



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 141 OF 2015**

**GRACE WAMUTIRA PHINEAS MUGO (Suing through the Next Friend**

**JACOB WACHIRA MUGO.....PLAINTIFF/APPLICANT**

**VERSUS**

**PHINEAS MUGO MBOI.....1<sup>ST</sup> DEFENDANT/DECEASED**

**LUKE NJOGU MUGO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JOSEPH WACHIRA MWAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**FLORENCE WANJIKU MWANGI.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The Applicant has moved this Court vide a Notice of Motion dated 19<sup>th</sup> March 2019 seeking the following orders:

- 1. That this Honourable Court be pleased to grant leave to the firm of Wangechi Munene & Co. Advocates to come on record on behalf of the plaintiff in place of Maina Kagio & Co. Advocates.**
- 2. That this Honourable Court be pleased to vary, review and/or set aside its orders of 25<sup>th</sup> April 2018 and revive the suit herein.**
- 3. That upon grant of Prayer No. 2 & 3, this Honourable Court be pleased to extend time within which to substitute the plaintiff with her legal representative and the 1<sup>st</sup> defendant with his legal representative Luke Njogu Mugo.**
- 4. That the costs of the application be provided for.**

The applicant filed an affidavit and grounds shown on the face of the said application in support thereof. The respondent filed a replying affidavit in opposition to the said application.

**APPLICANT'S CASE**

- According to the applicant, this suit was declared as having abated on 25<sup>th</sup> April 2018 by consent of the parties' counsels.
- The applicant deponed that the original plaintiff Grace Wamutira Phineas Mugo (deceased) who is her mother passed away on 30<sup>th</sup> April 2016.
- She stated that upon her death, she instructed her former Advocates to apply for letters of administration ad litem and substitute her with her legal representative but they did not do the same.
- The applicant also stated that on 25<sup>th</sup> April 2018, his former advocate entered a consent with defendants' advocates to declare the suit having abated without his knowledge and consent.
- She further deponed that failure to substitute the plaintiff within the mandatory period was caused by the negligence of his former advocate.

## RESPONDENTS CASE

- The respondents filed a replying affidavit opposing the said application stating that the orders sought for by the applicant are not available or tenable in that the orders dated 25<sup>th</sup> April 2018 were granted by consent of all parties therein and were issued regularly and without fraud, mistake, error, misrepresentation or any vitiating elements and hence are binding to the parties herein and that the matter cannot be re-opened again.
- The respondent also stated that as the matter stands now, the same is duly concluded and that there is no pending issues for determination and that the application is frivolous, misconceived and an abuse of the Court process.

## LEGAL ANALYSIS

- I have considered the Notice of Motion and the supporting affidavit. I have also considered the rival submissions and the applicable law. The application is brought under **Order 9 Rule 9, Order 24 Rule 7 (2), Order 50, Rule 6 CPR**. Prayer No. 2 which relates to **Order 9 Rule 9** has been allowed by consent. The provisions of **Order 24 Rule 7 (2) CPR** reads as follows:

**“Order 24 Rule 7 (2) – The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal, and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it think fit”.**

From the consent order entered into between counsels for the plaintiff and the defendant on 25<sup>th</sup> April 2018, the parties agreed as follows:

**1. That the plaintiff’s suit filed herein be and is hereby declared as abated in accordance with the law.**

**2. That its hereby ordered that the orders of temporary injunction issued on 25<sup>th</sup> February 2016 restraining the 3<sup>rd</sup> and 4<sup>th</sup> defendants/applicants by themselves, servants, agents or anybody else claiming through them from selling, charging, alienating, entering and/or interfering with the plaintiff’s occupation of land parcel No. MUTIRA/KIRIMUNGE/927 pending the hearing and determination of this suit be and are hereby lifted and/or vacated AND is hereby further ordered that the next of friend herein JACOB WACHIRA MUGO, by himself, servants, agents or anyone claiming under him be forcibly evicted from the applicant’s L.R. MUTIRA/KIRIMUNGE/927.**

**3. There be no orders as to costs”.**

The above consent order which compromised this suit is of the nature of an agreement between the parties. The same can only be varied and/or set aside in the same terms an agreement can be set aside and/or varied. **Section 25 Rule 5 of the Civil Procedure Rules** provides as follows:

**“25 (5) (1) Where it is proved to the satisfaction of the Court, and the Court after hearing the parties, directs, that a suit has been adjusted wholly or in-part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall, on the application of any party, order such agreement, compromise or satisfaction be recorded and enter judgment in accordance thereto.**

**(2) The Court on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree”.**

The above Section of the law provides for the compromise of a suit by parties and once the Court is satisfied that such a suit has been adjusted wholly or in part by any lawful agreement either between the parties themselves or their legal counsels, it shall cause it to be recorded and adopted as an order of the Court. Once the consent order is recorded and signed, the same becomes a judgment/order of the Court and the effect of such order/judgment is that it becomes enforceable and binding upon the parties subject to the law governing the discharge of Court orders and decrees. Under the law, a consent order or decree can only be discharged by way of review and/or setting aside. Being an order/decree obtained by consent of the parties, an appeal is not obtained under **Section 67(2) of the Civil Procedure Act**. That Section provides that no appeal shall lie from a decree/order passed by the Court with the consent of parties. The only legal remedy available to parties who want to wriggle out of a consent order is to set aside by way of Judicial Review. The applicant has not invoked the provisions of the law for Judicial Review. There is no such review sought by the applicant in his application.

The other issue for determination in this application is whether the Court can vary terms of a consent order. In the case of **Flora N. Wasike Vs Destimo Wamboko (1982 – 88) 1 K.A.R 625**, the Court ruled that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract such as fraud, mistake or misrepresentation.

The Court restated the same principle in the case of **Hirani Vs Kassam (1952) 19 E.A.C.A 131** where it was held as follows:

**“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ..... 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 in general for a reason which would enable the Court to set aside an agreement”.**

The applicant in his affidavit in support of this application or the grounds on the face of the application herein has not alluded to any of the above reasons for setting aside the consent order. He is only blaming his former lawyer for failure to substitute him for the plaintiff within the mandatory period. There is no evidence showing that the applicant provided his former advocate with instructions to initiate the substitution in place of the original deceased plaintiff. There is even no letter written by the applicant to the Advocates Complaints Commission against their former advocates of any professional misconduct in the handling of this case. In any event, an advocate has general instructions to compromise a suit on behalf of his client provided he acts in good faith and not contrary to express negative directions. That was the holding in the case of *Kenya Commercial Bank Limited Vs Benja Amalgamated Limited & another (1998) e K.L.R* where the Court of Appeal cited a passage in the *Supreme Court Practice 1976 (Vol 2) paragraph 2013 page 620* as follows:

**“Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative directions; and it would seem that a solicitor acting as agent for the principal has the same power..... No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice...”. (Emphasis mine)**

The application dated 19<sup>th</sup> March 2019 for the reasons given lack merit and the same is out for dismissal which I hereby do with *costs to the respondent*.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 18<sup>th</sup> day of October, 2019.**

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**E.C. CHERONO**

**ELC JUDGE**

**18<sup>TH</sup> OCTOBER, 2019**

In the presence of:

1. Mr. Munene holding brief for Ms Wangechi Munene
2. Ms Kiragu holding brief for Mr. Kahiga for Respondents

3. Mbogo – Cour clerk