



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. 71 OF 2013**

**HALIMA AMIR BOI .....PLAINTIFF**

**-VERSUS-**

- 1. OBADIAH OTIENO WESONGA**
- 2. DIVINE DOVE PROPERTIES LIMITED**
- 3. DISTRICT LAND REGISTRAR – KWALE.....DEFENDANTS**

**RULING**

1. The application for determination is dated 24<sup>th</sup> September 2015 brought under order 45 & 51 of the Civil Procedure Rules and section 1A, 1B & 3A of the Act. The application was filed by the 2<sup>nd</sup> Defendant/Applicant and sought the following orders;

**1. That the orders made herein on the 29<sup>th</sup> October 2014 and 27<sup>th</sup> April 2015 pursuant to a consent letter filed on the 29<sup>th</sup> October 2014 be set aside.**

**2. The costs of the application be in the cause.**

2. The application is supported by the grounds on the face of it and on the affidavit of Joel Olewe Obura advocate. Briefly, the applicant averred that the plaintiff misrepresented to the applicant that she is the sole owner of the suit property and that she had capacity to withdraw the caveat lodged at the Kwale Lands Registry to allow the second defendant to dispose of the suit property.

3. The application is supported by the 1<sup>st</sup> & 3<sup>rd</sup> defendants. It is opposed by the plaintiff vide grounds of opposition filed on 22<sup>nd</sup> January 2016. In the grounds, the plaintiff stated that this application is an abuse of the court process; lacks merit and is frivolous and scandalous.

4. The parties agreed to file written submissions. The 2<sup>nd</sup> defendant/applicant filed his written submissions on 9<sup>th</sup> May 2016. The Plaintiff did not file any submissions within the agreed timelines or within the time extended to her by the court. She has therefore not explained to this court why she feels the application is an abuse of the court process or why it lacks merit as stated in her grounds of opposition. The 2<sup>nd</sup> defendant/applicant on his part expounded on the grounds upon which consent can be

set aside and supported his submissions with several cases.

5. I have read the facts set out in the grounds and the affidavit in support of the motion. The facts have explained the nature of misrepresentations made by the plaintiff for instance;

*i) That the plaintiff was never the registered owner of the suit property.*

*ii) Immediately after instituting this suit on 22. 4. 13, the plaintiff sold off the suit property to K. S. Rekhi for Kshs.10,000,000 and the said Rekhi has lodged a caution against the title claiming purchaser's interest.*

*iii) The plaintiff was not entitled in law to remove the caution registered by K.S. Rekhi to enable the 2<sup>nd</sup> defendant sell the land.*

*iv) The plaintiff has not caused to be discharged the order of injunction obtained by her on 24. 4. 2013 which order also prevented the sale.*

6. The plaintiff has not denied these facts and based on the documents annexed to the supporting affidavit, I am satisfied the facts as set out by the applicant are indeed true. That being the case and following the decision in **Flora N Wasike vs Destino Wamboko** I am satisfied that the applicant has laid grounds upon which a consent can be set aside to wit ignorance of material facts and on account of mistake. For this reason, I find merit in the application and hereby allow it.

7. Consequently the consent that was adopted as an order of the court on 13<sup>th</sup> November 2014 be and is hereby set aside. The suit shall proceed on its merits unless the parties enter a fresh consent. The costs of the application are hereby ordered in the cause.

**Dated and Delivered at Mombasa this 20th day of JAN. 2017**

**A. OMOLLO**

**JUDGE**