

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1146 OF 1997

JOHN NGIRIA NGURU & OTHERS ----- PLAINTIFF
VERSUS
MARY WANGECHI GITHIRE & OTHERS ----- DEFENDANT

R U L I N G

We have before the Court two applications: One by the 1st Defendant dated 15th November, 1999 and the other by the 2nd Defendant dated 28th January, 2000. Both applications seek to set aside a consent judgment.

On 13th May, 1994, the Plaintiff filed this action against the Defendants seeking a declaration that the registration of certain persons as allottees of Land reference number MWEA/MUTHITHI/SCHEME: - (hereinafter referred to as the suit land”) was null and void and a direction to the 3rd and 4th Defendants to cancel the illegal registrations. The Plaintiff’s Advocates and the 2nd Defendant’s Advocates negotiated and recorded a consent in this Court on 23rd April, 1999. The consent judgment settled the suit. The 1st and 2nd Defendants now challenge that judgment. The 1st judgment was entered without her knowledge. The 2nd Defendant on the other hand, alleges that its erstwhile Advocates recorded the consent judgment without its instructions.

It is common ground that the consent judgment was obtained without the participation of the 1st Defendant. Her Advocate was not involved in its procurement. This was a fatal defect as it had the effect of altering the 1st Defendant’s rights without giving her an opportunity to be heard. That was contrary to the principles of natural justice. She was never allowed to present her case before a determination was made on her rights by the consent judgment. On this ground, I will not hesitate to allow her application. Although the 2nd Defendant’s application is so intertwined with the 1st Defendant’s application, I would like to say as follows in relation to it. By allowing the 1st Defendant’s application, the effect is that the consent judgment is wholly set aside. However, the 2nd Defendant’s application was premised on the ground that its erstwhile Advocate acted without its instructions. That is a matter, of great controversy, as evidenced by the Affidavits of that Advocate and the 2nd Defendant’s representatives. The evidence shows on that issue is ver contentious and I am minded not to determine any point on it as this application has technically succeeded albeit on the 1st Defendant’s application. In that regard, the 2nd Defendant is not entitled to any costs.

I, therefore, allow both applications and order the 2nd Defendant to pay the Plaintiff’s thrown away costs and the 1st Defendant’s costs of this application.

DATED and delivered this 7 th day of March, 2001

ALNASHIR VISRAM

JUDGE