



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CIVIL SUIT NO. 1 OF 2018**

**(Formerly Kisumu High Court Civil Case No. 147 of 2009**

**and now consolidated with Migori High Court Civil Suit No. 2 of 2016)**

**RAPHAEL OCHIENG OTIENO (ADIKA)**

**& 2 OTHERS (Sued as the Registered Trustees**

**of Legion Maria of Africa Church Mission.....RESPONDENTS/PLAINTIFFS**

**-VERSUS-**

**ROMANUS JOSEPH ONGOMBE**

**& 2 OTHERS.....DEFENDANTS/APPLICANTS**

**RULING NO. 1**

1. This ruling relates to the Notice of Motion dated 06/09/2019 which was evenly filed by the Defendants/Applicants. I will hereinafter refer to it as '**the application**'.
2. The application sought the following orders: -
  1. **This Honourable Court do grant a stay of execution of eh Consent Order issued on the 9<sup>th</sup> day of August 2019 pending hearing and determination of this application.**
  2. **This Honourable court be pleased to review the consent order issued herein on the 9<sup>th</sup> day of August 2019.**
  3. **This Honourable Court be pleased to set aside and/or discharge the consent order issued on the 9<sup>th</sup> day of August 2019.**
  4. **The costs of this application be provided.**
3. The application was premised on the grounds appearing on the body thereof and was supported by the affidavit sworn by **Romanus Joseph Ongombe**, the 1<sup>st</sup> Defendant/Applicant on 06/09/2019.
4. The application was opposed by the Plaintiffs/Respondents. They relied on the Replying Affidavit sworn by **Raphael Ochieng Otieno**, the 1<sup>st</sup> Plaintiff/Respondent on 16/09/2019 and evenly filed in Court.
5. Directions on the hearing of the application were given. The parties proposed and this Court sanctioned the disposal of the application by way of written submissions. Counsels for both parties duly filed their respective submissions.
6. At the centre of this application is the consent order which was recorded before Court on 07/08/2019. The consent was between the Plaintiffs herein and the 1<sup>st</sup> Defendant/Applicant. The terms of the consent were as follows: -

**1. The matter herein be and is hereby marked as settled between the Plaintiff's and the 1<sup>st</sup> Defendant ROMANUS JOSEPH**

ONG'OMBE upon the following terms:-

(a) Raphael Ochieng Otieno (Adika) to remain the only Pope of the LEGIO MARIA OF AFRICAN CHURCH MISSION as prescribed by the Constitution of the Church as ROMANUS JOSEPH ONG'OMBE resumes his roles as CARDINAL of the Church (PATRIARCH).

(b) Membership from across the two camps herein be at liberty to access every Worship place of the Church without any hindrance by either side.

(c) Parties herein undertakes to unite all the Members of the Church and promote necessary reconciliation among the entire Membership of the Church in Kenya and beyond.

(d) Each party to the Consent herein to bear own costs.

(e) The parties herein undertake to grow the church and restore its glory as it were before the dispute herein arose.

(f) The consent herein to apply similarly to MIGORI HCCC NO. 2 OF 2016.

(g) The parties HEREIN CONFIRM THAT THIS Consent has been entered into freely and voluntarily with the sole desire of uniting the church and end litigation which has adversely affected the church.

7. In support of the application the Applicants contended that the consent ought to be reviewed and set-aside. They raised several grounds including that the consent was obtained by fraud, coercion, collusion, undue influence and inequality of bargaining power, that the 1<sup>st</sup> Defendant/Applicant did not have the legal capacity to enter into the consent on behalf of the Legion Maria of Africa Church Mission (hereinafter referred to as '**the Church**') without involving the membership, that the consent violated the Constitution of the Church, there was a glaring error on the purport of the consent among others.

8. The Applicants submitted that the consent although entered into between the Plaintiffs and the 1<sup>st</sup> Defendant/Respondent impacted on the entire membership of the Church and in essence it purported to settle the entire dispute. They further submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Applicants were not involved in the execution of the alleged consent. They posited that the 1<sup>st</sup> Applicant/Defendant did not have the legal capacity to enter into the consent on their behalf without their express consents.

9. The Applicants posited that the consent ought to be set-aside and the dispute fully heard so that a final determination may be arrived at. In further support of the application the Court of Appeal decision in **Civil Appeal No. 158 of 2014 East African Portlands and Superior Homes Limited** (unreported) was relied upon.

10. Opposing the application, the Respondents/Plaintiffs submitted that a consent is a contract and that it can only be set-aside or varied on settled grounds which none had been proved. It was further submitted that the consent was proper in law and was regularly entered into after the Court took all the parties through it prior to its adoption. The Applicants contended that litigation must end and urged the Court to be alive to the fact that the matter had been in Court for the last 10 years.

11. The Respondents relied on the decisions in **Flora Wasike vs. Destimo Wambora** and **Hiram vs. Kassam (1952) EACA 131** in buttressing their position.

12. I have carefully perused the application and the response. I have also read and understood the submissions and the decisions referred to therein.

13. The power of a Court to review and set-aside its own orders and/or decisions is donated by **Section 80 of the Civil Procedure Act, Cap. 21** of the Laws of Kenya and **Order 45 of the Civil Procedure Rules, 2010**. The grounds upon which such an application for review can be made are clearly stated in the law.

14. The legal terrain however shifts when it comes to reviewing and setting aside consent orders. Since the **Civil Procedure Act** and the **Civil Procedure Rules, 2010** are silent on the grounds upon which a consent by the parties was duly adopted by and became an order of the Court may be reviewed, varied or set-aside, Courts have variously dealt with the subject.

15. The legal position is settled. The Court of Appeal in **Brook Bond Liebig Ltd vs. Mallya (1975) EA 266** laid the position clear in holding that: -

*.....a consent order 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.*

16. Further the Court of Appeal in **Flora Wasike vs. Destimo Wamboka (1988) 1 KAR 625** held that: -

*...It is now settled 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.... In Purcell vs F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;*

17. From the reading of the above decisions among many others it comes out clearly that a consent is an agreement between the parties to it. Such an agreement must be lightly interfered with. It may only be set-aside on settled grounds. The grounds are however many. In the words of the Judges of Appeal in the **Brooke Bond Liebig Ltd case** (supra) the grounds may include ‘.....or in general for a reason which would enable the court to set aside an agreement’. The position in the **Brooke Bond Liebig Ltd case** (supra) had been adopted by the East Africa Court of Appeal in the early 1950s in **Hirani vs. Kassam (1952) 19 EACA 131**.

18. I will now apply the foregone to the matter before me.

19. I have carefully read the consent order. The Plaintiffs (In Migori Civil Case No. 1 of 2018) are the Respondents in the application. They prayed for judgment against the Defendants/Applicants in the following manner: -

**(i) A declaration that their activities and conduct is against the constitution of the Legion Maria of African Church Mission and that they (defendants) have no Constitutional rights to take up the positions they have allocated themselves.**

**(ii) An Order of eviction, evicting the defendants from all and singular the properties of the society and an order directing the defendants to surrender and hand over the Society’s properties to the plaintiffs.**

**(iii) A permanent injunction restraining the defendants jointly and severally from holding themselves out as members of the said Society as well as restraining them from conducting business of the Society in whatever capacity; and**

**(iv) Costs of the suit.**

20. There is also Migori High Court Civil Case No. 2 of 2016. It was instituted by the Defendants in Migori High Court Civil Case No. 1 of 2018 against the Plaintiffs in Migori High Court Civil Case No. 1 of 2018. At directions stage, Migori High Court Civil Case No. 2 of 2016 was deemed as a Counter-claim in Migori High Court Civil Case No. 1 of 2018. I will henceforth refer to Migori High Court Civil Case No. 2 of 2016 as ‘**the counter-claim**’.

21. The counter-claim sought for judgment in the following manner: -

**(a) A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not the bonafied or legitimate trustees of the Legion Maria of African Church Mission.**

**(b) An Order directed to the relevant registrar of documents to rectify the register by cancellation of the entry relating to registration of the Defendants as the trustees and replacing them with the Plaintiffs as the duly appointed trustees of Legion Maria of African Church Mission.**

**(c) An order for permanent injunction to restrain the Defendants whether by themselves, servants or agents from making any transaction on behalf of Legion Maria of African Church Mission or in any manner dealing with the societies affairs, other than by way of surrender to the Plaintiff’s all the Church document in their custody.**

**(d) Costs of and incidental to this suit together with interest.**

22. The consent settled the twin suits as between the Trustees of the Church (Raphael Ochieng Otieno, Nahashon O. Nyakondo and Nicholus Omwera Keya) on one hand and Romanus Joseph Ongombe on the other hand. However, **Part 1(b)** of the consent provided as follows: -

**Membership from across the two camps herein be at liberty to access every Worship place of the Church without any hindrance by either side.**

23. It therefore turns out that there were two camps in the suits each with its membership. Romanus Joseph Ongombe hence had a camp with members. The members undoubtedly included the two Co-Defendants in Migori High Court Civil Case No. 2 of 2018 who were the Co-Plaintiffs in the counter-claim who are Joseph Ongawo Aloo and Patrick Rachier.

24. A holistic reading and a closer look at the consent reveal that indeed the dispute between the two rival camps was finally settled by the consent. In building up post dispute consensus the respective membership of the rival camps was to undertake efforts to heal, reconcile and restore the Church unto its former glory before the dispute.

25. The effect of the consent is that it compromised both suits. If the terms of the consent, which are now orders of this Court, are to be strictly enforced then there shall be no dispute for determination between the Plaintiffs and Joseph Ongawo Aloo and Patrick Rachier for the reason that Joseph Ongawo Aloo and Patrick Rachier form part or are so considered to form part of the membership of the camp led by Romanus Joseph Ongombe.

26. The 1<sup>st</sup> Applicant, Romanus Joseph Ongombe, has now admitted in the application that he did not involve Joseph Ongawo Aloo and Patrick Rachier in arriving at the consent. Further, Joseph Ongawo Aloo and Patrick Rachier hold the position that the suits must be fully heard.

27. As the consent was between the Plaintiffs and Romanus Joseph Ongombe then it was to be confined to those parties only. Any attempt to involve other parties in the suits or otherwise rendered the consent open to successful challenge. A consent between parties cannot bind other parties not part of the consent unless such other parties were claiming under the parties to the consent. (See the Court of Appeal in **Hirani vs.**

**Kassam** (supra)).

28. In this case there is no evidence or even an averment that Joseph Ongawo Aloo and Patrick Rachier were claiming under Romanus Joseph Ongombe. From the record the three persons are distinct parties in the suits having been sued and having sued independently.

29. The consent therefore contravened the right to a fair trial under **Article 50(1)** of the **Constitution** of Kenya, 2010 for Joseph Ongawo Aloo and Patrick Rachier. The two were not parties to the consent and yet the consent compromised the suits. If Romanus Joseph Ongombe was keen to settle the matter amicably on his part, then he ought to have limited the terms of the consent to between himself and the Plaintiffs. The terms of the consent as they are transcended the legal boundaries and encroached into the domain of Joseph Ongawo Aloo and Patrick Rachier. The consent was hence in contravention of **Article 50(1)** of the **Constitution** of Kenya, 2010. It remains contrary to law.

30. The Applicants therefore have a valid ground to cry a false start on the consent. Even without considering any other ground I believe that I have demonstrated that the consent cannot stand before the law. I choose to end the race at this point.

31. I must also remind the parties that the dispute has been in Court now for 10 years. During all that time the affairs of the Church have continued to be adversely affected. The suits must henceforth be determined soonest possible.

32. In the end, the following orders do hereby issue: -

**(a) The Notice of Motion dated 06/09/2019 is allowed in terms of prayers 2 and 3 thereof.**

**(b) This matter shall now be fixed for the hearing of the main suits for 2 consecutive days in the new Court term;**

**(c) Costs in cause.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 11<sup>th</sup> day of December 2019.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open court and in the presence of: -**

**Mr. Kwanga Mboya** Counsel instructed by the firm of Messrs. Kwanga Mboya & Co. Advocates for the Defendants/Applicants.

**Mr. Omonde Kisera** Counsel instructed by the firm of Messrs. Omonde Kisera & Co. Advocates for the Plaintiffs/Respondent's.

**Evelyne Nyauke** – Court Assistant