REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KERICHO

ELC NO. 65 OF 2015

ERICK KIMUTAI SITONIK (*suing as the legal representative*

***of the Estate of the late* ZACHAYO KIPLAGAT**

SITONIK ALIAS ZAKAYO KIPLAGAT SITONIK).....PLAINTIFF

VERSUS

SOT TEA GROWERS SAVINGS AND

CREDIT CO-OPERATIVE SOCIETY LIMITED.....1ST DEFENDANT

STEGRO (EPZ) TEA FACTORY LIMITED.....2ND DEFENDANT

DANIEL KIPKIRUI LANGAT.....3RD DEFENDANT

PETER KIPKORIR LANGAT.....4TH DEFENDANT

JOEL KIPKEMOI LANGAT.....5TH DEFENDANT

BOMET DISTRICT LANDS REGISTRAR.....6TH DEFENDANT

CO-OPERATIVE BANK OF KENYA.....7TH DEFENDANT

COUNTY GOVERNMENT OF BOMET.....1ST INTERESTED PARTY

RULING

1. Both Mr. Samwel Kimutai Langat on behalf of the 2nd Applicant/Defendant, and the 3rd Applicant/Defendant, **Daniel Kipkirui Langat** and filed their respective Applications dated the 28th May 2021 under Certificate of urgency seeking an order of stay of execution of a consent filed in court on the 19th April 2021 and adopted through virtual hearing as the order of the court on the 28th May 2021.

2. **Both the** Applicant's **Applications were supported by the grounds on their face as well as on the supporting affidavits of both** Mr. Samwel Kimutai Langat and Mr. **Daniel Langat t**he Applicants herein respectively, which were **sworn on the 28th May 2021.**

3. The 2nd Applicant/Defendant's grievance was that the said consent was adopted with some modifications without his participation, knowledge and/or involvement. That the firm of K.N. Mutai and partners Advocates had purported to act for the 2nd Applicant/ /Defendant without there being a resolution or consent. That the 2nd Applicant/Defendant was not granted audience to voice its objection and by the he addressed the court virtually, directions had been given and the consent order adopted to their detriment.

4. The 2nd Applicant/Defendant deponed that the impugned consent order defied the consent order entered on 10th October 2017 in JR 373 of 2017 and directions of Lady Justice Ongeri of 23rd November 2020 before the Kericho High Court. That further, there was a pending Petition No. 7 of 2018 before Justice Gikonyo where the Applicant had been enjoined as an interested party. That lack of full disclosure denied the court from appraising itself on these proceedings before the adoption of the impugned consent which in turn would lead to unnecessary

litigation, division, confusion, chaos and frivolous claims, contrary to negotiations and proposals for amicable settlement of all cases.

5. His disposition was that should there be no stay of executions of the consent adopted on 28th May 2021, the 2nd Applicant/Defendant would be exposed to liability of over Ksh. 12,500,000/-, thereby suffering irreparable harm, loss and damage that could not be compensated before the intended settlement of the court cases.

6. The 3rd Applicant/Defendant on the other hand also deponed that the consent adopted on 28th May 2021 had been adopted in his absence and without his consent and participation as he had been unable to log on to the virtual meeting on time.

7. That unless the proceedings on consent were set aside by the court, he stood to suffer irreparable harm as well as irreversible loss and damage in the likely event that the matter is compromised without affording him a right of audience.

8. The Applicant also sought that in the alternative, the matter be referred to Bomet High Court for adoption of the consents pending in P & A 193 A of 2015 in the Estate of the late **Zachayo Kiplangat Sitonik alias Zakayo Kiplagat Sitonik.**

9. Pursuant to the filing of the said application, on the 2nd June 2021, the court directed for service of the same upon the Respondents who were granted leave to file and serve their respective responses to the application which was to be disposed of by way of written submissions.

10. Following the courts' directions, the 5th Defendant filed his Notice to act in person dated 5th June 2021 wherein he supported the application and **also adopted submissions filed by the 3rd Applicant/Defendant as his submissions.**

11. The Respondent/Plaintiff via their Replying Affidavit of the 26th July 2021 deponed that the application dated 28th May 2021 by the 3rd Defendant/ Applicant was misconceived, incompetent and bad in law for reason that the consent order adopted by the court on 28th May 2021 did not affect him in any manner whatsoever.

12. That it was not possible to adopt the consent in issue in Bomet High Court Succession Cause No.193A of 2015 as the 1st and 2nd Defendants were not parties to the Succession Cause.

13. That parties had been provided with the consent by the respective Counsel where the 3rd Applicant had requested that a sum of 2,500,000 million be paid to the Administrators of the Estate of Zachayo Kiplangat Sitonik which led to the change of the initial consent. That prior to the adoption of the consent the entire family of the late Zachayo Kiplangat Sitonik had met and endorsed the same as per the annexed minutes marked as EKS 1. The Applicant had thus not shown how the consent would be prejudicial to him and the Estate Zachayo Kiplangat Sitonik. That since the consent was now binding, it could only be set aside or varied if the Applicant showed that the same was adopted by the court through misrepresentation, mistake and/or fraud to which no such application had been made. The Respondent/Plaintiff sought that the application be dismissed with costs. No mention was alluded to the 2nd Respondent's Application.

14. There was no response to the 2nd Applicant/Defendant's application by all parties and neither was there a response to the 3rd Applicant/Defendant's application by the 1st, 2nd, 4th, 6th, 7th Defendant as well as the interested party herein.

15. It is also worth noting that despite directions by the court giving parties a time frame within which to file their respective submissions to both applications, the court only received written submissions from the 2nd and 3rd Applicants/Defendants in support of their respective application to which the courts shall summarize as herein under.

2nd Applicant/respondent's submissions.

16. The 2nd Applicant/Defendant's submissions in opposition to the consent dated 19th April 2021 and adopted as the order of the court on 28th May 2021 was that the same was adopted in their absence and further that the speed at which the same was adopted left a lot of concern and doubt and created confusion in the way the case had been handled.

17. That the consent adopted in court was oppressive prejudicial and did not compromise the case as per their resolution of 28th October 2020 since the same was arrived at without the participation of all parties, consensus, knowledge and/or involvement of the 2nd Defendant through its elected director and/or company lawyers. That the removal of their advocates (Mengich and Co advocates) in the proceedings of 25th May 2021 was aimed at rushing through a skewed and bogus settlement proposal that had not been deliberated upon its Board of Directors and hence violated its right to be represented by an Advocate of their choice.

18. The 2nd Applicant/Defendant further submitted that they had not been represented during the adoption of the consent for which their right to representation was severely compromised. That further the failure to accord its directors an opportunity to ventilate their concerns regarding the adoption of the consent which had been modified without the approval and concurrence of Stegro (EPZ) Tea Factory Limited, further complicated the issues.

19. That with the intervention of the officials from the 7th Defendant, Directors of the 1st and 2nd Defendant companies had resolved to pay legal fee to the firm of Mengitch and Co. advocates as part of the negotiations to settle all pending matters between parties. The 2nd Applicant/Defendant thus sought that the court reviews its decision of 25th May 2021 on this aspect.

20. The 2nd Applicant/Defendant also faulted the court's ruling of 25th May 2021 while intertwining it with their present application, in

manner that was akin to an Appeal which this court respectively finds, lies within the jurisdiction of an Appellate Court and therefore shall not delve on the same.

21. Their further submission was that the impugned consent was prejudicial to its interests as it sought to commit the company to settle debts on behalf of a separate and distinct entity wherein there had been a settlement agreement already filed in court. That the consent thus exposed it to liabilities wherein it stood to lose monetary sums, suffer irreparable harm, loss and damage.

22. That the impugned consent filed by the firms of Mutai Waiganjo and Co Advocates was fraudulent and the circumstances leading to its filing and adoption were well choreographed and aimed at excluding its elected and bona fide Directors from having a say on the same thus going against the spirit of an amicable settlement.

23. The 2nd Applicant/Defendant also blamed the court for not admitting him virtually before the adoption of the consent for reasons that he was represented had not filed his notice to appear in person. That he was only admitted after adoption of the consent thereby denying him an opportunity to be heard and challenge the same. The 2nd Applicant/Defendant relied on the decided cases in Multiscope Consulting Engineers vs. University of Nairobi & Another [2014] eKLR and Protus Hamisi Wambada & Another vs Eldoret Hospital [2021] eKLR, to buttress his argument.

24. That given that the intention of the consent was to compromise the entire suit, all parties ought to have been granted an opportunity to be heard as per the provisions of Order 25 Rule 5 (sic). That in the present case, the impugned amended consent did not meet the five conditions set out in the said provision of the law. That the said consent was not signed by all parties which was in breach of the directives issued by Justice Kaniaru on the 21st November 2019.

25. The 2nd Applicant/Defendant relied on the decided case in KCB Limited vs Specialized Engineering Company Limited [1982] KLR to submit that the events leading to the adoption of the consent was grossly unjust, arbitrary and amounted to interference with the affairs of the company. That the same would thus expose the company to third party claims, multiple suits and endless litigations to their detriment and loss.

26. That the consent was procured through trickery, fraud, and collusion by advocates not appointed by its company with an intent to steal from the company coffers. The 2nd Applicant/Defendant urged court to allow its application.

The 3rd Applicant/Defendant's submissions.

27. The 3rd Applicant/Defendant submitted that his application remained unopposed as per the timelines granted by the court on 2nd June 2021 and sought for his prayers to be granted. After giving a brief history of the matter in question. he submitted that the subject matter before court was in relation to Kericho/Merigi/38, an Estate left out in the Succession Cause No.193A of 2015 before the Bomet High Court. That any settlement arising from the instant case therefore ought to benefit all the three families in equal shares and brought to the attention of the Succession Court for rectification of the grant.

28. That in as far as they were concerned the balance owed to the 1st Defendant was Ksh. 2,500,000/= and it was therefore legally and morally wrong to ask for an extra 10,000,000/= over property and that was sold to the 1st Defendant and who out of mutual understanding and negotiation had ceded 0.9 acres to the deceased's three families.

29. That the consent filed and adopted in court concealed material facts to the effect that both the Plaintiff and the 1st Defendant had ignored the binding sale agreements and /or memorandum of understanding entered into by parties when they recorded a consent that did not consider the part payment/deposit made to the family, the land that was ceded back by the 1st Defendant as well as the Succession Court proceedings. That the said consent would unjustly enrich the Plaintiff over issues that had been deliberated and agreed upon.

30. The 3rd Applicant/Defendant further submitted that there was lack of involvement and participation of other houses as the firm of Waiganjo & Co Advocates did not share the new drafted consent with the 1st and 3rd house/Estate, thereby leaving out their input which was prejudicial to them. That the impugned consent was a product of the Plaintiff and the 1st Defendant and therefore discriminative to the other parties who were not in agreement.

31. That the reading and recording of the impugned consent proceeded without his consent, participation and/or notice due to unavoidable circumstances as he could not log onto the virtual hearing due to internet connectivity. That if the consent was not stayed, or set aside the deceased's Estate would suffer irreparable harm, irreversible loss and damage.

32. That the consent was also signed by Mr. Kipkurui N. Mutai who previously acted for the County Government of Bomet, and was now as speaker of the County Assembly of Bomet, the interested party herein. That as a public officer, he was barred from acting for the 1st and 2nd Defendant due to conflict of interest. That his participation through Advocate Koko or Brigitte Chepkoech was therefore null and void and of no effect.

33. To summarize his submission, the 3rd Applicant/Defendant relied on the decided cases in Migadde vs Musoke & 4 Others (Miscellaneous Cause 2017/107 [2020] UGHCFD 9 and Attorney General & Another vs James Mark Kamoga & Another SC CA No 8 of 2004 wherein he sought for the consent order dated 28th May 2021 to be set aside in the interest of justice and the case be set down for hearing in the alternative.

Determination.

34. The Applications herein seeking that the Consent herein adopted as the order of the court on the 28th May 2021 has raised intriguing insight to this matter with the effect that the court had been obliged to look into the history of the facts (without going into the merits of the case,) that led to the recording of the impugned consent.

35. Via a Plaint dated 16th November 2015 and amended on 7th November 2016, the Plaintiff herein sought permanent injunctive orders against the Defendants in relation to parcel of land No. Kericho/Merigi/38 the suit herein which was part of the Estate of the late Zachayo Kiplangat Sitonik alias Zakayo Kiplagat Sitonik.

36. Pursuant to the filing of the suit, and there being interim orders in place, parties sought to give arbitration a chance in relation to ADR. The prayer was denied by the court in its ruling of 2nd September 2016 for reasons that the agreement of **19th September 2011 which had a** mandatory ADR clause, was only between the 1st and 3rd, 4th and 5th Defendants to the exclusion of the Plaintiff who was not bound by its terms. See **Erick Kimutai Sitonik(suing as the legal representative of the Estate of the late Zachayo Kiplangat Sitonik v Sot Tea Growers Savings and Credit Co-Operative Society & 7 Others [2016] eKLR.**

37. Subsequently parties had complied with the provisions of Order 11 of the Civil Procedure Rules wherein the matter had been slated for hearing but failed to take of due to numerous applications and adjournments. On the 18th November 2017, parties had informed the court that they had agreed to have the matter resolved out of court through the recording of a consent.

38. The court then gave them time to confirm whether there had been a settlement reached. It was during this period of time that there had been a change of Advocates wherein the firm of Obondo, Koko & Co Advocates came on record for the 1st and 2nd Defendants via their notice of Change of Advocates dated 22nd January 2018. Their previous Counsel Mr. Mengitch Advocate filed his bill of costs dated 26th February 2018 which had been taxed on the 26th June 2019. The proceedings of the court to show that whilst the firm of Obondo, Koko & Co Advocates appeared for the 1st Defendant, Mr. Mengitch advocate continued to appear for the 2nd Defendant. In the meantime parties continued to pursue their out of court settlement.

39. On 25th September 2019 the court received and assessed an unexecuted consent from the firm of M/S Mengitch & Co. Advocates wherein on the 21st November 2019 the court noted that the parties have not yet reached a settlement and scheduled the matter for hearing for the 27th February 2020.

40. On 2nd December 2019 the court received a Notice of Change of Advocates dated 29th November 2019 to which the firm of K. N Mutai Advocates now came on record for the 1st and 2nd Defendants again in place of the firm of M/S Mengitch & Co. Advocates. Vide their letter dated the 4th December 2019, the firm of K. N Mutai Advocates forwarded a consent dated 4th December 2019 seeking that the suit be compromised as against the 1st and 2nd Defendant in the terms therein specified. The consent was received in the registry on the 6th December 2019.

41. On the 27th February 2020, the matter did not proceed for hearing as earlier slated, instead the court rescheduled the same for mention for the 20th April 2020. This is the time when there was an outbreak of the Covid-19 pandemic and the court did not sit.

42. However on the 21st September 2020, when the matter came before court, the court noted that there was pending an application dated 9th July 2020 and directed that the same be heard through written submissions.

43. On the 21st January 2021, when this court was seized of the matter, it was informed of the pending application dated the 9th July 2020 and the directions issued on the 21st September 2020 wherein the court directed parties to comply with the same and slated the matter for mention to confirm compliance on the 8th March 2021 on which day the court did not sit.

44. On the 15th April 2021, the firm of K. N Mutai Advocates forwarded yet another consent dated 14th April 2021 seeking that the suit be compromised as against the 1st and 2nd Defendant in the terms therein specified.

45. On 22nd April 2021, the court was informed of two pending consents dated 21st November 2019 and 25th September 2019. The same were neither on the record nor had they been adopted as there had been a pending ruling on the application dated 9th July 2020. The court noted that the matter had been slated for mention with a view of adopting the consent dated 15th April 2021. The same was however left in abeyance pending delivery of the ruling to the application.

46. It was while the delivery of the ruling was pending, that the 3rd Defendant filed his notice dated the 5th May 2021 to act in person.

47. The ruling was subsequently delivered on the **25th May 2021 dismissing the** application dated 9th July 2020 wherein the court found that the firm of M/S Mengitch & Co. Advocates ceased to have the instructions from the 1st and 2nd Defendants the moment the Notice of Change had was filed and served, as the matter had neither been determined nor had there been an adoption of the consent compromising the matter. **See Mengich & Company Advocates & another v Sot Tea Growers Savings & Credit Co-operative Society Limited & 6 others; County Government of Bomet (Interested Party) [2021] eKLR.**

48. The court then slated the 27th of May 2021 as a date for the recording of the consent dated the 15th April 2021. On the said day, the court did not sit as it had a site visit to the proposed Kericho Law Courts new premises. The matter was re-scheduled for mention for the recording and adoption of the consent dated the 15th April 2021 for the next day, the 28th May 2021. On the said date, proceedings proceeded virtually (due to the corona pandemic) wherein Miss. Chepkoech and Mr. Koko Advocates were present representing the 1st and 2nd Defendants. Mr.

Waiganjo appeared for the Plaintiff (parties to the Consent.) There was no appearance for the 3rd to 5th Defendants as well as the 7th Defendant. The court also noted that Mr. Daniel Langat and Mr. Samwel Langat who were represented by Miss. Chepkoech and Mr. Koko advocates were also present in the conference. The consent dated 15th April 2021 was adopted as the order of the court with amendments to the distribution of the sum of Ksh 12,500,000/=. The said consent therefore settled the matter as against the 1st and 2nd Defendants.

49. The consent read as follows;

> "*That the sum of Kshs 12,500,000/= be broken down as follows;*
>
> *i. Kshs 7,500,000/- be paid to the Plaintiff on behalf of the second house of Zachayo Kiplangat Sitonik (deceased)*
>
> *ii. Kshs 2,500,000/- to be paid into the account of the three administrators of the Estate of Zachayo Sitonik on behalf of his family.*
>
> *iii. The sum of Ksh 2,500,000/- to be paid to the Plaintiff on account of costs on legal fees.*
>
> *iv. The sum mentioned in (i) and (ii) above be paid to Waiganjo advocates for the Plaintiff within 30 days from today.*
>
> *v. The rest of the consent be as per the consent dated 15th April 2021''.*

50. Pursuant to the adoption of the said consent, on 28th May 2021, the court received, via e-mail, the above captioned applications filed under certificate of urgency, the subject matter of this ruling herein. Together with his certificate of urgency Mr. Samwel Kimutai Langat had also filed his notice to act in person on behalf of the 2nd Applicant/Defendant. The court then directed the Applicants herein to serve the Respondents with their respective applications within 7 days. Leave was also granted to the Respondents to file and serve their responses within seven days wherein the applications would then be disposed of by way of written submissions.

51. On the 28th day of July 2021, when the matter came up for mention to confirm whether parties have complied with the consent order of 15th April 2021 the court was informed that the payments were about to be made and parties sought for a further 14 days to comply with the terms of the Consent..

52. On the 29 July 2021 when the matter came for mention to confirm compliance on the disposal of the application dated 28th May 2021, only the 3rd Applicant/Defendant, **Daniel Kipkirui Langat had served his application and filed a return of service dated the 29th July 2021 herein erroneously titled as ''Certificate of Urgency''.**

53. Pending the delivery of the current ruling on the 5th of October 2021 the court was informed by the Plaintiffs' Counsel that another consent dated the 3rd September 2021 between the Plaintiff and the 1st, 2nd, 4th and 7th Defendants in regard to the payment of 2.5 million shillings, had been filed in court wherein parties sought that the same be adopted. The court was also informed that the Plaintiff had been paid as per the consent dated the 28th May 2021. That the only remaining dispute was between the Plaintiff the 3rd, 4th 5th and 6th Defendants wherein Counsel for the Plaintiff sought for a date for pre-trial. The court ordered that the consent dated the 3rd September 2021 remains in abeyance and once again reminded Samwel Kimutai to comply with the directions issued on the 2nd of June 2021 for the disposal of the current application. The orders were not complied with.

54. I have considered the Applications herein as well as the replying affidavit and the written submission by both parties hereto. I find the issue herein arising for determination as being whether there should be stay of execution of a consent filed in court on the 19th April 2021 and adopted as the order of the court on the 28th May 2021.

55. In the case of **Brooke Bond Liebig (T) Limited vs Mallya (1975) E.A. 266, Law JA, stated the law at P. 269** in these terms:-

> *The circumstances in which a consent judgment may be interfered with were considered by this court in* ***Hirani vs Kassam (1952), 19 EACA 131,*** *where the following passage from Seton on Judgment and order, 7th edition, Vol. 1 page 125 was approved;*
>
> *'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.'*

56. The Court of Appeal in the decision in **Munyiri –vs- Ndungunya (1985) KLR 370 held as follows:**

> '*….will exercise its jurisdiction to review, vary or set aside a consent order if it is shown that such an order has been obtained by fraud or collusion, by agreement contrary to the policy of the Court, or the consent was given without sufficient material fact, or misapprehension or ignorance of material facts or for a reason which would enable a court to set aside an agreement or by the consent of the parties themselves.'*

57. In the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR** the court of Appeal held that:

The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.

58. **Hancox JA (as he then was)** in the case of **Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625**, held as follows:

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

59. The Court of Appeal in the case of **Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd (1982) KLR 485** held that:

"A consent order entered into by Counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.

60. Having given the background of the facts in issue, I find that it is not in dispute that **the Plaintiff herein filed suit and sought permanent injunctive orders against the Defendants in relation to parcel of land No. Kericho Kericho/Merigi/38, part of the Estate of the late Zachayo Kiplangat Sitonik alias Zakayo Kiplagat Sitonik.**

61. It is also not in contention that the Plaintiff subsequently chose to enter into an out of court settlement with Counsel representing the 1st and 2nd Respondents wherein they eventually recorded the impugned Consent which was adopted by the court and upon which the Plaintiff was been fully paid as per the terms therein. That the only remaining dispute now was between the Plaintiff and the 3rd, 4th 5th, 6th and 7th Defendants who were not parties to the Consent. In effect therefore the horse has bolted and there cannot be a stay of execution of the Consent.

62. The law on variation of a consent judgment is now settled as above stated the 1st and 2nd Respondents herein having been represented by Counsel as per the holding in the ruling of **25th May 2021** and given that a*n advocate has general authority to compromise a suit on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. I find that the consent herein adopted was binding.*

63. The Consent having been adopted by the court formed the decree or order of the court and therefore a judicial determination, the 2nd Applicant could not purport to act in person to seek to stay its execution. Order 9 rule 9 of the Civil Procedure Rules provides as follows:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and ***the proposed incoming advocate or party intending to act in person as the case may be"***

64. As per the provision of Order 9 Rule 9 of the Civil Procedure Rules, the correct procedure that was to be followed in the present case where a consent decree had been adopted, was for the 2nd Applicant who now sought to act in person, to have sought leave of the court to come on record, then file and serve the application to stay execution of the Consent Decree. The filing of the current application therefore without leave of the Court, clearly offended the express provisions of Order 9 Rule 9 of the Civil Procedure Rules which provisions were mandatory and not a mere technicality.

65. I find that both the applications dated the 28th May 2021 lack merit and the same are dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 3RD DAY OF MARCH 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE