REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Misc Civ Appli 240 of 2002

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE REGISTERED LAND ACT CHAPTER 300 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC……APPLICANT

VERSUS

DISTRICT LAND REGISTRAR NANDI……..…….RESPONDENT

AND OBADIAH KIRUI……....……INTERESTED PARTY APPLICANT

EX-PARTE

KIPRONO TEGEREI……....SUBJECT (NOW DECEASED)

AND

JONATHAN K. RONO…….……...SUBSTITUTED SUBJECT

RULING

Before me is an application by way of a Notice of Motion brought under Order XLIV rule 1 of the Civil Procedure Rules, Section 3, 3A and 80 of the Civil Procedure Act, The Succession Act Cap, 60, the Registered Land Act and all other enabling provisions of the law. The application seeks a review of the orders given on 15th March, 2004 with a view to setting them aside and granting the defendant unconditional leave to oppose the application dated 10th March, 2004.

The main grounds for bringing the said application can be summarised as follows:-

(a) The orders given on 15th March, 2004, though issued by consent recorded between the counsel for the substituted party, Jonathan K. Rono and the former counsel for interested party/applicant, Mr. Obadiah Kirui, were consented to by the applicant's erstwhile Advocate without instructions, specifically or generally, whether expressly or impliedly.

(b) The said advocate acted contrary to instructions so much so that complaints had been made against him at the Advocates Complaints Commission and at Nakuru Police Station.

(c) That there were adequate and sufficient reasons to warrant an order of review.

(d) That there were mistakes and errors apparent on the face of the record.

(e) That there were new and important matters justifying review.

The application was supported by the applicant's affidavit. The substituted subject filed a replying affidavit but his advocate did not attend court on the hearing date of this application because he was said to have been unwell, an allegation which was vehemently denied by the applicant's advocate as the two advocates had been together in court on the material day. The hearing of the application therefore proceeded in the absence of the substituted subject.

The background of this matter is as follows:-

On 22nd July, 2002, one Kiprono Tegerei (now deceased) commenced Judicial Review proceedings under Order LIII of the Civil Procedure Rules urging the court to issue an Order of Certiorari to bring before it and quash the decision of the Land Registrar, Nandi District made on 19/10/2001 to cancel the Title Deed for **L. R. NANDI CHEPTERIT BLOCK 856** which was in the name of the deceased and the subsequent registration of the said land in the name of the applicant herein as **NANDI/CHEPTERIT/BLOCK 292**. The application was heard and the orders sought were granted by Visram J. on 29th July, 2003.

On 29th September, 2003 Kiprono Tegerei passed away and by an application dated 19/1/2004 Jonathan K. Rono applied to be substituted as the applicant in place of the aforesaid deceased person, the applicant held himself out as the legal representative of the estate of the late Kiprono Tegerei although he had obtained only a Limited Grant of Letters of Administration ***ad colligenda bona*** issued under Section 67(1) of the Law of Succession Act Cap 160.

On 26th January, 2004 the said application was by consent of all the parties allowed. At that time Mr. Mbeche Advocate was acting for the interested/party/applicant, Obadiah Kirui.

On 10th March, 2004, Jonathan K. Rono having become a party to these proceedings, filed an application under Order XXXIX Rule 1 (a) and 2, 3 and 9 of the Civil Procedure Rules seeking a temporary injunction to restrain the interested party by himself, his servants and/or agents from entering, remaining in, dealing or interfering in whatsoever manner with **L. R. NO. NANDI CHEPTERIT/856**. By the same application, a permanent injunction against the interested party, his servants, and/or agents was also sought to restrain them from interfering, dealing with or tempering with the said parcel of land, **NANDI CHEPTERIT/856**.

The applicant also prayed that the above orders be executed with the assistance of the O.C.S. Kapsabet Police Station. When the said application came up for hearing on 15th March, 2004 the prayer for a temporary injunction was allowed by consent as well as the prayer requesting for enforcement of the said order by the O.C.S. Kapsabet Police Station. Again Mr. Mbeche Advocate was on record for the interested party. No replying affidavit or grounds of opposition seem to have been filed in respect of the two applications where the consent orders were recorded.

In the affidavit sworn by the applicant in support of this application, he deponed that his former advocates did not have his specific or general instructions, express or implied to consent to the said applications and

they had neither told him about the applications having been filed and served on them nor had they asked for the applicant's reactions or instructions to the said applications. The advocates also did not inform their client that they had attended court on his behalf on any application and recorded any consent orders. The applicant further deponed that he learnt of the consent orders when the O.C.S. Kapsabet arrived at his farm and started re-ploughing his farm, cutting his fence and damaging trees. That forced him to go and peruse the court file in this matter.

The applicant further deponed that his former advocates did not act in his best interest in consenting to the said applications considering the circumstances of this case, the facts obtaining and the law. Even with regard to the orders made by Visram J. on 29th July, 2003, the applicant said that he was made aware of them on 15th December, 2004 when he received a letter dated 30th November, 2003 by which time he could not appeal or even seek a review due to passage of time. He accused the said advocates of dishonesty in assuring him that there was no activity and/or issue pending in this matter while at the same time they were making prejudicial court attendances and recording equally prejudicial consent orders.

I have perused the replying affidavit that was filed by the substituted party, Mr. Jonathan K. Rono. He stated that an Advocate has ostensible authority to compromise or enter into any agreement on behalf of his client and that such a consent or agreement is biding upon his client. He also deponed that there were no mistakes or errors on the face of the record that called for a review of the consent orders.

Having set out the background to this application, I believe an appropriate starting point is to consider the propriety of the consent orders issued on 15th March, 2004.

It is not in dispute that an advocate has general authority to compromise a matter on behalf of his client but he has to act bona fides and in the best interests of his client.

"***SETON ON JUDGMENTS AND ORDERS"***, 7th edition, volume 1 page 124 states as follows:-

"***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 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."***

That position was restated by the Court of Appeal in ***FLORA WASIKE VS DESTIMO WAMBOKO*** [1988] 1 KAR 625 and recently by the same court in ***KENYA COMMERCIAL BANK LTD VS BENJOH AMALGAMATED LTD & MUIRU COFFEE ESTATE LTD*** Civil Appeal No. 276 of 1997.

I have carefully considered the consent orders issued on 15th March, 2004. The applicant was not aware of the application dated 10th March, 2004 which gave rise to the said orders. His instructions were not sought in the matter at all. The applicants erstwhile advocates did not file any grounds of opposition and neither did they get the applicant to swear a replying affidavit. How then could they challenge the said application? The orders sought in the said application had far reaching effects and so it was incumbent upon Mr. Mbeche Advocate to seek express instructions from the applicant.

Although an advocate has ostensible authority to compromise his client's case, employment of such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which he has been given by a client in a matter. It is not easy to prove that there was fraud or collusion in recording of any consent orders between advocates in the absence of their instructing clients but where such orders completely negate the interests of an instructing client and it is shown to the satisfaction of the court that the client was not even aware of the application that gave rise to those consent orders leave alone having consented to the recording of the orders, in the absence of any satisfactory explanation by the counsel who is accused of entering into the consent orders in question, a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold

the consent orders issued.

I have seen the complaints that were made to the police and to the complaints commission by the interested party and I have also perused the reply that Mr. Mbeche made to the Complaints Commission and there is no doubt that the advocate entered into consent orders that were contrary to the given instructions and in my view contrary to the interests of his client. He did not even notify his client of those orders inspite of their serious implications to him. Such a consent is contrary to the unwritten policy of the court of promoting reconciliation between warring parties and expeditious disposal of matters. Such consents only increase litigation.

I therefore find that there are sufficient reasons to warrant the setting aside of the said orders and hereby set aside the orders given on 15th March, 2004 and grant unconditional leave to the interested party/applicant to contest the application dated 10th March, 2004.

There are also some other aspects of the application dated 10th March, 2004 which I found very unusual in that it was an application for an injunction made within an application for judicial review brought under Order LIII of the Civil Procedure Rules, and the judicial review matter had already been finalised when the orders of certiorari were granted as sought in a ruling delivered on 29th July, 2003. Firstly, the court became ***functus officio*** after it granted the orders for certiorari that had been prayed for and I do not see how the matter could have been re-opened so that injunctive orders could be granted.

Secondly, it is common knowledge that under Order LIII, the only remedies that can be granted are orders of Certiorari, Mandamus and Prohibition. Injunctions cannot be sought in a matter commenced as a judicial review.

Thirdly, the applicant therein was praying for temporary prohibitory and mandatory injunctive orders against the interested party as well as a permanent injunction to restrain him from entering, remaining or using in any way L.R. Number **NANDI CHEPTERIT/856**. The orders sought were also mandatory in nature in that it was anticipated that the O.C.S. Kapsabet Police Station would evict the interested party from the aforesaid parcel of land. These orders were being sought when there was no matter pending between the parties herein following the finalisation of the judicial review matter on 29th July, 2003.

It is also not clear whether the parcel of land known as **NANDI CHEPTERIT/856** exists any more as there are proceedings which seem to indicate that the said title was cancelled.

All in all, I allow the application dated 26th May, 2004 in its entirety and award costs thereof to the interested party/applicant.

DATED, SIGNED & DELIVERED at Nakuru this 26th day of April, 2005.

DANIEL MUSINGA

JUDGE