



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ENVIRONMENT & LAND COURT**  
**CIVIL CASE NO. 49 OF 1987**

**SOSPETER MURIMI KARITU.....PLAINTIFF**

**VERSUS**

**MARTIN MURIUKI MUGO.....DEFENDANT**

**R U L I N G**

On the 17th February, 1987, Sospeter Murimi Karitu, (*hereinafter referred to as the respondent*) filed a suit against Martin Muriuki Mugo, (*hereinafter referred to as the applicant*) claiming that by agreement dated 22nd November, 1967 entered between the plaintiff and Mugo Kario, (*hereinafter referred to as the applicant's father*), the applicant's father agreed to sell to the respondent land parcel No. MWERUA/KANYOKORA/144, (*hereinafter referred to the suit property*) which had been registered under the name of the applicant herein who is a real son of the said Mugo Kario in trust for his father at an agreed purchase price of Kshs.2,500. Immediately after paying the whole purchase price to the father of the defendant, the plaintiff started developing the said land from 1987 and has been doing so to date. He has already covered the whole said piece of land with tea plants being 17,500 plants which are mature with the knowledge of the applicant and with the authority of the applicant's father before his demise. He had developed the said land without any interruption of the applicant and the value of the developments on the said land is over Ksh 500,000. The applicant's father died in or around 1984 before he could have caused the defendant to transfer to the plaintiff the suit property which is the subject matter in this case. On various occasions the respondent had requested for transfer of the said land from the applicant but the latter had refused and or neglected to transfer the same to the former. The claim against the applicant was for an order requiring the defendant to transfer the suit property to the responded. It is alleged that despite demand and notice of intention to sue having been given to the applicant he had refused to transfer the suit property to the responded and this action has been rendered necessary.

Summons to enter appearance under order V rule 1(1)a as it then was were issued on the 3/3/1987. On the 21/5/1987, Lt. B. N. Mbatha the Officer Commanding C. Squadron 78 Tank Battalion wrote to the Deputy Registrar High Court of Kenya Nyeri in respect of this suit informing the Deputy Registrar that the applicant could not enter appearance in time as required due to exigencies of duty. On the 22/12/1988, S. K. NJUGUNA & Co. Advocates wrote to the Deputy Registrar High Court Nyeri requesting him to enter a consent on the following term:-

1. ***That the defendant do transfer land parcel No. MWERUA/KANYOKORA/144 the subject matter in this case to the plaintiff herein.***
2. ***That the defendant to execute all the necessary documents to effect the transfer of land parcel No. MWERUA/KANYOKORA/144 to the plaintiff herein AND in default the Executive Officer***

*of this Honourable Court to execute the same.*

3. *That the plaintiff to meet all the transfer fees payable to the necessary authorities.*

4. *That no orders as to costs in this case.*

The consent was signed by S. K. Njuguna and allegedly Martin Muriuki Mugo and Sospeter Murimi Karitu. On the 14/9/1989 the Deputy Registrar, Nyeri wrote to the parties and informed them that since the applicant's father was the real equitable owner of the parcel of land, the parties were to attend court before the consent judgment could be entered in terms of the consent letter dated 22/12/1988 and duly signed by all.

On the 9/1/92 the firm of S. K. Njuguna fixed the matter for mention on the 24/2/1992. The record shows that the parties appeared before Justice Tunoi on the 24/2/1992 and recorded the consent however they did not sign the same before the judge as is practice, but the said consent was registered by the court.

On the 25/7/2013, the defendant filed the application dated 25/7/2013 praying for orders that the same be certified as urgent, be heard on a priority basis and service thereof upon the respondent be dispensed with in the first instance. **Moreover**, that the consent judgment and decree entered against the applicant on 24/2/1992 as well as all subsequent orders be set aside and that he be granted leave to file defence and defend the suit unconditionally. He also prayed for an order that the court file be kept under lock and key to avoid any interference as there is clear evidence of criminality involved in the transfer of the applicant's property to the respondent. Furthermore, the applicant prays for a prohibitory order against any transactions in respect of the suit property and the same be served upon the Land Registrar Kerugoya for registration against the said title in the land register.

The application was based on grounds that the consent judgment alleged to be signed by, and entered against, the applicant was irregular and fraudulent and that the alleged service of summons on the applicant was fraudulent and amounted to no service. The respondent has even taken a loan from the Agricultural Finance Corporation using the applicant's land as security hence the risk of the suit land being sold by the financier due to default is very high.

The application was supported by the affidavit of the applicant who states that he resides at Mombasa City within Mombasa County. The suit land herein belonged to him until 2/7/1993 when it was fraudulently transferred to the respondent. The applicant was not aware of the existence of this suit until he bought the green card and realized the land is now registered in the name of the respondent. Upon realizing the land had been fraudulently converted, he instructed his advocate on record to peruse the court file and find out the current position. His advocate ascertained that an alleged consent judgment was entered against him on 24/2/1992. His advocate also ascertained that there was no evidence of service of summons to enter appearance. However, the applicant purportedly signed a consent order with the respondent giving him his land and that the applicant was purportedly present and consented to the entry of a consent judgment. Before the entry of the judgment, it is purported that he signed a consent letter with the respondent's advocate, one S.K. Njuguna, to the effect that judgment be entered in favour of the respondent. The applicant vehemently objects to the respondent's conduct as he has never before been made aware of this suit, and has never before appeared before the respondent's advocate or before this honourable court in this matter. He verily believes that the judgment, decree and execution proceedings are unlawful and irregular and should be set aside. He is desirous of ventilating his defence and should be given the chance unconditionally and believes that the respondent will not be prejudiced if the orders sought are granted as he does not live on the land. The suit land is the only land he knows as home has no other land. According to the applicant the matter is urgent as the respondent has used the suit land as security for a loan of Kshs.953,000 from the Agricultural Finance Corporation. He is certain that he has a good defence and should be allowed to ventilate the same.

The applicant has set out some of the irregularities on record as follows:-

(a) The identity card number given in the consent letter dated 22/12/1988 by S.K. Njuguna & Co.

is 18536 whereas the applicant's identity card number is 0752614.

- b) No demand letter was ever written given before the suit was filed or even after the alleged consent was signed asking him to sign the transfer.
- c) The person purported to have attended the judge when the consent was adopted was not the applicant.
- e) That the transfer of land was exclusively done in the respondent's advocate's office and it is clear the executive officer of the court was not involved.
- f) That the signature on the purported consent letter is not his.
- g) That the letter dated 21/5/1987 purported to be from the 78 tank battalion is a fraud as there was no commanding officer by the name of B.N. Mbatha as the material time.
- h) That the plaintiff purported that it was the applicant's father who had promised to sell the applicant's land to the respondent whereas he had never authorized anyone to sell it.

He also relies on a further affidavit filed on 26/8/2013 in which he reiterates that he has never appeared before the said **Justice Tunoi** or any **other judge** on the said date or any other date. He protests that his father had no capacity to contract to sell the land on his behalf, even granted there was any agreement to sell the land, which he vehemently denies. The only reason he has taken long to bring the application is because he did not know about this case and has been away from home in the Kenya army and after retiring from the army, has been working in Mombasa all through. The suit land is also far from where his other family members reside.

The Respondent filed a replying affidavit whose import was that he was informed by his advocates on record that the application is frivolous, vexatious, bad in law an abuse of the court process a non-starter and brought under wrong provisions of the law and therefore the prayers sought in the said application cannot stand. He states that the applicant is lying to the court by claiming that he stays in Mombasa County as he has all along together with his extended family stayed in his rural home at Mwerua location within Kirinyaga County. According to the respondent, there was no fraud in transferring the suit property to the respondent as he appeared before the Hon. Justice Tunoi on 24/2/1992 after being ordered to do so on 12/9/89 by the Deputy Registrar.

There was a consent letter dated 22/12/1988 signed by S.K. Njuguna & Co. advocate, who was then the advocate for the respondent, the respondent himself, and, the applicant herein which was placed before the judge on 7/9/1989 and whereupon the Deputy Registrar indicated that parties must attend court as the same was a land matter. The applicant cannot be heard to state that he was not aware of the suit as he signed the consent letter. After summons to enter appearance and the plaint were served through the assistant chief, Kanyokora, the applicant took them to the officer commanding his place of work at the time who wrote to the Deputy Registrar Nyeri indicating why the applicant could not be able to enter appearance within the stipulated time. It was after the above letter that the applicant who knew all the transactions over the suit land decided without any force or coercion to enter into the consent above without appearing before the court until he was ordered to appear.

The respondent is surprised that the applicant has come to this court claiming that he was not aware of this suit after 23 years and yet he well knew that the respondent entered the said land and started developing in the year 1967. The applicant again is untruthful to the court that he was not aware of the change of title over the suit land as the respondent has been in quiet possession therein and had planted tea bushes which are over 12,000 stems which even the applicant helped in planting. The delay in filing this application after 23 years after judgment was entered herein is unexplainable. The respondent believes that the intended defence is a sham. He confirms that the secured loan of Kshs.953,000/= over the property has been cleared. In reply to paragraph No.21 of the supporting affidavit he stated that the number which is in the consent letter dated 22/12/1988 is not his national identity number but his service

card number as he was working with the armed forces at the time and had been using the same in all transactions as the National Identity cards are usually surrendered after joining the forces. All documents in relation to the transactions herein are signed by the executive officer and the respondent still keeps the originals and will be at liberty to produce the same in court. All documents especially the letter dated 21/5/87 are from the applicants place of work after he took the summons to enter appearance from his assistant chief to his place of work. All the issues regarding the transactions over the purchase of the suit property herein are well explained in the plaint reasons why the applicant entered the consent judgment.

The applicant is well aware of the circumstances why the respondent still retains the original title deed as after the executive officer signed the documents, he disappeared to his place of work and nothing could have hindered another title deed to be issued as there was a court order in respect of the transfer of the suit property. The respondent herein had been in occupation of the suit property since 1967 and has developed the same extensively by planting tea bushes, grown mature trees and other crops.

According to the respondent the application herein cannot be allowed to stand as the reasons given have not been proved to warrant the consent judgment to be set aside.

He also filed a supplementary affidavit on 8/10/2013 stating that the applicant No.18536 which he presented to the firm of S.K. Njuguna & Co. advocates at the time of drawing the consent letter is his Kenya Armed Forces Identify Card. He instructed his advocates on record to apply to the department of defence to be issued with details of the applicants service identity card on 20/9/2013 to enable verification of the above said number and it appeared that the number he had given at the time of drawing the consent letter is the serial number above stated. The department of defence replied to his advocates letter vide their letter dated 24/9/2013 and supplied them with the copy of his service card.

The signature of the applicant on the copy of the service identity card and that in the annexure are similar and the applicant should not be heard to deny the same. The authenticity of the annexures in the further affidavit is questionable as the same does not have the official rubber stamp at the place where it would be signed and stamped by the employer nor does it have a specimen signature of the applicant at the place indicated as it is supposed to be. The annexures are said to be certified true copies of the original but do not have a stamp nor the names of the person certifying them hence their authenticity is again questionable. He was advised by his advocate on record, information he verily believes that the application herein is an afterthought and does not meet the principals of setting aside a consent judgment and the said should be dismissed with costs.

On the 30th of September 2014 by consent of the parties the court ordered that the Kerugoya Divisional Criminal Investigations Officer to investigate the matter and determine whether the signature on the consent dated 22/12/1988 was executed by the applicant.

On the 22/11/2013 the Executive Officer Nyeri Law Courts received a letter from the Divisional Criminal Investigations Officer, Kirinyaga Central referring to the court order made on 30/9/2013 by this court. The letter forwarded the document examiners report **Ref.CID/ORG/8/3/1/963-13** dated **4/9/2013**. Though the report is dated before the order, it appears that the police had investigated the matter and had come up with a report hence they deemed it fit to forward the initial report In obedience of the court order.

This prompted the respondent to file an application on 22/11/2013, dated 21/11/2013 praying for an order that the D.C.I.O Kirinyaga Central be compelled to appear in court and produce the original documents examiner's report dated 9/10/2013 in respect to this suit and in respect of the orders made on 30/9/2013.

The D.C.I.O chose to file the report made on the 4/9/2013. The report made on 9/10/2013 was filed by the respondents advocate. This prompted the court to order the Document examiner to appear in court for cross-examination.

On the 18/12/2013 the Document Examiner appeared in court for cross-examination. He states that he is the chief inspector of police, a forensic document examiner of more than 5 years experience working on a

full time basis with criminal department of Kenya Police. He was trained as a document examiner by the National Rabat University in Khartoum Sudan.

On the issues before court, Chief inspector, Daniel Gutu explained the essence of the reports. According to him the 1st report dated 4/9/2014 was made after considering specimen signatures with the signature in the consent and found that the signature in the consent and the signatures specified were made by different persons. He signed it first hence this was the initial report.

The second report was made by Mr Daniel Gutu on the 9/10/2013 after comparing the signature in the consent letter and known signatures ascertained from the Kenya armed forces identity card and the certificates of general liability. After comparing the signatures, he came to the conclusion that the disputed signature in the consent and the known signatures were made by the same person. He concluded that the applicant gave the police a signature different from the known signatures in order to deny having signed the questioned document. He produced both reports to the court.

On cross-examination by **Mr. Igati**, he reiterated that Mr. Martin Muriuki might have given wrong specimen signatures to mislead the document examiner but that the truth was ascertained when the examiner visited his employer and obtained known signatures.

On cross-examination by **Mr. Macharia**, he conceded that **Mr. Stephen Kariuki** (plaintiffs son) visited him in his office and that the said Kariuki had his telephone number. He did not know that Mr. Kariuki was related to the plaintiff. The document examiner conceded that he gave the respondents the second report because he was told to do so. He conceded that the two reports are similar word by word apart from the findings. Mr. Gutu stated that second report was prepared from documents obtained from D.O.D which he annexed.

Mr. Macharia showed him the marriage certificate in respect of the defendant/applicant and a burial permit of Tabitha Wanjiru which had signatures of the applicant and he agreed that the signatures in the two documents were similar to the specimen signatures.

I have considered the evidence on record, the submissions of the parties and do find that the issue before me is whether the applicant was served with the summons to enter appearance and whether he signed the consent letter dated 22/12/1988. if the court finds that he did not ,should the consent judgment be set aside.

It is trite law that the principles applicable in setting aside a consent judgment are similar to the principles of nullifying a contract.

The Court of Appeal applied these principles in **FLORA WASIKE v. DESTIMO WAMBOKO (1982-88) 1 KAR 266** where the main holdings of the Court were as follows: -

- 1. It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation.**
- 2. An advocate would have ostensible authority to compromise a suit or consent to a judgment so far as the opponent is concerned.**
- 3. The court would not readily assume that a judgment recorded by a Judge as being by consent was not so unless it was demonstrably shown otherwise.**

The foregoing decisions were followed by this Court in recent cases of **KENYA COMMERCIAL BANK LTD v. BENJOH AMALGAMATED LTD & ANOTHER – Civil Appeal No. 276 of 1997 (unreported)** and **DIAMOND TRUST BANK OF KENYA LTD v. PLY & PANELS LTD & OTHERS – Civil Appeal No. 243 of 2002 (unreported)**.

In view of the foregoing, I think it can safely be stated that a consent judgment may be set aside only in

certain circumstances e.g. on the ground of fraud or collusion; misrepresentation of the facts, public policy or for such reasons as would enable a court to set aside or rescind a contract.

This court finds that the fact that there are two reports from the same document examiner creates doubts as to whether the defendant signed the consent. Moreover it appears that the applicant has two sets of signatures as exhibited by the burial permit and marriage certificate. The second report was not filed in court but was introduced through an application by the plaintiff. The report was neither forwarded to court nor the applicant's counsel but was forwarded to Mr. **Igati Mwai** for purposes of challenging the first report. I do find the process of availing the report to the plaintiff without the defendant's knowledge and without filing the same in court was highly irregular.

Moreover, the fact that **Mr. Stephen Kariuki**, the plaintiff's son had inappropriate contact with the document examiner before the second report was made, which was not proper as he was interested in the outcome of the investigation, taints the second report.

The fact that the specimen signatures used in the first report are similar to the known signatures in the marriage certificate and the burial permit further creates doubt as to whether the signatures in the consent letter were made by the defendant. When the matter was placed before Justice Tunoi on the 24/2/1982 neither the defendant nor the plaintiff signed the consent that was recorded by the judge. It was prudent for the parties to sign the consent before the judge as is practice in all matters and also due to the fact that one party was presumably acting in person. **This court holds that a consent judgment is an agreement between the parties and therefore ought to be signed by the parties at the time and place of making the same.** The court has a duty to ensure that parties in a suit sign the consent before making an order.

Moreover this court finds that the consent order entered on the 24/7/1992 was not regular as there was **no appearance filed** by the defendant. No evidence has been shown that the defendant was served with summons to enter appearance. No return of service or affidavit of service has been shown by the plaintiff to demonstrate that the defendant was served in accordance with the Civil Procedure Rules.

**Order V rule 19(i) of the Civil Procedure Rules as it then was and now Order 5 Rule 19 in the Civil Procedure Rules 2010**, provides for service of summons to enter appearance on soldiers and public officers thus:-

***“Where the defendant is a public officer or an officer of a local authority, the court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is deployed together with a copy to be retained by the defendant.”***

The plaintiff has deponed that the summons to enter appearance were served through the Assistant Chief Kanyokora and the respondent took them to the officer commanding applicants place of work at the time who wrote to the Deputy Registrar High Court indicating that the applicant could not enter appearance within the stipulated time. This mode of service was irregular as the Deputy Registrar was obligated to send the documents directly to the applicant's employer as provided for by law and not to take the circuitous route of serving the assistant chief who in turn allegedly gave the documents to the applicant who finally took them to his employer. The court also finds that it was irregular for a consent to be entered without the defendant entering appearance.

The principles for setting aside a consent judgment are now settled this grounds of fraud or collusion and that evidence that there was no consensus between the parties, public policy or such reason as would enable a court to set aside or rescind a contract.

It is not very clear whether the parties in this case consented in view of the two conflicting reports but it is clear that the consent is questionable as the defendant was neither properly on record nor at all. The defendant has a strong defence because it is clear that the sale agreement, which I did not see, was between the plaintiff and the defendant's father hence the principle of **privity of contract** applies. On the issue of delay the court finds that the same has been explained by the defendant that he was not aware of the existence of the suit.

The upshot of the above is that the application dated 25/7/2013 is allowed. The consent judgment on the 24/2/1992 as well as subsequent orders are set aside and the defendant is granted leave to file defence within the next 14 days. A prohibitory order is issued against any transactions in respect of L.R. No.Mwerua/Kanyokora/144 and the same be served upon the Land Registrar Kerugoya for registration against the said title in the Land Register. The file herein to be kept in the strongroom at the registry. Costs to the defendant/applicant. Orders accordingly.

***Dated, signed and delivered at Nyeri this 6th day of November 2014.***

**A. OMBWAYO**

**JUDGE**