



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**E & L CASE NO. 122 OF 2008**

**KENYA ANTI-CORRUPTION COMMISSION..... PLAINTIFF**

**VERSUS**

**ESTHER NYABATE NGARE.....1<sup>ST</sup> DEFENDANT**

**SAMMY SILAS KOMEN MWAITA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This suit was filed by the Plaintiff against the 1<sup>st</sup> defendant on 24<sup>th</sup> September, 2008. The Plaintiff was subsequently amended on 7<sup>th</sup> December, 2010 to join the 2<sup>nd</sup> defendant into the suit. In the amended Plaintiff dated 7<sup>th</sup> December, 2010, Plaintiff sought among other reliefs, a declaration that the leasehold title held by the 1<sup>st</sup> defendant with respect to all that parcel of land known as LR. No. Kisii Municipality Block 3/430 (hereinafter referred to as “**the suit property**”) was acquired fraudulently and as such the same is illegal null and void, an order for the rectification of register of the suit property by the cancellation of the registration of the 1<sup>st</sup> defendant as the proprietor of the leasehold interest in the suit property and all subsequent entries in the register related thereto, an order of vacant possession of the suit property and an order of permanent injunction to restrain the 1<sup>st</sup> defendant from alienating, charging, leasing, entering or in any manner howsoever described dealing with the suit property. The Plaintiff’s claim against the defendants was brought on the grounds that the suit property was part of land that was reserved for Community Development Centre within Kisii town and that the same was fraudulently and in breach of the law leased by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant after the 2<sup>nd</sup> defendant had unlawfully changed the user thereof. The Plaintiff therefore sought to recover the suit property for public use as was initially intended.
2. While this suit was pending hearing and determination, the District Land Registrar, Kisii through Gazette Notice No. 15576 published on 26<sup>th</sup> November, 2010 revoked the 1<sup>st</sup> defendant’s title over the suit property on the ground that the suit property was reserved for public purpose and as such its allocation to the 1<sup>st</sup> defendant was illegal and unconstitutional. There is no indication on record that the 1<sup>st</sup> defendant challenged the said revocation.
3. It is the said revocation of the title of the suit property that has given rise to the application before me. Following the said revocation, the Plaintiff filed the application herein on 21<sup>st</sup> November, 2012 by way of Notice of Motion dated 30<sup>th</sup> April, 2012. The application was brought under Order 25 rules 5 (1) and (2) and Order 51, rule 1 of the Civil Procedure Rules. The Plaintiff sought

the following orders;

- i. **An order that this suit has been compromised and/or overtaken by events consequent to the revocation of the title of the suit property through Gazette Notice No.15577 of 26<sup>th</sup> November, 2010;**
- ii. **An order striking out the 1<sup>st</sup> defendant's statement of defence and entering judgment against the defendants as prayed in the plaint;**
- iii. **An order directing the Land Registrar, Kisii District to cancel the Certificate of Lease and entries numbers 2 and 3 in the land register relating to the suit property;**
- iv. **An order that each party should bear its own costs of this application and of the entire suit.**

4. The Plaintiff's application was supported by the affidavit of Yuvinalis Angima sworn on 17<sup>th</sup> May, 2012. The application was brought on the grounds that; the title to the suit property was revoked on 26<sup>th</sup> November, 2010 by the District Land Registrar, Kisii, the 1<sup>st</sup> defendant did not challenge the said revocation, the revocation of the title to the suit property has compromised the principal reliefs that were sought by the Plaintiff in this suit and that it would only be fair and just if the compromise of this suit through the revocation of the title of the suit property by District Land Registrar aforesaid is adopted by the court and judgment entered accordingly for the Plaintiff against the defendants as prayed in the plaint save for costs which should be borne by each party. The application was opposed by the 1<sup>st</sup> defendant. In her grounds of opposition dated 12<sup>th</sup> March, 2013, the 1<sup>st</sup> defendant contended that the Government did not have the power to revoke the 1<sup>st</sup> defendant's title to the suit property without following the due process and as such the purported revocation was null and void.
5. On 13<sup>th</sup> March, 2013, the parties agreed to argue the application by way of written submissions. The Plaintiff filed its submissions on 4<sup>th</sup> April, 2013 while the 1<sup>st</sup> defendant filed her submissions on 19<sup>th</sup> April, 2013. I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the 1<sup>st</sup> defendant's grounds of opposition to the application and the written submissions filed by the advocates for the Plaintiff and the 1<sup>st</sup> defendant. The Plaintiff's application was brought under Order 25 rule 5 (1) and (2) of the Civil Procedure Rules 2010 which provides as follows;

**5.(1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.**

**(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.**

The court has power under this rule to direct that a suit has been adjusted wholly or in part by a lawful agreement or compromise upon receipt of satisfactory proof to that effect, and, to enter judgment, on application of any party in accordance with the said agreement or compromise. The lawful agreement or compromise envisaged under this rule must be that between the parties to the suit. See, **Mulla, The Code of Civil Procedure, 18<sup>th</sup> edition, Reprint 2012**, where the authors while commenting on Order 23 rule 3 of the Indian Code of Civil Procedure which is similar to our Order 25 rule 5 save for minor variations stated as follows at page 2916;

**“Unless it is clearly established that such accord or compromise has been entered into between the parties, the powers under Order 23 rule 3 could not be exercised.”**

The Plaintiff has not placed before this court any lawful agreement or compromise between the parties herein in which they have expressed their desire to settle this suit wholly or in part. What has been presented to court is the Gazette Notice No. 15576 by the District Land Registrar, Kisii (hereinafter referred to as “**the notice**”) that revoked the 1<sup>st</sup> defendant’s title to the suit property. This notice cannot be by any imagination be construed as an agreement or a compromise between the parties herein. Although the notice was published after the filing of this suit, no reference has been made to this suit in the same and there is no indication therein that the defendants herein were consulted before the decision to revoke the title to the suit property was arrived at. This notice does not have the elements of a lawful agreement or compromise envisaged under Order 25 rule 5 (1) and there is no basis upon which this court can infer such agreement. The Plaintiff’s contention is that following the revocation of the 1<sup>st</sup> defendant’s title to the suit property by the land registrar as aforesaid, the substratum of this suit collapsed and as such to proceed with the same will be an act in vain. In my view the answer to the Plaintiff’s problem is found in Order 25 rules (1) and (2) of the Civil Procedure Rules and not under Order 25 rule 5. If the Plaintiff feels that the reliefs sought in this suit are no longer tenable due to intervening events subsequent to the filing of the suit, the only avenue open to the Plaintiff to lay this suit to rest is to have it withdrawn. The jurisdiction of the court under Order 25 rule 5 is limited to adopting compromises and agreements between the parties. The court has no power under the rule to adopt a decision arrived at by the executive arm of the Government through extra-judicial process as its own judgment. To do so in my view would be equivalent to abdicating judicial authority of the court. As submitted by the 1<sup>st</sup> defendant’s advocates, the legality of the revocation of the 1<sup>st</sup> defendant’s title is doubtful. In the circumstances, for this court to endorse the same unquestionably without testing the validity thereof through the normal court process of adjudicating disputes brought before it would in my view occasion a miscarriage of justice to the defendants.

## **6. Conclusion;**

The upshot of the foregoing is that the Plaintiff’s application dated 30<sup>th</sup> April, 2012 is not for granting. The same is hereby dismissed with costs to the 1<sup>st</sup> defendant.

**Dated, signed and delivered at KISII this 8<sup>th</sup> day of November, 2013.**

**S. OKONG’O,**

**JUDGE.**

**In the presence of:-**

**No appearance for the plaintiff**

**No appearance for the 1<sup>st</sup> defendant**

**No appearance for 2<sup>nd</sup> defendant**

**Mobisa Court Clerk.**

**S. OKONG’O,**

**JUDGE.**