



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 427 OF 1974**

**WAITHIRA GACHINO.....PLAINTIFF (1<sup>ST</sup> RESPONDENT)**

**-VERSUS-**

**KAMAU KABURU.....1<sup>ST</sup> DEFENDANT (APPLICANT)**

**NG'ANG'A KABURU.....DEFENDANT (2<sup>ND</sup> RESPONDENT)**

**RULING**

1. The ruling herein relates to a Notice of Motion Application dated 22<sup>nd</sup> March 2017, brought under the provisions of; Section 1A, 1B & 3A Civil Procedure Act (Cap 21), laws of Kenya, Order 22 Rule 22 (1), Order 24 Rule 1, Order 45 Rules (1) and (2), and Order 51 Rules (1 and (3), of the Civil Procedure Rules & all other enabling provisions of the Law.

2. The Applicant is seeking for orders as here below reproduced:

*a. That pending the inter-parties hearing and determination of this Application and/or until further orders of this Honourable Court:-*

*i. The Court do issue a stay of the execution of the order of Justice Ogola J. dated 29<sup>th</sup> July, 2015 and issued on even day.*

*ii. A temporary injunction do issue restraining the 1<sup>st</sup> Respondent/Plaintiff & 2<sup>nd</sup> Respondent/2<sup>nd</sup> Defendant whether by themselves, their servants, their agents, and/or employees howsoever from entering, subdividing, destroying, alienating or otherwise interfering with the suit property i.e. all the land known as Nyandarua/Kitiri/338 including the buildings standing thereon.*

*b. That, this Honourable Court be pleased to set aside/review and/or vary the order by Honourable Ogola J.*

*c. That, this Honourable Court be pleased to reinstate and/or order for enforcement of the order/ruling of Hon, Njagi J. dated 4<sup>th</sup> November, 2011.*

*d. That, the 1<sup>st</sup> Defendant/Applicant be at liberty to execute the order of Justice Njagi J. dated 4<sup>th</sup> November 2011.*

*e. That, the Deputy Registrar be compelled to sign the requisite transfer documents lodged by the 1<sup>st</sup> Defendant on 21<sup>st</sup> July, 2016.*

*f. That, the Respondents do bear the cost of this Application.*

3. The Application is premised on the grounds on the face thereof and an Affidavit sworn by Kamau Kaburu; the Applicant. He deposed that the Plaintiff (herein "the 1<sup>st</sup> Respondent"), filed this suit against him and the 2<sup>nd</sup> Defendant (herein "the 2<sup>nd</sup> Respondent"), in the year 1974 seeking among others orders, an order that they be evicted from the suit premises.

4. The Defendants filed a joint statement of Defence and counterclaim seeking that the Court determine whether that the 1<sup>st</sup> Respondent held the subject property in trust as a trustee for the Defendants. The judgment was delivered on 6<sup>th</sup> October, 1981, by Hon Platt J, who dismissed the suit. Thereafter the Defendants filed an Application seeking that the order issued by the Court be extended to benefit two other parties

who were also beneficiaries of the said parcel of land. On 14<sup>th</sup> February 1996, Justice Juma J.V, allowed the other two brothers to be added and ordered further that the property be divided into 5 portions to give effect to the decree.

5. However, unfortunately on or about 28<sup>th</sup> April 2000, the 2<sup>nd</sup> Respondent died. The 1<sup>st</sup> Respondent then filed a suit for injunctive relief against the Applicant, and the 2<sup>nd</sup> Respondent's Estate to stop the burial of the 2<sup>nd</sup> Respondent in the suit premises. But there has never been an Application to substitute the deceased.

6. Even then, the parties, having been dissatisfied with the direction of Justice Juma J.V and having failed to agree on to the modalities of distribution, approached the Court again by an Application which was heard by Justice L. Njagi and in a ruling dated and delivered on 4<sup>th</sup> November, 2011, the Court decreed that the property should be divided into 5 equal plots to be shared among all the 5 siblings and that the 1<sup>st</sup> Respondent should be allocated where his dwelling currently lay. Unfortunately again, the 1<sup>st</sup> Respondent died leaving no legal representative of her estate and no representation in this suit. That, one Francis Wambiru Kibiro vide a Notice of Motion Application dated 7<sup>th</sup> March, 2014, applied to the Court to have himself substituted for the 1<sup>st</sup> Respondent, which Application was dismissed on 25<sup>th</sup> July, 2014, by Hon. E. K. O. Ogola.

7. On 29<sup>th</sup> July, 2015, the Advocates in conduct of this matter allegedly, purported to record consent as to the manner of subdivision of the property, with the Plaintiff represented by a Mr. Kariuki instructed by King'ori Kariuki & Co. Advocates while the Defendants were represented by a Mr. Nyagah instructed by Njeru, Nyaga & Co. Advocates.

8. It is averred that at the time of recording the consent, Mr. Nyagah, who was representing the Applicant, had not consulted him on the recording of a possible consent and had no instructions to do so, thus his actions were *ultra vires*. That both Advocates failed to alert the Court, and indeed misled the Court, to the fact that the Plaintiff as well as the 2<sup>nd</sup> Defendant had been long deceased.

9. The Respondent averred the consent recorded by non-existent entities and without the express consent of the only living party is unenforceable and the same ought not to be enforced. That had the Honourable Court been informed of the material facts of the death of the two parties, it would have rendered a totally different decision on the matter and thus the same ought to be reviewed.

10. The Applicant further argues that no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal and once aware of circumstances that may manifest a crime, fraud or other illegality, the Court should give opportunity to have the matter investigated and a determination thereon made as appropriate, as one party cannot record a consent in Court, as the very tenet of consent can be construed as contract.

11. That, without an order for substitution either in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, the suit stands with only one party with the cause of action surviving being land. Therefore it is important for the Court to regularize the record to reflect the true will of the parties as at the time they were alive. That no prejudice will be suffered by either party if the Court sets aside the consent order by Hon. Ogola J. and reinstate the order by Hon. Njagi J.

12. The Applicant averred that on or about year 2014 to 2015, taking into consideration that he was the only living party, he undertook to enforce the order by Justice Njagi J. and procured the services of a surveyor, the requisite consent and the relevant mutation forms. He filed the same in Court for the execution by the Deputy Registrar High Court on 21<sup>st</sup> July, 2016, upon payment of Kshs 1,635 being Court fees. That the suit has been in Court for the last 44 years, and litigation must come to an end. If the orders sought are granted it will enable and ensure that the matter is put to rest and that the parties get their share of the properties. It is therefore, in the interest of justice, fairness and constitutionality that the Court grants the orders as prayed for in the Application.

13. However, the Application was opposed vide a Replying Affidavit dated 11<sup>th</sup> May 2017 sworn by the Francis Wambiru Kibiro. He deposed that, he is the legal representative of the Estate of the late Mukurata Waithira Kibiro and that, the Consent order that was recorded in Court was to enforce the ruling of Hon. Justice Njagi. That it did not in any way attempt to vary it and when it was recorded on 29<sup>th</sup> July 2015, the Applicant was represented by his Advocate who is still on record and that the Applicant has been fully aware of the consent.

14. He averred that, the parties herein have never agreed on the mode of distribution of the suit property which was the main reason why the said consent was recorded and therefore, the Applicant cannot propose to subdivide the suit property on his own without involving the other parties. The alleged subdivision that the Applicant undertook on his own is a mere sham and unfair to the other parties.

15. In conclusion it was argued that, the other parties are in physical occupation of the suit property together and the Applicant prayers for injunction are not enforceable and neither has the Applicant given any sufficient reason to warrant the Court to grant the prayers sought for therein.

16. In addition to the Replying Affidavit the 1<sup>st</sup> Respondent filed grounds of opposition, on the grounds inter alia that:-

a) *the Application is misconceived and bad in law;*

b) *the Advocate for the Applicant is not properly on record;*

c) *the Estate of the Plaintiff (deceased) has no legal representative by the name Francis Wambiru Kibiro;*

d) *there has been an excessive, inordinate and flagrant delay in filing this application from the time the said consent was recorded.*

17. The Application was equally opposed by the Learned counsel David Njeru, Advocate of the High Court of Kenya practicing as a Partner in the firm of Messrs Njeru, Nyaga & Co. Advocates and having the conduct of this matter on behalf of the Defendants.

18. He deposed that, he has been the Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants since the year 2000 or thereabout. That, the 2<sup>nd</sup> Defendant died on 23<sup>rd</sup> April, 2000 and in the year 2001 he filed an Application to substitute him with Daniel Mbugua Nganga and James Kibiro Nganga and which was allowed. Thus it is wrong for the 1<sup>st</sup> Defendant/Applicant to claim that he is the only surviving party herein.

19. That indeed, on 4<sup>th</sup> November, 2011, Honourable J. Njagi delivered a judgment herein to the effect that the suit property be sub-divided in five equal portions and to be allocated to the five beneficiaries, and pursuant to the judgment, he instructed his clients to come up with a proposal on the sub-division of the aforesaid land, to be shared with the Advocates for the Plaintiff for purposes of seeking an agreement on the issue.

20. The Plaintiffs were not agreeable to the proposed sub-division plan by his client and opted to move to Court vide a Chamber Summons Application dated 16<sup>th</sup>, January, 2015. In return the Defendants sought for the Plaintiff's proposed sub-division scheme as per the orders of Hon. Justice Njagi and which was forwarded vide the Plaintiff's Advocate letter dated 4<sup>th</sup> June, 2015. However, the Defendants were not acceptable to the Plaintiff's proposed sub-division. In view of the above, it was crystal clear that the parties herein would not, on their own reach an agreement on the sole issue of the mode of sub-division of the suit property into five equal portion as per the Judgment of Hon. Justice Njagi.

21. That in the premises, he advised his clients, that it would be fair and a quicker solution for all the parties herein to have a meeting at the site in the company of their respective Lawyers and Surveyors. The said meeting was to be supervised by the Honourable Court Deputy Registrar with the assistance of the District Land Surveyor and District Officer Nyandarua. The sole purposes of the above meeting would be to give every party a chance to raise their respective concerns about the two proposed sub-division proposals, and also get expert advice with a view to strike a compromise and settle this long outstanding matter.

22. That it was then agreed by all his clients including the 1<sup>st</sup> Defendant/Applicant that it was the best way forward and on the 29<sup>th</sup> July, 2015, they recorded the consent herein in the presence of the Applicant and the representatives of the 2<sup>nd</sup> Defendant, thus the contents of paragraph 15 of the Supporting Affidavit that the Applicant is unaware of the consent are false.

23. He averred that he has acted for the Applicants for the past 17 years up to the successive conclusion of this case and have never acted without his instructions, therefore the allegations to the same lack any legal basis. That in particular he takes issue with the suggestion that there was fraud or crime while recording the consent. Whereas he appreciates that the Applicant is of Advanced age and may not be able to be in a position to well co-ordinate issues herein, its rather unfortunate that he makes such wild allegations, yet on 25<sup>th</sup> October, 2016 while acting in person, he was present in Court before Deputy Registrar, Hon. Nancy Makau, when she made order to give effect to the consent orders herein. He did not raise the issue now in Application. That it is rather sad that this current Application has only resulted in delaying the matter unnecessarily and yet the Applicant blames other parties of delaying the said suit.

24. However, the Applicant swore a supplementary Affidavit in response to the opposition raised against the Application. He deposed that, on or about 18<sup>th</sup> May, 2016, he filed a Notice dated 17<sup>th</sup> May, 2016 to act in Person, whereupon on or about the 10<sup>th</sup> October, 2016, he instructed his current Advocate to enter appearance on his behalf, which was duly done as evidenced by the documents on the Court record.

25. That, Francis Wambiru Kibiro has no locus standi before this Court and in specific this matter as his Application to be enjoined or substituted has already been heard, determined and dismissed. The Court should not even proceed to entertain both the grounds of opposition and the Replying Affidavit as they grossly offend the provisions of the Civil Procedure Rules and other related statutes.

26. He argued that, the consent order does in fact vary the terms of the order of the Hon. Justice Njagi, by introducing outside influence to a matter that had already been justly determined and that the issue of the mode of distribution had already been exhaustively determined by the Hon. Justice Njagi.

27. He deposed that the advocate chose to be economical with the truth for that long and purported to represent a deceased litigant which shows the nature of conduct and advocate has been engaged in. As a result of acting without his express instructions, he proceeded to file a complaint with the Advocates Complaints Commission for among other issues professional misconduct, of failing to inform the client and other issues.

28. The Applicant argued that Francis Wambiru Kibiro, serves only one purpose in this suit, to scuttle and throw off the suit, extending its life and praying that his time on this earth comes to an end before this really old suit is finalized. He alleged the deponent of the Replying Affidavit has been colluding with the Plaintiff's counsel instructing him behind the "Court's back" to proceed as if counsel had been and was still being instructed by the deceased Waithira Gachino. That he is now of advanced years over the age of 90 and have been exhausted by this suit, that has been pending in Court for the last 44 years which he is keen in ensuring that it is concluded in his lifetime.

29. I have considered the Application, the prayers sought for therein alongside the grounds and the Affidavit in support, the grounds and the Affidavit in Reply and the submissions filed and I find the following issues arise for determination:-

(a) *Whether the Application has been filed by a law firm that is properly on record;*

(b) *Whether the Application has been brought under the correct provisions of law;*

(c) *Whether Francis Wambiru Kibiro has the locus standi to swear the Replying Affidavit he has sworn;*

(d) *Whether the Applicant was privy to the consent order he seeks to set aside;*

(e) *Whether the consent order should be set aside, and/or the prayers sought be granted.*

30. In relation to the first issue, the Counsel for the 1<sup>st</sup> Respondent submitted that the Law firm of; Arati & Co. Advocates that has filed this Application did not seek for leave as required under Order 9 Rule 9 of the Civil Procedure Rules, before coming on record. However in response, the Applicant submitted that on 10<sup>th</sup> October 2016, the Law firm filed a notice to enter appearance and documents to that effect are on the Court file. I have looked at the Court record, and note that, on 18<sup>th</sup> of May 2016, the Applicant filed a notice in Court to act in person. On 10<sup>th</sup> of October 2016, the firm of Arati & Co. Advocates filed a Notice of Appointment of an Advocate.

31. However I note that the stamp on the Notice shows it was filed in Court on 10<sup>th</sup> of October 2016, but it is dated 11<sup>th</sup> October 2016 and even then, there is no evidence as to whether it is was served on the other parties, because on 22<sup>nd</sup> November 2016, the firm of King'ori & Kariuki Co. Advocates, wrote a letter and addressed it to the Applicant in person.

32. Be that as it were, the provisions of Order 9 Rule 9 of the Civil Procedure Rules require that an Advocate coming on record after a judgment has been entered in a matter should seek for the leave of the Court. Thus for there to be charge of an Advocate after judgment has been entered, the party who wishes to come on record must apply to Court for an order with notice to all the other parties. There is no evidence herein that, this was done in this matter before the subject Application was filed. In that regard, the Application is incompetent and has no legal effect and so is the Notice of appointment of the Advocate filed in Court on 10<sup>th</sup> October 2016. The Court can strike the Application out at this stage.

33. Be that as it were, in the interest of justice, I shall consider the Application on merit. The second issue is whether the Application has been brought under the correct provisions of law. The Application has been brought under the provisions stated herein. The Counsel for the 1<sup>st</sup> Respondent argued that the Applicant seeks for stay of the execution of the Court orders and therefore, provisions of Order 22 Rule 22 of the Civil Procedure Rules does not apply, as the decree is being executed by the same Court that issued it.

34. However, I find that in view of the provisions of Article 159 sub-article (2) (d) of the Constitution of Kenya that require the Court do uphold substantive justice as against technicalities the Court will disregard any wrong provisions of the law invoked. But of course it does not reflect well on the competence of the drafter of the Application. I say no more.

35. The third issue concerns the Affidavit sworn by Francis Wambiru Kibiro. He describes himself therein as the legal representative of the Estate of the late "Mukurata Waithira Kibiro". Further it is on record that Francis Wambiru Kibiro, filed a Notice of Motion Application dated 7<sup>th</sup> March, 2014, to be substituted for the 1<sup>st</sup> Respondent, which Application was dismissed on 25<sup>th</sup> July, 2014, by Hon. E. K. O. Ogola. It is therefore clear that he is not the legal representative of any of the deceased parties herein and in that case he is incompetent to depose on any matters herein. I shall disregard the content of the Affidavit he has sworn but the grounds of opposition are properly on record.

36. The key issue herein though is the alleged consent. I have looked at the application and I find that the copy of the said consent is not annexed thereto. However, the parties seem to be in an agreement that a consent was entered into and the issue is whether the Applicant gave instructions to his lawyer to enter the consent or not. He denies knowledge of the same but the lawyer has sworn an affidavit that indeed he was given authority. Therefore there is a dispute as to whether that consent was entered into by the applicant voluntarily or otherwise.

37. The law is settled on the principles of setting aside of a consent order. A Consent as a matter of fact constitutes a contractual relationship between the parties. The factors that will vitiate a contract are sufficient to set aside a consent order. These includes but are not limited to a consent obtained by fraud, collusion, coercion, undue influence, misrepresentation of material facts contrary to public policy on non-fulfillment of conditions set.

38. The Applicant alleges that by the time the consent was entered into, there was non-disclosure of material facts that the plaintiff and the 2<sup>nd</sup> defendant were deceased, and that their legal representatives had not applied to be substituted as such. If that was the position at that time, and there was indeed non-disclosure of the material facts, then the consent entered on their behalf will be null and void. But in the same vein, if at the time the Court is considering this application, that status has not changed then this Application too, has no legal basis. The Applicant cannot seek orders against deceased persons.

39. It suffices to note that in his own affidavit in support of the Application, he avers that the deceased could not have given instructions to their Advocates from the grave and so he cannot sue them or take any legal action against them in their absence. Therefore the reasons he uses to defeat the consent order are the same reasons that will work against him. A suit abates after one year of the death of the deceased. The suit herein has thus abated. The Application has no foundation on which to stand. It is therefore subject to striking out.

40. Be that as it were, I note that in the ruling delivered by the Court on 25<sup>th</sup> July 2014, the Court gave orders inter alia that the Defendant's notice of motion dated 22<sup>nd</sup> October 2013, and filed in Court on 19<sup>th</sup> February 2014, be allowed with costs. That Application, was filed under order 24 rule 2 and rule 43 of the civil Procedure Rules and Section 1B and 3A of the Civil Procedure Act. It was seeking for orders of stay of execution granted on 8<sup>th</sup> May 2012, be vacated and the Defendant's be at liberty to execute the ruling delivered on 4<sup>th</sup> November 2011, it was allowed and those orders allowed.

41. On 30<sup>th</sup> January 2015, the Court delivered another ruling, on the notice of motion application filed on 7<sup>th</sup> October 2014, whereby the plaintiff/1<sup>st</sup> Respondent applied for an order for stay of execution of the ruling delivered on 25<sup>th</sup> July 2014, and the Court dismissed that Application. It therefore follows that; there is already an order on record, for enforcement of the orders made on 4<sup>th</sup> November 2011. Notably, the applicant herein is seeking that the Court orders for the reinstatement or enforcement of the orders made on 4<sup>th</sup> November 2011

and that he be at liberty to execute the same, and the Deputy Registrar be compelled to sign the requisite documents. I do not see the necessity of these orders if the same are already a subject of the earlier rulings.

42. Even then, I note that the Application is brought under the provision of Order 45 Rule 1 of the Civil Procedure Rules, under which the Applicant is required to prove that he has new and important matter which was not in his knowledge at the time the order to be reviewed was made or there is a mistake apparent on the face of the record. That has not been proved herein. The Applicant has always been aware that the two parties herein are and were deceased at the time the order was made.

43. As a matter of obiter dictum, I note that the parties herein have been embroiled in litigation in this matter for over 44 years since 1974. It is clear to the Court that, they are not in a hurry to bring this litigation to an end. As the Applicant rightfully puts it, litigation must come to an end. The parties herein must purpose to do the same.

44. All in all I find that there is no merit in the application and it is hereby dismissed, the same firstly having been filed by an incompetent law firm. Secondly, the suit has abated and finally no proof of discovery on new matter to warrant setting aside the consent order. In that case, I order the Application struck out and/or dismissed. I make no order as to costs taking into account the stalemate among the parties herein.

45. Those then are the orders of the Court.

**Dated, delivered and signed in an open Court this 3<sup>rd</sup> day of July 2018**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

No Appearance for the Plaintiff/Respondent

Mr. Mburugu for Ms. Arati for the 1<sup>st</sup> Defendant/Applicant

No appearance for the 2<sup>nd</sup> Defendant/Respondent

Fred .....court Assistant