



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

**AT NAIROBI**

**CIVIL CASE NO. 2687 OF 1998**

**YATIN VINUBHAI KOTAK..... PLAINTIFF**

**VERSUS**

**TUCHA ADVENTURES LIMITED..... 1ST DEFENDANT**

**THE COMMISSIONER OF LANDS..... 2ND DEFENDANT**

**RULING**

The Applicant herein who happens to be the 1st Defendant in the suit has brought this application under Order XX Rule 6 and Order L Rule 1 of the Civil Procedure Rules seeking orders as follows:

- a) That the decree purportedly by issued in this case on 24th July 2002 be set aside**
- b) That all steps taken by the Plaintiff and/or 2nd Defendant/Respondents in relation to the cancellation of the 1st Defendant's title to Plot No. Mombasa Island Block XXVI/919 consequent upon or pursuant to the purported decree of 24th July 2002 be set aside.**
- c) That the 2nd Defendant do restore and reinstate the 1st Defendant's title to the said plot on the register at both the Mombasa and Nairobi Land Registries pending the final hearing of the suit between the Plaintiff and the 1st Defendant.**
- d) That the Plaintiff do pay forthwith the 1st Defendant's costs of this application together with incidentals thereof.**

The grounds in support of the application are that

- a) The purported decree issued on 24th July 2002 does not accord with the judgment and orders recorded by this Honourable Court on 17th July 2002**
- b) The said decree was extracted by the Plaintiff and/or 2nd Defendant without the knowledge or consent of the 1st Defendant**
- c) The steps taken by the Plaintiff and/or the 2nd Defendant in relation to the cancellation of the 1st Defendant's title to the said plot purportedly in pursuance of the said decree are not sanctioned or warranted by the judgment and orders made by this Honourable Court on 17th July 2002, are unlawful and of no effect in law.**

**d) It is necessary in the interests of justice and fair play that the said steps be declared null and void and the 1st Defendant's title to the plot restored and reinstated in the registries aforesaid pending the final hearing and determination of the suit between the Plaintiff and the 1st Defendant.**

The application is supported by an affidavit sworn by Mr. Mohamed Mae, the Managing Director of the 1st Defendant in which he has deposed to facts appearing on the Court record, particularly the pleadings of both parties, proceedings and Ruling of the Hon. Mr. Justice Mbiti on 17th July 2002 and an affidavit filed herein by the Plaintiff in support of a Chamber Summons dated 30th October 2002 and the Ruling made in that application by the Hon. Mr. Justice Mbiti on 5th March 2003.

The application of 30th October 2002 was described in the Ruling of 5th March 2003 as acrimonious. Indeed my perusal the reason why. The genesis of this case is that the Plaintiff and the 1st Defendant were allotted the same plot, namely, L.R. No. Mombasa/Block XXVI/919 with Certificates of Lease being issued as follows.

**1) Certificate of Lease to TUCHA ADVENTURES LIMITED, the 1st Defendant, issued on 20th December 1996**

**2) Certificate of Lease to YATIN NINUBHAI KOTAK, the Plaintiff, issued on 4th September 1997.**

Clearly from the above, and unless it can be shown that the Certificate issued to the 1st Defendant was so issued after 4th September 1997 and then backdated the same stands out as the prior title. Yet the impression created by the Plaintiff in these proceedings is that his title was issued first and that the allocation of the said property to the 1st Defendant was a reallocation which he alleges in his plaint to have been effected in an irregular and illegal manner. He claimed to have been registered as owner prior to the 1st Defendant and prays for judgment, inter alia, as follows:

**a) A declaration that the purported reallocation of the said plot Number Mombasa/Block/XXVI/919 situated in Mombasa Island to the 1st Defendant is illegal and therefore null and void.**

**b) An order of permanent injunction restraining the defendant either by itself, servants, employees, and/or agents from evicting, barring or continuing to evict or bar the Plaintiff from remaining in or occupying the plot No. Mombasa/Block/XXVI/919 ....until the final determination of the suit or until further orders of the Court.**

**c) An order of temporary injunction restraining the Defendant either by itself servants and/or agents from wasting, damaging, alienation, sale, removal or disposition of the plot.....until determination of the suit or until further orders of the Court.**

**d) A declaration that the Plaintiff is a bone fide registered owner of Plot No. Mombasa/Block/XXVI/919.**

**e) A declaration that the registration of the 1st Defendant as the proprietor of Plot No. Mombasa/Block/XXVI/919... was obtained, made or omitted (sic) by fraud or mistake.**

**f) In view of prayer (e) above the Court do order rectification of the register by directing that the registration of the 1st Defendant as the proprietor having been obtained made or omitted (sic) by fraud or mistake be and is hereby cancelled or amended.**

The background to the present application is clearly articulated in the Ruling of 5th March 2003 which dealt adequately with the events following the consent judgment recorded by the Plaintiff and the 2nd Defendant and with a strong protest by the 1st Defendant on 17th July 2002. I find it unnecessary to

repeat those facts or even to state Counsel's submissions thereon in the presence of the said Ruling. It is clear from the proceedings of 17th July 2002, the pleadings and the said Ruling that by allowing the Plaintiff and the 2nd Defendant to record the consent of 17th July 2002, the court did not anticipate that the said two parties would thereafter conspire together and proceed in a manner so prejudicial to the 1st Defendant as is now clearly apparent. Firstly, the prayers in the Plaint cannot be granted on the consent of the 2nd Defendant particularly when the 1st Defendant has not been heard on its defence and counter claim. The facts of the case clearly show that it has an arguable defence to the action as well as a reasonable cause of action in the counterclaim which must be given a chance.

To say in the decree under challenge that the orders of 17th July 2002 were made "...UPON hearing Counsel for the 1st Defendant, the Plaintiff and Counsel for the 2nd Defendant" is to state a non-truth. The 1st Plaintiff was not heard at all before the consent order was recorded. The 1st Defendant's Counsel protested strongly against what he called

**"the irregular manner in which the Plaintiff and the 2nd Defendant joined together to shut out the 1st Defendant from defending the suit against the 1st and 2nd Defendant."**

That the 1st Defendant has filed an appeal against the order of 17.07.02 is not, in my view to be taken as a bar to the present application considering the speedy manner in which the Plaintiff and the 2nd Defendant moved to enforce the said consent order much to the horror and shock of the Honourable Judge before whom the same was recorded. The judgment entered was against the 2nd Defendant only. The order clearly reads:

**"As the 2nd Defendant is not now opposing the Plaintiffs claim, by consent judgment is now hereby entered against the 2nd**

**Defendant in favour of the Plaintiff as prayed in the Plaint.**

No judgment was recorded against the 1st Defendant as to support the purported declarations that the allocation (referred to in the decree as a reallocation) "is illegal and therefore null and void" or that the Plaintiff, as against the 1st Defendant "is the bona fide owner" of the suit premises. In my considered opinion, order 3 of the decree is not an order at all in so far as it states that among other things, the registration of the 1st Defendant by the 2nd Defendant as the proprietor of the disputed plot was "omitted by fraud or mistake". Moreover the record shows that the 2nd Defendant did not admit the allegation of fraud.

I agree with Mr. Inandar's submission that the Ruling of the Hon. Mr. Justice Mbiti of 5th March 2003 is a clear demonstration that the purported decree is at variance with the consent judgment of 17th July 2002 seeing that the judge therein clearly stated, and I quote, that

**"Armed with this consent judgment, the applicant for reasons which I cannot comprehend made out a decree affecting the Respondents (applicant herein) title and now seeks the aforesaid orders as the 2nd Defendant has apparently for reasons not yet clear cancelled the Respondent's title to the suit premises while it was not party to the consent order....."**

The learned judge clearly observed that the Plaintiffs suit against the Respondent and the Respondent's counterclaim to determine who of the two was the bona fide owner was still at large. He ruled accordingly that

**"...It is therefore yet to be determined by the Court as to who is the bona fide title**

**holder of the suit premises.”**

Judicial discretion is such that no-one is better placed to interpret the meaning and purport of a judgment or order than the judge who recorded the same. Even on appeal the Appeal Court will normally make a finding that a judge has misdirected himself one way or another, before arriving at a conclusion that such judge recorded a wrong judgment.

With the above considerations in mind I have no hesitation to find that indeed the purported decree is at great variance with the consent judgment entered by the Plaintiff and the 2nd Defendant on 17th July 2002 and that the steps taken by the consenting parties upon reliance on the same are without basis or sanction of this Court. The same are greatly prejudicial to the 1st Defendant and cannot be allowed to maintain and are hereby declared illegal, null and void. I order that the purported decree issued on 24th July 2002 be set aside and that the 2nd Defendant takes steps to put the warring parties back to their status quo ante, pending the hearing and determination of the dispute and the final determination of who the bona fide owner of Mombasa/Block/XXVI/919 is.

Accordingly, this application is allowed with costs to the 1st Defendant as prayed. I commend both warring parties and their Counsel for keeping the previous acrimony at bay during these proceedings.

Dated, Signed and Delivered this 29th day of April 2005.

**M.G. Mugo**

*Judge*

**In the presence of:**

***Kibanya for Applicant***

***Kyalo for 2nd Defendant/Respondent***

***Letangule for Plaintiff/Respondent***