



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 98 OF 2000**

**SAMUEL AYIENDA MOKUA.....PLAINTIFF**

**VERSUS**

**TING'A TRADING CO. LTD.....DEFENDANT**

**AND**

**ALFRED KENNEDY MAKORI.....APPLICANT/PURCHASER**

**R U L I N G**

1. On 30<sup>th</sup> September 2016 this court dismissed the Plaintiff's application dated 22<sup>nd</sup> August 2008 seeking review and/or setting aside of the judgment entered on 8<sup>th</sup> January 2001 on the counterclaim. The application had also sought the setting aside of the sale by public auction that emanated from the execution of the said judgment and decree. The court further on 13<sup>th</sup> April 2018 allowed the application filed by the Applicant/Purchaser dated 26<sup>th</sup> June 2008 which inter alia had sought an order:-

**That the Deputy Registrar of the court do make an order confirming the sale made on 16<sup>th</sup> July 2007 of all that land parcel No. Lietigo Settlement Scheme/83 at a public auction.**

2. The Plaintiff/Applicant being dissatisfied with the ruling the court made on 13<sup>th</sup> April 2018 on the application dated 26<sup>th</sup> June 2008, filed a Notice of Appeal on 13<sup>th</sup> April 2008 to signify his intention to appeal to the Court of Appeal.

3. The Plaintiff on 30<sup>th</sup> April 2018 filed a Notice of motion application dated on the same date seeking inter alia:-

**1. That there be a stay of execution of the court's order made on 13<sup>th</sup> April 2018 directing the Deputy Registrar Kisii High court to confirm the sale made on 16<sup>th</sup> July 2007 by public auction of all that parcel of land known as Lietigo Settlement Scheme/83 pending hearing and determination of an intended appeal to the Court of Appeal.**

**2. That the court be pleased to set aside, review or vary its order made on 13<sup>th</sup> April 2013 directing the Deputy Registrar, Kisii High Court to confirm the sale made on 16<sup>th</sup> July 2007 by public auction of all that parcel of land known as Lietigo Settlement Scheme/83.**

4. The application was supported on the grounds set out on the body of the application and on the supporting affidavit sworn by the Plaintiff/Applicant dated 30<sup>th</sup> April 2018.

5. Before the application dated 30<sup>th</sup> April 2018 was heard, the Plaintiff/Applicant filed another application dated 19<sup>th</sup> July 2018 and by this application the Plaintiff inter alia sought the following orders:-

**1. That in the interest of justice Advocate C. M. Ayienda be called to court to explain whether he had instructions to act for the Purchaser/Respondent.**

**2. That all documents purportedly signed by and/or on behalf of the firm of C. M. Ayienda & Co. Advocates in the case be struck out.**

**3. That the purported Purchaser/Respondent Alfred Kenneth Makori be summoned before this court to ascertain his existence or availability.**

6. The grounds on which the application was founded are set out in the body of the application and on the affidavit sworn in support by the Plaintiff/Applicant dated 19<sup>th</sup> July 2018.

7. The Purchaser/Respondent filed grounds of opposition to the Plaintiff/Applicant's application dated 30<sup>th</sup> April 2018 on 19<sup>th</sup> June 2018 and set out the following grounds:-

**1. The application lacks merit.**

**2. The application is misconceived and otherwise an abuse of the court machinery.**

**3. The application is res judicata, similar applications have been dismissed by this court and the Court of Appeal.**

8. In regard to the Plaintiff/Applicant's application dated 19<sup>th</sup> July 2018 the Purchaser/Respondent, Alfred Kennedy Makori filed a replying affidavit sworn on 27<sup>th</sup> September in opposition thereto. In the replying affidavit, he explained how he purchased the suit property at the public auction. He deponed that the Plaintiff challenged the sale by public auction but his application was dismissed by the court on 25<sup>th</sup> July 2007 and the subsequent appeal to the Court of appeal was also dismissed. He further deponed that the firm of Nyamweya Osoro & Nyamweya Advocates were initially his advocates before the firm of C. M. Ayienda & Company Advocates came on record for him. He stated that presently the firm of Bosire Gichana & Co. Advocates are on record for him having taken over the conduct of the matter for him from the firm of C. M. Ayienda & Company Advocates.

9. The Plaintiff/Applicant with the leave of the court filed a supplementary affidavit on 5<sup>th</sup> November 2018 to respond to the replying affidavit filed by the purchaser/Respondent. The further affidavits basically dealt with the question whether or not the Purchaser/Respondent had instructed the firms of Nyamweya Osoro & Nyamweya Advocates and C. M. Ayienda & Co. Advocates or it was Bosire Gichana & Co. Advocates who were unlawfully using the names of those firms to actualize what was otherwise a fraudulent transaction.

10. The court on 15<sup>th</sup> October 2018 directed that the Notice of Motion dated 19<sup>th</sup> July 2018 be disposed off first and directed the parties to canvass the same by way of written submissions. The Plaintiff filed submissions in respect of both applications on 22<sup>nd</sup> January 2019 and 2<sup>nd</sup> May 2019 respectively. The Purchaser/Respondent filed submissions on 8<sup>th</sup> May 2019 in regard to the Notice of Motion dated 19<sup>th</sup> July 2018.

11. Before I consider the application by the Plaintiff/Applicant on merits, it is necessary to briefly set out the history of this matter to contextualize the Plaintiff's both applications.

12. In a ruling delivered on 8<sup>th</sup> March 2001 by Wambilyangah, J. the Applicant had sought:

**(a) Stay of execution of the decree granted to the Respondent;**

**(b) Setting aside the judgment in default of filing of a reply to the counterclaim and;**

**(c) An order of reply to the effect that his reply to the counterclaim be deemed to have been duly filed.**

13. The court declined to set aside the judgment holding that it was regularly entered in favour of the Respondent. No appeal was preferred against this ruling.

14. On 22<sup>nd</sup> April 2010 Musinga, J. (as he then was) delivered a ruling on an application by the Plaintiff dated 29<sup>th</sup> April 2009 where the Plaintiff had sought to set aside, vary and/or vacate the interlocutory judgment and decree entered herein by the Deputy Registrar on 8<sup>th</sup> January, 2001 and the consent order dated 28<sup>th</sup> June 2001 together with all the consequential orders pertaining thereto. Hon. Justice Musinga dismissed the application on the basis that the ruling by Wambilyangah J, had not been appealed and that two subsequent applications to review the ruling by Justice Wambilyangah were struck out for various reasons and that an appeal to the Court of Appeal against the refusal to review the ruling was equally struck out. Musinga, J. held the prayer that sought the setting aside of the interlocutory judgment and decree entered on the counterclaim on 8<sup>th</sup> January 2001 was *res judicata* the same having been rejected by Wambilyangah, J. as he could not sit on appeal on the Judge's findings.

15. The Plaintiff appealed against Musinga, J's ruling of 22<sup>nd</sup> April 2010. The appellate Judges dismissed the appeal by the Plaintiff on 14<sup>th</sup> November 2014 and upheld the ruling by Musinga, J.

16. On 30<sup>th</sup> September 2016 this court considered an application by the Plaintiff filed on 22<sup>nd</sup> August 2008 which substantively sought the following orders:

**3) That the honourable court be pleased to review, set aside and/or vary the interlocutory judgment and decree entered on the counterclaim herein by the Deputy Registrar on 8<sup>th</sup> January 2001 and the consent order dated 28<sup>th</sup> June 2001 together with all consequential orders pertaining thereto, emanating therefrom and/or arising therefrom.**

**4) Consequent to prayer (3) hereinabove the honourable court be pleased to vacate, set aside and/or annul the sale and/or all the transaction arising from the sale of Lietego Settlement Scheme/83 in execution of the default judgment and decree dated 8<sup>th</sup> January 2001, together with the consent order dated 28<sup>th</sup> June 2001 and all the consequential orders flowing therefrom**

**and revert ownership of the said parcel of land to the applicant herein.**

17. The court dismissed the application on the basis that it was *res judicata* as Wambilyangah, J. and Musinga, J. had on 8<sup>th</sup> March 2001 and 22<sup>nd</sup> April 2010 respectively ruled on applications seeking the setting aside of the judgment and the sale by public auction and rejected the prayers.

18. On 13<sup>th</sup> April 2018 the court allowed the application dated 26<sup>th</sup> June 2008 by the Purchaser and confirmed the sale by public auction made on 16<sup>th</sup> July 2007 in respect of land parcel **Lietigo Settlement Scheme/83**.

**Plaintiff's Application dated 19<sup>th</sup> July 2018:**

19. The Plaintiff's application dated 19<sup>th</sup> July 2018 is primarily challenging the representation of the Purchaser/Respondent by C. M. Ayienda & Company Advocates. The applicant doubts C. M. Ayienda Advocate had any instructions to represent the Purchaser/Respondent. The principal parties in the present suit are the Plaintiff and the Defendant (Tinga Trading Co. Ltd). The Purchaser, Alfred Kenneth Makori entered the picture when he bought the suit property at a public auction in execution of the decree in favour of the Defendant/Decree holder. The record shows that the Auctioneers, Omwoyo Auctioneers sold land parcel **Lietigo Settlement Scheme/83** on 16<sup>th</sup> July 2007 as per the Memorandum of Sale filed in court on 19<sup>th</sup> July 2007. The Purchaser as per the memorandum of sale was Mr. Alfred Kenneth Makori Omwata ID/No. 13480479. Following the purchase, the Purchaser filed the Notice of Motion dated 26<sup>th</sup> June 2008 through the firm of C. M. Ayienda & Company Advocates seeking confirmation of the sale. The record shows the firm of C. M. Ayienda & Company Advocates was henceforth served with all the various court processes.

20. There is no reason to hold that the firm of C. M. Ayienda & Company Advocates was not instructed by the Purchaser to act for him. Once an advocate is instructed, there is no legal requirement that the advocate who received instructions and/or was instructed must personally attend to the matter in court. He can depute some other advocate and/or can get another advocate to hold his brief and prosecute the matter. It is routine practice in our courts for advocates to hold each other's briefs.

21. In the present matter, C. M. Ayienda & Company Advocates have had various advocates hold their brief on behalf of the Purchaser/interested party. Indeed, even Bosire Gichana Advocate who has all the while represented the Defendant has severally held Mr. C. A. Ayienda Advocates brief without any protest from the Plaintiff and/or his counsel. The firm of C. M. Ayienda & Company Advocates on 27<sup>th</sup> September 2018 signed a consent to allow the firm of Bosire Gichana & Co. Advocates to come on record for the purchaser and a formal notice of change of Advocates was filed on 15<sup>th</sup> October 2018.

22. In the case of **Gitonga Mureithi & Co. Advocates -vs- Centre for Multiparty Democracy [2018]eKLR** Chacha, J. held there is no law requiring that instructions by a private entity to an advocate must be in writing and noted that instructions or retainer may be express or implied from the conduct of the parties in a particular case. See also the case of **Ochieng Onyango Kibet and Ohaga Advocates -vs- akiba Bank Ltd [2007]eKLR**. In the instant case, it is clear that all the parties had accepted that the firm of C. M. Ayienda & Co. Advocates was on record for the Purchaser/Interested party. How he chose to execute his client's instructions was entirely upto him. The Purchaser/Interested party was comfortable with the manner his case was handled otherwise he would have complained/protested.

23. Equally, I find no basis for the Plaintiff to require the Purchaser/ Respondent Alfred Kenneth Makori to be summoned to ascertain his existence. The memorandum of sale by the Auctioneer clearly named him as the Purchaser at the auction and further he made the application dated 26<sup>th</sup> June 2008 to have the sale confirmed and he on 27<sup>th</sup>September 2018 swore the replying affidavit in opposition to the Plaintiff's application dated 19<sup>th</sup> July 2018.

24. I find no merit in the Plaintiff's said application dated 27<sup>th</sup> July 2018 and the same is hereby ordered dismissed with costs to the Purchaser/ Respondent.

**Plaintiff's Application dated 30<sup>th</sup> April 2018:**

25. I now turn to the Plaintiff's Notice of Motion dated 30<sup>th</sup> April 2018 seeking stay of execution of the court order issued on 13<sup>th</sup> April 2018 confirming the auction sale held on 16<sup>th</sup> July 2007 pending the hearing and determination of the intended appeal to the Court of Appeal and for review of the said order. I must say I find no basis upon which I can grant either of the prayers. Earlier in this ruling, I gave a chronology of the various rulings that this court and the Court of Appeal have given. The application to set aside the judgment and decree of the court has been denied on more than two occasions and so has the application to review the ruling by Wambilyangah, J. and Musinga, J. On 30<sup>th</sup> September 2016 I restated the position taken by Wambilyangah, J. and Musinga, J. which position the Court of Appeal agreed with. The ruling of 13<sup>th</sup> April 2018 was merely effectuating what the court had determined. The application to stay the order is truly misconceived and cannot be granted. The ruling of 13<sup>th</sup> April 2018 was a process in execution of a decree that the court had validated.

26. The Plaintiff/Applicant in the same application sought review of the same order that he had appealed against by filing a Notice of Appeal to appeal to the Court of Appeal. Under Order 45(1) of the Civil Procedure Rules a party cannot exercise the option to seek a review and appeal at the same time. A party can either exercise the option to appeal or to seek a review but not both. In the present instant, the Plaintiff had appealed and therefore the review option was not available to him.

27. However, be it as it may be, I firstly do not consider that the Applicant's appeal has any chances of succeeding given the circumstances that I have discussed and outlined in this ruling and accordingly I decline to grant any stay of the order of 13<sup>th</sup> April 2018. Secondly, concerning review, the Plaintiff has not demonstrated any of the conditions under Order 45(1) of the Civil Procedure Rules which a party must satisfy to be entitled to an order of review. The Plaintiff has not shown there is any discovery of new and important matter or evidence

which was not available and could not after exercise of due diligence be produced; or that there was an error on the face of the record; and/or there was sufficient cause to warrant an order for review.

28. In the premises, I find no merit in the Plaintiff's application dated 30<sup>th</sup> April 2018 and I order the same dismissed with costs to the Purchaser/Respondent.

29. Before I pen off, I must express my disappointment to note that a case whose judgment was rendered in 2001 is still doing its rounds in the corridors of justice all because the plaintiff has refused to accept there is finality in litigation. From the record it is evident the Plaintiff/Applicant has made what could be as many as 8 applications where rulings have been made which have all been unfavourable to him. Some of the rulings have gone to the Court of Appeal but even there the Plaintiff has not found any joy. All the Judges cannot all be wrong and the Plaintiff may be well advised to undertake a self-introspection of himself and determine whether or not it was not time he cut his losses and accepted the inevitable that the wheels of justice have gone full circle and there is nowhere else to turn. As the saying goes **"the law is an ass"** and though the wheels of justice at times glide painfully slowly, surely as the sun rises and sets, must at some point come to a halt. In the Plaintiff's case the wheels have ground to halt.

**RULING DATED, SIGNED AND DELIVERED AT KISHI THIS 26<sup>TH</sup> DAY OF JULY 2019.**

**J. M. MUTUNGI**

**JUDGE**