



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 301 OF 2009

WAYUA MUEKE & REGINA KAMENE KARIMI

as the administrators of the Estate of

SIMEON MUEKE MAINGI (dcd).....PLAINTIFFS

VERSUS

SABETHI KANUNGUI MULWA, WILLY MUTISYA MULWA

& SIMON MAKAU MULWA *as the administrators of the Estate of*

STEPHEN MULWA ILIVI (dcd).....1ST DEFENDANT/APPLICANTS

LAND REGISTRAR MACHAKOS DISTRICT.....2ND DEFENDANT

AND

VITO AUTO SPARES LIMITED.....INTERESTED PARTY

RULING

1. In the Notice of Motion dated 19th March, 2018 and filed on the same day, the 1st Defendant is seeking for the following orders:

a) This Honourable Court herein be pleased to review, vary and/or set aside its Ruling dated and delivered on the 27th January, 2017 in so far as the Ruling adopted the orders set out in the consent letter awarding the Plaintiffs/Respondents herein ownership of the 1st Defendant's /Applicant's properties (suit properties) title No Mavoko Town Block 2/110, Mavoko Town Block 2/12112, Mavoko Town Block 2/12242, Mavoko Town Block 2/12407, and Mavoko Town Block 2/12257 by stating that the suit properties shall be owned by the Plaintiffs absolutely or co-owned with the 1st Defendant/Applicants in the ratio set out under the consent letter.

b) Costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the 1st Defendant, Simon Makau Mulwa, who has deponed that he is one of the administrators of the Estate of the late Stephen Mulwa Ilivi (*the deceased*); that in May, 2014, the Plaintiffs' advocate on record, Muindi & Mutunga advocates, and the firm of R.M. Matata & Company advocates, also known as Matata R. M. & Company advocates, being allegedly on record for the 1st Defendant, entered into a compromise for the ownership of the suit properties through a consent letter dated 12th May, 2014 and that the then deceased's advocate, Jackson Kimeu Kakonzi, was struck off the roll of advocates on 11th June, 2007.

3. It is the 1st Defendant's deposition that Jackson Kimeu Kakonzi advocate had no legal capacity to act on behalf of the 1st Defendant; that Mr. Richard Mutavi Matata of R.M. Matata & Company Advocates denied knowing the identity of the advocate who purported to sign the consent letter of 12th May, 2014 on behalf of the 1st Defendant and that the said Mr. Matata advocate further denied having received instructions from the 1st Defendant or his agent regarding this suit or the purported consent letter of 12th May, 2014.

4. The 1st Defendant deponed that Mr. Matata advocate denied by way of an Affidavit that the signatures on the Notice of Change of Advocates dated 6th May, 2014 and the consent letter of 12th May, 2014 were his; that the consent letter only came to the attention of the 1st Defendant upon appointment of the current advocates - R.M. Mutunga & Co. Advocates and that the purported consent letter of 12th May, 2014 was illegal, unlawful and an abuse of the court process.

5. The 1st Defendant finally deponed that there is an apparent misrepresentation, fraud and collusion in the negotiation, compromise and signing of the consent letter dated 12th May, 2014 and that this court has unfettered discretion to review, vary or set aside the orders of 27th January, 2017.
6. In his Replying Affidavit, the 1st Plaintiff deponed that this court heard this matter by way of *viva voce* evidence in support of the Application dated 30th May, 2014; that the late Simeon Mueke Maingi and Stephen Mulwa Ilivi personally negotiated the Agreement that the 1st Defendant is seeking to set aside and that the late Stephen Mulwa Ilivi was cross-examined in court on 16th March, 2016 and admitted that he had instructed the firm of R.M. Matata advocates but only withdrew his instruction on 9th July, 2014.
7. The 1st Plaintiff finally deponed that the issues as to whether the 1st Defendant had legal representation was heard and this court made a Ruling on the same on 27th January, 2017 and that the issues in the current Application are *res judicata*.
8. The Interested Party's Director deponed that she supports the Application dated 19th March, 2018; that the events leading to the recording and filing of the consent letter dated 12th May, 2014 and the subsequent Ruling of 27th January, 2017 was fraught with misrepresentation and concealment of material facts and that the purported consent of letter of 12th May, 2014 was entered into without the Interested Party's input.
9. The Interested Party's Director deponed that the 1st Defendant failed to disclose that the Interested Party had sued him in Machakos HCCC No. 238 of 2011 seeking for specific performance of the Sale Agreement of 30th September, 2009 for parcel of land known as Mavoko Town Block 2/110 and that the firm of R. M. Matata & Company Advocates has denied ever receiving instructions from the 1st Defendant to enter into the consent of 12th May, 2014 on behalf of the 1st Defendant.
10. Mr. Richard Mutavi Matata Advocate (PW1) was cross-examined in this matter. PW1, informed the court that he perused the Notice of Change dated 6th May, 2014 showing that his firm had come on record for the 1st Defendant; that he also perused the consent letter dated 12th May, 2014 purportedly signed by an advocate from his law firm on behalf of the 1st Defendant and that he never signed the aforementioned Notice of Change of Advocates or the consent letter of 12th May, 2014.
11. PW1 stated that he is a stranger to the proceedings herein; that one Jackson Kakonzi Kimeu was behind the impugned consent letter of 12th May, 2014 and that the said Jackson Kakonzi Kimeu was struck off the roll of advocates on 11th June, 2007 and 14th February, 2008.
12. PW1 denied having received a hearing notice dated 11th July, 2014; that he is the only advocate in his law firm and that he does not know a Mr. Paul who purported to hold his brief in court on 9th July, 2014.
13. According to PW1, Mr. Kakonzi has never worked in his office as an advocate or at all; that Mr. Kakonzi was practicing in Machakos since 1993 and that he is familiar with his signature because he used to hold his briefs.
14. The 1st Defendant's advocate submitted that the law firm of R. M. Matata & Company advocates denied being on record for the 1st Defendant or having instructed Mr. Kakonzi to negotiate and compromise this matter; that Mr. Kakonzi was not an employee or agent acting on the 1st Defendant's instructions and that the said Mr. Kakonzi was an unqualified person to sign the consent letter on behalf of the 1st Defendant.
15. The Plaintiffs'/Respondents' advocate submitted that the firm of R.M. Matata advocates were served with the hearing notice for 2nd December, 2014 which they acknowledged receipt; that there is collusion between the firm of R.M. Matata & Co. Advocates and the 1st Defendant after the Ruling of 27th January, 2017 and that no good reason has been given why the 1st Defendant did not call Mr. Matata to testify during the hearing of 16th March, 2016.
16. The Plaintiff's advocate submitted that this court is being called upon to sit on its own Appeal; that the 1st Defendant has never filed a complaint against the firm of R.M. Matata advocate and that the Application should be dismissed. Both the Plaintiffs' and the Defendants' advocates relied on authorities which I have considered. The Interested Party's advocate relied on the submissions and authorities filed by the 1st Defendant's advocate.
17. This suit was commenced by way of a Plaint dated 5th October, 2009. At the commencement of the suit, Simeon Mueke Maingi (*deceased*) was the Plaintiff while Stephen Mulwa Ilivi was the 1st Defendant. The Plaintiff filed an Amended Plaint on 17th November, 2014. A re-Amended Plaint was filed on 23rd June, 2016. The Re-Amended Plaint introduced an Interested Party and the Legal Representatives of the late Simeon Mueke Maingi who died on 5th September, 2015.
18. The record shows that on 5th June, 2014, the Plaintiff herein filed an Application dated 30th May, 2014 which sought for the following orders:

“1. That this suit be compromised in terms of the consent letter dated 12th May, 2014 and filed in court on 12th May, 2014 signed by both the Plaintiff and the Defendants and the same be and is hereby adopted as the Judgment of this court”.

19. The Application dated 30th May, 2014 was premised on the grounds that: the dispute involves properties belonging to the Plaintiff and the 1st Defendant jointly and in equal shares but registered in the name of the 1st Defendant; that the dispute arose after the 1st Defendant secretly colluded with the Interested Party for the sale of one of the properties without the consent of the Plaintiff and that the Plaintiff and

the 1st Defendant have finally reached a compromise on all the properties and a consent letter signed on 12th May, 2014 and filed in court on 12th May, 2014.

20. The consent order that the plaintiff prayed to be adopted by the court reads as follows:

“Kindly record the following orders by consent of the parties herein.

- 1. That it is hereby declared that the Plaintiff and the 1st Defendant are co-owners of L.R. Mavoko Town Block 2/110, Mavoko Town Block 2/12112, L.R. Mavoko Town Block 2/12242, L.R. Mavoko Town Block 2/12407 and Mavoko Town Block 1/12257 in equal shares.**
- 2. That the Plaintiff has given his 5% entitlement in L.R. Mavoko Town Block 2/110 to the 1st Defendant as a sign of good will in settling this matter out of court. Consequently, they have agreed to share out the properties as follows:**
 - (a) The first Defendant now owns a 55% (fifty five percent) share of L.R. Mavoko Town Block 2/110 and which translates to 11 (Eleven) Hectares or thereabouts.**
 - (b) That the Plaintiff owns 45% (Forty five percent) of L.R. Mavoko Town Block 2/110 which translates to 9 (Nine) Hectares or thereabouts.**
 - (c) That the Plaintiff is the owner of Plot L.R. Mavoko Town Block 2/12242 and L.R. Mavoko Town Block 2/12112 and the 1st Defendant do forthwith transfer to the Plaintiff the said plots.**
 - (d) That the 1st Defendant acknowledges having disposed of L.R. Mavoko Town Block 2/12257 and the Plaintiff lays no claim to the same.**
- 3. That the Plaintiff and the Defendant do jointly sell L.R. Mavoko Town Block 2/110 currently in the name of the 1st Defendant and they share the proceeds at the ratio of Simeon Mueke Maingi - 45% and Stephen Mulwa Alivi - 55%.**
- 4. That should the Plaintiff and the 1st Defendant fail to secure a buyer within Ninety (90) days as envisaged in Clause 3 of this consent Judgment, the property shall forthwith be sub-divided and registered as follows:**
 - (i) MAVOKO TOWN BLOCK 2/110**
 - a. Simeon Mueke Maingi - 9 Hectares**
 - b. Stephen Mulwa Alivi – 11 Hectares**
- 5. That in case the 1st Defendant refuses to sign any documents to effect transfer as envisaged in paragraph 2 (c), 3 and 4 above or surrender the original titles to effect sale or sub-division of the properties envisaged in paragraphs 1 (c), 3 and 4 above, the Deputy Registrar of the High Court of Kenya at Milimani, be and is hereby authorized to execute all the necessary and requisite documents to effect the sale or sub-division or transfer of the said properties and the 2nd Defendant herein be at liberty to effect the transfer or sub-division without the surrender of the original title by the 1st Defendant.**
- 6. That the 1st Defendant is the one liable to refund to Vito Auto Spares Limited any monies he may have obtained from them regarding L.R. Mavoko Town Block 2/110 without the Plaintiff's consent.**
- 7. That pending the actualization of the consent Judgment herein the 1st Defendant, his agents, servants or assigns be and are hereby restrained by an injunction from selling, transferring, alienating, charging or in any other way interfering with L.R. Mavoko Town Block 2/110 and Mavoko Town Block 2/12112 and Mavoko Town Block 2/12242 otherwise than as envisaged in this consent Judgment except in accordance with paragraph 3 and 4 above.**
- 8. That the Plaintiff's suit against the Defendants be marked as compromised in the above terms and each party do bear its own costs.”**

21. The said consent letter dated 12th May, 2014 was signed by the firm of Mutunga and Muindi advocates for the Plaintiff and R.M. Matata & Company Advocates for the 1st Defendant.

22. When the Application dated 30th May, 2014 came up for hearing, the then 1st Defendant (*deceased*) objected to the adoption of the consent letter dated 12th May, 2014. The court then conducted the hearing of the Application by way of *viva voce* evidence. The 1st Defendant testified and was cross-examined at length.

23. In his evidence, the 1st Defendant (*deceased*) informed the court that the consent by R.M. Matata and the Plaintiff was entered into without his consent and that he never gave to the firm of R.M. Matata any instructions. The 1st Defendant was also cross-examined by the

Interested Party's advocate.

24. On his part, the Plaintiff (*deceased*) informed the court that his advocate, Mr. Muinde, met Mr. Kakonzi of R.M. Matata advocate; that he was present during the negotiations; that they eventually agreed on how to share the suit property and that the consent letter was a valid document. In its Ruling of 27th January, 2017, the court held as follows:

***“23. R.M. Matata advocates were on record for the 1st Defendant. The 1st Defendant deny that he instructed R.M. Matata to act for him yet he never took any action against Mr. Matata or even write a protest letter to him. The 1st Defendant never sought an order from the court to summon the said advocates to come to court and be cross-examined on who instructed them or even paid the fees to act for the 1st Defendant. From the oral evidence and the Affidavits, the court has no doubt that the firm of R.M. Matata advocate was on record on instructions of the 1st Defendant in line with the case of Manchester Outfitters above. The 1st Defendant is bound by the acts of his advocate and thus the terms of the consent entered.*”**

24. As for the Interested Party, he entered into a Sale Agreement but never got a Land Board Consent to enable the transfer of part of the suit land that he was buying. He has sought for extension of time to apply for the consent of Land Control Board.

25. However, as it is now, 45% of the suit land he was buying is to go to the Plaintiff. The 1st Defendant is to refund him the purchase price. The Interested Party should pursue the refund of the purchase price or proceed with suit for the 55% remaining of the land he was buying, assuming that he will get extension of time to apply for the Land Board Consent.

26. The court makes the following orders:

(a) The Application dated 30th May, 2014 is allowed as prayed.”

25. The 1st Defendant and the Interested Party are seeking for an order reviewing the Ruling of the Court of 27th January, 2017 on the ground that they “have discovered new information and evidence affecting the validity of the consent letter dated 12th May, 2014; that R.M. Matata & Company Advocates also known as Matata R.M. & Co. Advocates had no capacity to compromise, sign and enter into the consent letter dated 12th May, 2014 and that the said firm has denied knowing Stephen Mulwa Ilivi, the 1st Defendant.

26. The other “*new evidence*” that the 1st Defendant has discovered is the fact that Jackson Kimeu Kakonzi, who allegedly oversaw the compromise and fraudulent signing of the consent letter dated 12th May, 2014 on behalf of R.M. Matata & Company Advocates was not known to the said law firm of R.M. Matata & Company Advocates and therefore had no capacity to negotiate, compromise or sign the consent letter dated 12th May, 2014 on behalf of the 1st Defendant.

27. Furthermore, it is the 1st Defendant's case that the said Kakonzi was struck off the roll of advocates on 11th June, 2007 and had no legal capacity to act on behalf of the 1st Defendant.

28. Section 8 of the Civil Procedure Act provides as follows:

“Where a Plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.”

29. Order 45(1) (a) and (b) of the Civil Procedure Rules provides as follows:

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

30. In the case of *Tokesi Mambili & Others vs. Simon Litsanga, Civil Appeal No.90 of 2001*, the Court of Appeal held as follows:

“In order to obtain a review, an Applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made.”

31. For an order of review to pass, the Applicant should prove that the said new evidence could not be discovered on exercise of due diligence, or that the said new evidence was not within the Applicant's knowledge or that the said evidence could not have been produced by the Applicant at the hearing of the case or Application.

32. The issue of representation of the 1st Defendant by an advocate in this proceedings was central in the hearing of the Application dated

30th May, 2014. This court having heard the oral evidence of the Plaintiff, Mr. Simeon Mueke Maingi and the 1st Defendant, Mr. Stephen Mulwa Ilivi, and having examined the court record, the court held that the firm of R.M. Matata & Co. Advocates had filed a Notice of Change of Advocates on 12th May, 2014 to represent the 1st Defendant in this proceedings and served the same upon the advocate for the Plaintiff and the advocate for the Interested Party.

33. From the said date, the advocates for the Plaintiff rightfully dealt with the said firm of R.M. Matata & Co. Advocates as the advocates representing the 1st Defendant. Hence, the consent that was executed by the said firm, and the subsequent proceedings in this matter until the 14th day of August, 2014 when the firm of R.M. Mutunga & Co. Advocates filed a Notice of Change of Advocates were all valid.

34. The court noted at page 4 paragraph 23 of its Rulings delivered on 27th January, 2017 that the 1st Defendant had not called Mr. R.M. Matata as a witness during the proceedings before the court nor wrote a protest letter to him or summoned him to court.

35. It is on record that all parties were given an opportunity to call all their witnesses on 16th March, 2016. However, the 1st Defendant refused to call Mr. R.M. Matata as a witness.

36. No good reason has been given to this court as to why he did not call Mr. Matata then, during the main hearing of the Application considering that he had been mentioned in all Affidavits and the proceedings before the court on 16th March, 2016.

37. If the 1st Defendant/Applicant was dissatisfied with the holding of the court that a party has a right to appoint an advocate and is bound by the acts of the advocate, the correct position in law was to file an Appeal, but not to apply for review.

38. The issue of the firm of R.M. Matata & Company advocates being on record for the 1st Defendant, and Mr. Kakonzi having been struck off the roll of advocates in the year 2014 is not a discovery of new evidence. It is the firm of R.M. Matata advocate which has always been on record on behalf of the 1st Defendant. The issue as to whether the Notice of Change of advocates and the consent letter of 12th May, 2014 was signed by Mr. Kakonzi advocate, who was not qualified to act as an advocate, were in valid, should have been raised when the Application dated 30th May, 2014 was heard.

39. In any event, there is no evidence before me showing that it is Mr. Kakonzi advocate who signed the consent letter. The mere assertion by Mr. Matata that he knew how Mr. Kakonzi advocate used to sign documents without producing a document examiner's report, is not enough.

40. Considering that the Interested Party participated in arguing the Application dated 30th May, 2014, the issue of whether the Interested Party participated in the signing of the consent letter dated 12th May, 2014 does not arise.

41. For those reasons, I find the Application dated 19th March, 2018 to be unmeritorious. The Application is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020

O. A. ANGOTE

JUDGE