



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 522 OF 2013**

**(FORMERLY EMBU HCCC NO. 101 OF 2009 (OS))**

**GRACE NJOKI KIBAGI.....APPLICANT**

**VERSUS**

**JOHN KIBAGI KANGANGI.....RESPONDENT**

**AND**

**INOI FARMERS CO-OPERATIVE SOCIETY LTD.....INTERESTED PARTY/APPLICANT**

**RULING**

The record of the proceedings of 27th January 2016 in this matter reads as follows:

***“27.1.2016***

***Before***

***B.N. OLAO - J***

***GICHIA – CC***

***Mr. Magee for Plaintiff – present***

***Mr. Mwai for Defendant – absent***

***Ms Munene for I.P – absent***

***Mr. Magee: Date taken by consent. Both Mr. Mwai and Ms Wangechi are not here. We already had a consent recorded between plaintiff and defendant who are man and wife on 21.7.09. We can place file aside.***

***CT: Mention at 11 a.m. to see if Mr. Mwai and Ms Wangechi will have arrived.***

***B.N. OLAO – JUDGE***

***27.1.16***

*Later at 10.56 A.M.*

*Coram as before*

*Mr. Magee for Plaintiff – present*

*Ms Thungu for Mwai for Defendant – present*

*Ms Wangechi for I.P – absent*

*Mr. Magee: This suit was coming for hearing but we have a consent between the plaintiff and defendant.*

*By consent, the land parcel No. INOI//KIMANDI/621 be registered in the joint names of the plaintiff and defendant. The inhibition and prohibitory order issued by this Court on the application by the Interested party be removed.*

*Ms Thungu: That is the position.*

*CT: A consent order in the terms dictated by Mr. Magee is recorded and adopted as an order of this Court.*

**B.N. OLAO – JUDGE**

**27.1.16”**

Pursuant to that consent, the Deputy Registrar issued a decree dated 27th February 2016.

The interested party has by its Notice of Motion dated 27th May 2016 sought the following orders:

**1. Spent.**

**2. Spent.**

**3. That this Honourable Court be pleased to vary, review and/or set aside the consent order granted on 27th January 2016 and order that the suit proceeds to full hearing.**

The gravamen of that application which is the subject of this ruling is that on 22nd September 2004, the interested party had obtained a judgment in the sum of Ksh. 111,925.00 plus costs and interest against the defendant herein **JOHN KIBAGI** in **CO-OPERATIVE TRIBUNAL CASE No. 8 of 2004** and was in the process of executing it through the sale of land parcel No. INOI/KIMANDI/621 (the suit land) by public auction. In an attempt to frustrate that decree, this suit was filed by the plaintiff who is the wife to the defendant and thereby had the suit land registered in the couple's joint names and the inhibition order issued by the Court removed. It is the interested party's case, as per the supporting affidavit filed by its Chairman **ISAAC KARIU KAMUNDI**, that the consent recorded on 27th January 2016 between the plaintiff and defendant was obtained fraudulently without full disclosure.

The application is opposed. The defendant has filed grounds of opposition terming the application as incompetent, bad in law, lacking in merit and an abuse of the Court process.

The plaintiff **GRACE NJOKI KIBAGI** has filed a replying affidavit in which she has deponed, inter alia, that the interested party was duly served with the hearing notice for 27th January 2016 but only her advocate and the defendant's advocate were present and they recorded a consent. She denies that the consent was recorded fraudulently adding that this is the second time such an application is being made as a similar application was filed on 23rd July 2010 seeking to set aside a similar consent order issued on 24th July 2009 which was allowed and the hearing date fixed for the main suit on 27th January 2016.

That the interested party's advocate is not being sincere by alleging that she did not diarize the date of 27th January 2016. That if the suit land is sold, her family will be rendered destitute.

The application was canvassed by way of written submissions which have been filed both by **MS WANGECHI MUNENE** advocate for the interested party and **MR. MAGEE WA MAGEE** advocate for the plaintiff. No submissions were filed by **MR. MWAI** advocate for the defendant.

I have considered the application, the rival affidavits and grounds of opposition as well as the submissions filed.

I started this ruling by reproducing the record of the proceedings on 27th January 2016 when the consent order sought to be set aside was recorded. It is clear beyond peradventure that the "**consent**" order recorded by this Court on 27th January 2016 and pursuant to which a decree was extracted by the Deputy Registrar on 27th February 2016 cannot be a consent order as known in law for the simple reason that the interested party which was already enjoined in the suit was not involved in the same. A consent decree is defined in ***BLACK'S LAW DICTIONARY 9<sup>TH</sup> EDITION*** as follows:

***"A Court decree that all parties agree to"***

Clearly therefore, as the Interested party was not involved in the "**consent**" order recorded between the plaintiff and the defendant on 27th January 2016, that order and the subsequent decree cannot in law amount to a consent order as known in law. Therefore, all the submissions filed herein in so far as they relate to how a consent order may be set aside are not of any help in this matter. The order recorded on 27th January 2016 was, simply put, not a consent. It was a fraud. It must be set aside ex debito justitiae in the interest of justice.

This application is also premised under the provisions of ***Order 45 Rule 1 of the Civil Procedure Rules*** which provides as follows:

***1 (1) "Any person considering himself aggrieved –***

***(a) by a decree or order from which no appeal is allowed but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent, on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay"*** Emphasis added

It is clear from the record of the proceedings herein that although the interested party had a counsel on record who was not present on 27th January 2016 when the said "**consent**" order was recorded, the Court inadvertently did not take into account the fact that no valid consent could be recorded in the absence of one party. The Court was not vigilant enough and in the process, made an error which is apparent on the face of the record. While the Courts must always remain vigilant, parties to a suit and their counsels are also enjoined to assist the Courts, not to mislead them, in order to achieve the objectives set out in the law. ***Section 1 (A) (3) of the Civil Procedure Act*** provides as follows:

***"A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court"***

I am therefore satisfied that there is a mistake or error apparent on the face of the record herein to warrant the grant of the orders sought by the interested party in its Notice of Motion dated 27th May 2016.

The up-shot of the above is that the interested party's Notice of Motion dated 27th May 2016 is allowed and the order dated 27th January 2016 is set aside. The plaintiff and defendant shall both meet the interested party's costs.

**B. N. OLAO**

**JUDGE**

**21<sup>ST</sup> JULY, 2017**

Ruling delivered, dated and signed in open Court this 21<sup>st</sup> day of July 2017

Mr. Maina for Ms Munene for Applicant/Interested party present

Mr. Abubakar for Plaintiff present

Mr. Mwai for the Defendant absent.

**B. N. OLAO**

**JUDGE**

**21<sup>ST</sup> JULY, 2017**