

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 81 of 2005

SYMON GITARI MUNENE MUCHIRA PLAINTIFF

VERSUS

EDWARD NJAGI MURIITHI

NGAIRE KAARA..... DEFENDANTS

RULING

By an order of 15th November 2006 the applicant was joined in this matter as interested party. The applicant has now moved this court by Notice of Motion dated 29th November 2006. The applicant seeks by that application review of a Consent Order between the plaintiff and the defendant of 3rd October 2005. That consent order was made an order of the court subsequently. The background of the present application as can be seen from the affidavit in support is that the applicant/interested party purchased a half share of a plot No. 253 Kutus village from Wambu Gachoki now deceased. That plot will hereinafter be called the suit property. The other half of that plot belonged to the defendant. The defendant it is stated on 30th January 2003 attempted to sell the whole portion of that suit property. That sale was without notice to the interested party. It does seem that the defendant conceded to his error of trying to sell the whole plot but since he had received a deposit there was the question of the refund of that deposit. The interested party offered to make the refund on condition that he would from then on own $\frac{3}{4}$ (three quarters) of that suit property and the defendant would own a $\frac{1}{4}$ (a quarter) of the same. As a result of that agreement the interested party henceforth owned $\frac{3}{4}$ (three quarters) of the suit property. It does seem that subsequently the defendant again sold the whole portion of that plot to the plaintiff in this case. The plaintiff then sued the defendant in this action. In this suit the plaintiff sought an order to compel Kerugoya/Kutus Municipal council town clerk to rectify the register of the suit property to read that the suit property belonged solely to the defendant and thereafter to transfer the same to the plaintiff. The plaintiff and the defendant then thereafter entered into a consent in respect of this suit to the effect that the clerk to Kerugoya/Kutus Municipal council be compelled as stated herein before. That consent had the effect of divesting the interested party of the $\frac{3}{4}$ (three quarters) ownership of the suit property. It is that order which the applicant now seeks to set aside. It however should be understood that a consent is essentially a binding contract between the consenting parties. That being so a stranger cannot seek to set aside such a consent because such a stranger was not privy to such a consent or if you like a contract. It is for that reason more than anything else this application cannot succeed. The interested party has no locus to move the court to set aside the order of consent between the plaintiff and the defendant. Moreover when the application came up for hearing the plaintiff informed the court that he has subsequently transferred the suit property to other parties not present before court. The defendant on his part did not defend the application. Even if he did not defend since he entered a consent with the plaintiff that consent can only be set aside by another consent with the plaintiff. Accordingly for the reasons set out in this ruling the Notice of Motion dated 29th November 2006 cannot succeed and the same is hereby dismissed with no orders as to costs.

Dated and delivered at Nyeri this 4th day of March 2008.

MARY KASANGO

JUDGE