



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 65 OF 2015

MARGARET WAMBUI MWANGI.....PLAINTIFF

VERSUS

THE DISTRICT LAND REGISTRAR KIRINYAGA.....1ST DEFENDANT

THE COUNTY GOVERNMENT OF KIRINYAGA.....2ND DEFENDANT

RULING

On 3RD JUNE 2015, **MARGARET WAMBUI MWANGI** the plaintiff herein through the firm of **KAHUTHU & KAHUTHU** Advocates filed an Originating Summons in this Court seeking the main prayer that the restriction placed on land parcel No. KIINE/THIGIRICHI/527 (the suit land) by the defendants be removed forthwith. The 2nd defendant instructed the firm of **J.M. NJENGA & COMPANY ADVOCATES** who entered appearance on its behalf on 14TH JULY 2015 and filed a Preliminary Objection in which, inter alia, it described the Originating Summons as premature and filed un-procedurally in total contravention of the provisions of the Transition to Devolved Government (transfer of Assets and Liabilities Regulations) Act 2013 and in any event, the suit land was initially public land that had been fraudulently, un-procedurally and unlawfully transferred to the plaintiff's late husband with the convenience of officials of the then **KIRINYAGA COUNTY COUNCIL** and therefore the plaintiff has no good title to the same.

On 2ND MAY 2017, the firm of **NGIGI GICHOYA & COMPANY ADVOCATES** filed a Notice of Change of Advocates as appearing for the 2nd defendant in place of the firm of **J.M. NJENGA & COMPANY ADVOCATES**. Thereafter, on 1ST AUGUST 2017, the record shows that **MR. NGIGI** representing the 2nd defendant and **MS MUTHIKE** holding brief for **MR. KAHUTHU** for the plaintiff appeared before the Deputy Registrar **HON. J.A KASAM** and informed her that they were recording a consent in terms of a consent order signed both by **MR. NGIGI GICHOYA ADVOCATE** for the 2nd defendant and **MR. KAHUTHU ADVOCATE** for the plaintiff. The contents of that consent order are not relevant for this application save to state that it allowed the sub-division of the suit land and its subsequent transfer to some 87 beneficiaries with the balance remaining to the 2nd defendant for public amenities. The restrictions placed on the suit land were also lifted.

The 2nd defendant has now moved to this Court by its Notice of Motion dated 8th September 2017 in which it seeks the following orders:

1. *Spent.*

2. That the consent recorded on 2nd May 2017 purportedly as between the plaintiff and the 2nd defendant and all consequential orders including any entries made by the 1st defendant be set aside and/or invalidated unconditionally and the status quo as regards the suit property existing to the said consent be maintained.

3. Spent.

4. That the Honourable Court be at liberty to issue such other or further orders including recommending criminal prosecution of among others Miss Muthike advocate and Ngigi Gichoya advocate for their role in the recording of the consent on 2nd May 2017.

5. That the costs of this application be provided for.

The gravamen of the application which is supported by the affidavit of **JEREMY NJENGA** advocate is that the firm of **J.M. NJENGA ADVOCATES** has been on record for the 2nd defendant since 2015 as can be confirmed from the record and that the said firm are strangers to the said **NGIGI GICHOYA** advocate and have never instructed him to hold their brief and neither have there been any engagements with the plaintiff's advocate that would have otherwise culminated in the consent recorded on 2nd May 2017. Yet it has now come to their knowledge that a consent was recorded on **2ND MAY 2017** compromising the suit as between the plaintiff and the 2nd defendant represented by **NGIGI GICHOYA ADVOCATES** whereas they have not been served with any notice of change of advocate from themselves to any other law firm or to **NGIGI GICHOYA ADVOCATE** on behalf of the 2nd defendant. Further, that the 2nd defendant has confirmed that they have not instructed any other advocate to act for them in this matter and neither did they instruct the said **NGIGI GICHOYA** advocate to attend Court on **2ND MAY 2017** and therefore the purported consent recorded on that day is the work of fraud as between the plaintiff's advocate, the said **NGIGI GICHOYA** advocate and possibly other un-named third parties and is therefore not binding upon the 2nd defendant.

On **25TH SEPTEMBER 2017**, the firm of **KAHUTHU & KAHUTHU ADVOCATES** filed a Notice of Preliminary Objection to the application and raised the following grounds:

- 1. That the whole application is fatally defective and ought to be dismissed and/or struck out.*
- 2. That the application discloses no reasonable cause of action and ought to be struck out.*
- 3. That the application is an abuse of Court process hence it is purely hearsay.*
- 4. There is no cause of action.*
- 5. That the advocate has illegally brought this application since the 2nd defendant has not authorized him to do so.*

I notice from the record that the firm of **IRUNGU MWANGI, NG'ANG'A T.T. & COMPANY ADVOCATES** filed a Notice of Change of Advocates on **11TH SEPTEMBER 2017** to come on record for the plaintiff in place of the firm of **KAHUTHU & KAHUTHU ADVOCATES**. However, the fact that the said firm of **KAHUTHU & KAHUTHU ADVOCATES** filed the Preliminary Objection on **25TH SEPTEMBER 2017** in place of the plaintiff is a clear indication that they are still on record for the plaintiff and were not served with any Notice of Change of Advocates. The application was therefore duly served upon the firm of **KAHUTHU & KAHUTHU ADVOCATES** for hearing but there was no appearance either by counsel or the plaintiff when the matter came up for hearing on **25TH SEPTEMBER 2017**. Only **MR. NGIGI GICHOYA ADVOCATE** appeared having also been served and although he informed the Court that he was also on record for the 2nd defendant, both he and **MS KIRAGU ADVOCATE** appearing on behalf of the 2nd defendant later informed the Court that the firm of **J.M. NJENGA** would remain on record on behalf of the 2nd defendant. As there was no appearance on behalf of the plaintiff, **MS KIRAGU** orally addressed me on the application as it was urgent and duly

served. In her submissions, counsel relied entirely on the averments contained in the affidavit of **JEREMY NJENGA ADVOCATE**.

I have considered the application and the objections by the plaintiff.

It is not in dispute that until 2ND MAY 2017 when the firm of **NGIGI GICHOYA & COMPANY ADVOCATES** filed a Notice of Change of Advocates to act in this matter for the 2nd defendant, the firm of **J.M. NJENGA & COMPANY ADVOCATES** were still on record having entered appearance on 14th July 2015. According to the supporting affidavit of **JEREMY NJENGA ADVOCATE** which has not been rebutted, their firm was never served with any Notice of Change of Advocates and neither has the 2nd defendant instructed any other advocate to act on its behalf. It is instructive that **MR. NGIGI GICHOYA ADVOCATE** who had been served with the application and was present in Court did not file any response to that very serious allegation. It follows therefore that there was a breach of **Order 9 Rule 5 of the Civil Procedure Rules** which provides that:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the Court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal” Emphasis added

Order 9 Rule 6 of the Civil Procedure Rules on the other hand provides as follows:

“The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate Court (naming it)”. Emphasis added

The averment by **JEREMY NJENGA** that his firm was not served with any Notice of Change of Advocate by **NGIGI GICHOYA ADVOCATES** and that neither had the 2nd defendant instructed that firm to act on its behalf is a clear demonstration that when **MR. NGIGI ADVOCATE** appeared before the Deputy Registrar on 2ND MAY 2017 and purported to record a consent on behalf of the 2nd defendant, he had no instructions to do so. That consent was therefore not only a fraud but also a nullity which this Court must set aside together with all other consequential orders flowing therefrom. In **BROOKE BOND LIEBIG LTD VS MALLYA 1975 E.A 266, LAW Ag. President** stated the law on setting aside consent orders or judgments and said:

“The circumstances in which a consent judgment may be interfered with were considered by this Court in HIRANI VS KASSAM (1952) 19 E.A.C.A 13 where the following passage from SETON ON JUDGMENTS AND ORDERS 7TH EDITION VOL. 1 PAGE 124 was approved:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or actions, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement”. Emphasis added

The law is that an advocate has the general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to any express directions. Since **NGIGI GICHOYA ADVOCATE** was neither properly on record for the 2nd defendant nor have any instructions to compromise the suit, what he did on 2ND MAY 2017 can only be described as a fraud which this Court must deprecate in the strongest terms possible. As officers of the Court, advocates owe fidelity both to their clients and also to the Court in which they practice. With regard to **MS MUTHIKE ADVOCATE**, the record indicates that she was only holding brief for **KAHUTHU & KAHUTHU ADVOCATES** for the plaintiff who have not

denied having instructed her to do so. There would be no basis in finding any fault with regard to the role that she played.

The 2nd defendant has invited me to make other orders including recommending criminal prosecution of both **MR. NGIGI GICHOYA** and **MS MUTHIKE**. I am not inclined to take that route in the circumstances of this case. I think the strong views that I have expressed deprecating the conduct of **MR NGIGI GICHOYA** is enough to serve as a caution to him with regard to his role as an officer of this Court. In any case, **JEREMY NJENGA** if he so wishes, is at liberty to pursue any charges.

Ultimately therefore, the 2nd defendant's Notice of Motion dated 8th September 2017 is hereby allowed in the following terms:

1. The consent order dated 2ND MAY 2017 purportedly recorded between the plaintiff and the 2nd defendant and all consequential orders including any entries made by the 1st defendant as against title No. KIINE/THIGIRICHI/527 in the records held by the 1st defendant are hereby set aside unconditionally and the status quo as regards the said title existing prior to the said consent be maintained.

2. The plaintiff shall meet the costs of this application.

B. N. OLAO

JUDGE

29TH SEPTEMBER, 2017

Ruling delivered, dated and signed in open Court this 29th day of September 2017

Ms Kiragu for the Applicant present

Mr. Kahuthu for Respondent absent

B.N. OLAO

JUDGE

29TH SEPTEMBER, 2017