



REPUBLIC OF KENYA



**Mkali & 253 others v Suleiman & 2 others (Land Case 231 of 2017)  
[2023] KEELC 16440 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16440 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
LAND CASE 231 OF 2017  
MAO ODENY, J  
MARCH 24, 2023**

**BETWEEN**

**NICHOLAS MKOMA MKALI & 253 OTHERS ..... PLAINTIFF**

**AND**

**YAHYA MOHAMED SULEIMAN ..... 1<sup>ST</sup> DEFENDANT**

**KARISA KITSAO KITI ..... 2<sup>ND</sup> DEFENDANT**

**CHAIRMAN, NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated August 29, 2022 by the Plaintiff/Applicants seeking the following orders; -
  - a. Spent
  - b. That pending the hearing and determination of this application there be stay of execution of proceedings emanating from the decree dated February 22, 2022.
  - c. That the consent orders/judgment dated December 20, 2021 filed by the firm of George Egunza & Associate Advocates and the resultant decree dated February 22, 2022 be set aside.
  - d. That the execution and enforcement of and all further proceedings in relation to the judgment and decree delivered and given herein with the participation of the firm of George Egunza & Associate Advocates be set aside.
  - e. That costs of the application be provided for.
2. The firm of Egunza & Associate advocates filed a Notice of a Preliminary Objection dated October 4, 2021 on behalf of the Plaintiffs on the following grounds ;



- a. The firm of Messrs O M Robinson & Company advocates has no audience before the court by virtue of the Notice of Change of Advocates on record.
- b. That there is a binding, valid consent which has not been challenged.
3. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by Nicholas Mkoma Mkali one of the Plaintiffs who deponed that alongside 253 other Plaintiffs, they instituted this matter through Originating Summons dated November 23, 2017 through the firm of O M Robinson & Co Advocates.
4. That the matter has been pending determination and the last known activity was in respect of a ruling delivered by Hon. Olola J on July 16, 2021 on an application for contempt of court filed by the firm of Stephen Oddiaga & Co Advocates.
5. The Applicant further deponed that he visited their advocate on record Mr Malombo in mid-August 2022 with a view to finding out the status of the matter and upon perusal of the court file they established that there were proceedings in which a consent dated December 20, 2021 had been filed and an advocate named Mr Egunza was appearing for the Plaintiffs whom they have never instructed to record a consent in this matter.
6. Mr Nicholas Mkoma Mkali stated that they have made a complaint to the Advocate's Complaints Commission and the Mombasa Law Society over the conduct of Mr Egunza and the consent and consequent decree which was obtained through fraud, craft and dishonesty.
7. It was the Applicant's case that the entire proceedings, the consent and decree dated February 22, 2022 made with the participation of the firm of George Egunza and Associate Advocates are irregular and illegal as the said firm does not represent the Plaintiffs.
8. The Applicant further deponed that the Notice of Withdrawal dated December 20, 2022 filed by the firm of George Egunza & Associate Advocates is unknown to them as they have never instructed their advocates to withdraw any portion of the case.
9. In response, the 1<sup>st</sup> Defendant filed grounds of opposition and a replying affidavit dated September 29, 2022 where Mr Yahya Mohamed Suleiman deponed that his advocate was approached by the Plaintiffs' new advocate and asked if it was possible to settle the suit out of court.
10. That at the time of requesting for an out of court settlement, the new advocate had not gone on record but they promised to regularize their position to come on record and subsequently, the new advocate filed a Notice of Change of advocates which was served on his advocate on February 23, 2021.
11. The Respondent stated that on March 9, 2021, he instructed his advocates to write confirming his agreement to a settlement on condition that the said settlement be in line with the exgratia land donated to the squatters whose details are recorded before the Kadhis Court.
12. Mr Yahya Mohammed Suleiman further deponed that the consent and subject decree was lawful and entered into procedurally hence is not available for review.
13. Counsel agreed to canvas the application and the Preliminary Objection vide written submissions which were duly filed.

### **Analysis And Determination**

14. I have considered the application, the responses thereto, the submissions by counsel and the cases cited and come to the conclusion that the issues for determination are as to whether the firm of George



- Egunza & Co Advocates was properly on record and instructed by the Plaintiffs to enter into a consent, whether the consent was procured fraudulently and illegally without instructions, if so whether the same should be set aside, and whether O.M Robinson Advocates are still on record for the Plaintiffs.
15. Looking at the proceedings in this case, I notice that this matter was filed by O M Robinson were the Advocates who were instructed by the Plaintiffs to file this suit against the Defendants. There is no record that the said law firms either filed an application to cease acting or the Plaintiffs filing a notice to act in person.
  16. The firm of George Egunza & Co Advocates appears for the first time on September 20, 2021 with a Notice of Withdrawal of the entire suit dated March 23, 2017 against the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants and urged the court to mark the same as withdrawn.
  17. If the said firm was properly on record, then why were they copying the firm of O M Robinson who they purportedly took over from to act for the Plaintiffs. Was this notice actually served if the Applicant had to go and peruse the court file only to find out that there was a consent judgment entered into by the firm of George Egunza & Co Advocates.
  18. The firm if George Egunza Advocates has also not confirmed to the court that they served a Notice of change of Advocate on the firm of O M Robinson & Co Advocates. It is further noted that since there is a challenge on the representation by Egunza Advocate, it was incumbent upon him to get the client who instructed him to swear an affidavit to that effect. This was not done and the court is left with the question, who is this client who instructed Mr Egunza.
  19. It is the 1<sup>st</sup> Defendant who is defending the consent as a beneficiary and does not want it challenged. Where is the Plaintiff to defend the consent that they entered into.
  20. It is evident that the firm of Egunza Advocates only came into this case for a specific purpose, to withdraw the case against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and to enter into a consent marking the matter as settled without the authority of the Plaintiffs. The unknown Plaintiff who has not filed any affidavit to defend the consent is nowhere. This shows that the firm of Egunza Advocate acted without authority as the firm of O M Robinson were still on record for the Plaintiffs.
  21. The court cannot ignore an irregularity in the way the firm of Egunza Advocates came into this case and deal with technicalities to defeat justice. This application has been made to rectify the irregularity hence the court will not dwell on the technicality that there is already a consent judgment marking the matter as settled hence the firm of O M Robinson's application is an abuse of court process.
  22. It follows that the Egunza & Associate advocates had no legal authority to enter into a consent on behalf of the Plaintiffs which consent was adopted as an order of the court.
  23. The principles for setting aside consent orders were as laid down in the case of *Brooke Bond Liebig vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus; -

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”



24. Similarly in the case of *Flora N. Wasike – Versus- Destimo Wamboko* (1988) eKLR the Court held that: -
- “It is now settled law that a Consent judgement or Order has contractual effect and can only be set side on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”.
25. In the case of *Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd* [1982] KLR 485, Harris J correctly held inter alia, that –
- “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 an 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.”
26. I have found above that the firm of George Egunza & Co did not have the Plaintiffs instruction to enter into a consent judgment as the real Plaintiffs have disowned the consent.
27. In the case of *SMN v ZMS & 3 others* [2017] eKLR, the Court of Appeal on the issue of setting aside consent judgments held as follows: -
- “There is now a dearth of authorities on the law governing the setting aside of consent judgments, or orders, and we are grateful to counsel for citing some of them before us. Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is a necessity slightly higher than on balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High Court that he was involved in fraud or colluded with another advocate or person to subvert the cause of justice in a matter pending in court is certainly one of utmost gravity. It destroys the advocate’s honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charges.....”
28. The burden of proving that counsel did not have authority to enter into the consent judgment lies on the Applicant who followed it up by exhibiting a letter to the Advocates Complaints Commission with a copy to Mombasa Law Society registering displeasure on the conduct of the Advocate.
29. I find that the Preliminary Objection lacks merit and is therefore dismissed with costs. The consent judgment recorded in this matter is therefore set aside together with all the consequential decrees. If



the parties are desirous of entering into a consent, then they should do so with the relevant parties procedurally. Parties to sort out the issue of representation of the Plaintiffs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 24<sup>TH</sup> DAY OF MARCH, 2023.**

**M.A. ODENY**

**JUDGE**

