



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**APPEAL NO. 25 OF 2012**

**DIOCESE OF KISII REGISTERED TRUSTEE.....1<sup>ST</sup> APPELLANT**

**REVEREND JOSEPH MAIRURA OKEMWA.....2<sup>ND</sup> APPELLANT**

**SISTER ROSA CONSTRUCTION COMPANY.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**HEZEKIAH MAIRURA ONGERI.....1<sup>ST</sup> RESPONDENT**

**KENNEDY MORURI MOKUA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**(Being an appeal from the Ruling and Decision of Hon. V. W. Wandera, SPM dated on 9<sup>th</sup> February 2012 in Kisii CM Civil Case No. 478 of 2007)**

1. This appeal is against the ruling of Hon. V. W. Wandera, Senior Principal Magistrate in Kisii CMCC No. 478 of 2007 delivered on 9<sup>th</sup> February 2012. By the ruling the learned magistrate declined to grant orders sought by the appellants on a Notice of Motion application dated 1<sup>st</sup> July 2011. The appellants by the application had sought to have the consent order dated 11<sup>th</sup> March 2009 and the judgment adopted in court on 27<sup>th</sup> September, 2010 resulting from the said consent discharged and/or set aside.

2. The application before the learned trial magistrate by the appellant was inter alia based on the grounds that; the consent was entered by fraud and misrepresentation of the parties; that the defendant/applicants had no knowledge of the consent and that Ayiema Mbicha & Co. Advocates had no instructions of the defendants to act for them; and that the said firm of Ayiema Mbicha & Co. Advocates was compromised to frustrate the defendants then represented by the firm of Mose & Mose Advocates.

3. The learned trial magistrate after hearing the parties on the application which the parties argued by way of written submissions in his ruling held that the defendants' application was unmeritorious and dismissed the same with costs to the plaintiffs. The defendants being dissatisfied with the ruling of the learned magistrate preferred an appeal to this court vide the memorandum of appeal dated 27<sup>th</sup> February 2012 and sets out the following grounds of appeal:-

**1. That the learned trial magistrate erred in law and fact by dismissing the applicant's application dated 1<sup>st</sup> July 2011.**

**2. That the learned trial magistrate erred in law and fact by holding that the firm of Ayiema**

**Mbicha & Co. Advocates were instructed by the appellants and were therefore properly on record and had authority to compromise the matters.**

**3. That the learned trial magistrate erred in law and fact by holding that the consent dated 11<sup>th</sup> March 2009 was proper and not obtained by fraud, misconcelment and nondisclosure of material facts.**

**4. That the learned trial magistrate erred in law and fact by holding that the appellants did not raise any objection to the filing of the award by the District Land Registrar – Kisii/Gucha as a judgment of the court and yet there were no directions taken.**

**5. That the learned trial magistrate erred in law and fact by entertaining the matter which it had no jurisdiction *ab initio*.**

4. The appellants pray for the appeal to be allowed and the consent dated 11<sup>th</sup> March 2009 and adopted on 15<sup>th</sup> July 2011 be set aside and substituted with an order of dismissal of the suit. Directions were given by the court on 10<sup>th</sup> May 2016 for the appeal to be argued by way of written submissions. The appellants’ submissions were filed on 19<sup>th</sup> July 2016 and the respondents’ submissions were filed on 15<sup>th</sup> July 2016.

5. To contextualize the events that led to the recording of the impugned consent order and the application whose ruling has provoked the instant appeal, it is necessary to consider what the pleadings of the case before the lower court were like. The plaintiffs by the plaint dated 17<sup>th</sup> October 2007 filed on the same date complained that the defendants were constructing a perimeter wall on one side of LR No. **Nyaribari Chache/B/B/Boburia/2005** owned by the 1<sup>st</sup> defendant whose effect would be to block the access road to the plaintiffs land parcels **Nyaribari Chache/B/B/Boburia/7915** and **7914**. Under paragraph 9 of the plaint the plaintiffs’ averred as follows;-

**9. The plaintiffs’ claim is for a declaration that there does exist a road of access along the inside of the wall being erected which road of access provided the only ingress and egress to and from the plaintiffs’ parcels of land and that the defendants have jointly and/or severally exceeded the boundary of parcel No. Nyaribari Chache/B/B/Boburia/ 2005 to the full extent of the road of access leading to parcel No. Nyaribari Chache/B/B/ Boburia/7915 and 7914.”**

Interalia the plaintiffs sought an order for:

**(a) A declaration that there does exist a road of access along the inside of the wall being erected which road of access provided the only ingress and egress to and from the plaintiffs’ parcels of land and that the defendants have jointly and/or severally exceeded the boundary of parcel No. Nyaribari Chache/B/B/Boburia/2005 to the full extent of the road of access leading to parcel No. Nyaribari Chache/B/B/Boburia/7915 and 7914.**

**(b) .....**

**(c) .....**

**(d) .....**

6. The firm of Mose and Mose Advocates filed a memorandum of appearance for all the defendant dated 30<sup>th</sup> October 2007 and filed a replying affidavit dated 9<sup>th</sup> November 2007 to the Chamber Summons application by the plaintiff dated 17<sup>th</sup> October 2007. The law firm of Ayiema Mbicha & Co. Advocates filed a Notice of Change of Advocates from M/s Mose & Mose & Co. Advocates to themselves dated 27<sup>th</sup> January 2009. The firm of Ayiema Mbicha & Co. Advocates on 5<sup>th</sup> March 2009 filed a chamber summons application seeking interalia an order of stay of further proceedings and further the setting aside

of all orders made in the proceedings and dismissal of the suit for want of jurisdiction on the part of the court. This application was disallowed vide a ruling delivered on 27<sup>th</sup> July 2009.

7. The impugned consent vide the letter dated 11<sup>th</sup> March 2009 was duly filed in court on 1<sup>st</sup> April 2009 and was paid for vide receipt No. 2789318 of the same date. It was on the following terms:-

**“By consent of the parties, let this matter be and is hereby settled in the following terms:-**

**1. That ruling on the application dated 5<sup>th</sup> March 2009 be and is hereby dispensed with and the application be marked as settled.**

**2. That the land registrar’s findings in his report dated 14<sup>th</sup> November 2008 and filed on 18<sup>th</sup> December 2008 herein be confirmed as judgment herein.”**

The consent was duly signed on behalf of the firm of Nyatundo & Co. Advocates for the plaintiffs and on behalf of M/s Ayiema Mbicha & co. Advocates for the defendants.

8. The court record shows that when the plaintiffs’ application for injunction filed simultaneously with the plaint on 17<sup>th</sup> October 2007 came for interpartes hearing on 31<sup>st</sup> October 2007, Mr. Mbicha advocate was present for the defendants and the application was stood over by consent for hearing on 9<sup>th</sup> November 2007. Both Mr. Nyatundo advocate for the plaintiffs and Mr. Mbicha Advocate for the defendants were present in court on 9<sup>th</sup> November 2007 when the order of reference for arbitration by the land registrar, Kisii Central was made by consent. It is that order of reference to arbitration that culminated with the award filed by the land registrar in court on 10<sup>th</sup> December 2008. This is the award that was read out to the parties on 10<sup>th</sup> February 2009 in the presence of their respective counsel.

9. I believe I have given enough background information to lay the basis for the evaluation and consideration of the present appeal. I am mindful that this being a first appeal, I need to re-evaluate and consider whether the trial magistrate appropriately appraised and considered all the relevant facts and information that was before him to reach the decision/ruling that he did. In other words did the magistrate apply wrong principles or consider any matters that he ought not to have considered and in doing so reached a decision that was wrong or unjustifiable?

10. I have considered the grounds of appeal set forth by the appellants and the submissions filed by both the appellant and the respondent. The issues that arise in this appeal are as follows:-

**(i) Whether the firm of Ayiema Mbicha & Co. Advocates or indeed Ayiema Mbicha advocate was properly on record for the defendants.**

**(ii) Whether or not the consent order dated 11<sup>th</sup> March, 2009 was validly entered into and therefore binding on the parties.**

**(iii) Whether the court had the jurisdiction to entertain the suit.**

The learned trial magistrate in my view considered issues (i) and (ii) above and rendered himself appropriately as follows in his ruling at page 33 fo the typed proceedings:-

**“In the instant case I find no evidence exhibited by the defendants/applicants to prove that the consent order dated 11<sup>th</sup> March 2009 and filed on 1<sup>st</sup> April 2009 was obtained by fraud or collusion or by an agreement contrary to the policy of the court or that the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.**

**In my view M/s Ayiema Mbicha 7 Co. Advocates were duly instructed by the**

**defendants/applicants and had implied general authority to compromise the action on behalf of the defendants by referring this matter to arbitration and entering judgment in terms of the arbitral award. I find no evidence exhibited proving that Mr. Ayiema Mbicha acted mala fides and contrary to express negative direction.”**

11. Having regard to the background information that I set out earlier in this judgment, I cannot fault the decision of the trial magistrate. From the record, it is clear that Mr. Ayiema Mbicha Advocate is the one who represented the defendants during all the court attendances even when the firm of Mose & Mose Advocates were the ones on record for the defendants. The record shows Mr. Mbicha appeared for the defendants on 31<sup>st</sup> October 2007, 9<sup>th</sup> November 2007 and 11<sup>th</sup> December 2007 and that he filed a formal notice of change of advocate on 28<sup>th</sup> January 2009. It is inconceivable that he would have been attending court without instructions from the defendants and/or from the firm of Mose & Mose Advocates who were on record for the defendants. I agree with the trial magistrate that Mr. Ayiema Mbicha must have been duly instructed by the defendants such that on the 11<sup>th</sup> March 2009 when he recorded the consent order adopting the land registrar’s award as judgment of the court he had the ostensible authority to do so.

12. The trial magistrate was therefore right in holding that the consent was validly entered into and there was no basis to set the same aside. The trial magistrate correctly applied the principles on which a consent may be set aside as was discussed and considered in the case of **Kenya Commercial Bank Ltd – vs- Specialised Engineering co. Ltd [1982] KLR 485** where the court inter alia held:-

**1. 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 of such facts in general for a reason which would enable the court to set aside an agreement.**

**2. A duly instructed advocate has implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.**

**3. An advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In absence of proof of any express negative directive, the order shall be binding.**

**4. The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.**

13. I have reviewed the grounds set out in support of the application dated 1<sup>st</sup> July and the affidavit in support and in opposition and I am satisfied the trial magistrate properly considered and evaluated all the facts and evidence. I agree with his finding that the appellants did not prove there was any fraud in entering the consent order. The evidence did not show that the firm of Ayiema Mbicha & Co. Advocates had no instructions to act for the defendants. To the contrary, the facts showed that Ayiema Mbicha all along appeared in court for the defendants. Indeed the order of reference to arbitration by the land registrar made on 9<sup>th</sup> November 2007 was made in the presence of Mbicha Advocate. The award subsequently filed by the land registrar in court on 18<sup>th</sup> December 2008 shows that both the plaintiffs and the defendants participated in the arbitral proceedings and gave evidence. How did the defendants come to participate in the arbitration if they had not sanctioned the advocate to enter into the consent referring the matter to arbitration by the land registrar? It is the resultant award that the defendants advocate consented to being adopted as the judgment of the court.

14. On the issue whether the court lacked the jurisdiction to deal with the matter, I must observe that the

issue was not raised before the trial magistrate during the hearing of the application dated 1<sup>st</sup> July 2011 and thus the learned trial magistrate would have had no basis to pronounce himself on the issue. However, since the appellants have raised a jurisdiction issue before this court, I am obliged to deal with the issue. It is my understanding that the appellants' contention is that since the issue for determination related to what was a boundary dispute over neighbouring parcels of land the court in terms of Section 21 (4) of the **Registered Land Act**, Cap 300 Laws of Kenya (repealed) lacked jurisdiction to deal with a boundary dispute. Section 21 (4) of the Act provided thus:-

**(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.”**

15. The High Court under the previous Constitution was vested with unlimited jurisdiction. In the instant suit, in addition to the plaintiffs seeking a declaration of the existence of a road of access where the appellants were putting up a wall, the plaintiffs also sought orders of restraint pending the hearing and determination of the suit. It is the court that had jurisdiction to issue a conservatory order pending the hearing and determination of the dispute. The land registrar has no powers to issue injunctive orders or reliefs and in my view even where a dispute relates to a boundary dispute and a party is engaging in acts that are prejudicial to the neighbour, the party being offended by the acts of the other can seek preservation and/or conservatory orders from the court pending determination of the boundary dispute by the land registrar. The court in my view had jurisdiction to deal with the application for injunction and refer what was essentially a boundary dispute for arbitration by the land registrar who is the person mandated under the law to deal with such matters. I accordingly would reject the ground of appeal challenging the jurisdiction of the court. The court would have jurisdiction where it forms the opinion the dispute relates to the position of the boundary to order a stay of the suit and refer the matter to the land registrar to deal with the issue of boundary.

16. In the result, it is my finding and holding that the appellants appeal lacks merit and the same is dismissed with costs to the respondents.

**Judgment dated, signed and delivered at Kisii this 2<sup>nd</sup> day of December, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

N/A for the Appellants

N/A for the Respondents

Mr. Ngare Court Assistant

**J. M. MUTUNGI**

**JUDGE**