



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 5038 OF 1989**

MUSHIMIYAMANA AIMABLE.....PLAINTIFF

-VERSUS-

1. JONATHAN LEAKEY LTD.....1ST DEFENDANT

2. OBED OMARI MOGERE.....2ND DEFENDANT

RULING

This is an application by the plaintiffs brought by way of Notice of Motion under Section 3A of the Civil Procedure Act for an order that the court do vary and/or set aside the orders made on 24th July, 1995.

By a consent letter dated 6th July, 1995 and filed on 12th July, 1995 M/s. Hamilton Harrison & Mathews advocates and Meenye and company advocates asked the Deputy Registrar to record an order in the following terms:

1. The sum of Shs.200,000/- deposited into court on the 7th December, 1994 as security for costs be released to Meenye & company advocates on their professional undertaking to pay a sum of Shs.25,000/- being portion thereof to Hamilton Harrison & Mathews being their agreed costs in full and final settlement.

2. In consideration of the agreement of Jonathan Leakey Limited and Jonathan Leakey agreeing to this release the plaintiff renounces, releases and discharges all claims against Jonathan Leakey and the claims in the above two cases are marked and settled. The order was endorsed by the court on 24th July, 1995 aforesaid.

On 3rd May, 1995, the plaintiff had filed a Notice to act in person in H.C.C.C. No. 373 of 1993, which notice was to be served upon the defendant Jonathan H.E. Leaky and Meenye and Company Advocates.

It is now the plaintiff's case that M/s. Meenye and Company advocates had no authority to enter into any consent on behalf of the plaintiff. On that basic ground the plaintiff seeks to have the said order set aside..

Both learned counsels have addressed the court on the issues. Both these cases have had a checkered history and one of the reasons that comes out is the fact that the plaintiff is a Rwandese national who is in and out of this country. However, notwithstanding the records, I believe the issue for my determination is whether or not the order made following the consent letter is binding on the plaintiff.

An advocate on record has ostensible authority to compromise a suit on behalf of his client. In the instant case as at 6th July 1995 when the consent letter was written and 24th July 1995 when the order was signed, M/s. Meenye Company advocates was not acting for the plaintiff. There was already a notice to act in person. This was in the court file and the court should have noticed this. It has been suggested that if anything the plaintiffs' complaint should be directed at M/s. Meenye Company advocates. That may be true but the point is the plaintiff will then be driven out of the court without a hearing. I agree, with respect, that, the court as trustee of both parties should have ensured that the rights of the parties were protected in these proceedings.

The learned counsel for the defendants has pointed out that infact the plaintiffs' suits had already been dismissed or were at a dead end. I believe those are issues to be addressed. When attempts to have them heard is made. For now I hold the view that the endorsement of the order on 24th July, 1995 was by error as the plaintiff was acting in person and M/s. Meenye and Company advocates had not authority to purport to act for him.

Accordingly, the said order is hereby set aside. Each part shall bear own costs.

Orders accordingly.

Delivered and dated at Nairobi this 23rd November, 1998.

A. MSAGHA MBOGHOLI

JUDGE

23.11.1998

Mr. Kimani Kiragu for defendants N/A for respondents

A. MSAGHA MBOGHOLI

JUDGE

Mr. Kiragu: I need leave to appeal

Court: Leave granted.

A. MSAGHA MBOGHOLI

JUDGE