



REPUBLIC OF KENYA

THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 556 OF 2014

**JAFRED ESHITEMI ANYWA (Suing as the Legal Representative of the
Estate of the late JOHN ANYWA ODUNGA)....PLAINTIFF/RESPONDENT**

VERSUS

PHILIP NANDWA MUTENDE.....DEFENDANT/APPLICANT

RULING

The application is dated 24th October 2016 and brought under Articles 159 (2) (d) and (e) of the Constitution, Sections 1A and 3A of the Civil Procedure Act – Cap 21, Laws of Kenya, and Order 51 Rule 1 of the Civil procedure Rules 2010 seeking the following orders;

- 1. THAT** this honourable court be pleased to review, vary and/or set aside the consent judgment/orders of this honourable court issued on 10th November, 2014.
- 2. THAT** in the alternative, this honourable court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice regarding the nature and circumstances of this case.
- 3. THAT** the costs of this application be provided for.

The application is supported by the supporting affidavit of PHILIP NANDWA MUTENDE and the grounds therein. The grounds are that the applicant is the registered proprietor of property Title Number MARAMA/SHIBEMBE/1257. The plaintiff/respondent brought the instant suit to this court challenging the validity of the defendant/applicant's title. On 10/11/2014 counsel for both parties purported to record a consent to the effect that the plaintiff/respondent's suit be allowed a prayed. This position was adopted by this honourable court as judgment. That the defendant/applicant never instructed his then advocate, Mrs. Robina Andia, to enter such consent and thus she acted without instructions. That the defendant/applicant has evidence that will confirm the propriety of his title to the subject property and will suffer prejudice if he is not allowed to present the same in court, which is what will be the result if the aforesaid consent entered without his instructions, is sustained. That the material available and to be demonstrated before this honourable court is sufficient to grant the review of its adverse judgment/orders. The delay in bringing this application is explainable and excusable.

The defendant/applicant herein is seeking an Order from the court directing the review, variation and or setting aside of the consent judgment/orders of this honourable court issued on 10th November, 2014. He also seeks to be awarded costs. In his submissions, the defendant stated that he is the registered proprietor of property Title Number MARAMA/SHIBEMBE/1257 and that the instant suit was instituted by the

plaintiff to challenge the validity of the aforesaid registration. He has explained how the suit parcel of land came into existence:-

- (i) It was the result of the sub-division of a mother title number MARAMA/SHIBEMBE/482 which was owned by one Saul Opolu Wamalwa;
- (ii) After the death of Mr. Wamalwa, his son John Anywa Odunga being his sole beneficiary was granted Letters of Administration to the deceased's Estate, which included the property title number MARAMA/SHIBEMBE/482;
- (iii) The said John Anywa Odunga, decided to sell a portion of land measuring 2 acres, to be hived out of property title number MARAMA/SHIBEMBE/482 to one Josephine Alwanga Obingo Tianga
- (iv) The two-acre parcel of land hived off and sold as aforesaid is what came to be known as title number MARAMA/SHIBEMBE/1257, Josephine Alwanga Obingo Tianga in turn sold it to the defendant herein
- (v) Thus the sub-division process aforesaid was concluded with two separate titles coming into being: Title Number MARAMA/SHIBEMBE/1256 registered under John Anywa Odunga, and Title Number MARAMA/SHIBEMBE/1257 registered in the name of the defendant.

Sometime after the death of the late John Anywa Odunga, the plaintiff herein instituted the instant suit on the pretext that his father, the deceased, was the registered proprietor of the suit property and that he had died in that capacity. The defendant was thus accused of fraudulent intermeddling in the Estate of the Deceased.

The defendant duly appointed an advocate to represent him in court. He would religiously attend court on all dates reserved for that purpose when the matter kept being adjourned for one reason after another. During one such appearance on 25/2/2015, the defendant was disappointed to see that his retained advocate was not present. He then heard the judge say that the case was long concluded yet he was yet to testify to give his side of events. Rushing thereafter to his advocate's office to demand an explanation, he was told that a consent had been entered with the opposing side's advocate because it was "clear that the defendant did not have evidence to successfully defend himself in the matter". The defendant/applicant initiated the process that has culminated in the instant application to have the consent judgment/order issued on 10/11/2014 set aside to enable him finally get his day in court.

The Plaintiff/respondent submitted that Edwin Omulama & Associates Advocate took over the conduct of this matter for the defendant from Andia & Co Advocates through notice of change of advocates dated 24th October, 2016 and filed in court on 25th October, 2016. On the same date the 25th October, 2016 they filed notice of motion dated 24th October, 2016 under certificate of urgency. In the subject application, the main prayer is that the court be pleased to review, vary and/or set aside the consent judgment/orders of this court issued on 10th November, 2014.

To advance his client's case, counsel filed written submission on 28th February, 2017 in which he attacked not only the former advocate for the defendant but also the plaintiff's advocates for what he alleges is collusion. With that indictment of the other advocates on record, the advocate maintained that his "client" has a good title to the suit land and that the same is defensible. The plaintiff filed statement of grounds of opposition dated 2nd February, 2017 on 6th February, 2017. In his application and submissions filed by his counsel, the defendant acknowledges that there was a judgment by consent of the counsels who were then acting for parties. Irrespective of the counsel's perception of the judgment, his coming on record to replace the firm of Andia & Co Advocates is subject to the provisions of the Civil Procedure Rules 2010. He had either to file consent signed with Andia & Co Advocates allowing him to come on record or make an appropriate application for the record of the court with notice to the parties in the matter. Through such a process counsel would then acquire a platform to attack the colleague for

alleged professional misconduct as has happened. This requirement goes to the substance and is not merely procedural to be cured by Article 159 (2) (d) of the Constitution.

The plaintiff/respondent further submitted that, Order 51 Rule 10 (1) of the Civil Procedure Rules require that the rule or statutory provision under which an application is brought must ordinarily be stated. The provision goes further to state that an application may not be refused or objection taken for non-compliance with the requirement. The understanding of the provision is that a party is under no mandatory obligation to state the rule or the law under which an application is brought but where an application is brought but where that party chooses to comply then the correct law must be state or else he or she should suffer the consequences of attempting to rely upon a wrong or inapplicable legal provision.

The defendant/applicant has stated the provisions of the law he relies upon on the top of the notice of motion. None of those provisions empowers the court to review, vary or set aside the judgment/orders of the court. In effect where an advocate is involved in a matter and seeks to influence a court to grant him orders based on a different legal provision from the one the advocate advances that amounts to gross abuse of the court's process and renders the application incurably defective.

The judgment being challenged was entered on 10/11/2014. The application came on 25/10/2016 that's two years less one month. The applicant deponed that he attended court on all dates the matter was to come up. Long after the judgment had been entered, the defendant was in August and September, 2015 visiting the area chief and assistant chief for letters. This delay cannot be explained in any other terms than to subvert justice. It is against the overriding principle.

This Court has carefully considered the Instant Notice of Motion and the Court record in totality. The Court has also considered the relevant provisions of law, the written submissions, and the cited authorities.

The plaintiff/respondent further submitted that a party is under no mandatory obligation to state the rule or the law under which an application is brought but where an application is brought but where that party chooses to comply as in this case then the correct law must be state or else he or she should suffer the consequences of attempting to rely upon a wrong or inapplicable legal provision as is in the instant case. I find that order 51 rule 10 (1) of the Civil Procedure Rules require that the rule or statutory provision under which an application is brought must ordinarily be stated. However, order 51 rule 10 (2) goes further to state that an application may not be refused or objection taken for non-compliance with the requirement. I will therefore consider the application on its merit.

As is evident in the case of **Kenya Commercial Bank Ltd Vs Specialized Engineering Co.Ltd (1982) :-**

“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 or such facts in general for a reason which would enable the court to set aside an agreement”.

The case of;- **National Bank of Kenya Ltd Vs Ndungu Njau ,Civil Appeal No. 2011 of 1996** where the court held that;-

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a Statute or other provision of law cannot be a ground for review”.

Further the court relied on the case of **Board of Trustees National Social Security Fund Vs Micheal Mwalo ,Civil Appeal No. 293 of 2014** where the Court of Appeal held that ;-

“ The judgement arose from consent of the parties to the suit. The law pertaining to setting a side of consent judgement or consent orders has been clearly stated. A court of law will not interfere with a consent judgement except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a Consent Order or a Consent Judgement, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of Court”.

As per the court record, on the 10th November 2014 a consent judgment was entered in court on the following terms;

1. The Plaintiff's suit be and is hereby allowed.
2. The matter be mentioned on the 24th November 2014 to record settlement on costs.

The Plaintiff was represented by Musiega & Co Advocates and the defendant by Andia & Co Advocates who duly signed the consent. Edwin Omulama & Associates Advocate took over the conduct of this matter for the defendant from Andia & Co Advocates through notice of change of advocates dated 24th October, 2016 and filed in court on 25th October, 2016. On the same date the 25th October, 2016 they filed notice of motion dated 24th October, 2016 under certificate of urgency. In the subject application, the main prayer is that the court be pleased to review, vary and/or set aside the consent judgment/orders of this court issued on 10th November, 2014. The present counsel for the defendant did not comply before filing documents for the defendant/applicant as there is no application or consent filed. What counsel filed was notice of change of advocate which is inapplicable where judgment has been passed as in the present case. If counsel had complied by filing an application perhaps plaintiff's counsel and former defendant's counsel would get an opportunity to either admit or deny any collusion in entering the said consent. I find that no evidence of fraud or collusion has been established in this matter. *To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of Court.*

For the above reasons, the court finds that the defendant/applicant's Notice of Motion dated 24th October 2016, is not merited. The upshot thereof is that the said application is dismissed entirely with costs to the plaintiff/respondent herein.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12TH DAY OF JULY 2017.

N.A. MATHEKA

JUDGE