



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Civil Suit 61 of 2005

NATHAN WASHIKO FEDHA.....PLAINTIFF

VERSUS

GETRUDE NAFULA MARUTI

MARGARET MORAA ONTERI

GETRUDE WANJALA OKOMBADEFENDANTS

R U L I N G

The plaintiff moved the court by way of a Notice of Motion which was brought pursuant to sections 3, 3A and 63 (e) of the Civil Procedure Act, as read together with Order 39 rule 4 of the Civil Procedure Rules.

The substantive prayers sought by that application were four, namely;

- (i) The setting aside and discharge of the injunction orders granted on 13/12/2006, and which had been extended on 10/1/2007 and 24/1/2007.
- (ii) The setting aside of the consent order issued on 3/10/2006.
- (iii) To expunge from the record the Replying Affidavit filed on behalf of the plaintiff, which affidavit was allegedly sworn on 27/12/2006.
- (iv) Costs of the application.

When canvassing the application the plaintiff submitted that he did not give instructions to his former advocates, to record the consent on 3/10/2006. He says that on that date he had gone to mourn his sister, and was thus not in court.

To support the contention that his sister had indeed passed away, the plaintiff exhibited a letter dated 10/2/2007, which was written and signed by Chief Musinde of Chevaywa location. The said letter states that one Agnes Roda Nyikuri died on 1/10/2006, and was buried at Chenjeni Area, Kulumbeni sub-location, Chevaywa location, on 3/10/2006. The letter also states that the deceased, Agnes Roda Nyikuri, was the elder sister to Nathan W. Fedha of Mbao Farm, Kitale.

The plaintiff has stated, on oath, that on 2/10/2006 he did notify Mr. J.M. Wafula Advocate, who was then acting for him, that he would be unable to attend court on the next day, due to the

death of his sister. The plaintiff says that on account of that fact, he instructed Mr. J.M. Wafula to take another date, for the mention of the matter.

His contention is that by 2/10/2006, the parties had not yet achieved a settlement. Therefore, as far as the plaintiff was concerned, the parties needed more time to continue discussions.

The plaintiff submitted that the affidavit sworn by Mr. J.M. Wafula advocate was not an independent affidavit, as it was only annexed to the Replying Affidavit of the 1st defendant. Secondly, the affidavit of J.M. Wafula advocate is said to contain confidential matters as between an advocate and his client, in paragraphs 1 to 7.

The other point taken up by the plaintiff was that the 2nd and 3rd defendants had not opposed the present application, as it was only the 1st defendant who had sworn a replying affidavit. As far as the plaintiff was concerned, it did not matter that the 1st defendant had deponed that the 2nd and 3rd defendants had authorized her to swear the affidavit on her own behalf as well as on their behalf.

It is the plaintiff's case that the consent order should be set aside because his previous lawyer had acted without instructions. To the plaintiff's mind, that connotes fraud.

The plaintiff also asked the court to infer from the fact that his said previous advocate had sworn an affidavit which he then gave to the respondents herein, that that was further evidence of collusion.

But in any event, the plaintiff submitted that the consent in issue was contrary to the law, as it contravenes section 8 of the Land Control Board Act. That argument is premised on the fact that the transaction giving rise to the suit was entered into in 1992. However, as there was no consent of the relevant Land Control Board, the plaintiff contends that the transaction was void for all purposes. Therefore, as far as the plaintiff was concerned, the consent in question was meant to circumvent the statutory provisions.

Furthermore, the consent was said to be superfluous because the parties thereto had not obtained the prior written authority of the Agricultural Finance Corporation to enter into it. Such authority was said to be necessary by virtue of the provisions of section 30 of the Agricultural Finance Corporation Act, which attaches certain covenants to mortgages executed as security for AFC. In the circumstances, as the plaintiff had executed a mortgage in favour of AFC, the consent was said to be of no legal value, because the AFC had not issued its written authority to the consent, which if given effect would adversely affect the security.

In answer to the application, the defendants first submitted that the provisions of Order 1 rule 12 (2) of the Civil Procedure Rules had no application to this matter, as the said rule was only applicable to suits. That submission was, I believe, made in response to the contention that the application herein had not been opposed by the 2nd and 3rd defendants.

Order 1 rule 12 (2) reads as follows;

“(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

The defendant submitted that that rule was inapplicable to interlocutory applications, and in

particular to affidavits in relation to such applications.

In my reading of the rule, the defendant's interpretation thereof cannot be right. I say so because the rule itself makes reference to the right to;

“appear, plead or act for such other in any proceeding.”

“Barron's Dictionary of Legal Terms”, 3rd Edition, defines the word 'proceeding' as follows;

“1. The succession of events in the process of judicial action.

2. The form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them; the mode of deciding them, of opposing and of executing judgments.”

That being the case, Order 1 rule 12 does not only apply to suits, to the exclusion of applications within such suits. In my considered view, the said rule is applicable to applications such as the one before me.

However, that does not answer the contention that the 1st defendant was appearing, pleading or acting for or on behalf of the 2nd and 3rd defendants.

In my understanding, the firm of Lang'at and Wandabwa Advocates were acting for all the three defendants. It was not the 1st defendant who was acting for the other two defendants. She did not therefore need their written authority to so act.

An affidavit is a written statement of the facts within the knowledge of the deponent, which is made under oath, before a commissioner of oaths, an officer of the court, a notary public or other person legally authorized to certify the statement. By virtue of Order 18 rule 3 of the Civil Procedure Rules, affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. However, in interlocutory proceedings or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

I have delved into the definition of the word affidavit, because the 1st defendant has deposed that she had been duly authorized by her co-defendants to swear the replying affidavit on their behalf. I cannot quite understand how the deponent, who is required to limit her affidavit to such matters as she is able of her own knowledge to prove, could then purport to swear the same affidavit on behalf any other person.

On the other hand, that would not preclude the use of the contents of such an affidavit as material to respond to the application. In other words, should the material contained in the replying affidavit, be admissible, and sufficient to answer to the application, it would matter not that the other defendants did not swear separate affidavits.

However, it must be emphasized that in any case where there were more than one plaintiff or more than one defendant, it is desirable that each such party should make their own affidavit, if he/she wishes to answer to an application. Of course, there would be no need for each party to re-state everything which had already been said,. It would be sufficient to confirm having read such an affidavit, and to state agreement therewith, if that was the position.

In this case, just because the 2nd and 3rd defendants had not sworn their own replying affidavits would not be reason enough to allow the application as against them. Such a result would be an absurdity, if after analyzing the competing submissions made on the application, the court were to come to the conclusion that the 1st defendant's replying affidavit provided a sufficient answer to the whole application.

In effect, even though the 2nd and 3rd defendants had not filed replying affidavits, the fate of the application herein would only be determined after a detailed analysis of the material placed before the court.

In that regard, the defendants submitted that the plaintiff's former advocate, Mr. J.M. Wafula, had apparent authority to enter into the consent, as he did on 3/10/2006.

In the case of **SHAH VS. WESTLANDS GENERAL STORES PROPERTIES LTD. & ANOTHER (1965) E.A. 642, Duffus JA** expressed the view that in cases where a compromise or settlement has been entered into by counsel acting within his ostensible authority, the said compromise or settlement was binding, as they rest on the simple principle that a principal is bound by a contract made by his agent within his ostensible authority. (see page 647 paragraphs C to D)

In the light of that authority, the defendants submitted that an advocate has apparent authority to enter into a compromise on behalf of his client. Therefore, as the plaintiff herein concedes having instructed the firm of J.M. Wafula & Company Advocates to enter into a consent, the defendants contend that the advocate had apparent authority to enter into the consent, as he did.

To that end, there is annexed the affidavit of James Wafula Masai, advocate, which was sworn on 15/2/2007. He says that the plaintiff had instructed him to bring this action against the defendants herein. He also says that the plaintiff had instructed him to settle the matter out of court.

Mr. J.M. Wafula also expressly deponed about the plaintiff that;

“On 3rd of October, 2006, he gave me green light to have the consent recorded.”

The plaintiff appears to be saying that whilst he had, in principle, given to Mr. J.M. Wafula, instructions to settle the matter, on that date (the 3rd of October, 2006) he had specifically told his advocate to seek another mention, so that the parties would continue with discussions.

On the other hand, the lawyer says that he was not only given the general authority to negotiate a settlement, but that on 3rd October, 2006, he was given specific instructions as to the settlement whose terms he then recorded.

To my mind, the fact that the applicant did not attend court on the material date, because he had gone to attend the burial of his late sister, does not of itself indicate whether or not he had given instructions to Mr. J.M. Wafula to settle the case, as he did. The plaintiff could have given instructions to his lawyer, before setting off to attend the burial.

Upon a perusal of the record of the proceedings on 3/10/2006, I noted that when the case was first called out, Mr. Wafula advocate was in court, whilst Mr. Wandabwa advocate was absent. On that occasion Mr. J.M. Wafula notified the court that the parties had reached a consent, and that he had expected Mr. Wandabwa to send an advocate to hold his brief. Mr. J.M. Wafula therefore asked that the case be mentioned at 2.00 p.m., of that same day.

The record shows that the case was called out at 2.40 p.m., at which time Ms. Fuchaka advocate, held brief for Mr. Wandabwa.

After Mr. J.M. Wafula had set out the terms of the settlement, Ms. Fuchaka confirmed the same to be accurate. Thereafter, the three defendants each confirmed that the parties had agreed to the terms of the settlement. It is only then that the learned judge adopted the terms of the consent, as an order of the court.

Given the sequence of events, I hold the considered view that it is more probable than not that Mr. J.M. Wafula has stated the truth, when he said that he had been instructed to enter into the consent as he did. I say so because when the case was first called out, the defendants were not even represented in court. Therefore, had the plaintiff asked his lawyer to have the case put-off for a mention at a later date, I believe that there would have been no difficulty at all in the advocate achieving the said instructions. Instead, it is the advocate who asked for a mention on that very afternoon because, in his words, the parties had reached a consent.

To my mind, the fact that Mr. J.M. Wafula had sworn an affidavit, which he then gave to the 1st defendant, is not proof of collusion between Mr. J.M. Wafula and the defendants. In my considered view, once the plaintiff asserted that he had not instructed Mr. J.M. Wafula to record a settlement, it became necessary for Mr. Wafula to tell the court what his version was. By so doing, he cannot be deemed to be colluding with the defendants.

Indeed, if Mr. J.M. Wafula had chosen to remain silent, in the face of the plaintiff's assertions, he would then have been construed as accepting the contention that he had acted without instructions.

However, when giving to the court his version of events, I hold the considered view that Mr. J.M. Wafula should have limited his affidavit to the matters in issue in this case. He went too far by also purporting to give to the court the facts of other matters in which he had acted for the plaintiff.

It matters not that Mr. J.M. Wafula was no longer acting for the plaintiff. If he had become privy to some information as at the time when he acted for the plaintiff, such information would always remain subject to Advocate/client confidentiality, even after their professional relationship had come to an end. Therefore, in adjudicating upon this application I shall disregard all information in the affidavit of J.M. Wafula, save only those that relate directly to this case.

In that respect, it is important to note that the applicant expressly opted to limit the application to three prayers only. He wishes to have the consent order dated 3/10/2006 set aside; he also wishes to have expunged from record the replying affidavit alleged to have been sworn by him on 27th December, 2006. Finally, he asks for costs of the application.

His decision to abandon the prayer for the stay of the interim injunction during the pendency of this application; and to have the said injunction either discharged or set aside, was informed by the fact that the defendants had withdrawn the application which was targeted by those prayers.

The court records show that the defendants had filed a chamber summons dated 13th December, 2006, through which they sought an injunction to restrain the plaintiff from excising forty-five (45) acres from the defendants' portion of the suit property.

After an *ex parte* hearing on 20th December, 2006, the Hon. Ibrahim J. granted an injunction. Those orders were extended on 10th January, 2007, so as to remain in force until 24/1/2007. Thereafter, the interim orders were extended upto 20/2/2007, when the defendants withdrew the application dated 13/12/2006.

It is thus understandable that the plaintiff decided to abandon the two prayers, as they were no longer necessary.

Reverting to the prayer for setting aside the consent order, the question that the court needs to first address is as appertains to the principles applicable.

The applicant cited the case of **KAFUMA VS. KIMBOWA BUILDERS AND CONTRACTORS**

(1974) E.A. 91, as authority for the proposition that an applicant must;

- (a) Demonstrate that the consent was entered into by fraud or collusion;
- (b) Prove that the consent was contrary to the policy of the court or the law; and
- (c) Demonstrate that the consent was entered into without sufficient material facts.

As far as the applicant is concerned, he proved that there was fraud because the advocates then acting for him did not have instructions.

If by that assertion, the plaintiff was suggesting that his former advocates had no instructions at all, then there would be nothing further from the truth. Clearly, the advocate had been instructed by the plaintiff to file suit, and later to try and negotiate an amicable settlement.

I have also found and held that in my considered assessment of the material before me, it was more probable than not that the plaintiff did specifically instruct Mr. J.M. Wafula to enter into the consent whose terms were recorded in court.

In any event, the plaintiff did not illustrate how a decision to enter into the particular consent constituted fraud.

This case can be distinguished from that in **KAFUMA VS. KIMBOWA BUILDERS & CONTRACTORS** by the fact that in that other case, the learned judge did

“find as a fact that Mr. Mugenyi had no express or implied authority to compromise the suit on behalf of the defendant. He held no brief from the defendant.”
(see page 96 of the law report).

The Hon. Nyamuchonjo J. went on, at page 99 to hold as follows;

“The counsel who compromised the suit was not duly appointed by the applicant to act on his behalf in accordance with O. 3, r.1. The counsel purported to represent the Corporation which was not a party to the proceedings without being instructed by the corporation and yet he purported to file a consent judgment under O. 22, r.2 on the defendant’s behalf with his authority, express or implied with full knowledge that he held no brief for him. This procedure is so irregular by itself as to render the judgment a nullity.”

In this case, there is no doubt that Mr. J.M. Wafula had been duly instructed to act for the plaintiff and also to enter into negotiations with the defendants.

Accordingly, the case falls in the same category as **SHAH VS. WESTLANDS GENERAL STORES PROPERTIES LTD. & ANOTHER (1965) EA 642**, in which the Court of Appeal held that a compromise or settlement entered into by an advocate who had apparent authority, was binding on the client, in the same manner as a contract entered into by an agent on behalf of his principal.

In the case of **ISMAIL SUNDERJI HIRANI VS. NOORALI ESMAIL KASSAM**, the Court of Appeal for Eastern Africa quoted with approval the following words of Windham J., from the decision which was being appealed from;

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court, or if

the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

Having come to the conclusion that the plaintiff has failed to demonstrate either fraud or collusion, is there any ground upon which the consent could be set aside?

By virtue of section 30 of the Agricultural Finance Corporation Act, in every mortgage or other security document executed to secure a loan, there shall be implied on the part of the farmer and in favour of the Corporation the covenants and conditions set out in the Act.

The item numbered 2 in the schedule reads as follows;

“That the mortgagor will not at any time alienate his interest in the said security, or any part thereof, by way of sale or gift or in any other manner whatsoever, without prior consent in writing of the Corporation, which consent shall not be unreasonably withheld.”

The consent in issue purported to alienate a part of the property which is mortgaged to the Corporation. As such alienation had not been consented to, in writing, by the Corporation, any attempts to give effect to the consent order would have come across a major obstacle. Mr. J.M. Wafula advocate wrote to Langa Wandabwa Advocate on 17/11/2006 pointing out that without the involvement of AFC in the case, the consent would be legally useless.

Obviously, if an order issued by the court cannot be given effect, the said order would be in vain. But courts do not act in vain, yet it would be improper to compel the Corporation to give its written consent to a matter which they are not party to, just so as to make it possible for the court order to be given effect.

In order to ensure that there is not in existence an order of the court which could only be executed subject to the written consent of the Agricultural Finance Corporation or of any other person or body, it is necessary to set aside the consent order. Accordingly, prayer (iv) of the application dated 12/2/2007 is granted, with the result that the consent order dated 3rd October, 2006 is set aside.

However, the plaintiff did not address the court on the need to expunge from the record the affidavit allegedly sworn by him on 27th December, 2006. On the face of the application, he simply stated that the said replying affidavit was not prepared on his instructions.

Mr. J.M. Wafula advocate has stated quite categorically that the plaintiff signed the said affidavit before a Commissioner for Oaths.

Assuming for a moment that the said affidavit was prepared without the plaintiff's express instructions, that would not be reason enough to have it expunged from record, if thereafter the plaintiff read and signed it before a Commissioner for Oaths.

It is noted that the plaintiff has not denied being a graduate, with a good knowledge of English. He has also not denied reading and signing the replying affidavit, before a Commissioner for Oaths. I therefore find no legal basis for having the replying affidavit expunged from record.

In arriving at this conclusion, I have not overlooked the deposition by Mr. J.M. Wafula, to the effect that he had not drawn or filed the supporting affidavit. By that deposition I understand Mr. J.M. Wafula to be making reference to the affidavit sworn by the plaintiff on 12/2/2007, before Mr. C.K. Kibichiy, Advocate and Commissioner for Oaths. It is that affidavit which is in support of the present application.

At the bottom part of page 2 of that supporting affidavit; after paragraph 18, it is indicated that the affidavit had been drawn and filed by J.M. Wafula & Company advocates. It is that assertion which, that his firm had drawn and filed the affidavit, which Mr. Wafula was denying.

Finally, as regards costs, it is evident that the court rejected the plaintiff's primary contention, which was to the effect that his former advocates had acted without authority. I hold the view that it is sad for the plaintiff to seek to rely on an untruth as the basis of escaping from the terms of a consent order. For that reason, I feel that the plaintiff is unworthy of the costs for this application.

But in any event, I find that there would be no basis for burdening the defendants with the costs, as the plaintiff has not made out any case for the same. Whether or not the plaintiff had given instructions to his lawyers would not be known to the defendants. At any rate, the plaintiff has not said that the defendants knew that the plaintiff's advocate had no instructions to enter into the consent on 3/10/2006.

Therefore, although costs usually follow the event, I hold that in this case, the justice of the case demands that each party should bear his own costs. It is so ordered.

Dated and Delivered at Kitale, this 11th day of July, 2007.

FRED A. OCHIENG.

JUDGE.