



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL CASE 95 OF 2003

EZEKILE WEKHOMBA NAMBILI

(Suing as an administrator of the estate of

NAMBILI WEKHOMBA.....PLAINTIFF

VRS

TITUS MAONGA..... 1ST DEFENDANT
COSMAS SOITA..... 2ND DEFENDANT

RULING

This suit was filed on 19/3/2003 and sought eviction of the Defendants from land parcel no.Kimilili/Kimilili/211 measuring about 78 acres registered in the name of the deceased Nambili Wekhomba whose estate was being administered by the Plaintiff. The Plaintiff further sought damages for trespass and for the destruction of the property on the suit land. On 2/2/2006 judgment was given to have the Defendants evicted and for them to pay Ksh.242,665/= in damages, and then pay costs of the suit.

On 8/9/2009 the parties recorded a consent on the mode of payment.

On 14.4.2010 Kraido & Company Advocates for the Plaintiff and Elizabeth Chunge & Company Advocates for the Defendants filed a consent letter dated 12/4/2010 seeking that it be adopted as order of the court. It read:

“Any further execution pursuant to HCCC no.95 of 2003 be stayed, pending the hearing and determination of the two lower court matters i.e nos.131 of 2006 and 175 of 2007.”

On 14/6/2010 the registry received a letter from the Plaintiff to say that the consent letter had been posted to him and received on 12/6/2010 by the Defendants’ advocates. He was protesting that he was not party to the consent. He stated that he had on 6/4/2010 filed an application to act in person and therefore Kraido

& Co. advocates had no further instructions from him. The application had been heard on 29/4/2010 and allowed. He cautioned the court not to adopt the consent.

The record shows that on 2/7/2010 the Plaintiff appeared before Judge Onyancha. Mrs Chungu appeared for the Defendants. The Plaintiff raised the issue of the consent. The court adjourned the matter to 22/7/2010 to get Mr. Kraido to attend to clarify the issue whether he was still the Plaintiff's advocate. Mr. Kraido attended. He conceded that the Plaintiff had filed an application to act in person, but that he had filed the consent with full instructions and to protect the Plaintiff's interests. He stated:

"I stand by what I did. I wrote to him to give me instructions but he refused to write back. That is when I signed the consent."

The judge adjourned the issue to 27/10/10. Mrs Chungu was present as was the Plaintiff. It was ordered that:

"Defendant to formally apply to court to adopt the written consent into court orders."

The record shows that on 15/7/2011 the Deputy Registrar adopted the consent as order of the court and issued an order to that effect. It is clear that no formal application had been made by the Defendants to have the consent adopted. What the Deputy Registrar did went against the clear order of the Judge. The order has to be vacated as a matter of course.

I have indicated in the foregoing that the Plaintiff had on 29/4/2010 been allowed to act in person. If Kraido & Co. Advocates were aggrieved by the order they were at liberty to challenge it, but they were no longer acting for the Plaintiff. When the consent matter was signed and filed in court, the firm was not acting for the Plaintiff. Infact, Mr. Kraido conceded before Justice Onyancha that the Plaintiff was not communicating with him and he was aware he wanted to act in person. In short, the Plaintiff did not instruct the firm to consent to the letter, or to any order in court.

I am aware that a consent order may only be set aside for fraud, collusion, or for any reason which would afford a good ground for varying or rescinding a contract between the parties (**Brooke Bond Liebig (T) Ltd v. Mallya [1975] EA 266**). An advocate has a general authority to compromise a suit on behalf of his client, if *bona fide* and not contrary to express negative instructions (**Kenya Commercial Bank Ltd v. Benjoh Amalgamated Ltd & Another, Civil Appeal no.276 of 1997**). In **Diamond Trust Bank of Kenya Ltd v. Ply and Panels Ltd and Others, Civil Appeal no.243 of 2002** the Court of Appeal observed that so long as counsel is acting for a party in a case and his instructions have not been terminated, he has firm control over the conduct of the case and has apparent authority to compromise all matters connected with the action. In the instant case, however, the Plaintiff had terminated the instructions he had given to Kraido & Co. Advocates to act for him and the advocates could not therefore have been legally and validly acting for him at the time of signing and filing the consent.

Mrs. Chungu took the position that the application was incompetent before it was filed for the Plaintiff by Kassim Sifuna & Ass. Advocates who were not properly on record as required by Order 9 rule 9 of the Civil Procedure Rules. It is true the firm did not file application to act for the Plaintiff. However, they were coming into the matter after the Plaintiff had applied and obtained leave to act in person. This scenario has not been provided for by the Order and rules, but even if leave was required and was not obtained, I am prepared to do substantial justice in the matter by vacating what is openly an illegal consent that has unduly compromised the rights of the Plaintiff who has a judgment which he is entitled to execute.

In conclusion, I allow the application dated 18/10/2011 with costs.

Dated, signed and delivered at Bungoma this 4th day of July 2012.

A. O. MUCHELULE

JUDGE