



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 193 OF 2006

JULIUS NDIRITU.....1ST PLAINTIFF/APPLICANT

JARED ODUOR OSODO.....2ND PLAINTIFF/APPLICANT

JOHN WACHIRA.....3RD PLAINTIFF/APPLICANT

=VERSUS=

HABIB OMAR KONGO.....DEFENDANT/RESPONDENT

RULING

1. This is the notice of motion dated 21st November 2017 brought under Section 3A of the Civil Procedure Act, Order 51 Rule 4, 5, Order 19 Rule 19(1) (2), Order 22, Rule 25, 31(1) (52), Order 9 Rule 9, 10 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. It seeks orders:-

(1) Spent.

(2) That there be a stay of execution of a notice to show cause why execution should not issue entered against the 2nd plaintiff, dated 10th November, 2017 pending determination of this application interpartes.

(3) That the notice to show cause why the 2nd plaintiff should be arrested and committed to civil jail dated 10th November, 2017, and the certificate of taxation be set aside on terms as this court may find fair and just.

(4) That this honourable court be pleased to order that the decretal amount of Kshs.365,966/- contained in the notice to show cause dated 10th November 2017 be set aside

(5) That the consent and judgment entered thereto be set aside.

(6) That the costs of this application be borne by the judgement creditor/defendant.

(7) That such other and/or further relief be granted by this honourable court as it deems fit and just to grant in the unique circumstances.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 12.

4. The application is supported by the affidavit of Jared Oduor Osodo, the 2nd plaintiff/applicant sworn on the 21st November 2017.

5. The application is opposed. There is a replying affidavit sworn by Habib Omar Kongo the defendant/respondent herein sworn on the 30th April 2018.

6. On the 12th November 2018 the court directed that the notice of motion be canvassed by way of written submissions.

7. The plaintiffs/applicants did not instruct the firm of M/s Wamwayi & Co. Advocates to enter into any consent in Civil 193 of 2006. The Notice of Change of Advocates filed by the above mentioned firm was never authorized by the plaintiffs herein and therefore any action taken by the said Advocate was a product of fraud and professional misconduct. They have put forward the case of **Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd [1982] KLR 485 as quoted in the case of Betty Singura Nyabuto vs Law Society of Kenya [2014] eKLR**. The advocate has been reported to the Advocates Complaints Commission and the Law Society of Kenya.

8. None of the plaintiffs were aware of the execution process until the notice to show cause was served on the 2nd plaintiff. The whole process of execution was as a result of fraudulent actions of Wamwayi & Co. Advocates and for this reasons the decretal sum should be set aside.

The Defendant's/Respondent's Submissions

9. This application is similar to the one dated 31st October 2009 filed 9 years ago which the plaintiff never bothered to prosecute. The orders sought to be set aside were issued on 5th May 2008, which is more than 10 years ago and no explanation has been given for the inordinate delay. The plaintiffs are guilty of deception, non-disclosure and false hood on the issue of legal representation to the effect that the firm of Wamwayi & Company Advocates had been on record for the last ten years prior to the withdrawal of the suit and the same firm had been actively involved in the proceedings.

10. He has put forward the cases of **Stephen Somek Takwenyi & Another vs David Mbutia Githare & 2 Others Nairobi – Milimani HCCC 362/2009 Graham Rioba Sagwe & 2 Others vs Fina Bank & 2 Others [2017] eKLR**.

11. The plaintiff s withdrew this matter as they had filed ELC 508 of 2010 between the same parties, same subject matter and seeking similar prayers. The same is part heard, setting aside the orders would essentially lead to two active matters on the same subject matter and between the same parties.

12. The plaintiffs make serious allegation against their then advocate, Wamwayi Solomon A. There were frequent correspondences between the firm of M/s Wamwayi & Co. Advocates, the defendant's advocate and the courts such an allegation on the issue of instructions is an afterthought and should not be allowed to bring into disrepute the industrious career of Wamwayi Solomon Angweny Advocate of the High Court. He has also put forward the case of **SMN vs ZMS & 3 Others [2017] eKLR; Purcell vs Trigell Ltd [1970] 2 All ER 671 Winn Lj at 676; Lenina Kemigisha vs Mbabaze Star fish Limited**.

13. The consent order in question that was issued on 5th May 2008 and adopted by the court on 16th June 2008 was essentially to withdraw the matter. A similar suit was subsequently filed being ELC 508 of 2010 between the same parties and same subject matter. ELC 508 of 2010 is part heard lifting the said order would essentially have two matters on the same subject matter.

14. The plaintiff's claim of failure to serve the bill of costs and taxation notice is not founded as indicated in the annexures by the defendant. This application is brought to defeat the ends of justice. He prays that the application be dismissed with costs.

15. I have considered the notice of motion, the affidavit in support and the annexures, I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

16. The plaintiffs are seeking to set aside a consent order on the ground that M/S Wamwayi & Co. Advocates did not have instructions to act for them. I have gone through the court record and I find that the frequent correspondences between the firm of M/S Wamwayi & Co. Advocates, he defendant's advocates and the court. Such allegation on the issue of instruction is a serious allegation against Mr. Wamwayi advocate. Annexure 'J003' to the application is a letter by the plaintiffs to the Advocates Complaints Commission. Annexure 'J006' is a summary of the complaint.

17. I have also seen a letter for the advocates complaint commission to the 2nd plaintiff, seeking further particulars of the complaint. It appears the 2nd plaintiff never responded because the Advocates Complaints Commission wrote to him informing the file had been closed as he had failed to give in particulars of the complaint. If indeed Mr. Wamwayi had no instructions to act for the plaintiffs, why did they not file follow up on the complaint they had filed? I am of the view that the complaint was made without basis.

18. In the **Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited**, Githiji J (as he then was) while relying on the holding in the case of **Hirani Ltd vs Kassam [1952] 19 EACA 131** held that :-

“It is now well settled law that a consent judgment order has contractual effect and can only be set aside on grounds which would justify the setting a contract aside or if certain conditions remain to be fulfilled which are not carried out.....”

In the case of **Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485** it was held:-

“A consent order entered into by counsel is binding in all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by agreement contrary to policy of the court or where consent was given without sufficient material facts or in misapprehension or ignorance of such facts general for a reason which would enable the court to set aside the agreement”.

19. I find that the plaintiffs/applicants have failed to demonstrate any of the grounds stated above. The orders sought to be set aside were issued more than 10 years ago on 5th May 2008. There is no explanation as to why it has taken so long for this application to be brought. I find that this application is an afterthought and an attempt by the plaintiffs to defeat the end of justice.

20. In conclusion, I find no merit in this application and the same is dismissed with costs to the defendants/respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 27 day of JUNE 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Njagi advocate for the Plaintiffs

Mr. Waweru holding brief for Mr. Thuita advocate for the Defendant

Kajuju for Court Assistant