in support of their submissions. I have considered those submissions.

The record shows that the firm of Katwa & Kemboy advocates entered appearance for the defendants on 15th February, 2007. Thereafter a statement of defence was filed.

On 28th May, 2007 the plaintiff filed an application by way of chamber summons and sought the following orders:

"1. The honourable court be pleased to fix a time frame and/or limit within which the defendants/respondents do make discoveries.

2. In the alternative the defendants/respondents be ordered to make discoveries within 14 days and/or such other shorter time and/or otherwise, as this honourable court may deem fit and expedient.

3. In default of the defendants/respondents making discoveries within the time fixed in accordance with prayer 2 hereof, the court be pleased to order the statement of defence filed by the defendants/respondents on 1st day of March, 2007, to be struck out.

4. Consequent to prayer (3) herein above being granted, the Honourable Court be pleased to enter interlocutory judgment against the defendants/respondents.

5. Costs of this application be borne by the Defendants/Respondents.

6. Such further and/or other orders be made as the court may deem fit and expedient."

The application was served upon the defendants' advocate on 4th June, 2007. When it came up for hearing on 16th October 2007, Mr. Oguttu appeared for the plaintiff and Mr. Soire advocate held brief for Mr. Kemboy for the defendants. The following order was recorded by consent:

"By consent of the parties the chamber summons application dated 28/5/2007 be and is hereby allowed on the following terms:

That the defendants/respondents do make discoveries within the next 30 days. That in default of such discoveries being made the statement of defence on record to stand struck out in line with order X Rule 20 of the Civil Procedure Rules. That the costs of the summons do abide the suit."

As the defendants did not make discoveries within the required period of time or at all, the defence that had been filed stood struck out and the plaintiff proceeded to fix the matter for formal proof on 29th May 2008. In the meantime, M/s Kemboy & Company filed a Notice of Change of advocates for the defendants in place of Katwa & Kemboy advocates. The notice of change of advocates was filed on 12th August, 2008. The formal proof did not proceed on 29th May 2008 as scheduled and the same was rescheduled for 14th October 2008 and eventually on 29th November 2009.

M/s Kemboy & Company Advocates were served with a hearing notice for the formal proof but they did not attend court. The formal proof proceeded ex-parte and judgment was entered for the plaintiff as aforesaid.

It is evident that from 16th October 2007 when the consent orders were made the defendants' advocates, then Katwa & Kemboy, did not take any action to safeguard their clients' interests. The defendants stated through the 2nd defendant's Town Clerk that after filing of the statement of defence M/s Katwa & Kemboy advocates did not inform them that the matter had been set down for hearing. The defendants had not even been given any copy of the pleadings by the said advocates. They further stated that they did not instruct Kemboy & Company Advocates to file a notice of change of advocates. In short the defendants were not notified about the consent orders aforesaid and neither were they aware that the matter had been set down for formal proof after their defence had been struck out.

Mr. Otiso submitted that the consent order of 16th October 2007 was entered in excess of instructions. He further submitted that the consent was against public policy. He cited**SAMSON MUNIKAH practicing as MUNIKAH & COMPANY ADVOCATES –VS- WEDUBE ESTATES LIMITED**[2007] e KLR. In that appeal Mr. Asinuli Advocate then acting for the successful appellant, entered into a consent without his client's instructions. The consent became the subject of an application for review. It was argued, ***inter alia***, that Mr. Asinuli did not have express instructions from his client to enter into the consent. The application for review was rejected by Ransley, J.

On appeal it was argued, ***inter alia***, that the consent was illegal and contrary to Public Policy. The Court of Appeal, upon considering the circumstances under which the consent was recorded, found that it was tainted with illegality, undue influence and was against public policy and allowed the appeal.

On the other hand, Mr. Oguttu submitted that a consent order and/or judgment may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement. He cited **BROOK BOND LIEBIG**

(T) LIMITED –VS- MALLYA[1975] E.A. 266. None of the above factors had been demonstrated in this application. He urged the court to dismiss the same.

As regards the suit land, counsel submitted that the plaintiff, being registered as the absolute proprietor of the same, his title could not be challenged.

Under **order XLIV rule 1 (1)** of the **Civil Procedure Rules**, a party can apply for review **"for any sufficient reason",**which means the applicant is not confined to the reasons stated in the two preceding heads in that subrule, see **KIMITA –VS- WAKIBIRU**[1985] KLR 317. There is also no dispute that a consent judgment can be set aside if it is established that there was fraud and that the consent was contrary to Public Policy, among other factors. See **FLORA WASIKE –VS- WAMBOKO**(1982–88) KAR 625.

In this case, M/s Katwa & Kemboy Advocates entered into a consent even before they had informed their client about the application that had been served upon them. They had no instructions to record the consent. The consent as recorded had very drastic consequences yet even after recording the same they did not notify the defendants. As a result the statement of defence was struck out without the defendants' awareness. The advocates did not notify the defendants that the defence had been struck out. The advocates had been given instructions to defend the suit but their action was contrary to the said instructions. Whereas an advocate has general authority to compromise on behalf of his client, he can only do so if he acts ***bona fide***and not contrary to express and/or negative direction. See **KENYA COMMERCIAL BANK LIMITED –VS- BENJO AMALGAMATED LIMITED & ANOTHER**, Civil Appeal No. 276 of 1997. It is contrary to the policy of the court and Public Policy for an advocate to act contrary to express instructions given by his client. As a result of the aforesaid action on the part of the defendants' advocate the statement of defence was struck out and hearing proceeded ex-parte. The defendants' advocate did not even attend the formal proof though they had been served with the hearing notice. For the reasons aforesaid I am inclined to allow the defendants' application and now proceed to make the following orders:

(a) I set aside the consent order recorded on 16th October, 2007 as well as the judgment entered on 20th November, 2009.

(b) The defendants should do discoveries within the next 30 days from the date hereof.

(c) The defendants shall bear all the thrown away costs of the suit including the costs of this application. The costs to be taxed if not agreed upon.

DATED, SIGNED AND DELIVERED AT KISII THIS 2ND DAY OF JULY, 2010.

D. MUSINGA
JUDGE.
2/7/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Minda for Mr. Oguttu for the Plaintiff

N/A for the Defendants

Court: Ruling delivered in open court on 2nd of July, 2010.

D. MUSINGA
JUDGE.