



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ambwera v Ngurwe (Civil Case E006 of 2023)  
[2023] KEHC 26764 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26764 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL CASE E006 OF 2023  
PJO OTIENO, J  
DECEMBER 19, 2023**

**BETWEEN**

**JACKSON RIZIKI AMBWERA ..... PLAINTIFF**

**AND**

**GILFORD GITONGA NGURWE ..... DEFENDANT**

**RULING**

1. Before the court for determination is the defendant's notice of motion application dated 24<sup>th</sup> August, 2023 brought pursuant to sections 1, 1A,1B,3A of the Civil Procedure Act 2010, order 5 rule 3,15 and 16, order 10 rule 11, order 22 rule 22 and order 51 rule 1 of the Civil Procedure Rules. The application seeks, in the main, orders that this court does set aside the consent judgment entered on 7<sup>th</sup> August, 2023 and adopted as an order of the court on 10<sup>th</sup> August, 2023 against the Defendant and all consequential orders emanating therefrom. The applicant is further seeking for others that he be allowed to defend this suit and that the cost of this application be provided for.
2. The application is supported by the affidavit of Gilford Gitonga Ngurwe sworn on 24/8/2023 in which he avers that on 23/8/2023 he received a court order dated 10/8/2023 purporting to settle this matter of out court by withdrawing a sum of Kshs. 3,000,000/- from his fixed deposit account number 2022xxxx held at ABSA Bank, Changamwe Branch which account he wonders how the plaintiff had knowledge of and the amount therein. He claims that the consent judgment was obtained irregularly between the Plaintiff and the Defendant's purported advocate and questions how the suit was filed in the High Court yet the High Court's pecuniary jurisdiction is capped at Kshs. 20,000,000/- and above. He denies signing the consent dated 7/8/2023 or instructing any other person to sign on his behalf. On learning of the events, he states that he reported the incident with the police, the DCI head office in Nairobi and the Advocates Complaints Commission. He claims that he has never met or instructed the firm of W.W. Associates which is the firm purporting to represent him, that he has never met the plaintiff or his advocates on record being the firm of K.N. Wesutsa & Co. Advocates, that he



was neither served with the demand letter nor summons to this suit and that he is being condemned unheard. He later filed a supplementary affidavit sworn on 28/8/2023 in which he introduces his draft defence as an annexure.

3. The application is opposed by the replying affidavit of Polyne Joy Wanyonyi sworn on 27/9/2023 in which she avers that she is an Advocate of the High Court of Kenya and that on 7/8/2023 the defendant walked into her office seeking legal services relating to the subject suit which he wanted to negotiate to a reduced figure and settle prompting her to negotiate with the firm of M/S K.N.Wesutsa & Co. Advocates, advocates or the Plaintiff. The defendant thereafter executed an authority to act with the firm of WW & Associates Advocates and equally provided a copy of his National Identity Card and his coloured passport photo.
4. The application is also opposed by the replying affidavit of Kundu Nigel Wetsusa, advocate for the plaintiff, sworn on 25/9/2023 in which he asserts that the applicant has failed to demonstrate his identity to be Gilford Gitonga Mgurwe, the Defendant herein so as to prove that the person being represented by the firm of M/S WW & Associates Advocates is in fact an imposter thereby vitiating the said consent for being fraudulent.
5. The applicant filed a further affidavit sworn on 9/10/2023 in which he avows that his identity was resolved when he appeared when the matter came up before Hon. Lady Justice Chirchir in which he indicated that he was meeting Ms. Wanyonyi for the first time. He further claims that he never supplied Ms. Wanyonyi with his passport, national identity card or even his telephone number and that he has reported the fraud at the Nyali Police Station under OB No. 36/29/09/2023. He also contends that the best way for Ms. Wanyonyi to have proved communication was to produce evidence of any communication through his phone number which was never provided.
6. After the court directed parties to file submissions, the applicant identifies three issues for determination by the court. The first issue is whether the consent judgment entered on 7/8/2023 was irregular to which it is submitted in the affirmative for the reason that he never participated in any out of court negotiations leading to the consent judgment. He argues that for the reason that he was never served with summons to enter appearance, the default judgment ought to set aside *ex debito justitiae* and in that regard he cites the case of *Ali Bin Khamis v Salim Khamis Korobe & 2 others* (1956) 23 EACA 195 and *James Kanyita Nderitu v Maries Philotas Ghika & another* (2016) Eklr. He submits that the respondent should not be allowed to execute the consent judgment having obtained the same irregularly.
7. The second issue is whether this court should set aside the consent judgment delivered on 10/8/2023 and all consequential orders emanating therefrom to which he submits in the affirmative and claims that the mistake of his advocate should not be visited upon him to avoid injustice.
8. The third issue is whether this court should grant the defendant leave to unconditionally defend the suit to which he submits that his defence raises triable issues and that only documents on record that he is familiar with is his draft defence and counterclaim.
9. The firm of WW & Associates Advocates isolates three issues for determination by this court with the first being whether the defendant instructed the firm of WW & Associates Advocates to which they reiterate the averments of the replying affidavit of Polyne Joy Wanyonyi and further state that they produced documents to show that they were instructed by the Defendant.
10. The second issue is whether the consent entered is valid to which they submit they argue that the defendant was agreeable to the consent when he walked to the firm and issued instructions.



11. The third issue is whether they are entitled to legal fees as per the consent to which they contend that a client who chooses to withdraw instructions from his advocates without payment must be prepared to pay such advocate such amount as may be found due and in that regard they cite the case of *Machira & Company Advocates v Arthur K. Magugu & another* HCC Misc App No. 358 of 2001.
12. It is his submission that the defendant has failed to discharge his burden of proving to the court that the consent is a product of fraudulent activities since he has not established that his signature was a forgery though forensic examination and that he has not provided any documents indicating his nexus to the bank account.

### **Issue, Analysis and Determination**

13. Having looked at the application, the responses thereto and the submissions by the parties, the only issue that arises for my determination is whether the consent dated 10<sup>th</sup> August, 2023 was irregularly and unlawfully obtained. .... In court considers if the only issue for determination for its isolation will effectively dispose the application
14. The gravamen of the applicant's case is that he is the defendant herein and that the purported consent apparently entered into between the plaintiff's advocate and his purported advocates was entered into without his knowledge and/or participation. He contends that he does not know the firm of WW & Associates advocates, has never been to their office and has never met any of its advocates. This averment is rebutted by Ms. Wanyonyi of WW & Associates Advocates who asserts that she met the defendant who walked into her office, tendered a coloured copy of his passport, a copy of his National Identity Card and even signed an authority to act dated 9<sup>th</sup> August, 2023 issuing the firm with instructions to represent him. The defendant contends that the signature purporting to be his on the authority to act is a forgery.
15. Forgery was explained in law is a criminal conduct with grave criminal consequences. When pleaded in a civil matter the standard of proof is certainly higher than in usual civil claims
16. The standard of proof for allegation was only discussed by the court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed as follows; -
 

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
17. The applicant has throughout his documentations denied everything particularly knowledge of Ms. Wanyonyi or even giving her firm instructions. He has further denied giving his passport photo and copy of National Identity Card to Ms. Wanyonyi but has not attempted to lead the court on how the firm could have procured them.
18. The determination of this application revolves around whether the applicant proved that his signature was forged by the firm of WW & Associates Advocate. In advancing a case on that front, the applicant has alleged that he made a report to the Advocates Complaints Commission vide a letter dated 23/8/2023. He thereafter made a report at the Nyalı Police Station and issued with an OB No. 36/29/09/2023. The court hesitates to pronounce itself on whether or not there was forgery from



which must be left to the relevant agency to unearth. It is enough to say however that no proof of forger has been made to the satisfaction of the court.

19. Being a consent order, the same can only be set aside by another order or upon proof of a vitiating factor. See *Flora N. Wasike Vs. Destino Wamboko* (1958) eKLR.
20. Without any material on the property by Ms. Wanyonyi Advocate, there is no material upon which the court can upset to consent order.
21. Accordingly, for the reasons set out above, I find that the applicant's evidence fell too short of establishing fraud on the part of the firm of WW & Associates Advocates. The application dated 24/8/2023 is therefore found to lack merit and the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023**

**PATRICK J O OTIENO**

**JUDGE**

