



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2286 OF 1993

WAIRIMU NGIGI.....PLAINTIFF

VERSUS

KIAMBU NYAKINYA FARMERS.....DEFENDANT

R U L I N G

On 14th May, 1999, a consent order was entered into in respect of H.C.C.C. Nos. 2821 of 1986 H.C.C.C. 4581 of 1989 and H.C.C.C 2286 of 1993 which, inter alia, consolidated those three cases.

By a Notice of Motion dated and filed on 24th August, 1999, the plaintiffs in H.C.C.C. NO. 2286 of 1993 moved the court for orders, among others, that the said consent order be set aside and/or vacated in its entirety and consequently the said three cases be deconsolidated and the same be reinstated.

The reasons given in the application are that the said consent order adversely affects the plaintiffs in H.C.C.C NO. 2286 of 1993 aforesaid and that it was recorded without instructions and/or knowledge of the applicants herein and by counsel who was not on record in the said suit, that is, H.C.C.C. NO. 2286 of 1993 or at all. It is also stated that the alleged consolidation was erroneous as the subject suits did not contain similar questions of law or fact.

The application is supported by an affidavit sworn by one Margaret Wanjiru. It is opposed and both counsel appearing for the respondents have filed grounds of opposition. Learned counsel on record have also made their submissions which I have on record.

The contentious consent order followed consent order filed in court on 6th April, 1999 signed by Waweru Gatonye & Company Advocates for the defendants and Rumba Kinuthia & Company Advocates for the plaintiffs. The said letter which was addressed to the Deputy Registrar, High Court Nairobi mentioned all the three cases set out above.

I have taken some time and perused all the three files before me. Mr Rumba Kinuthia who purported to execute the consent letter on behalf of the plaintiffs including those in H.C.C.C. No. 2286 of 1993 was then not on record for the said plaintiffs neither was he when this application came up for hearing. The record shows that the firm of Ben M. Wambaa & Associates was on record. Mr Wambaa is said to have died sometime in 1997 and it was not until 24th August, 1997 that W.G. Wambugu & Company Advocates came onto record as advocates for the plaintiffs in H.C.C.C. No. 2280 of 1993. It is clear that Mr. Rumba Kinuthia did not comply with the provisions of order 3 of the Civil Procedure Rules in relation to change and appointment of advocates.

In the grounds of opposition filed by Rumba Kinuthia & Company Advocates, ground No. 2 reads as follows:-

“The application is an after thought since the consent was agreed upon by all the parties, to all the suits (including the applicants) at parliament Buildings on 16th November, 1998 during a meeting attended by representatives of all the parties AND 5 members of Parliament for all the 5 areas.”

The said statement is not authority all to compromise a suit on behalf of litigants who had not retained Mr. Rumba Kinuthia to act for them in that suit Further, the said representatives have not been named, they did not sign the said consent and their members of Parliament who have also not been named are not parties to this litigation.

The Court of Appeal has had occasion to address the issue of setting aside consent orders in several of its decisions. (see Flora N. Wasike -v- Destimo Wamboko (1982-88) 1 KAR 625.) In Civil Appeal No. 276 of 1997 Kenya Commercial Bank Limited -v- Benjoh Amalgamated Ltd and Muiru Coffee Estates Limited the Court of Appeal citing The Supreme Court Practice 1976 (vol2) paragraph 2013 page 620 set out the following.

“Authority of solicitor a solicitor has a general authority to compromise on behalf of his client, if he acts bonafide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re; Newen (1903) 2 K B 658) No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice - see Welsh -vs- Roe (1918-(9) ALL E.R. Rep 620”

The learned Judges then went ahead to cite the case of Brooke Bond Liebig (T) limited -vs Mallya (1975) E.A. 266 setting out the circumstances in which a consent order or judgment may be interfered with such an order cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court... of if consent was given without 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.

It has been shown that Mr. Rumba Kinuthia had no authority to compromise the suit. He was not on record. He does not say he was. He cannot say so as the record is clear and speaks for itself.

The counsel for the defendant must have known that Mr. Rumba Kinuthia was not on record. after all they (Waweru Gatonye & Company Advocates) were acting for the defendants and had been served with documents by the late wambaa's firm regretablely, I am constrained to observe that there is more than meets the eye in the whole transaction.

Be that as it may, I have come to the conclusion that the said consent order entered into on 14th May, 1999 and issued on 5th July 1999 must be an is hereby set aside. Consequently the three suits are de-consolidated and each reinstated.

The two advocates firms which executed the consent letter leading to the said order shall pay the costs occasioned by this application.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of March 2000

A. MBOGHOLI MSAGHA

JUDGE