



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE**

Civil Suit 97 of 2008

MARCELLUS LAZIMA CHEGEAPPLICANT.

VERSUS

MARY MUTORO SIRENGO

JOEL BOB SIRENGO..... DEFENDANT.

R U L I N G.

BY a Notice of Motion dated 12th August, 2008, pursuant to the provisions of Order XLIV Rules 1 and 2 and Order L Rule 1 of the Civil Procedure Rules, the applicant seeks orders:-

1. THAT, the application be certified urgent and heard ex-parte in the first instance.
2. THAT, there be a stay of execution of the consent judgment entered on 24th February, 2005 and all consequential orders, decrees pending hearing and determination of this application.
3. THIS honourable court be pleased to review, vary and/or set aside the consent judgment entered in favour of the plaintiff and the decree issued herein in the sum of Ksh. 1.7 Million.
4. THAT, costs of this application be provided for.

The application is based on the grounds:--

(i) THAT, the Advocates formerly on record M/s Walter Wanyonyi & Co. Advocates acted in bad faith and contrary to the express instructions of the Applicants by colluding with the plaintiffs advocates to set aside the ex-parte orders, signed the consent judgment and agreements in pursuit of their own personal interests to the detriment of the applicants.

(ii) THAT, the defendant/applicants did not give the aforesaid advocates instructions to record any consent in the suit on their behalf.

(iii) THAT, the circumstances under which the consent order entered on 24th February, 2005 and decree dated 8th April, 2005 was recorded was against the law and the amounts to fraud in the absence of the Applicants instructions and/or consent.

(iv) THAT, the applicants have already satisfied the plaintiff's claim herein and the purported consent order was for the benefit of the two firms of Advocates formerly acting in this matter and the applicants shall thus suffer substantial loss if a stay of execution and/or settlement of the decree or the orders is halted or set aside.

(v) THAT, the respondent shall not suffer any prejudice at all.

The application is predicated upon the annexed affidavit of Mary Mutoro Sirengo sworn on the 13th day of August, 2008.

It was argued on behalf of the applicant that she entered into a lease agreement with the plaintiff/respondent on 1st July, 2000 in respect of Trans Nzoia Sinyenye/301. A copy of the said agreement is exhibited as "MMS".

For the next 4 years the plaintiff/respondent was in actual occupation of the subject land.

In the course of the lease the applicant entered into a contract with Kibera Solidale-Italia Sididale that in consideration of the applicant selling 7 acres out of 25 acres of Trans Nzoia/Sinyenye/301 the plaintiff/respondent would pay her 1,190,000/= in installments of Ksh. 300,000/= at the execution of the agreement and a further sum of Ksh. 890,000/= on the completion date. A copy of the said agreement is exhibited as "SMM 2".

It would appear that the plaintiff/respondent laid a claim to part of the second and last installment being Ksh. 890,000/=.

The applicant instructed their advocates on record to facilitate the payment of the aforesaid sum to the plaintiff/respondent. Copies of correspondence relating thereto are exhibited as "SMM3".

To date the applicant's former advocates on record and the plaintiff/respondent advocates on record have never furnished the applicant with proof of payments. All efforts to obtain confirmation have come to naught.

To add salt to injury the applicant and the plaintiff/respondents advocates entered into various agreement and consent judgments contrary to the applicant and the plaintiff/respondents instructions. Copies of the said agreement and that judgments/decrees are annexed hereto and marked "SMM 4".

That the said advocates have since conspired and/or colluded with the plaintiff/defendant's advocates to curve out and transfer a piece of the subject land measuring 15 acres to be registered in their joint names without their consent. The said consents are exhibited as "SMM 5".

That the applicant's advocates proceeded to record the consent judgments aforesaid without the consent of the applicant.

In the premises the applicant sought stay of execution of the decree arising from consent judgment entered on 24th February, 2005.

On behalf of the plaintiff/respondent it was argued that the consent judgments which gave rise to the decree challenged were entered into three years ago. The delay in bringing this application is therefore made in bad faith. It is aimed at denying the decree-holder the enjoyment of the fruits of the consent judgment.

That the consents were entered into by the advocates for both parties on instructions of their client's. There was no collusion between the two advocates.

That if the applicant did not give instructions to his advocates to enter into the consent judgments then he should lodge a complaint with the Advocate's Complaints Commission.

That the said consent judgment were effectual and binding on the parties. The applicant cannot resile from the same.

I am grateful to both counsels who appeared before me for their industry. I have considered the various authorities cited before me, even though I have not quoted the same in extanso in this ruling.

It is now settled law that an advocate on record have ostensible authority to compromise a suit or consent to judgment, so far as the opponent is concerned. For this proposition, I call in aid the binding authority if FLORA N. WASIKE VS. DESTIMU WAMBOKA (1982-88), KAR P. 625.

On the available evidence presented before me it is common ground that M/s. Walter Wanyonyi Advocates was acting for the applicant and M/s. Ndimbiri & Co. Advocates were acting for the plaintiff/respondents at all material times.

In the premises the said advocates had ostensible authority to compromise the suit or enter into any consent judgment. The applicant is merely trying to resile from a valid consent judgment. Accordingly there is no merit in this application. I dismiss the same with costs to the plaintiff/respondent.

Dated and delivered at Kitale this 2nd day of July, 2009.

N.R.O. OMBIJA.

JUDGE.

Ms. Ndombi for Ndambiri for plaintiff.