



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 2026 OF 2009

**MWIHANGIRI FARMERS
LTD.....PLAINTIFF**

VERSUS

**ECUMENICAL DEVELOPMENT CO-OPERATIVE SOCIETY (E. D.C.S) U
A.....RESPONDENT**

RULING

1. On 7th July, 2008 a consent letter was signed by J K Mwangi & Company Advocate for the plaintiff and Swaleh Mwangi and Company Advocates for the defendant. That consent was recorded by the deputy registrar and a decree was issued on 29th June, 2009 in the following terms:-

1. **‘THAT** in exercise of the statutory power as chargee, the Defendant be and is hereby at liberty to sell and or dispose off at its sole discretion all that parcel of land known as Nyandarua/Karati/2352 now registered in the plaintiff’s name and charged to the Defendant.

2. **THAT** the Defendant shall return to the plaintiff’s Advocate, the original title documents for the parcels of land mentioned and contained in a charge dated 3rd October 1996 and registered at the land Registry Nyandarua on 15th October 1996 except for the title number Nyandarua/Karati/2352.

3. **THAT** the Defendant shall deliver to the plaintiff’s advocate a duly executed Discharge of Charge for each of the titles mentioned and contained in the charge aforesaid in paragraph 2 above with the exception of Nyandarua/Karati/2352.

4. **THAT** this case be otherwise marked as wholly settled with no orders as to costs’.

2. By a Notice of Motion dated 15th January, 2010 the plaintiff sought for an order that they be granted leave to change their advocates from **J K Mwangi & Company Advocates** to **Njoroge Musyoka Advocates**. They also sought for an order that the consent entered on 6th June, 2009 and issued on 29th June, 2009 be set aside and reviewed and the charge against LR No. Nyandarua/Karati/2352 be discharged and the original title deed be handed to the plaintiff. This application is predicated on the grounds that pursuant to the consent order a decree has been issued thus the leave of the court is necessary before the change of advocates.

3. Secondly, it is alleged that the plaintiff’s advocates **J K Mwangi & company Advocates** had no instructions to enter into a consent whereby the plaintiff’s property LR No. Nyandarua/Karati/2352 was

sold as there was no loan due to the defendant. Thirdly, it is contended that the plaintiff had fully paid the legal fees due to the former advocates. Moreover, the suit land belonged to a group of people who are members of the plaintiff. It was meant for carrying on the business of processing milk but the property was sold through collusion, fraud and misrepresentation.

4. This application is also supported by a lengthy affidavit sworn by **Evanson Munga Ngalia** on 18th January, 2010. He has elaborated on the grounds stated in the application and attached documents among them a complaint dated 7th July, 2008 lodged with the Advocates Complaints Commission regarding Mr J K Mwangi. That complaint was communicated to the Advocate and he responded in a lengthy letter dated 26th June, 2009 in which he gave the history of the suit and his relationship with the plaintiff's chairman who subsequently passed away.

4. According to Mr. J K Mwangi, he handled the suit from the time it was filed until the consent was recorded compromising the entire suit. The effect of the consent order was that the plaintiff's property known as Nyandarua/Karati/2352 was to be sold so that the defendant could recover the loan. The defendant was also supposed to return the other titles which the members of the plaintiff had guaranteed the loan. The defendant duly discharged those titles handed them to Mr. Mwangi who discharged them with his own money but the guarantors have refused to collect the titles for the last 22 months.

5. It was submitted that the case was settled with no order as to costs after the plaintiffs representatives went to see the Mr. Mwangi and gave him instructions to settle the matter. The deponent of the affidavit in support of the application, Mr. Evanson Munga Nderitu was present when the instructions were given to the Mr. Mwangi. They furnished the advocate with their telephone numbers which they do not deny. Counsel urged the court to find there is no mistake to enable the court set aside a consent order. Moreover, the application is brought after more than a year since the consent was recorded. The matter was referred to the advocate's complaints commission but after the advocate replied, there was no further communication.

6. This application was also opposed by the defendants Prof. Gacheru who was the chair person of the plaintiff passed away and the plaintiff's agreed that they were notified by a letter dated 3rd April, 2008 that the matter will be settled, thus the plaintiffs are aware of the settlement. Moreover, the fact that this application was combined with the prayer for leave to come on record was challenged. It was contended that to set aside a consent order, a party seeking for that order must prove fraud or collusion and in this case no evidence has been tendered to show fraud on the part of the advocates. The supporting affidavit merely contains allegations with no supporting documents.

6. This application seeks for leave for the firm of Njoroge Musyoka and Company to come on record on behalf of the plaintiff. I agree the application is slovenly drawn, seeking for omnibus orders when infact the applicant should first have applied for leave to come on record. I however find this prayer for leave was not contested. I have no hesitation to grant the firm of Njoroge Musyoka and Company Advocates leave to represent the plaintiff. It is also clear the relationship between the plaintiff and J K Mwangi is not cordial thus they cannot work together.

7. The second prayer seeks for the review of an order recorded in this court by consent. The said consent order was made the decree of this court. The power to review and set aside an order of the court is an exercise of discretion which principally is provided for under the provisions of section 80 of the Civil Procedure Act and more specifically under rules 44 of the CPR which provides as follows:-

8. Under the provisions of the law under which this application is brought, a party seeking to review and set aside an order, must show a mistake or error apparent on the face of the record, the error must be manifest and does not require a detailed examination in order for a court to review its own order. Although this application invoked the provisions of order 44 of the CPR, the applicants failed to advance those grounds set out under order 44. The matters complained about by the applicants are that Mr. J K Mwangi was not instructed by the plaintiff to compromise the suit. The applicants further claimed that there was no loan owing to the defendant to be recovered from the sale of their charged property. They however did not bring any evidence to support those allegations.

9. Mr. Mwangi on the other hand denies those allegations vehemently and gives a chronology of the events that led to the suit being compromised. Moreover that consent included a release and discharge of several titles that had guaranteed the plaintiff's borrowing with the defendant. In the case of **FLORAWASIKE vs. DESTIMO WAMBOKO {1988} KLR** the Court of Appeal held that;

There was no evidence adduced by the applicant to show collusion between Mr J K Mwangi and the defendant's Advocates. What is on record is that the plaintiff instructed the firm of Mr Mwangi, he filled the suit on their behalf which came up for hearing in court on several occasions and eventually it was compromised if the plaintiff had not instructed their Advocate on the terms stated in the consent, that is a separate cause of action against Mr. Mwangi, nothing to do with the defendant.

10. Lastly, it is evident from the averments by Mr. Mwangi that the terms of the consent have been fulfilled and the only matter outstanding is his legal fees. The other problem which I see in this matter is the fact that the defendant, relied on the consent order to discharge the titles according to the compromise; can the defendant be made to suffer prejudice due to a disagreement which they were not party to? The applicants have not demonstrated at what point they disagreed with the advocates and how they terminated the instructions from the time the suit was filed. Moreover, if an Advocate misrepresents a client, who suffers loss or damages as a result of the misrepresentation, that is a matter of professional negligence which is actionable on its own

11. For the aforesaid reasons I see no grounds to warrant the setting aside of the consent order. In any event that consent order was entered into in June 2008; it was made the decree of the court on 29th June 2009. There was unexplained delay in bringing this application which lends credence to the submission by the respondent that it was a mere afterthought.

Accordingly the application is dismissed with costs to the Respondents.

Ruling signed and submitted for delivery on 9th day of November 2010

MARTHA KOOME

JUDGE

Delivered and countersigned on 12th day of November 2010.

P KIHARA KARIUKI

JUDGE