



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 14 OF 2019**

**KINYEKI NJOGU MARA.....PLAINTIFF**

**VERSUS**

**JULIUS MUGURO MWANGI.....DEFENDANT**

**STEPHEN KARIUKI WANJIKU.....APPLICANT**

**RULING**

**INTRODUCTION**

The applicant, Stephen Kariuki Wanjiku has moved this Honourable Court under *Order 45 Rule 1 & 2 CPR and Section 1A, 1B and 3A CPA* for the following orders:

- (1) Spent.***
- (2) That this Honourable Court be pleased to substitute plaintiff herein now deceased with the Applicant.***
- (3) That this Honourable Court be pleased to vacate the orders dated 8<sup>th</sup> May 1997.***
- (4) That after granting the orders sought herein 1 & 2 above, this Honourable Court do transfer this suit to the Chief Magistrate Kerugoya Law Courts for hearing and determination.***
- (5) That costs of this application be provided for.***

The application is supported by ten (10) grounds shown on the face of that application and the affidavit sworn by the applicant on 19<sup>th</sup> March 2019.

The defendant was served with the said application but did not file any response thereto.

**APPLICANT'S CASE**

- The applicant in his affidavit evidence stated that he is the son of the plaintiff and that the plaintiff has since passed away. He attached a copy of the death certificate.
- The applicant further deponed that their late father had instituted this suit way back in 1984 and soon thereafter, he was taken ill and eventually passed on before the suit could be heard and finalized.
- He stated that him and his brother became aware of an alleged sale when their attempt to enter the suit property was restricted by the defendant.
- The applicant deponed that the suit property is a family land and that their rights to inherit matrimonial land has been violated by the defendant who has neglected, refused and/or declined to move out.

**RESPONDENT'S CASE**

The defendant was served with the application personally and also his advocate M/S Kebuka Wachira & Co. Advocates. However, the

respondent did not file any response. The application proceeded ex-parte after the Court was satisfied that the respondent was duly served.

#### ANALYSIS AND DECISION

I have considered the affidavit evidence and the documents annexed to the supporting affidavits. I have also perused the proceedings in this case. Though the defendant filed no response either in support or opposition to this application, the law behoves the applicant to prove his case on a balance of probabilities. **Section 106 and 107 of the Evidence Act Cap 80 Laws of Kenya** states as follows:

**“106. Whoever deserves any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts must prove that those facts exist.**

**107. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence”.**

In the case of **Brite Stone Plc Ltd Vs Smith & Associates Fair East Ltd (2007) 4 SLR (R) 855 at 59, Rajah, J.A.** held as follows:

**‘The Court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed upon him”.**

- The applicant in this case is seeking a substantive order of setting aside/vacating, an order of this Court issued on 3<sup>rd</sup> May 1997. The applicant has not attached a certified copy of the alleged order (s) issued on 8<sup>th</sup> May 1997. Upon perusal of the proceedings, I note that the orders of this Honourable Court issued on the said 8<sup>th</sup> May 1997 was a consent order which read as follows:

**“By consent, the entire suit is hereby withdrawn. The issue of costs to be agreed at a later date”.**

That order was entered by consent of the parties more than twenty two (22) years ago. The original plaintiff passed away on 6<sup>th</sup> June 2018. The principle (s) for setting aside a consent order/judgment was set out in the case of **Flora N. Wasike Vs Destimo Wamboko (1988) e K.L.R** where it was held:

**“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out; see the decision of this Court in J.M. Mwakio Vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983”.**

Again in the case of **Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd (1982) K.L.R, 485, Harris J.** held as follows:

**‘(1) A consent order entered into by counsel is binding on 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 an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.**

**2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side”.**

These decisions of this Honourable Court and the Superior Courts have pronounced itself on the principles for setting aside and/or varying a consent judgment/order. It is now settled that a consent judgment/order can only be set aside and/or varied on grounds similar to setting aside/varying a contract. It is also settled that a duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate. The consent which compromised this suit was entered between the counsel appearing for the plaintiff and the defendant. There is no suggestion from the affidavit evidence that the counsel appearing for the plaintiff at the time had no implied authority to compromise this suit. I notice that the applicant has not alluded to acts of fraud nor collusion or that the consent was given without sufficient material facts or in misapprehension or ignorance of such material facts. The reasons given by the applicant in support of this application are insufficient to set aside the consent order which was recorded in 1997 more than twenty two years ago. The delay in bringing this application twenty two years after it was entered has not been explained. There are no grounds of fraud to enable this Court entertain such an application. In my view, this application lack merit and the same is hereby dismissed. Since the respondent did not file any response, I make no order as to costs.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 11<sup>th</sup> day of October, 2019.**

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**E.C. CHERONO**

**ELC JUDGE**

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

In the presence of:

*Stephen Kariuki Wanjiku – present*

*Respondent – absent*