



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**Civil Case 28 of 2001**

**ADIEL MURITHI PHILIP.....PLAINTIFF/RESPONDENT**

**VERSUS**

**THOMAS MAINGI.....DEFENDANT/APPLICANT**

**RULING**

1. The Applicant in this matter is Thomas Maingi who was the 1<sup>st</sup> Defendant in the suit. By his motion dated 17.7.2007 and premised on S.3, S.3A and S.63 (e) Order XXXIX Rule 2, cap 21 and any other enabling provision he seeks orders as follows:-

“(i) .....

(ii) The honourable court do set-aside sale by auction dated 16<sup>th</sup> July, 2007 of Motor Vehicle Reg. No. KAH 885H. MISTUBISH LORRY.

(iii) The honourable court do declare the sale by Auction of motor vehicle Registration No. KAH 885H MISTUBISH LORRY a nullity ab-initio.

(iv) The honourable court do grant a temporally injunction to restrain the respondent or his advocates O.P. NGOGE & CO. ADVOCATES and/or any other person, firm, or body of persons from obtaining transfer of motor vehicle Reg. KAH 885 MISTUBISH LORRY to MAFUKO INDUSTRIES or by themselves until this application is heard and determined.

(v) The honourable court do make any other orders for the ends of justice.

**a. Costs of this application be provided for.”**

2. In the supporting Affidavit sworn on 17.7.2007 sworn by the said Thomas Maingi and the Replying Affidavit of Adiel Murithi Philip sworn on 24.7.2007, as well as the elaborate submissions by both advocates for the parties, the history of the dispute is not in contention. What happened was that Kasanga Mulwa J. delivered judgment in the suit on 15.5.2003 and from the decree extracted on 7.8.2003, the Respondent was to be paid Ksh. 2,495,425.00 together with costs and interest thereon. Costs were assessed at Ksh. 198,978.00. Subsequently parties entered into negotiations on the manner of payment of the whole decretal sum and the resultant consent dated 20.8.2003 which is on record and filed on 21.8.2007 reads as follows:-

“**CONSENT LETTER**

By consent and in lieu of the judgment of this honourable court's judgment given on 15<sup>th</sup> May 2003, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do pay to the Plaintiff the sum of Ksh.1,898,978/- in full and final settlement of this claim. That the same be paid in two installments as follows:

- (a) Ksh.1,500,000/- to be paid on or before 25<sup>th</sup> August, 2003
- (b) Ksh. 398,978/- to be paid within twenty (21) days from the date thereof.
- (c) In Default of any one of the installments execution for the full amount to issue forthwith.

Dated this 20<sup>th</sup> day of August 2003

**MITHEGA & COMPANY ADVOCATES**

**ADVOCATES FOR THE PLAINTIFF**

**NDONYE, MBUGWA, ATUDO & MACHARIA**

**ADVOCATES FOR THE 1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANTS"**

3. The amount agreed upon under the Consent was then paid by the Applicant's Insurance Company and the Applicant thought that the matter had come to an end. It did not because the Respondent and his then advocate, Mugambi Mithega Esq. had a fall out and with the leave of this court, was allowed to have new advocates come on record to represent him. Ostensibly and on his instructions, the said new advocates proceeded to instruct M/s Clear Real Traders to attach the Applicant's Motor Vehicle registration number KAH 885 H that was later sold to M/s Mafuko Industries Ltd. That action triggered the present application.

3. The only issue to determine and which will hopefully also determine the application is this; what was the effect of the consent letter vis-a -vis the decree and could it vary, amend or otherwise change the import and tenor of the judgment and decree?

4. I have anxiously considered the matter and very reluctantly I have to disagree with the Respondent that the decree remains valid unless properly varied by an order on record. I say so because the letter of 20<sup>th</sup> August 2003 in which the parties through their advocates compromised the decree is properly executed and filed and what remained to be done with it was only the extraction of the order. I note that in fact the order in line with the consent letter was extracted but was not executed by the Deputy Registrar. The Deputy Registrar even with that consent order lying unextracted for over four (4) years failed to extract it but instead issued warrants of sale of property in execution of the decree without enquiring whether there was in fact a consent varying the decretal amount recoverable. That was an error on the part of the court which should not be visited upon any party more so where one party more has been led by the other to believe that the matter is fully settled.

5. Mr. Ngoge for the Respondent has submitted quite forcefully inter-alia that "**the consent order signed by the parties was not signed or sealed and was therefore not a judgment of the court and cannot be relied upon**". The submission cannot meet my favour because parties, it is agreed, consented to the compromise to forestall the appeal on quantum by the applicant and clearly they intended to be bound by it. The respondent was tied to it through his advocate and I note that the Respondent on 19.9.2003 signed a discharge voucher in the following terms:-

**"DISCHARGE VOUCHER**

**I ADIEL MURITHI PHILIP ID No. 3525570 of Box 2600 Meru do acknowledge receipt of Ksh.182,735/- vide cheque No. 100350 from M/S MITHEGA & Co Advocates being my final entitlement in this matter as per the statement of account herein below:-**

**STATEMENT OF ACCOUNT**

**(a) Total amount received as per the consent letter**

**Dated 20<sup>th</sup> August 2003                      Ksh.1,898,978/-**

**(b) Less payable to Dr. Wangai as per lawyers**

**Undertaking dated 27<sup>th</sup> November 2000              Ksh. 46,550/-**

**( c ) Less payable to Mithega & Arithi being money**

**paid by them to Dr. Wangai on my behalf to**

**cover my medical bill                      Ksh. 50,000/-**

**(d) Less agreed legal fees                      Ksh. 569,693/-**

**Payable                      Ksh.1,232,734/-**

**Less 1<sup>st</sup> instalment paid on 8<sup>th</sup> Sep 2003              Ksh. 1,050,000/-**

**Final balance payable                      Ksh. 182,734/-**

**I now confirm that this matter is fully settled and I fully discharge my Advocates, the defendants and their insurance company from any further liability.**

**Dated at Meru this 19<sup>th</sup> day of September 2003.**

**Signed by.....**

**Adiel Murithi Philip**

**In the presence of**

**Advocate**

**DRAWN AND FILED BY**

**Mithega & Co**

**Advocates**

**P.O. Box 612 (M/AMP/49/01)**

**MERU.**

6. This voucher was signed upon the Applicant's insurer releasing all the money under the consent to the Respondent and he confirmed that he had no further claim from his advocates, the defendants (including the applicant) and their insurance company and there was no further liability on their respective parts.

7. The Respondent now attempts to say that he never intended to be bound by this voucher, the consent letter and any other compromise. Why then did he sign all these documents if he never intended to be bound by it? I am told by his advocate that the consent letter was a nullity but Sir Charles Newbold P. said this in Boyes vs Gathure [1969] E.A. 385.

**“May I repeat some words used in Nanjibhai Prabhudas and Co Ltd vs Standard Bank Ltd [1968] E.A. 670. I said in that case at page 1683 B)**

**“The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”**

8. I fully agree with the learned judge because failure by the Deputy Registrar to extract a consent order founded on a consent letter duly executed and on record cannot by itself nullify the consent and intent of parties which they have dutifully brought to the attention of the court. This court has taken cognizance of it and the same being a matter of record must imply, reflect and is truly the intention of the parties. None of them can now turn back and say it does not exist.

9. Having found on the one issue that is important, I see no need to go into and delve into other issues raised by counsel in submissions. I mean no disrespect for the depth of their research and authorities quoted but to my mind the matter is at an end.

10. The Application dated 17.7.2007 is merited and I allow it as prayed.

11. The Plaintiff shall pay the costs thereof.

12. Orders accordingly.

Dated, signed and delivered this 1<sup>st</sup> day of November 2007

**ISAAC LENAOLA**

**JUDGE.**

In the presence of

Plaintiff present

N/A Advocate for the Plaintiff/Respondent

Mr. Isaboke holding brief for Mr. Mbugua Advocate for the Defendants/Applicant

**ISAAC LENAOLA**

**JUDGE.**