



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

**Civil Case 58 & 59 of 2001**

**HANNAH CHERONO KOSKE ..... PLAINTIFF**

**VERSUS**

**SIMON A. ROTICH ..... DEFENDANT**

**CONSOLIDATED WITH**

**CIVIL CASE NO. 59 OF 2001**

**HANNAH CHERONO KOSKE ..... PLAINTIFF**

**VERSUS**

**CHEPKWONY ARAP TOGOM ..... DEFENDANT**

**RULING**

The applicant in this Notice of Motion dated 3<sup>rd</sup> March 2006, Simon Rotich was the defendant in the above suit. He has sought for orders particularly for the review of the ruling and order dated 13<sup>th</sup> February 2006.

The grounds of review are stipulated in the body of the application and they are further expounded in the supporting affidavit of the applicant.

Briefly, the respondent herein filed the present suit against the applicant seeking for among other orders, eviction orders from **L.R No. Kericho/Chesinende/241**. The applicant filed a defence and

counterclaim seeking among other prayers general damages for a breach of contract and a refund of the purchase price of the subject parcel of land.

Thereafter on 14<sup>th</sup> January 2004, the defendant filed an application dated 30<sup>th</sup> December 2003 seeking for an order to strike out the defence and counterclaim on the grounds that the sale transaction was not supported with the requisite land control to ..... consent thereby making it null and void. This application was allowed with costs to the respondent by a ruling by Honourable Apondi, J dated 23<sup>rd</sup> March 2004.

The applicant who was dissatisfied by the said ruling filed an application dated 27<sup>th</sup> July 2004 seeking for review of the orders of 25<sup>th</sup> March 2004. Before the said application was heard, the applicant was evicted from the suit premises on 30<sup>th</sup> August 2004 and after a number of adjournments when the application came up for hearing on 6<sup>th</sup> October 2005, the parties recorded the following consent;

*“By consent, the defendant be refunded the purchase price paid to the Plaintiff.”*

The court recorded the following words;

*“The court hereby adopts the consent of the parties. Each party to bear its costs.”*

According to the applicant that consent order is supposed to have settled the whole suit. However on 13<sup>th</sup> February 2006, the applicant complains that the respondent unilaterally caused the file to be placed before Honourable Apondi, J who had already been transferred to Nairobi and Counsel for the respondent requested the order of 6<sup>th</sup> October 2005 which had been entered by consent to be reviewed.

Further Counsel for the applicant argued the said order was obtained irregularly as there was no application for review that was before the Honourable Judge and secondly, the decree that was approved did not correspond with the ruling of 6<sup>th</sup> October 2005 which decree was properly drawn and issued on 3<sup>rd</sup> November 2005.

Counsel submitted that there is an error in the face of the record. It is trite law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a consent for example fraud, mistake or misrepresentation. (See the case of **Flora N. Wasike Vs Destimo Wamboko [1982-88] 1 KAR**). It is on the above grounds that this court was asked to review the orders of 13<sup>th</sup> February 2006.

This application was not opposed despite the fact that the same was duly served upon the respondent. The exact application that was placed before Honourable Apondi, J on 13<sup>th</sup> February 2006 is not clear what is recorded is as follows: -

*“Before Muga Apondi – Judge*

*Migiro for plaintiff present.*

**Court**

*The court has carefully perused the draft decree that has been drawn by Mr Migiro. Since the same correctly interprets my ruling dated 25<sup>th</sup> March 2005, the same is hereby approved. The order for costs shown on the proceedings of the 6<sup>th</sup> October, 2005 refer to that day’s costs.*

**Order**

*Any further application on this file should be dealt by any judge in Nakuru.”*

Having carefully examined the proceedings, I have noted some anomalies for instance, there is no indication what application was before the judge. Since there is no substantive application for review of the order by consent on record, it follows that this was an oral application. The next issue is whether the application or notice was served upon the applicant. The orders sought have definitely affected him and thus the applicant ought to have been notified.

Lastly, the orders of 13<sup>th</sup> February 2006 reviewed a consent order by indicating that the “*costs indicated on the order of 6<sup>th</sup> October 2005 was in respect to the costs for the day.*” .....order that changed the order of who to pay the cost was a substantive matter that should have required the involvement of the applicant. What the court was asked to correct was not in my humble an accidental error or clerical mistake. This was a consent order recorded by both parties.

Accordingly, I am satisfied there was an error on the face of the record on the order made on 13<sup>th</sup> February 2006, and therefore review the same and set it aside with costs to the applicant.

The facts are this application are similar to **H.C.C.C No. 59 of 2001** at Kericho which involve the same respondent and therefore this ruling shall abide in that case as well.

It is so ordered.

**Ruling read and signed on 12<sup>th</sup> day of May 2006.**

**MARTHA KOOME**

**JUDGE**