



**Nzimba v Munyao & another (Environment and Land Appeal
E029 of 2021) [2023] KEELC 17823 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E029 OF 2021**

A NYUKURI, J

MAY 17, 2023

BETWEEN

CHRISTOPHER MUINDI NZIMBA APPELLANT

AND

STELLAMARRIS MUNYAO 1ST RESPONDENT

MUSYOKI TELLA 2ND RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. D. Orimba, Senior Principal Magistrate, Kangundo delivered on the 9th day of June 2021 in MCELC NO. 52 of 2019)

JUDGMENT

Introduction

1. This appeal is against the Ruling of Honourable D. Orimba, Senior Principal Magistrate delivered on 9th June 2021 in Kangundo MC ELC No. 52 of 2019 in respect of the Appellants (then Interested Party) application dated 12th April 2021. In that ruling, the subordinate court declined to set aside the consent orders entered into on 10th July 2019 and 2nd September 2020.
2. In the Memorandum of Appeal dated 5th July 2021, the Appellant anchored his appeal on the following grounds;
 - (1) That the Honourable Learned Magistrate misdirected himself in law and in fact by failing to place due circumspection to the Appellant's Motion dated 12th April 2021 and the depositions in support thereof.
 - (2) That the Honourable Learned Magistrate erred in law and in fact by failing to reckon that the impugned consent recorded on 2nd September 2020 was marked by fraud thus meeting the threshold for its setting aside.



- (3) That the Honourable Court misdirected itself in law and fact in dismissing the Appellant's motion dated 12th April 2021 without interrogating the Appellant's grounds for setting aside the impugned consent order.
3. Consequently, the Appellant sought the following orders;
 - (a) That the ruling made by the Honourable Court on 9th June 2021 be set aside.
 - (b) That the Appellant's motion dated 12th April 2021 be allowed.
 - (c) That this Honourable Court do issue any other orders it deems fit.

Background

4. Stellamaris Munyao, the 1st Respondent in this appeal filed a plaint dated 20th March 2019 in the subordinate court alleging that she was the registered proprietor of Land Parcel No. Matungulu/Katine/2870 (Suit property) and that Musyoki Tella who is the 2nd Respondent in this appeal, trespassed on the suit property and settled thereon. Therefore the Plaintiff sought orders of eviction and damages for trespass against the Defendant.
5. The Defendant did not file any defence to the plaint and a request for judgment against him was filed on 18th April 2019.
6. On 18th July 2019, the Appellant in this appeal filed a Notice of Motion of even date seeking to be joined to the suit as an Interested Party. In support of his application, the Appellant swore a replying affidavit of even date alleging that he had 40 plots which included Plot Nos. 2870 and 2871. Further that he sold Plot Numbers 2873 and 2875 to one Felix Kilonzo Maingi but that Felix took possession of Plot Nos. 2870 and 2871 without the Interested Party's knowledge. That therefore in good faith, the Interested Party sold Plot No. 2870 to the Defendant not knowing it is the same Plot Felix had sold to the Plaintiff as the Interested Party was not aware that the Plots Felix occupied were different from the ones sold to him. He maintained that the Defendant had been on Plot No. 2870 since 2010 and had constructed a residential home on the Plot. He stated that he intended to compensate the Plaintiff with another Plot instead of evicting the Defendant.
7. On the same date of 18th July 2019, Mr. Odhiambo Advocate appeared for the Plaintiff while Mr. Akonya Advocate appeared for the Defendant. Mr. Akonya informed court that the Interested Party who was in court on that day had through him, filed the application dated 18th July 2019 seeking to be joined to the suit for purposes of entering a consent with the Plaintiff. Mr. Odhiambo, counsel for the Defendant was not opposed to the application and the same was allowed by court. Subsequently, Mr. Akonya informed court that he had a consent to record which he dictated to the court and upon confirmation by Mr. Odhiambo, ultimately, the court adopted the following consent;
 - (1) The Interested Party do compensate the Plaintiff a subsequent Plot of the same measurement as claimed by the Plaintiff in this suit or an amount equivalent to the value of the Plot based on valuation that will be done;
 - (2) The Defendant be allowed possession of the plot of land in dispute being Plot No. 2870 and the Plaintiff to transfer the same to the Defendant; and
 - (3) That the Interested Party, pay the Plaintiff the cost of this suit, costs of Kshs. 200,000/-.The matter was then fixed for mention on 17th October 2019 to confirm compliance.



8. The record shows that the consent was not complied with by the Interested Party and after several mentions, on 2nd September 2020, counsel for both sides asked the court to adopt a valuation report. In the valuation report, the disputed plot was valued at Kshs.700,000/-. Therefore counsel for the Interested Party sought for 45 days to settle both Kshs. 700,000/- and costs of Kshs. 200,000/-.
9. On 16th April 2021, the firm of Howard, Nick & Kenneth Advocates filed the Notice of Motion dated 12th April 2021 seeking leave to come on record for the Interested Party and for orders that the consent orders entered into on 18th July 2019 and 2nd September 2020 and all consequential orders be set aside.
10. Upon hearing that application, the trial court, in the impugned ruling made a finding that although the Interested Party alleged fraud and collusion, he failed to explain the particulars thereof. The trial court further found that the Interested Party was dishonest and held that there was no fraud or collusion in respect of the consents in dispute.
11. It is that finding that provoked this appeal. The appeal was canvassed by way of written submissions. On record are the Appellant's submissions filed on 23rd November 2022 and the 1st Respondent's submission filed on 1st August 2022.

Appellant's Submissions

12. Counsel for the Appellant submitted that the Appellant was not a party to the suit in the subordinate court and that the firm of Nzaku & Nzaku Advocates who were appearing for the Defendant shockingly were also appearing for the Interested Party, when the two parties' interests were different, competing and conflicting. Counsel observed that the consents entered into led to a judgment against the Appellant. Counsel submitted that it did not make any logical sense for the Appellant who had not been sued to bring himself in the suit for purposes of having judgment entered against him. Counsel submitted that the only logical explanations was that the impugned consent was entered into by fraud.
13. Counsel relied on the case of Lazarus Kirech v. Kisorio Arap Barao [2018] eKLR, for the proposition that where there is fraud, collusion or an agreement contrary to public policy, ignorance of material facts or misrepresentation or for any just cause, the court may set aside a consent.
14. On whether the Appellant proved fraud, counsel argued that the firm of Nzaku & Nzaku Advocates roped the Appellant in a suit in which he was not privy to and proceeded to crucify him through the impugned consent. Counsel pointed out that a complaint against the said firm was filed as demonstrated in annexure C-1 of the Appellant's supporting affidavit of 12th April 2021. According to counsel, the consents in dispute were entered into without instructions. Counsel argued that the subordinate court erred in failing to arrive at a finding that the impugned consents were entered into by fraud and collusion.
15. In addition, counsel submitted that the impugned consents were contrary to public policy of the court as the firm of Nzaku & Nzaku Advocates was acting for two parties who had competing interests. It was submitted for the Appellant that there was conflict of interest. To buttress the argument that a counsel should not act where there is conflict of interest, reliance was placed on Rule 6 paragraphs 95 and 96 of the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct 2016, and the case of Evan Gachoki Njuki Krukuma [2008] eKLR.

The 1st Respondent's Submissions

16. Counsel for the 1st Respondent submitted that registration of a person as proprietor of land vests in that person absolute ownership together with all the rights appurtenant thereto. In support of that



argument, counsel referred to the case of Kiplangat Shelisheli Mutarakwa v. Joseph Rotich [2018] eKLR.

17. Counsel contended that it was not in dispute that the suit property was registered in the 1st Respondent's name and that the same belonged to him as demonstrated by the copy of the title deed and search certificate filed before the trial court. Counsel stated that that position was confirmed by the Appellant and the 2nd Respondent and that the Appellant admitted having sold the 2nd Respondent herein the suit property, despite the same belonging to the 1st Respondent and that he agreed to compensate the 1st Respondent with the value of the same. Counsel held the view that the Appellant being aware that the suit property was registered in the 1st Respondent's name, fraudulently sold the same to the 2nd Respondent and therefore the Appellant willingly joined himself to the suit to compensate the 1st Respondent with another plot instead of evicting the Defendant.
18. Reliance was placed on the case of Brooke Bond Liebig Ltd v. Mallya [1975] EA 266 at 269, for the proposition that a court cannot interfere with a consent judgment except in such circumstances that afford good grounds for rescinding a contract between parties. Counsel also referred to the cases of Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd [1982] KLR 485, Hirani v. Kassam [1952] 19 EACA 131 and Gurpreet Singh v. Chatur Bhuj Goel [1988] AIR 400 to argue that a consent judgment is binding on the parties.

Analysis and Determination

19. I have carefully considered the appeal, submissions and the entire record of the subordinate court. In my considered view, the issue that arises for determination is whether the impugned consents were entered into through fraud, collusion and against the public policy.
20. It is settled, in a long line of judicial pronouncements that a consent judgment is a contract and the same is binding on the parties involved and cannot be varied or set aside unless it is demonstrated that the consent was obtained by fraud or collusion or by an agreement inconsistent with the policy of the court, misapprehension or in ignorance of material facts or for any just cause, that would allow the court to set aside a contract.
21. In the case of Hirani v. Kassam [1952] 19 EACA 131, the court held as follows;

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 the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.
22. In the instant appeal, the Appellant's grievance is that he was not a party to Kangundo CMELC No. 52 of 2019 when the suit was instituted and that the firm of Nzaku & Nzaku Advocates sought to, and succeeded in joining him to that suit merely for purposes of having a judgment entered against him. The Appellant's position was that the said law firm was representing the 2nd Respondent who was the Defendant then and that at the same time representing the Appellant herein. According to the Appellant, the two parties had conflicting, competing and different interests, and therefore could not be represented by one advocate. He therefore insists that it was illogical for him to instruct the firm of Nzaku & Nzaku Advocates for purposes only of crucifying him, and that therefore the only inference that can be made is that there was fraud and collusion. He also argues that public policy would not allow counsel to act where there is a conflict of interest.
23. On the other hand, the 1st Respondent's answer to that is that it was not in dispute that the suit property was registered in her name but that the 2nd Respondent had settled in the suit property pursuant to



a sale by the Appellant when he was aware that the land belonged to the 1st Respondent which was a fraudulent act. The 1st Respondent argues that it was only expected that the Appellant would rectify that state of affairs by either compensating the 1st Respondent with another plot or the value thereof. She maintained that the consents were entered into voluntarily, and are binding on the parties.

24. To interrogate whether there was fraud and or collusion, this court will relook at the application made seeking the setting aside of the impugned consent. In paragraph 2 of the supporting affidavit in support of the application to set aside the impugned consent, the Appellant deponed that he sought legal representation from an advocate called Kevin Akonya from the firm of Nzaku & Nzaku Advocates to represent him in the lower court proceedings which revolve around a parcel of land which initially belonged to him but which he later sold.
25. The Appellant further deponed that he explained the circumstances of the case to his counsel aforesaid, paid legal fees and thereafter counsel prepared pleadings on his behalf which he signed on the assurance that they were a true account of his instructions. His complaint in that affidavit was that to his shock, and dismay, his advocate disregarded his instructions and entered the impugned consents. He stated that he had filed a complaint before the Advocates Complaints Commission and attached a letter dated 16th February 2021 to that effect.
26. From the deposition of the Appellant, it is not disputed that he willingly instructed the firm of Nzaku & Nzaku Advocates to come on record for him in a matter where he was not a party, but in which he claimed he had owned the suit property at some point which he later sold.
27. In this appeal, while the Appellant argues that he instructed his advocate to secure his interests and which interests were at cross purposes with the interests of the 2nd Respondent, the Appellant was tight lipped on what exactly were his interests, which according to him were conflicting with the 2nd Respondent's interests. He did not make disclosure as to who, when and how he sold the suit property and the import of that sale on the overall case filed by the 1st Respondent. Besides, the Appellant did not state what, according to him was the 2nd Respondent's interest.
28. As the Appellant's case is that he instructed his advocate to secure his interest, but the advocate shockingly entered into the impugned consents; it was upon him to disclose the particulars of the instructions he gave to his advocates, which the advocate failed to comply with, because Section 107 of the *Evidence Act* provides that whoever alleges, is legally bound to prove their allegations. In the premises, I am not convinced that the Appellant has demonstrated that the interests of the Appellant and the 2nd Respondent were in conflict.
29. On whether there was fraud, I take the position that fraud must not only be pleaded but must also be strictly proved, and the standard of proof of fraud is slightly higher than in ordinary civil cases. Counsel for the Appellant invited this court to infer fraud on the basis that it was illogical that the Appellant would get into a suit they had not been sued, for purposes only of having judgment entered against them. From the pleadings on record, the Appellant confirmed that he sought on his own volition to be joined to the suit, to protect his interests. He however did not state why wanted to be jointed to a suit where he had not been sued and none of his interests were apparently at risk. He does not accuse his advocate of misadvising him to join the suit. I also note that at the core of the Appellant's grievance are the two consents recorded on 18th July 2019 and 2nd September 2020. However, the Appellant did not fault, disown or allege that the application for joinder dated 18th July 2019, and the grounds thereof in the supporting affidavit were contrary to his instructions. As earlier indicated in this judgment, the reasons given for the application for joinder dated 18th July 2019, were that the suit property was sold to the 2nd Respondent by the Appellant when the Appellant was not aware that the same property had



been sold by one Felix Kilonzo Maingi to the 1st Respondent. He also stated that his reason for seeking for joinder was to compensate the 1st Respondent with another plot.

30. I have perused the affidavit that supported the application for setting aside the impugned consents and there is nowhere, where the Appellant denounced the contents of his affidavit sworn on 18th July 2019. His only dispute is that the consent was without instructions. Having compared what is in the two consents and the contents of the affidavit sworn on 18th July 2019, it is my finding that the two are consistent and the only inference that can be made is that the position in the Appellant's affidavit of 18th July 2019, was the factual basis upon which the impugned consents were entered into as there was an admission of liability and a willingness to compensate the 1st Respondent in the affidavit of 18th July 2019; so that even if there was no consent, it was clear to the court below as to how the state of affairs described by the 1st Respondent in her plaint, came to be.
31. In the premises, as there is no inconsistency between the undisputed affidavit sworn on 18th July 2019 by the Appellant and the impugned consents, there can be no inference of fraud or collusion and therefore I find and hold that the Appellant failed to prove fraud or collusion.
32. The Appellant has argued that it would be illogical for him to get into a suit only for judgment to be entered against him. My position on that issue is that a consent judgment is a contract binding two parties and one party cannot rescind the contract merely because it is a bad bargain for them therefore the argument that the consent apparently does not make sense for the Appellant, because the same placed liability at the Appellant's door step is immaterial because what may appear to third parties including the court, as illogical, may be the most logical thing for the parties to do as between the parties since it is only them who are privy to the finer details of all the matters that touch on the dispute.
33. In the case of National Bank of Kenya Ltd v Pipe Plastic Somkolit (K) Ltd & Another [2011] eKLR, the court emphasised the import of a contract, in the following terms;

It was clear beyond peradventure, that same for those special case where equity might be prepared to relive a party from a bad bargain, it is ordinarily no portion of equity's function to allow a party to escape from a bad bargain.
34. Having found that the impugned consents were entered into by a firm of Advocates who had voluntarily been instructed by the Appellant, I find that the same are binding on the Appellant, who was the principal and his advocates were merely the agents, and therefore the acts of an agent binds the principal.
35. In the premises, this court takes the view that herein were entered into by counsel lawfully instructed to act for the Appellant in the matter, and the Appellant having not faulted the grounds for joinder application which are consistent with the terms of the consents, and as he was unwilling to disclose material facts in the application for setting aside consent judgment, I agree with the findings of the trial court that the Appellant was dishonest and failed to meet the threshold for setting aside a consent judgment.
36. There being no reason to interfere with the findings of the trial court, this court finds and holds that this appeal fails for lack of merit and the same is hereby dismissed with costs to the 1st Respondent.
37. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI



JUDGE

In the Presence of;

Mr. Omari for Appellant

Mr. Odhiambo for 1st Respondent

Ms Josephine – Court Assistant

