

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 959 of 1997

JEDIDAH NGIMA NDEGWAPLAINTIFF/APPLICANT

V E R S U S

MURANGA COUNTY COUNCIL.....DEFENDANT/RESPONDENT

R U L I N G

The Plaintiff/Applicant filed this suit on 21st April, 1997 seeking to recover from the Defendant/Respondent KShs. 426,000/= with interest at 25% per annum and costs. She had allegedly paid KShs. 425,000/= for 5 acres she was buying from the Respondent on 17th February, 1995. She further paid KShs. 1,000/= being registration fees. She claimed she did not like the land the Respondent offered and therefore sought the refund of the money. A defence was filed denying the claim.

On 4th March, 2008 Mr. Mbuthia for the Defendant and Mr. Ng'ang'a for the Plaintiff entered consent before Justice Ang'awa in the following terms:-

“By consent of both parties:-

- (i) The plaintiff do execute a transfer form in respect of land ref. Nginda Samar Block 1/2122 in favour of the defendant within 14 days from the date of this order and do obtain a valid Land Control Board consent to transfer the said property within 30 days from the date of this order.**
- (ii) The defendant do pay to the plaintiff the principal sum together with costs being KShs. 461,000/= within 30 days from the date of delivery of the Land Control Board consent and transfer to the defendant's advocates.**
- (iii) Upon fulfillment of the terms in para (i) and (ii) herein above the matter shall stand settled.”**

On 23rd October, 2009 the Applicant brought the present application by way of summons under sections 3, 3A and 63 (e) of the Civil Procedure Rules and Order IXB rule 8 of the Civil Procedure Rules seeking stay of the consent order and that the order and all consequential orders be set aside. The application was based on the grounds that:-

- a) the terms of the consent did not favour her.
- b) the order was a gross misrepresentation of the instructions she gave to her advocate.

- c) the order was detrimental to her as it did not take into consideration the prayers in the plaint in regard to costs, *mesne* profits and interest and
- d) the consent was against the interest of justice, equity and conscience and could prejudice her position.

In the supporting affidavit, the Applicant deponed that when she sued the Defendant she wanted her purchase price to be refunded together with interest. She stated that she was not aware of the position taken by her advocate prior to his consenting. When she learnt of the consent order she protested to the advocate and even withdrew instructions, she said. She wanted the order which was entered into without her authority to be set aside and the suit heard in full.

The Respondent swore that the application was belated and an afterthought. It was deponed that the consent was entered into in the presence of the Applicant as it was done on the day of hearing. It was deponed that before the advocates recorded the consent the Judge asked them to go out and consult their clients which was done and a consent (annexture A) drafted and signed.

The court heard the application. Mr. Mbutia represented the Respondent and Mr. Oyiembo represented the Applicant.

The Applicant feels aggrieved by the consent order recorded on 4th March, 2008 and seeks its review. She ought to have made application under **Order XLIV rule 1(b)** of the **Civil Procedure Rules**, and not under **Order IXB rule 8** which deals with the consequence of non-attendance of a party. In the instant case both parties attended and therefore it was an *interparte* hearing. (See **GIELLA –VS- CASSMAN BROWN & CO. LTD [1973] EA 358**). Section 63 (e) of the **Civil Procedure Rules** is in regard to interlocutory orders or proceedings. In this case the consent order was compromising the suit. It was a judgment. Section 3 of the Civil Procedure Act is invoked in the absence of any specific provision under which an applicant can approach the court, and the inherent power of the court under section 3A of the Civil Procedure Act cannot be invoked so as to override other rules unless it can be shown that special circumstances exist or that injustice would be occasioned by the application of such other rules. (See **KIBUTHA –VS- KIBUTHA [1984] KLR 243**). In short, and I agree with Mr. Mbutia, the application is incompetent

From the record of the Judge, the parties' advocates were present and came to court with a drawn consent which was dictated and filed. Counsel signed their consent, and also appended their signatures to the recorded order. The Respondent has sworn that both parties were present as it was day case was for hearing. This was not controverted. The present application to set aside the order was filed about 1½ years later. There was no explanation for the long delay. Such application is supposed to be brought without unreasonably delay. The Applicant had instructed advocates whom she had given full control over the conduct of the case and who had her authority to compromise the case. (See **FLORAH WASIKE –VS- DESTINO WAMBOKO [1982-88] KAR 625**). The consent order entered into, therefore, was *prima facie* binding on the Applicant and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or for reason which would enable the court to set aside an agreement. (See **DIAMOND TRUST BANK OF KENYA LTD. –VS- PLY AND PAPERS LTD AND OTHERS, Civil Appeal No. 243 of 2002**). The burden on a party who alleges that there was in fact no consent or that the consent was invalid is a heavy one.

The suit was for the recovery of KShs. 426,000/= plus interest at 25% per annum from 1st February, 1995 until payment in full. The consent was for KShs. 461,000/= which included costs. The Applicant is saying this was a gross misrepresentation of the instructions, but does not say how much money in total she had asked her counsel to ask. She says she was not aware of the consent and yet

she was present when it was recorded. She is not alleging she is illiterate. She does not say when she first noted that her advocate had compromised the suit. After considering the competing affidavits and the submissions by counsel, I come to the conclusion that the Applicant is seeking to resile from a consent she voluntarily entered into which cannot be allowed. The application is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI

THIS 1ST DAY OF MARCH, 2010

A. O. MUCHELULE

J U D G E