



Basheikh (As the trustee of Warf) v Moledina & 2 others (Environment & Land Case E54 of 2022) [2023] KEELC 16521 (KLR) (21 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16521 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E54 OF 2022
NA MATHEKA, J
MARCH 21, 2023**

BETWEEN

ABDULRAHMAN MOHAMMED BASHEIKH (AS THE TRUSTEE OF WARF) PLAINTIFF

AND

GULAMABBAS KASSAMALI MOLEDINA 1ST DEFENDANT

SEASIDE HOSPITAL 2ND DEFENDANT

LANDS REGISTRAR, MOMBASA 3RD DEFENDANT

RULING

1 The application is dated July 28, 2022 and is brought under Sections IA, 1B, 3.4, of the [Civil Procedure Act](#) (Cap 21), Order 2 Rule 15, Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#) seeking the following orders;

1. That the Honourable Court be and is hereby pleased to certify this instant application as extremely urgent and the same be dispensed with in the first instance.
2. That the Honourable Court be and is hereby pleased to set aside and/or vacate the Consent filed in Court on or about the June 22, 2022 and any other subsequent Orders.
3. That the Costs of this Application be provided for.

2 It is based on the grounds that That the 2nd Defendant/ Applicant herein appointed the firm of Mokaya & Onyambu Advocates to represent it in this matter. That the 2nd Defendant/ Applicant on record has come to learn of a Consent purportedly entered into between the Plaintiff and the 2nd Defendant/ Applicant herein through the firm of Mogaka Omwenga & Mabeya Advocates and the firm of Said Mgupu & Company Advocates. That the 2nd Defendant/ Applicant herein has never issued



instructions to the firm of Mogaka Omwenga & Mabeya Advocates to act for it in this matter or any other matter whatsoever.

- 3 That there have never been any negotiations between the Plaintiff, 2nd Defendant/ Applicant herein and/or any other parties whatsoever in regards to the instant suit. That the 2nd Defendant/ Applicant herein has never issued any instructions to the said firm of Mogaka Omwenga & Mabeya Advocates to enter into any negotiations on its behalf in regards to this suit. That the Consent herein which condemns the 2nd Defendant/ Applicant to pay monies in terms of arrears to the Plaintiff/ Respondent was therefore obtained fraudulently without the involvement and/or authority of the 2nd Defendant/ Applicant herein and/or its Advocates on record.
- 4 The Respondents submit that 2nd Defendant/Applicant's application is a non-starter, misconceived, incompetent in law and an abuse of the court process and the same ought to be dismissed with costs. That one Jacquiline Muthoni Mutune and himself appointed the firm of Mogaka Omwenga and Mabeya Advocates to represent them as interested parties in this matter and that on June 21, 2022, a Notice of Appointment of Advocates was filed as per the copy attached hereto on page 1 of the exhibit marked BMM-I. That consequently, a consent between the Plaintiff and them was filed in court on the June 22, 2022 wherein they agreed to pay to the Plaintiff the claimed arrears as per the terms of the said consent, which was adopted as an order of the court, the same is produced on page 2 of the exhibit. That the 2nd Defendant/Applicant has applied to court seeking to have the said consent set aside when the consent does not involve it. That the draft consent that has been annexed to the Applicant's supporting affidavit was never executed and neither was it ever filed. The same therefore cannot be used as evidence in this Honourable Court as it is a mere draft, annexed hereto and produced as exhibit BMM1 is a copy of the consent that was actually filed and adopted. That the Applicant has no locus standi to bring the instant application having been a total stranger to the subject consent. That that a consent is essentially a contract which is binding between the consenting parties only and as such a stranger cannot seek to set aside such a consent because the stranger was not privy to the consent nor does the consent infringe its rights.
- 5 This court has considered the application and submissions therein. In the Court of Appeal in the case of *Brooke Bond Liebig Ltd v Mallya (1975) EA 266* at 269 the court stated that;

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.”
- 6 In *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.
7. In *Hirani v 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 v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v FC 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.”

8. Be that as it may, from the court record, which the court has perused the said consent filed in court on June 22, 2022 is not in the court file. The only copy seen is the one attached to the replying affidavit of Benjamin Muthama Mutune dated October 13, 2022. Secondly, the said consent is with Third Parties namely Benjamin Muthama Mutune and Jacqueline Muthoni Mutune who are calling themselves Interested Parties but have not been enjoined as such. Thirdly the said consent was never adopted as an order of this court and hence is of no consequence. This court cannot set aside what is not there. I find this application is not merited and I dismiss it with costs.
9. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF MARCH 2023.

N A MATHEKA

JUDGE

