



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 81 OF 2010

LT COL (RTD) JAMES N. KARANGI.....PLAINTIFF

VERSUS

NATHAN MUTISO1ST DEFENDANT

PAUL NGEI MUSESUYA.....2ND DEFENDANT

RULING

1. In the Application dated 24th June, 2014, the Defendants are seeking for the following orders:

a. That the firm of B.M. Mung'ata & Co. Advocates be granted leave to come on record for the Defendants herein.

b. That this Honourable Court do hereby vary set aside and or expunge the consent Judgment dated the 3rd day of May, 2013 and filed on the 8th day of May, 2013.

c. That leave to issue to the Defendants to withdraw the Defence on record and leave to issue to file a fresh Defence.

d. That the costs of Application be provided for.

2. The Application is premised on the ground that the Defence and the consent that was entered into were made without the Defendants' instructions. According to the Affidavit of the 1st Defendant, they instructed the firm of Winnie Nyamai & Co. Advocates to file a Defence on their behalf; that their instructions to the effect that they were not aware of the alleged sale transaction between the Plaintiff and their late father and that they never instructed their advocate to enter into a consent Judgment with the Plaintiff.

3. The 2nd Defendant deponed that their advocate filed a Defence suggesting that they recognized the alleged sale transaction and that they have a good Defence to the Plaintiff's claim.

4. The Defendants' former advocate filed a detailed Replying Affidavit in which she deponed that the 1st Defendant, in the company of Boniface Mutua Musyoki, went to his office and instructed him to file a Defence in this matter; that from the briefing that he was given, he was able to understand that the 1st Defendant did not dispute that the Plaintiff had purchased 4 acres of the suit land from his father and that what was in dispute was the exact location of the land that was excised from the bigger portion.

5. The advocate deponed that he gave to the 1st Defendant the draft Defence to peruse and that after he agreed to the contents of the Defence, he signed it in his presence; that the Defence he filed reflected the Defendants' position; that the 1st Defendant brought to her duly signed transfer documents in respect to the suit land in favour of Divisional Integrated Programmes Company Limited for the whole land and that after advising the 1st Defendant, she went back to her office with filled Mutation forms which the 1st Defendant and other co-owners of the suit land signed in her presence.

6. The advocate deponed that in April, 2013, the 1st Defendant handed to her a consent Judgment which had been prepared and signed by DM. Mutinda advocate, but undated, and that it is the 1st Defendant who took the signed consent back to the Plaintiff's advocate's office.

7. In response, the 1st Defendant filed a Supplementary Affidavit in which he deponed that the Defendants had no problem effecting transfer of the suit land to the Plaintiff on condition that the Plaintiff proved that he purchased the suit land from their father; that if the Plaintiff was to produce the Sale Agreement, they were willing to transfer the land to him and that those were his instructions. The then advocate for the

Defendants was cross-examined on the contents of her Affidavit.

8. It was the evidence of the then advocate for the Defendants that she prepared a Defence on the 1st Defendant's instructions; that she prepared a Defence without the 2nd Defendant's input and that she was paid instructions fees of Kshs. 30,000 by Divisional Integrated Programmes Company Limited who were also interested in the suit land.

9. In his submissions, the Defendants' advocate submitted that the former advocate for the Defendants did not produce in court evidence to show the instructions that she was given; that she admitted having been paid instructions fees by the Director of Divisional Integrated Programmes Company Limited who had purchased 29.5 acres of the suit land and that she did not have the instructions of the Defendants to enter into the alleged consent Judgment.

10. In his Complaint dated 30th April, 2010, the Plaintiff alleged that he purchased a portion of land measuring three (3) acres of land known as Mavoko Town Block 11/195 from the 1st Defendant's father; that the two Defendants obtained Letters of Administration in respect to their father's Estate in Succession Cause No. 366 and 416 of 2003 and that the said Letters of Administration were confirmed by the court but excluded the Plaintiff as a beneficiary of the three (3) acres that he had purchased.

11. In the Complaint, the Plaintiff averred that the Defendants had completely refused to facilitate the transfer of the suit land to him and sought for specific performance.

12. The then advocates for the Defendants, Winnie Nyamai & Co. Advocates entered appearance and filed a Defence on behalf of both Defendants. In the Defence, the Defendants purportedly averred that they were aware about the sale of 4 acres that the Plaintiff had purchased and that they are in the process of procuring the Deed Plans to facilitate the issuance of the Title Deed to the Plaintiff.

13. After the filing of the Defence on 10th June, 2010, the record shows that a consent Judgment was entered into between the Plaintiff's and the Defendants' advocate dated 3rd May, 2013. In the said consent, it is stated that the Defendants had agreed to sell the portion that the Plaintiff purchased; that the facilitation of the partitioning of the said portion was to be paid by the Defendants and that after that is done, the caution that had been lodged by the Plaintiff on land known as Mavoko Town Block 11/195 would be removed and the matter would be marked as settled.

14. According to the Affidavit of the 1st Defendant, he never instructed his advocate to concede to the fact that their father sold to the Plaintiff the alleged land and that he never gave to his advocate instructions to enter into the consent of 3rd May, 2013.

15. The Defendants then advocate, while testifying in this matter, and in her Affidavit, stated that the 1st Defendant was taken to her office for the first time by a Director of Divisional Integrated Programmes Company Limited (*DIP Co. Ltd*); that the said Director was her landlord in Rehema House and that the said Director had purchased 29.5 acres of the suit land.

16. According to the evidence of the then advocate for the Defendants, the 1st Defendant later on told her that the said Director of Divisional Integrated Programmes Company Limited had misled him into transferring the whole land to the company and that later on, the 1st Defendant went to her office with the impugned consent Judgment which had already been signed by the Plaintiff's advocate and which she duly signed. It was the evidence of the said advocate that her legal fees of Kshs. 30,000 was paid by the Director of Divisional Integrated Programmes Company Limited

17. From the above chronology of events, it follows that the Defence by the Defendants, and the subsequent consent Judgment was done at the behest of a third party, Divisional Integrated Programmes Company Limited, who also had an interest in the suit land. Indeed, it is the Director of Divisional Integrated Programmes Company Limited who paid the Defendants' advocate legal fees of Kshs. 30,000.

18. What is interesting about the Defence that was filed by the Defendants' counsel is that although the Plaintiff alleged in the Complaint that he bought from the Defendants' father three (3) acres, the Defences show that the land that the Plaintiff bought was four (4) acres, meaning that the Defendants were agreeable to cede an acre of land which the Plaintiff had not claimed.

19. Further, the consent Judgment, which purported to settle the suit, did not even allude to the acreage of the land that was to be transferred to the Plaintiff. Although the Defendants' advocate has indicated that she was not involved in the negotiations that led to the consent Judgment, she did not inform the court if indeed she considered that she had adequately advised her client on the anomalies that were apparent on the face of both the Defence and the consent Judgment.

20. It would appear that she never did that, meaning that she was a participant in the preparation of a document that was manifestly prejudicial to her client. Considering that she was personally known to the Director of Divisional Integrated Programmes Company Limited, who had an interest in the suit land, and who was keen to have the caution on the suit land lifted to facilitate the transfer of a portion of the land in their favour, I find that the consent Judgment of 3rd May, 2013 was a well orchestrated scheme to defraud the Defendants.

21. In any event, the suit herein was against the two Defendants. The Defendants' advocate filed a Defence admitting the Plaintiff's claim without receiving instructions from the 2nd Defendant. The said advocate also entered into a consent Judgment without consulting the 2nd Defendant. Consequently, it follows that the said advocate did not have instructions to file the Defence that is on record and to enter into the

consent Judgment of 3rd May, 2013.

22. For the reasons I have given above, I find that the Defendants' Application dated 24th June, 2014 is meritorious. I therefore allow the Application as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27TH DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE