



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 623 of 1999**

**RELIANCE BANK LIMITED.....PLAINTIFF**

**VERSUS**

**JOSEPH WAWERU NJOROGE.....DEFENDANT**

**RULING**

Application dated 13.01.2006 amended, seeks orders to vary/vacate orders made on 02.02.2005 by setting aside the same and reinstating the applicant's decree of 20.08.2001. And that Ruth Kigiri be enjoined in the instant suit as 2<sup>nd</sup> Defendant. And that mandatory injunction against the Respondents to release green book for Plot No. 4/31 Mathare North and /or the title thereof to the applicant. And that the Respondents be restrained from collecting rents in the suit premises, transferring or wasting the property in any manner whatsoever.

The application is based on grounds stated:

1. That there was no service.
2. orders not obtained regularly and are therefore untenable.
3. That Defendant knew about this decree all the way from the year 2001.

The supporting affidavit is sworn by Franklin Omino, an Advocate acting for Applicant. He swears that after service of summons the Defendant failed to file defence and judgment was entered and decree issued on 20.08.2004. That after issue of decree the Plaintiff put the property under management to apply rents towards loan services and loan balances.

On 22.11.2004 an application was filed by Defendant seeking orders interlia that decree dated 20.08.2001 be set aside/vacated and the suit be heard on merit on reasons that Plaintiff Company was put into liquidation after filing suit and that Defendant has never been served with summons to enter appearance and decree was obtained irregularly.

That the date for the hearing of the said application was served on one Joseck Onyino. The said Joseck Onyino does not work in the Advocate's office and would not have received the summons on their behalf. That the stamp used F.I. Omino is not of the deponent and had never had since a stamp or one of its appearance. There was a proposed sale in December 2005 but in reality, there was no sale. On

02.02.05, the court granted orders and directed that the applicant be served with Defence. We were never served. On 17.02.2005 we were served with orders purportedly obtained by consent.

The Applicants filed written submissions. On the hearing date the respondents did not appear. Though served no response was recorded from the Defendant. No grounds of opposition filed or replying affidavit. The application is therefore not opposed. In addition to the affidavit of the Advocate, the liquidator also filed an affidavit. The liquidator deponed that in the year 2004, the Respondent who had mortgaged his property by way of Power of Attorney dated 27.06.1997 Exhibit 7 (Power of Attorney by deed of assignment) proposed a scheme to pay off the applicant and obtained another financier. He proposed to pay all the balances outstanding then. The proposal did not yield anything. No money was forthcoming.

On 23.02.2004 the Applicant instructed its lawyer who wrote to the Respondents lawyers in terms of letter dated 23.07.2004 marked "M 11". In line with decree issued on 20.08.2001 a Manager for collection of rents was appointed. After rents were collected for about 3 months, another proposal was floated that a purchaser had been found, a Ms. Ruth Kagiri. The Ms. Kingori Kariuki & Co. Advocates were appointed to act for both vendor and purchaser and M/s Abuodha Advocates for Chargee as contained in exhibit "M1" dated 26.07.2004.

However, the property was sold to the purchaser but the Advocates never paid the balances of loan to the Chargee.

The sale was fraudulent and illegal. It is submitted. The applicants Counsel never participated in any consent concerning the decree issued by the court on 20.08.2001. The sale and sale proposals were taking place after the decree of the court. The proposal to sell the property was to raise funds to pay off the plaintiff's loan. But it appears no payment was made. The Advocates who were conducting the sale transaction moved out and other Advocates, Kiguru Kahiga moved in on 22.11.2004 and got a letter signed purportedly by consent with the Plaintiffs Advocate on 11.02.2005 marking the matter as settled.

What purports to be a decree was dated 17.02.2005 is not true. It is false document. The applicant could not have marked the matter settled without payment having been received. The document is for expunging from the record. Application by Counsel for Defendant/Respondent dated 19.11.2004 and filed on 22.11.2004 was not genuine. The Plaintiff was already aware of judgment of court and appointment of rent collector after judgment was entered. He was aware that a rent collector had been appointed that is why he was applying for an account to be taken and monies received from the said plot be deposited in court and that the decree be set aside.

The applicant has shown by demonstration the forgery of letter dated 05.08.2004. The layout of the letter heads is different. The signatures are different from the known signatures of Counsel F.I. Omino and the false signature is similar to that in the alleged consent of 11.02.2005. Authorities relied upon is ***Kauma –vs- Kimbova Contractors, 1974 E.A 91*** where the court held that if an advocate has no authority to enter into a consent judgment the same is a nullity and ought to be set aside. Again in ***Tropical Food Products International –vs- Eastern and South Africa Trade and another Civil Suit No. 1534 of 2001*** that consent order may be reviewed by setting aside the same if the same was entered into by fraud, mistake, misapprehension and any general reason which may enable the court to set aside an agreement. Upon considering all matters laid before the court and also the record of the court, it is my finding that the consent was obtained fraudulently. It is not the decree of the Court. The decree in this case was drawn and issued on 17.05.2004 Judgment having been entered on 20.08.2001.

I therefore allow application and grant orders as per prayer 2, 4, 5 and 6. The Respondents shall pay the costs of this application.

Orders accordingly.

**DATED** this 29<sup>th</sup> day of October 2008.

**JOYCE N. KHAMINWA**

**JUDGE**