



Kamu (Suing as the Legal Representative of the Estate of the Late Martha Mbane Deceased) v Kakundi & another (Environment & Land Case 8 of 2019) [2023] KEELC 16514 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16514 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 8 OF 2019
TW MURIGI, J
MARCH 22, 2023**

BETWEEN

SIMON MUTHUKA KAMU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MARTHA MBANE DECEASED) PLAINTIFF

AND

HARRISON MUSYIMI KAKUNDI 1ST DEFENDANT

JEREMIAH NZOMO MASAI 2ND DEFENDANT

RULING

1. By a Notice of Motion dated February 18, 2022 brought pursuant to the provisions of Sections 1A and 2A of the *Civil Procedure Act*, Order 51 Rule 1, Order 9 Rule 9(a) and Rule 10 and Order 24 Rule 3(1) of the *Civil Procedure Rules*, the Applicant seeks the following orders:-
 1. Spent.
 2. Spent.
 3. That the Honourable Court be pleased to substitute the Plaintiff Simon Muthuka Kamu(deceased) with Aaron Kyengo Kamu the proposed Plaintiff.
 4. That the Honourable Court does set aside the consent entered on November 17, 2021 for stay of execution pending appeal and the application dated July 01, 2021 proceed for hearing *inter partes*.
 5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Aaron Kyengo Kamu sworn on even date.



The Applicant's Case

3. The Applicant averred that this matter was heard and determined in favour of the Plaintiff vide the judgment delivered on June 29, 2021. That being dissatisfied with the judgment, the Defendant filed a Notice of Appeal together with an application for stay of execution pending the hearing and determination of the intended Appeal. He further averred that on the date of the hearing of the application, both Counsels entered into a consent to stay execution of the judgment dated June 29, 2021 pending the hearing and determination of the Appeal.
4. He further averred that on the date of recording the consent, the Plaintiff had passed on, a fact which was well within his Advocate's knowledge. He argued that, upon the demise of the Plaintiff, his Advocate had no authority to act in the matter. He contended that he has obtained the limited grant of letters of administration and is desirous to be substituted in place of his late brother. He urged the Court to allow the application as prayed.

The 1st Respondent's Case

5. Opposing the application, the 1st Respondent vide his replying affidavit sworn on March 11, 2022 averred that he filed an appeal against the judgment delivered on June 29, 2021 together with an application for stay of execution which the Applicant conceded. He argued that the Applicant has not demonstrated that the deceased Plaintiff never gave his Advocate instructions prior to his demise or that his Advocate acted on his own accord in recording the consent.
6. He further argued that he will be prejudiced if the orders sought are granted since he will be evicted from the suit property. In addition, the Respondent averred that the Court of Appeal has already issued directions on the disposal of the Appeal.
7. The application was canvassed by way of written submissions.
8. The Respondent conceded to prayer No 2 and 3 of the application. The parties herein filed submissions on prayer No 4 of the application.

The Applicant's Submissions

9. The Applicant's submissions were filed in Court on July 7, 2022.
10. Counsel for the Applicant submitted that the Plaintiff passed away on August 18, 2021. Counsel further submitted that the Plaintiff had already passed away by the time the consent was being recorded in Court. He further submitted that the current Administrator had informed the Advocate of the Plaintiff's demise. Counsel argued that instead of notifying the Court, the Plaintiff's Advocate chose to withhold the information and proceeded to record the consent.
11. It was further submitted that upon the demise of the Plaintiff, Counsel had a duty to inform the Court that he lacked instructions to act for the Plaintiff. Counsel contended that the act of recording the consent was not only illegal but was also unlawful.

The 1st Respondent's Submissions

12. The 1st Respondents submissions were filed in Court on October 9, 2022.
13. Counsel for the Respondent submitted that a Court cannot interfere with a consent judgment except in circumstance as would provide a good ground for varying or rescinding a contract between the



parties. He argued that it must be shown that the consent was obtained by fraud or collusion or by an agreement contrary to the policy of the Court.

14. Counsel argued that the Applicant cannot purport to speak for the dead as he was not privy to the communication between the deceased Plaintiff and his Advocate. Counsel argued that the Applicant has not presented any evidence to prove that the Plaintiff's previous Advocate acted on his own accord or that the deceased did not issue instructions to his Advocate prior to his death.

Analysis And Determination

15. Having considered the application, the affidavits and the rival submissions, I find that the issue that arises for determination is whether the consent order should be set aside.

16. The Court of Appeal in the case of *Brooke Bond Liebig Ltd Vs Mallya* [1975] EA 266 at 269 Law Ag P said;

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

17. In *Kenya Commercial Bank Ltd Vs Specialised Engineering Co Ltd* [1982] KLR 485, Harris J correctly held inter alia, that;

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.

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.

18. In *Hirani Vs Kassam* [1952] 19 EACA 131 the Court of Appeal held;

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *JM Mwakio Vs Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell Vs F C Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

19. It is not in dispute that this Court delivered its judgment on June 29, 2021 in favour of the Plaintiff. It is also not in dispute that the Respondent filed an Appeal together with an application dated July 01, 2021 seeking for an order of stay of execution of the judgment pending the hearing and determination of the Appeal.

20. The Applicant is challenging the consent recorded in Court with regards to the application dated July 01, 2021 in which the Applicant had sought the following orders;-



1. That the application be certified as urgent and the same be heard *ex-parte* at first instance.
 2. That there be stay of execution of the judgment delivered by this honourable court on June 29, 2021 pending the hearing of this application.
 3. That there be stay of execution of judgment delivered by this honourable court on June 29, 2021 pending the hearing of the intended appeal before the court of Appeal.
 4. That cost of the application be in cause.
21. From the record, it is clear that the Court directed the parties to canvass the application through written submissions. The matter was fixed for mention on November 01, 2021 to confirm compliance and to fix a ruling date. When the matter came up for mention on November 01, 2021, Mr Muthiani was present for the Plaintiff/Respondent while Munyao was present for the Applicant.
 22. Mr Muthiani informed the Court that his client was amenable to the application being granted in terms of prayer No3 of the application and urged the Court to mark the file as closed. Both parties were in agreement.
 23. The Court proceeded to grant the orders as prayed. It is this order that is the substance of the instant application.
 24. The Applicant argued that the Plaintiff's previous Advocate did not have instructions to record the consent since the Plaintiff was deceased at the time of recording the same.
 25. It is not in dispute that the Plaintiff passed away on August 18, 2021. The consent was recorded in Court on November 01, 2021.
 26. It is crystal clear that on 1st November, 2021, Mr Muthiani did not have an instructing client. There is no evidence that the deceased Plaintiff had been substituted so as to instruct Counsel to concede to prayer No 3 of the application.
 27. The upshot of the foregoing is that the application dated February 18, 2022 is merited and I proceed to allow the same in the following terms;-
 1. The Plaintiff Simon Muthuka Kamu(deceased) be and is hereby substituted with Aron Kyengo Kamu.
 2. The consent recorded on November 17, 2021 be and is hereby set aside.
 3. The application dated July 01, 2021 will proceed for *inter partes* hearing.
 4. The Applicant is awarded costs of the application.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MARCH, 2023.

HON T MURIGI

JUDGE

In The Presence Of: -

Court Assistant – Mr Kwemboi

Ms Kyalo holding brief for Ms Munyao for the 1st Respondent.

Ms Mwanzia holding brief for Ms Kilonzo for the Applicant.

