



1. **Land and Environmental Law Division**

2. **Subject of main suit – Contract**

- a. Sale of land LR. No. 17589 Ongata rongai Kajiado district
- b. Purchase price Kshs.3 million
- c. Contract date 13 October 2006
- d. Original plaintiff Col(Rtd) Henry Muthee Kathurima enters into contract agreement for sale with original defendant Martha Karwirwa Anthony on 13 January 2006.
- e. Original plaintiff rescinds contract on 18.10.06 and files suit HCCC 1114/06 now ELC on 25 November 2006, having been paid Kshs.2 million.
- f. Files for orders seeking court to declare and rescind sale of land. That all the documents of title and transfer be returned to him.
- g. Injunction application No.1 dated 25 October 06 seeking:

- i. Orders to restrain original defendant from selling, wasting the said land.
- ii. Orders pending the hearing of the main suit that the land title be released to the respondent/plaintiff

h. Before duty Judge K. Kariuki J.

i. Declined on grounds application be first served.

ii. That to rescind a contract under sale agreement, 21 days notice was required to be given.

i. Before Osiemo J 06 November 2006

aa. Status quo be maintained

j. Before Aganuanya J (as he then was) 5 March 2006

aa. Application of 2 October 2006.be withdrawn.

bb. Full hearing on main suit on 19 April 07

cc. Status quo be maintained.

k. *Application No.2 – dated 28 February 2007 filed 1 March 07 by original plaintiff.*

*Prays that the sum of Kshs.2 million be deposited to court (not heard).*

l. *Application No.3 dated 23 March 2007 by original defendant injunction to restrain plaintiff from constructing on land.*

m. *Ruling Ang’awa J, application granted 29 March 2007.*

n. *Original plaintiff files application. 29 March 2007 to set aside orders of Ang’awa J 29 March 2007.*

o. *Original defendant files contempt proceedings dated 16 April 07.*

p. *On 23 April 07, both application of 29 March 2007 and 16 April 2007 are withdrawn (Ang’awa J.)*

q. *Consent : Compromising suit (note original defendant filed defence and counter-claim for specific performance of contract)*

i. *“By consent the plaintiff undertakes to complete the sale action entered into on 3 October 2006 between the defendant and himself in accordance with the terms and conditions of the said sale agreement and in any event within 14 days from the date hereof.*

ii. *That the said agreement entered into between the plaintiff and Barclays Bank Ltd on 28.9.06 be registered within 14 days hereof.*

iii. *That the defendant and Barclays Bank Ltd be at liberty to continue the negotiations of the term of lease of suit property.*

iv. *A date be fixed for submission as to which parties to hear the bear the costs of the suit.”*

r. *Notice of Motion 25 June 07 by the original defendant to have transfer forms signed is withdrawn (Ang’awa J.)*

s. *Notice of Motion 18 October 2007 seeking to renew/set aside consent orders adjourned after brief arguments to enable one E. Njenga, who recorded the consent on behalf of original defendant come to court as requested by advocate (Ang’awa J.)*

- t. *Hon. Judge transferred from station.*
  
- u. *Original plaintiff enters into a lease agreement with Barclays Bank over property.*
  
- v. *M/s Barclays Bank willing to negotiate on lease with Original defendant on condition lease is first registered.*
  
- w. *Barclays Bank of Kenya Ltd files HCCC 446/07*
  - i. *Files injunction against original defendant (2043/07. Dismissed Okwengu J.*
  
  - ii. *Files application to Court of Appeal do extend time to file notice of appeal . Dismissed Onyango Otieno JA.*
  
- x. *M/s Barclays Bank vacates premises.*

3. **Application, Notice of Motion 15.12.10**

- i. *by original defendant, whether the court may interpret consent order of 23 April 07.*
- ii. *Preliminary objection notice, 15 December 2010 withdrawn by original plaintiff.*
  - iii. *Replying affidavit*
    - aa. *Non-compliance of consent order by original defendant. That is lease not registered*
  
    - bb. *Sale agreement rescinded*
  
    - cc. *consent orders a nullity for want of Land Control Board.*
  
  - iv. *In reply by Original Defendant/Applicant*
    - aa. *Transaction interpretation is that it ought to be completed within 14 days.*

- bb. *Clause 9 permitted, original defendant to take possession of property.*
- cc. *No application to set aside consent attempted or made by original plaintiff.*
- dd. *Land consent board applies to RLA title not RTA titles.*
- ee. *Consent binding*
- ff. *M/s Barclays Bank of Kenya Ltd no longer an issue.*

**4. Held – Interpretation**

- a. *Parties intention and did concede in the consent that the sale agreement transaction would be completed in any event within 14 days.*
- b. *The agreement with M/s Barclays Bank of Kenya as to a lease of 6 years was to be registered.*
- c. *The property in question as to the agreement would belong to the original defendant.*

**5. Case Law**

**a. Greenfield Investments Ltd V Balie Alibhai Mawji**

*CA 160 1997 (unreported) (Kwach, Tunoi, & Shah JJA)*

**b. Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd Bank**

*CA No.276 of 1997 (unreported) (Kwach, Tunoi & Bosire JJA)*

**c. Filona Wasike v Destmo Wambuka (1982 – 88) IKAR 65**

*Hancox JA , Nyanagi & Plate*

**d. Kenya Commercial Bank Ltd V Specialized Engineering**

*(1982) KLR 485 (Harris J)*

e. Galaxy Auctioneers V. E. N. Nganga & Co. Associates

HC Misc. App 177/01 unreported (Lenaola J)

6. Advocates

1. P.J Machira instructed by M/S Machira & Co. Advocate for the Defendant/Applicant

2. R. M. Mokaya instructed by M/S Migos Ogamba & Co. Advocate for the plaintiff/Respondent

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC HCCC 2043/07**  
**(FORMERLY HCC 1114/06)**

**COL (RTD) HENRY MUTHEE KATHURIMA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MARTHA KAWIRWA ANTHONY.....DEFENDANT/APPLICANT**

**RULING**

**(On the interpretation of the consent order entered to by the parties on 23 April 2007)**

I. BACKGROUND

1. Col (Rtd) Henry Muthee Kathurima the original plaintiff/respondent herein represented by M/S Migos Ogamba & Co. Advocates sued Martha Kawirwa Anthony, the original defendant/applicant herein, formerly represented by M/s Kiiru, Wainana & Co. Advocates and currently represented by M/S Machira & Co. Advocates on the 25 October 2006 for orders from this court that the sale agreement for land parcel LR. No.17585 situated in Ongata Rongai, Kajiado District be rescinded.

2. Both parties conceded that there indeed was a sale agreement dated the 13 October 2006 in which the plaintiff agreed to sell and the defendant agreed to purchase the said parcel of land for a consideration sum of Kshs.3 million. The said parcel of land appears to be allocated to the plaintiff under the Registration of Titles Act by the government at Kshs.21,000/= and or at Kshs.300,000/=. This land parcel was measuring 0.0800 and registered in the Lands Title Registry as grant No. LR 6095. The remainder leasehold of 99 years, with effect from 1<sup>st</sup> August 1992, was sold.

3. It was the term of the agreement that the defendant/purchaser would pay a sum of Kshs. 3 million by bankers cheque to the plaintiff/seller. That on completion of the registration of the said transaction, the balance of the Kshs. 1 million would be paid to the plaintiff/seller. The plaintiff/seller did provide to the advocate for the purchaser:-

**i. The title deed of the property.**

**ii. The original transfer document between the plaintiff and defendant**

**iii. The deed plan**

**iv. The agreement was subject to the Law Society condition of sale 1989 Edition (in so far as they are not in consistent with the terms and conditions of (this) agreement**

4. On the 18 October 2006, five days after the sale agreement had been signed, the Advocate for the plaintiff notified the defendant that the plaintiff had a change of heart after seeking counsel from his family and his legal representative that he was not willing to complete the transaction and wished to rescind the same. He asked for the return of the original documents forwarded to the defendant's advocate being:-

**i. The original Title Deed**

**ii. The original Deed Plan**

**iii. The transfer document between himself and the defendant**

**iv. The copies of the Pin Number and 100 Identity Card.**

5. The defendant declined through her advocate to have the agreement rescinded on grounds that the same had been entered between the parties voluntarily and without coercion from any person. That the sale of the property had been ongoing for long with advertisement in the papers and or through agents.

6. The plaintiff/purchaser issued a three day notice on the same day with intention to sue.

7. The suit was filed on the 25 October 2006 and prayed that there be a declaration to issue that :

**i. The sale agreement dated 13 October 2006 was null & void and had duly been repudiated and or rescinded.**

**ii. A permanent injunction to issue compelling the defendant to return forthwith to the plaintiff all the original document of title in her possession**

**iii. Damages**

**iv. Costs.**

8. An application of the same date of 25 October 2006 was filed seeking orders of injunction to restrain the defendant from selling, wasting the said land; that pending the hearing of the main suit, the title deed be released to the original plaintiff. This application coming before Kihara Kariuki J, was declined to be heard *ex parte* unless it be served first. The orders prayed for was questioned on rounds that with the Law Society Sale condition of 1989, Edition, where a contract on the sale of land is to be rescinded, a notice of 21 days was first required to have been issued to the other party. The application nonetheless was set down for hearing *inter parte* on 6 November 2006. The matter came before Osiemo J who ordered that Status Quo be maintained. It then came before Aganyanya J (as he then was) on 5 March 2007 whereby the application of 25 October 2006 was withdrawn and dates for a full hearing on the main suit was given for the 19 April 2007. The status quo once again was ordered to be maintained.

9. The plaintiff attempted to return the Kshs. 2 million cheque to the defendant. This was resisted and an application was made to have the sum of Kshs.2 million deposited in court dated 28 February 2007 and filed on 1 March 2007. This application does not appear to have been heard.

10. The plaintiff proceeded to commence construction on the suit land. The defendant filed an application dated 23 March 2007 seeking orders of injunction to restrain the plaintiff from undertaking any construction. The plaintiff argued that as the sale agreement was rescinded and thereby cancelled by a notice, he was at liberty to construct.

11. This court (Ang'awa J) in its ruling of the 29 March 2007 granted the application of injunction till the hearing of the main suit set by Aganyanya J (as he then was) to the 19 April 2007. On the same date of 29 March 2007 the plaintiff filed an application seeking orders to set aside the injunctive orders restraining him from constructing. The defendant, on the other hand filed contempt proceedings on the disobedience to court orders dated 16 April 2007.

12. When both parties appeared before me, they withdrew this respective application of 29 March 2007 (setting aside the injunctive orders by the plaintiff) and contempt proceedings by the defendant dated 16 April 2007.

13. Both parties proceeded to file and or enter into consent compromising the whole suit.

**i. “By consent, the plaintiff undertakes to complete the sale action entered into on 13 October 2006 between the defendant and himself in accordance with the terms and conditions of the said sale agreement and in any event within 14 days from the date hereof.**

ii. *That the lease agreement entered into between the plaintiff and Barclays Bank [of Kenya] Ltd on 28 September 2006 be registered within 14 days hereof.*

iii. *That the defendant and Barclays Bank [of Kenya] Ltd be at liberty to continue the negotiations of the terms of lease of (the) suit property.*

iv. *A date be fixed for submission as to which parties [is] to bear the cost of the suit.”*

14. By a Notice of Motion dated 25 June 2007, the defendant attempted to have the transfer forms signed, was not argued but instead withdrawn (Ang'awa J) A further notice of motion dated 18 October 2007 was then filed by the defendant's current advocate seeking orders to set aside the consent order of 23 April 2007, to be set aside. After a brief argument on the point, it was agreed by the parties to the advocate concerned for the defendant, one E. Njenga, should be called and examined upon this matter.

15. The Hon. Judge was unfortunately transferred out of the Nairobi Station.

16. The plaintiff by now entered into a lease agreement with M/S Barclays Bank over the property (said to be dated 28 December 2006 for 6 years (see HCC 446/07). The bank nonetheless were willing to negotiate the lease with the original defendant on condition that the lease be first registered.

17. It appears nothing happened. M/S Barclays Bank of Kenya Ltd then filed case HCCC 446/07 in the Milimani High Court. They then filed an application for injunction against the defendant (HCCC 2043/07) restraining the defendant from dealing with the premises. The said application for injunction was dismissed ( Okwengu J). An appeal was not filed. An application to the court of Appeal was made to extend the time to file the notice of appeal. This was dismissed by Onyango Otieno J.

18. On 4 December 2010, M/S Barclays Bank vacated the premises.

19. The Hon. Judge was transferred back to Nairobi.

## II. APPLICATION

### Notice of motion

#### 15 December 2010

20. The defendant/purchaser/applicant, filed the notice of motion dated 15 December 2010, in which the defendant sought this court to interpret the consent orders dated 23 April 2007. Once the interpretation is clarified, this court be pleased to have all the legal documents signed. That the defendant be the allowed to deposit the Kshs. 1 million to court.

21. This type of application may be made as seen in the ruling of the case of

**GALAXY AUCTIONEERS**

**VERSUS**

**E. N. NGANGA & CO. ADVOCATES & ANOTHER**

*HC MISC. APP 177/01*

*Lenaola J*

Which dealt with the interpretation of the court order entered into:

22. The argument put forward by the defendant is that the consent entered into was binding upon all the parties. The case law on consent orders was relied on being:

(i) **GREENFIELD INVESTMENTS LTD**

**VERSUS**

**BABER ALIBHAI MAWJI**

*CA 160/97 unreported*

*(Kwach, tunoi, Shah JJA)*

Quoting the *Hirani v Kassam case*

*(1952) 19 EACA 13*

***“any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or to the action and on those claiming under them... and cannot be varied or discharged unless obtained by fraud....”***

(ii) **KENYA COMMERCIAL BANK LTD**

**VERSUS**

**BENJOH AMALGAMATED LTD & ANOTHER**

*CA 276/97*

*(Kwach, Tunoi, Bosire JJA)*

*A decision that also relied on the*

*Hirani v Kassam case (Supra)*

(iii) **FLORA WASIKE**

**VERSUS**

**DESTIMO WAMBOKO**

(1982 – 88) 1KLR 625

(Hancox JA, Nyarangi & Platt Ag. JJa

A case that held

***“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.”***

(iv) **KENYA COMMERCIAL BANK LTD**

**VERSUS**

**SPECIALIZED ENGINEERING CO. LTD**

(Harris J)

***“The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order, either personally or through their advocates and which made such an order is not lightly to be set aside or varied so by consent or on one or none of the cognized grounds.”***

23.The advocate for the plaintiff/respondent agreed entirely with the above decision. He argued that it was the defendant/applicant who originally challenged the consent orders. His issue, on behalf of the plaintiff, was the non-compliance of the said consent orders and thus the unenforcement of the same. Namely, that the defendant failed to register the lease between Barclays Bank and the plaintiff/respondent and or at all.

24.What then does the consent say on this point?

25.Before embarking on this point, I noted that the other issue that arose was the illegality of the consent. There was no land consent board approval within the six months as required by law.

26.It was conceded by the advocate for the plaintiff, who had raised this issue and who further withdrew his preliminary objection and grounds of objection. The advocate for the defendant/applicant brought it to this court’s attention that Land Control Board applies to the land registered under the Registered Land Act, Cap 301, Laws of Kenya dealing with agriculture land. The land herein is held under the Registration of Titles Act Cap 281 Laws of Kenya. The special condition under that Title Deed was that “the land and buildings shall only be used for shops, offices and flats (excluding the sale of petrol and motor oils)”

27.The issue therefore before this court is the interpretation of the consent entered into by parties dated 23 April 2007.

### III. FINDINGS/INTERPRETATION

28.The consent orders which is not being challenged, was entered into voluntarily by the parties and without any coercion.

29.The first step the parties were to take was:-

i. To complete the sale transaction. This means that there would be specific performance of the sale transaction. The plaintiff would transfer the property to the defendant and the defendant upon being registered as owner of the land would pay the value of Kshs.1 million.

ii. This process was to have been undertaken and completed within 14 days.

29b. The second step was that the lease agreement entered into by the plaintiff and M/S Barclays Bank of Kenya Ltd on 28 September 2006 be registered within 14 days.

29c. From the record of the court, there is no lease agreement dated 28 September 2006 on the court record. What there is, is a lease agreement for a building dated 28 December 2006 and for payment of rates. That agreement appears to have been drawn by M/S Migos Ogamba & co. Advocates. I have said in the past where an advocate draws a document and it is disputed another advocate should take up the representation.

30.Nonetheless I can only conclude that once the property is registered in the defendant's name, then the transaction for a lease would be with the defendant.

31.In a letter copied to the Deputy Registrar (which letters had been marked "without prejudice)." It is an error to have such a letter put to court as it would not normally be disclosed unless under special circumstances to court) the letter stated:

**13 July 2007**

***"...our client has executed the transfer and we have it in our possession together with his passport photographs".***

***We wish to confirm that we are interested in the conclusion of this matter and in so doing safeguard the interest of Barclays Bank of Kenya Ltd and others can be discerned from the consent order that was recorded in court on 23 April 2007."***

In the premises, we wish to prefer the following option:

#### **Alternative A**

***Kindly have the lease dated 28 February 2006 between Barclays Bank of Kenya Ltd and our client registered (we had forwarded the original leases to you by our letter of 23 April 2007) and upon***

*supplying us with a copy of the registered lease, we shall let you have the executed transfer (relating to your client and ours together with the other completion documents).*

**Or Alternative B**

*Let us have:*

*a. The Title Deed to the suit premises and*

*b. The lease between Barclays Bank of Kenya and your client to make us register the lease after which we shall forward to yourselves the title together with the other completion documents for registration in your client favour in terms of your professional undertaking.*

32.This proposal and or suggestion is not in the spirit and terms of the consent.

33.The consent was simply that there be a specific performance of the contract. That the time the suit was filed there was not only vacant possession of the land but the lease agreement entered into by the plaintiff which M/S Barclays Bank of Kenya Ltd was so done at the peril of the plaintiff. By consenting to transfer the property by way of specific performance, he would thereafter have no capacity to hold the lease and collect rent. The reasons being that the sale agreement entered into and duly executed by either parties states:

**At clause 8:-**

***“The property is sold with vacant possession on completion”***

**At clause 9:-**

***Upon signing of the agreement for sale and upon the vendor receiving the sum of Kshs.2 million only as aforesaid the purchaser will be at liberty to take possession of the property”***

34.I am reliably informed that the defendant took possession of the suit land. When the matter was filed in court on 25 October 2006 almost two weeks after the sale agreement, the said Kshs.2 million had already been paid.

35.The consent of the party to-day is simplified when M/S Barclays Bank of Key have vacated the premises.

36.The orders of the court was to meet the parties intention being that is to complete the sale agreement and have the same transferred to the defendant.

37.If M/S Barclays Bank of Kenya Ltd were still interested in the property they had to first await the defendant registration before entering into a lease agreement.

**In summary**

38. My clear meaning and interpretation of the consent is that there be a transfer of the property to the defendant

- i. That the sum of Kshs.1 million be released to the advocate for plaintiff
- ii. That the plaintiff do sign all necessary forms, failure to there be liberty to apply.
- iii. I would award costs to the defendant/applicant .

**DATED AND DELIVERED THIS 1<sup>ST</sup> DAY OF MARCH 2011 AT NAIROBI**

**M. ANG'AWA**

**JUDGE**

**In the presence of:**

**Advocates**

- a. *P.J Machira instructed by M/S Machira & Co. Advocate for the Defendant/Applicant*
- b. *R. M. Mokaya instructed by M/S Migos Ogamba & Co. Advocate for the Plaintiff/Respondent*