



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC MISC. APPLICATION NO. 50 OF 2017**

**ROBSON HARRIS & CO. ADVOCATES.....ADVOCATE/APPLICANT**

**AND**

**EQUIP AGENCIES LIMITED.....1<sup>ST</sup> CLIENT/RESPONDENT**

**JAYABEN INDUBHAI PATEL.....2<sup>ND</sup> CLIENT/RESPONDENT**

**GRISHMA ASHITE PATEL.....3<sup>RD</sup> CLIENT/RESPONDENT**

**AND**

**KIPYATOR KIBET & ASSOCIATES**

**ADVOCATES.....INTERESTED PARTY**

**RULING**

Through the application dated 5/7/2018, the clients (“the Respondents”) seek to set aside the consent on costs dated 16/11/2017 and to have the costs payable to Robson Harris and Company Advocates (“the Applicant”) assessed. The application was made on the grounds that the Applicant misled the Respondents into believing that they had transferred land reference number (L.R. No.) 1870/11/206 Nairobi (“the Suit Property”) as instructed when in fact they had not done so. Further, that the Applicant failed to carry out the instructions given by the Respondents on the issue of obtaining the necessary transfer of the Suit Property through transmission under intestacy. The Respondents contended that the Applicant colluded with the Interested Party to execute a consent settling the Applicant’s fees at Kshs. 1,100,000/= when in actual fact the Applicant had not done any work. The Respondents urged that the consent letter was fraudulently obtained and should therefore be set aside.

The application was supported by the affidavit of Rashminkumar C. Kapadia who deponed that the Applicant was instructed to transfer the Suit Property in January 2012 from the names of Mr. Indubhai S Patel (Deceased) and Mrs. Jayaben I. Patel to the names of Mrs Jayaben I. Patel, Divyeshkumar I. Patel, Vineshkumar I. Patel and Mrs. Grishma A. Patel. Since the late Mr. Indubhai S. Patel was the father of the persons to be included in the title, it was necessary for confirmed letters of administration to be obtained to enable a transfer by way of transmission.

Mr. Kapadia deponed that without advising the Respondents, the advocate proceeded to prepare transfer documents over the Suit Property as if it were being commercial transferred and not through transmission and made the Respondents execute the transfer, a copy of which he annexed to his affidavit. He averred that the Applicant had the Suit Property valued and sought stamp duty in the sum of Kshs. 6,000,000 at which point the Respondents asked the Applicant to hold further proceedings and return the documents to

the Respondents. The Applicant demanded fees of Kshs. 1,874,900/= based on the value of the Suit Property of Kshs. 150,000,000. The Respondents contended that based on faith and trust they negotiated settlement of the fees and settled on Kshs. 1,100,000/= which was on the assumption that the fees were due to the Applicant. The Applicant filed its bill of costs seeking Kshs. 2,329,728/=. He deponed that the Interested Party who did pupillage in the Applicant's office and who had been seconded by the Applicant to work in the Respondents' office advised the Respondents to settle the bill which culminated in the execution of the consent order dated 16/11/2017. The Respondent maintained that the advice they received as well as the signing of the consent was unlawful and fraudulent because the Suit Property had not been transferred and also because the Respondents were not buying and selling the land hence the transfer should have been by way of transmission. The Respondents maintained that there was no justification for the fees the Applicant demanded and that the Applicant and the Interested Party should have properly advised the Respondents on the correct amount of fees payable to the Applicant. Mr. Kapadia attached copies of the letter dated 26/1/2012 giving instructions to the advocates, the letter dated 14/5/2012 and the one dated 5/6/2012. He also exhibited copies of the draft transfer over the Suit Property, certificate of confirmation of grant and other correspondence relating to the demand for a refund of the fees paid to the Applicant.

Chepchirchir Sego, an advocate of the High Court of Kenya and a partner in the Applicant law firm swore the replying affidavit in opposition to the application brought by the Respondents. She made reference to L.R. No. 209/4129 which she stated was jointly registered in the names of Cofftea Machinery Limited and Equip Agencies Limited. She stated that the Respondents instructed the Applicant to transfer the Suit Property vide a letter dated 26/1/2012. That the Applicant proceeded to obtain the necessary searches to ascertain the proprietorship of the land and thereafter prepared the transfer which was executed by the transferors and transferees. She attached a copy of the title over the Suit Property issued to Indubhai Shivabhai Patel and Jayaben Indubhai Patel.

Entry number 5 registered against the title over the Suit Property indicates that a certificate of the death of Indubhai Shivabhai Patel was registered on 6/2/2012. She also annexed copies of rates demands for the Suit Property and a request for exemption from the payment of stamp duty over L.R. No. 209/4129. She attached a copy of the Applicant's letter dated 14/6/2012 addressed to Equip Agencies Limited seeking payment of Kshs. 6,000,000/= on account of stamp duty and Kshs. 1,874,900 as legal fees. The Applicant forwarded the original grant in respect of the Suit Property vide its letter of 21/3/2018. She attached a copy of Applicant's bill of costs dated 24/3/2017 item one of which reads, *"to receiving instructions to effect the transfer of property known as L.R. No. 209/4129 from Cofftea Machinery Services Limited to Equip Agencies Limited for consideration of the amount of Kshs. 7,500,000/= for a property valued at Kshs. 13,300,000/=."*

A consent was recorded vide which that bill costs was settled in the sum of Kshs. 1,100,000/= and was to be paid through two cheques. At paragraph 10 of her affidavit. M/s. Sego averred that the stamp duty requested was in respect of L.R. No. 1870/11/206 which was registered jointly in the names of Cofftea Machinery Limited and Equip Agencies Limited. She deponed that the legal fees was based on the Advocates Remuneration Order (ARO) and that the fees was calculated based on the value of the Suit Property which was Kshs. 150,000,000/=. She deponed that the Respondents refused to settle the outstanding fees which necessitated the filing of the bill of costs dated 24/3/2017 by the Applicant, which was negotiated and a consent recorded in court.

Parties filed submissions which the court considered. The Respondents submitted that they instructed the Applicant to transfer the Suit Property from the name of their late father to his children who were to hold the land jointly with their mother. They argued that the transfer should have been effected through transmission from the administrator of their father's estate to the children through the probate process with the grant being confirmed. They relied on Section 60 of the Land Registration Act to the effect that on the death of one of the joint owners, the Land Registrar shall delete the name of the deceased owner by registering the death certificate. They also relied on Section 61 of the Land Registration Act. They contended that the Applicant grossly misled and misadvised them on the legal process necessary to remove the name of the late Indubhai Shivabhai Patel from the title over the Suit Property.

They faulted the Applicant for preparing a transfer in the matter as if it was a commercial transaction. They maintained that there was no need to obtain consent for the transfer, rent clearance certificate, rates clearance certificate and that there was no need to obtain a valuation for stamp duty purposes since no duty was payable to the Government in those circumstances. They argued that the Interested Party misled them to settle the bill of costs which was not due in law. They also faulted the Applicant for registering a lease for five years over the Suit Property without evidence of execution of the lease by the proprietor. They maintained that the consent letter of 12/3/2018 specifically dealt with the bill of costs in this matter and that it did not relate to L.R. No. 209/4129.

The Respondents submitted that the transfer which the advocate prepared was never registered against the Suit Property. They added that they paid legal fees of Kshs. 2,968,103.45 to the Applicant on 25/9/2014 for processing of the grant of letters of administration of the estate of the late Indubhai S. Patel. They contended that the fees payable on the transfer by transmission of the Suit Property was part and parcel of the fees paid to the advocates on the probate of the estate of the late Indubhai S. Patel.

The Respondents relied on various decisions including **Hezekiel Oira t/a Oira & Company Advocates v Kenya Broadcasting Corporation [2016] eKLR**, **Desai Sarvia and Pallan Advocates v Tausi Assurance Company Limited [2017] eKLR** on the issue of costs which were improperly incurred. They also relied on the decisions in **Nairobi Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others [2019] eKLR** and **East African Portland Cement Company Limited v Superior Homes Limited [2017] eKLR** where the court held that consent orders recorded on the basis of misrepresentation, mistake, non-disclosure, fraud or collusion could be set aside.

The Applicant submitted that the crux of this application was the consent dated 12/3/2018 which was filed in court on 16/3/2018 with respect to the bill of costs dated 24/3/2017 for the sum of Kshs. 2,329,728/=. The Applicant mixed up the proprietors of the Suit Property in paragraphs 6 and 11 of its submissions. In paragraph 11 it mentioned that the property was registered in the joint names of Cofftea Machinery Limited and Equip Agencies Limited. The court notes from the copy of title which was annexed to the affidavit of Chepchirchir Sego that the Suit Property was registered in the names of Indubhai Patel and Jayaben Indubhai Patel.

The Applicant conceded that upon the death of a joint tenant, the interest in land automatically vests in the surviving joint tenant who has to make a formal application for transfer of the Suit Property by way of transmission. The Applicant maintained that the request for assessment of stamp duty was based on the fact that the particular transaction was not exempt from stamp duty under the Stamp Duty Act. It maintained that it calculated the legal fees based on the value of the subject matter of the dispute which in this case was the value of the Suit Property of Kshs. 150,000,000/=. The Applicant maintained that the consent on the settlement of the advocate-client bill of costs was well within the provisions of the ARO. It maintained that the consent was not fraudulently procured and added that the Respondents had not met the threshold for setting aside a consent order. The Applicant relied on several decisions.

The Interested Party submitted that it diligently acted on the Respondents' instructions by executing and filing the consent and that the negotiations that culminated in the consent were exclusively carried out between the Applicant and the Respondents. The Interested Party denied that it engaged in any collusion in the execution of that consent. It maintained that there was no proof to suggest that it acted unlawfully with the Applicant. The Interested Party urged the court to find that the consent order was not obtained fraudulently.

The issue for determination is whether the court should set aside the consent recorded on costs between the Applicant and the Respondent. The court notes that Chepchirchir Sego who swore the affidavit on behalf of the Applicant annexed a copy of the bill of costs dated 24/3/2017 which related to the transfer of L.R. No. 209/4129 from Cofftea Machinery Services Limited to Equip Agencies Limited. The consent attached to her affidavit relates to Misc. Application No. 50 of 2017 and a different bill of costs from the one she attached. It is not clear whether the bill of costs in respect of Misc. Application No. 51 of 2017 was ever settled. The court notes from the bill of costs filed in Misc. Application No. 50 of 2017 that the Applicant was instructed to transfer the Suit Property from Jayaben Indubhai Patel to Jayaben Indubhai

Patel, Indivyesh Indubhai Patel, VineshKumar Indubhai Patel and Grishmar Ashite Patel. The transfer was never registered because the Respondents withdrew instructions at the point when the Applicant requested stamp duty to effect the transfer.

It is clear from the averments in the affidavit of Chepchirchir Segoo that there was misrepresentation if not a mix up on the instructions from the Respondents that the Applicant was acting upon.

According to Section 60 of the Land Registration Act in order to effect the transfer of land that was jointly owned to the surviving owner where one joint owner dies, one only needs to furnish proof of death to the Land Registrar who deletes the name of the dead owner by registering the death certificate. The Respondents indicated that they paid the Applicant fees for handling the probate matter separately.

The transfer of the Suit Property from Mrs. Jayaben I. Patel to the names of Mrs Jayaben I. Patel, Divyeshkumar I. Patel, Vineshkumar I. Patel and Mrs. Grishma A. Patel was not completed because the Respondents withdrew instructions when the Applicant sought stamp duty from the Respondents which had been assessed based on the value of the Suit Property.

The Applicant was only entitled to fees for the work it undertook in relation to the transfer of the Suit Property before the Respondents withdrew instructions from it. The Applicant was not entitled to the full instruction fees for the transfer of the Suit property which is what it charged in its bill of costs dated 24/3/2017, and which was the basis upon which the impugned consent was recorded by the parties. The consent was recorded on the basis of misrepresentation and mistake and should be set aside so that the proper fees due to the Applicant can be assessed.

The court grants the orders sought in the application dated 5/7/2018. The costs payable to the advocates will be assessed by the taxing master.

The Respondents are awarded the costs of this application.

**Delivered virtually at Nairobi this 9<sup>th</sup> day of August 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Henry Macharia for the Applicant

Mr. Fred Okeyo for the Respondents

Mr. Wisdom Kibet for the Interested Party

Mr. V. Owuor- Court Assistant