



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Civil Case 206 of 2008

WEB ENGINES LIMITED PLAINTIFF

=VERSUS=

MOHAMED HAMISI MWASENGEZA 1ST DEFENDANT

ABDALLA SAID KUGOTWA 2ND DEFENDANT

JANE MUTISO 3RD DEFENDANT

THADDEUS MUTISO 4TH DEFENDANT

MWICIGI JANE 5TH DEFENDANT

KAMONI MWICIGI 6TH DEFENDANT

RULING

Before this court is the application brought by way of a Notice of Motion dated 17th December 2008. The Applicants herein are the 3rd, 4th, 5th and 6th Defendants in the main suit. They seek inter alia the following orders:-

“2) THAT the order entered on 14th October 2008 be vacated and/or lifted as well as the Inhibition

Order issued on 13th August 2008.

3) THAT the costs of the application be provided for”

The application is supported by the affidavit of the 4th Defendant one **THADDEUS MUTISO. DR. KHAMINWA** Senior counsel acted for the Applicants whilst the Respondents were represented by **E.W. NJERU & COMPANY ADVOCATES**. It was agreed between the parties that the application be disposed of by way of written submissions. Both parties duly filed their submissions by 31st July 2012. At the heart of this application is the order made on 13th August 2008 by **Hon. Justice Azangalala** that an inhibition be registered against Title Number Kwale/Galu Kinondo/1 (hereinafter referred to as the ‘suit land’) restricting the registration of any dealings whatsoever with the said title pending the inter partes hearing of the Plaintiffs/Applicants Notice of Motion dated 12th August 2008. This latter application has not been heard and/or determined to date.

The Applicants herein premise their application to set aside the court orders of 14th October 2008 on the following grounds:

- (a) That since the suit was filed on 13th August 2008 the Plaintiffs made no attempt at all to serve the 3rd to the 6th Defendants with the Plaint. As such the 3rd to 6th defendants were denied an opportunity to enter appearance and present their defence.
- (b) That **MR. WAMEYO** Advocate who appeared on record as acting for the Defendants was in actual fact acting only for the 1st and 2nd Defendants. Mr. Wameyo had **no instructions** to act for the 3rd to 6th Defendants.
- (c) The consent entered into by the parties to the suit is therefore not binding on the 3rd to 6th Defendants who were not represented and were not a party to that consent.
- (d) That 3rd to 6th Defendants have a good defence and ought to be allowed an opportunity to present the same.
- (e) That in any event the parties have not complied with the Courts orders made on 14th October 2008 and the 30 day period has expired.

The application was opposed through the replying affidavit of **COLIN STUART** filed on 16th June 2009 in which he raised the following main grounds of objection –

- (a) That the transfer and registration of the suit property to the 3rd to 6th Defendants was irregular as the same was effected in breach of the provisions of the Registered Land Act. Chapter 300, Laws of Kenya.
- (b) Since the Defendants concede that the suit seeks to have the Defendants’ ownership of the property declared null and void, the suit property needs to be preserved so as to avoid any sale, transfer or dealings which may dispose of the subject matter of the suit.
- (c) The 3rd to 6th Defendants were in fact served with suit papers and did appear through an advocate **MR. WAMEYO** who is still on record for them.

I have carefully perused and considered the written submissions filed by both parties in respect of this present application. The main bone of contention is the consent recorded on 14th October 2008 that all interlocutory applications be done away with and that the suit be heard on its merits. The law is that any order made in the presence of and with the consent of counsel will bind all parties and cannot be varied unless such order is proved to have been obtained by fraud, collusion, or by misapprehension or in ignorance of material facts. The legal principles upon which a consent order may be set aside were well

established in the case of **GERISHOM LIKECHI KITUNGULU –VS- PATEL PRABHAKER ISUER BHAI [2005] eKLR** where it was held:

“It is now accepted as law that a consent order or a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example where there is a mistaken, fraud or misrepresentation”

The Applicants herein insist that they **did not** instruct the firm of **Marende Birir and Company** to act for them in this matter thus this consent was entered into without their participation, knowledge and/or agreement. I note that on the material date i.e. 14th October 2008 the record shows that **MR. WAMEYO** held brief for Mr. Ngeno of Marende Birir and Company for the Defendants. The company of Marende Birir were duly served with this present application and have not bothered to respond to the same nor to set the record straight. Neither have they tendered any proof of valid instructions to act for the 3rd to 6th Defendants. From their silence this court can only conclude that they had no instructions to act for the 3rd to 6th Defendants. I have no reason not to believe the Applicants. It stands to reason that an advocate who does not have instructions **cannot** record a consent on behalf the client who has not instructed him. In such circumstances any consent entered into may be set aside. The Applicants herein have aptly demonstrated that they did not instruct the firm of Marende Birir and Company to act for them. As such the consent entered into on 14th October 2008 in which Mr. Wameyo purported to act for the 3rd to 6th Defendants is hereby set aside.

Regarding the Inhibition granted on interim basis by the court on 13th August 2008, it is my view that the subject matter of this suit must in the interests of justice be preserved pending the hearing and determination of the main suit. This is because the dispute between the parties involves validity of Title to the suit land. The status quo therefore ought to be maintained. I am therefore not inclined to order the lifting of said inhibition at this stage.

I further order that the Plaintiffs serve the 3rd – 6th Defendants with suit papers within 14 days of today's date. The 3rd to 6th Defendants to file their defence/response within 21 days of such service. Thereafter the main suit to be listed down for hearing on **priority basis**. Costs of this application to the Applicants.

Dated and Delivered in Mombasa this 10th day of October 2012.

M. ODERO

JUDGE

In the presence of:

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