



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Case 26 of 2008**

**1. EVAN GACHOKI NJUKI )**

**2. ELPHAS GICHOBHI NJUKI )**

**3. FREDRICK MWENDIA NJUKI )**

**4. HERNIEL MUCHIRI NJUKI ) ..... PLAINTIFFS**

***Versus***

**WILSON NJUKI KARUKUMA ..... DEFENDANT**

**RULING**

The plaintiffs filed this claim against the defendant on 10<sup>th</sup> March 2008. The plaintiff prayed for judgment against the defendant for orders that the defendant do subdivide the property KABARE/MUTIGE/255. The plaintiffs also sought that the court will order any caution restriction and or prohibition on the title to be removed. Further that the executive officer be ordered to sign all the necessary subdivision transfer documents to facilitate the execution of the court orders. The defendant filed her defence on 13<sup>th</sup> March 2008. The defendant denied the plaintiff's claim. On 23<sup>rd</sup> April 2008 a consent was recorded by the deputy registrar of the parties in this case. By that consent the parties agreed that the defendant would subdivide and transfer that property in the following manner;

1. Wilson Njuki Karukuma 2 acres
2. Edward Njagi Muriithi 1 acre
3. Evan Gachoki Njuki
4. Elphas Gichobi Njuki
5. Fredrick Mwenda Njuki 8 acres jointly
6. Harniel Muchiri Njuki

Following that consent an application has been filed by an interested party namely Francis Kariithi. The said applicant revealed that the suit property had been the subject of a hearing before the Gichugu land dispute tribunal and its award had been adopted by the magistrate court in Kerugoya namely LDT No. 55

of 1998. That averment of the applicant was not denied by the respondents. The applicant seeks by the notice of motion dated 28<sup>th</sup> July 2008 for the following prayers:-

- 1. That the court be pleased to review and set aside the consent order of 30<sup>th</sup> April 2008.**
- 2. That the applicant be joined as an interested party/defendant in this matter.**
- 3. That the annexed draft defence of the applicant be deemed as duly filed and served upon payment of requisite court fees.**

As stated before the applicant in his affidavit revealed the previous litigation over the suit property. He further stated that on 10<sup>th</sup> April 2008 he filed an application before the Kerugoya magistrate court seeking for orders of dispensation with the production of the old title deed of the suit land to enable him be registered as the owner of that land. That order would put into effect the award made by the tribunal which was later adopted by the Kerugoya magistrate's Court. On 12<sup>th</sup> June 2008 the order for dispensation with the production of the original title was granted. As the applicant was waiting to go to the Land Control Board for transfer he was informed that the defendant had obtained a consent from the Land Control Board to transfer the same land. On visiting the Land Control Board the applicant confirmed that the consent had been given for the transfer of the land on the strength of the order of the High Court at Nyeri in this particular suit. He deponed that the defendant in filing this matter at the High Court at Nyeri rather than Kerugoya Magistrate Court or at High Court at Embu was an attempt to conceal it from the applicant. The applicant stated that to allow the consent in this matter to subsist would be to give way to the parties in this case to circumvent the court order of Kerugoya magistrate court which adopted the tribunal award. In argument it was stated that the plaintiffs were the sons of the defendant. The application was opposed by the defendant. The defendant referred to other proceedings still pending between him and the applicant. He however did not deny that the tribunal had given judgment in favour of the applicant. He also did not deny that that judgment was adopted by the Kerugoya magistrate court whose order was essentially defeated by the consent filed in this case. The defendant argued that parties were at liberty to enter into a consent and that such consent does not necessary prove that there was collusion between the parties. The defendant argued that the applicant was a stranger in this case and had no standing to seek to set aside the consent of the parties herein. He termed the applicant as a stranger who was not privy to the consent which was tantamount to a contract. Further that the applicant did not have locus standi in this matter. The applicant relied on a decision of this court namely *CIVIL CASE NO. 81 OF 2005 SYMON GITARI MUNENE MUCHIRA Vs EDWARD NJAGI MURIITHI & ANOTHER*. That authority is in my view distinguishable from the present case. In that case the party who came to court to set aside a consent had no recognizable interest in the immovable property. In our present case there exists a valid court order giving the applicant proprietary right over the suit property. That court order was nullified by the consent entered in this matter. The defendant relied on the case of *BROOKE BOND LIEBIG (T) LTD. vs MALLYA Civil Suit No. 18 of 1975 (1975) EA* where it was held;-

***“A consent judgment may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement”***

The applicant in response to the argument that he had no locus on this matter relied on the case of *NJOROGE vs MBIT Civil appeal No. 87 of 1983* where it was held as follows;-

***“On the other hand, a wider discretion is provided in bring application for review under section 80 of the Civil Procedure Act and order XLIV of the civil Procedure Rules, both of which do not make reference to the term “parties in a suit” probably because it is desired to cater for persons who have not right of appeal”***

As correctly stated by the defendant a consent can only be set aside for fraud collusion or any other reason which would enable a court to set aside a contract. Bearing in mind the facts that have been brought before court, can the court find that the defendant and the plaintiffs either colluded or fraudulently entered into the consent. Fraud in the black's law dictionary is defined as;

***“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”***

The parties in entering into the consent in this matter concealed a material fact and misrepresented the truth. They indeed therefore were guilty of fraud by signing that consent. They failed to disclose to this court that there was a former valid court order giving the property to the applicant. Collusion is defined in the black's law dictionary as ***‘an agreement to defraud another or to do or obtain something forbidden by law’***.

From that definition it is also clear that the parties were also guilty of collusion. By now it should be clear that I am of the view that the consent entered by the parties can be set aside by this court. The issue raised by the defendant that the applicant had no locus needs to be considered. Both section 80 of the civil procedure act and rule XLIV of its rules provide that any person who is aggrieved by a decree or an order may apply for its review. Any persons include the applicant. He therefore has a right to approach the court in this matter. The end result is that the applicant's application succeeds as follows:-

- 1. The court does hereby review and set aside the consent order issued by this court on 30<sup>th</sup> April 2008.***
- 2. The applicant is hereby enjoined as a defendant in this matter.***
- 3. The annexed defence of the applicant shall be filed in this court and served within 14 days from this date hereof.***
- 4. The costs of the notice of motion dated 28<sup>th</sup> July 2008 are awarded to the applicant Francis Kariithi as against the plaintiffs and the defendants.***

***Dated and delivered at Nyeri this 16<sup>th</sup> day of October 2008.***

**MARY KASANGO**

**JUDGE**