

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 5961 of 1993

JORAM OLE TOME & ANOTHER PLAINTIFFS
VERSUS
MESCHACK OLE TOME & ANOTHER DEFENDANTS

RULING

The Applicant seeks to set aside a consent order recorded before Mr. Justice Ole Keiwa on the 13.10.99 nearly six years ago. The ground is that the 1st Plaintiff and fourth Defendant were not present.

The consent is signed by 2nd Plaintiff and 1st Defendant and a legal representative of 1st Plaintiff. It appears that the 1st Plaintiff was deceased at the time.

Mr. Chacha objects that the Application is brought wrongly under Order IXB rule 8, which applies to non-attendance of parties at a hearing.

He relied on *Munyiri Versus Ndunguya (1985) KLR page 370* which states an application to set aside a consent Judgment must be by way of review. Alternatively a suit can be filed. The reason for setting aside a court Judgment is that there is either fraud or mistake.

He also relied on *Hirrani versus Kassam {1952} E.A.C.A. Vol.19 page 131*, which states that the reason for interfering with a disputed claim compromised can only be in circumstances, which would afford good grounds for varying or rescinding a contract.

I agree that this Application is brought under the wrong order of the Civil Procedure Rules. However if there was merit in their application I would allow an amendment.

However the Applicant fails on two grounds.

1. It is brought nearly five years after the court order was recorded and lacks bona fides as no reason is given for the delay.
2. No allegation is made of either fraud or mistake sufficient to set aside the order. The order was recorded in the presence of counsel for both parties and is signed by the 2nd Defendant and fourth Defendant. The absence of the 1st Plaintiff and 2nd Plaintiff does not vitiate the consent. For these reasons I dismiss this application with costs to the Respondent.

Dated and delivered at Nairobi this 14th day of July,2005

P.J. RANSLEY
JUDGE