



REPUBLIC OF KENYA



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**Mbugua v Mbugua & 5 others (Civil Case 11 of 2019)
[2022] KEHC 11912 (KLR) (Commercial and Tax) (18 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11912 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 11 OF 2019
WA OKWANY, J
AUGUST 18, 2022**

BETWEEN

DANIEL MWANGI MBUGUA APPLICANT

AND

ISAAC GICHIA MBUGUA 1ST RESPONDENT

JOSEPH MBAI MBUGUA 2ND RESPONDENT

NDUNDE INVESTMENTS LIMITED 3RD RESPONDENT

ELIZABETH WANJIKU MBUGUA 4TH RESPONDENT

CATHERINE WANJIRU MBUGUA 5TH RESPONDENT

GLADYS WANGARE MBUGUA NDOLO 6TH RESPONDENT

RULING

1. The 1st defendant/applicant herein Daniel Mwangi Mbugua filed the application dated October 12, 2021 seeking the following orders: -
 - 1) Spent
 - 2) Spent
 - 3) Spent
 - 4) This Honourable court hereby discharges, sets aside and/or reviews in its entirety the consent dated September 23, 2020



- 5) Pursuant to granting order 4 herein above, this Honourable court sets aside nullifies and voids any transactions pursuant to the consent dated September 23, 2020
 - 6) The firm of Munyasa & Company Advocates including any of its partners or employees therefrom be and is hereby disqualified from acting for the defendants or any other party forthwith in this matter.
 - 7) The firm of WC Wambugu & Co Advocates, including any of its Partners or employees therefrom, is hereby disqualified from acting for the Interested Parties or any other party forthwith in this matter.
 - 8) Costs be awarded in favour of the applicant.
2. The application is brought under sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* Cap 21, Order 9 Rule 9 and order 45 of the *Civil Procedure Rules 2010*, the Code of standards of professional practice and ethical conduct and all other enabling provisions of the law.
 3. The application is supported by the applicant's affidavit and is based on the following grounds:-
 - 1) On or about the September 23, 2020, the firm of Ahmed-Nasir Abdikadir & Co Advocates who were previously on record for the Applicant maliciously, unethically and unlawfully colluded with the Defendants and Interested Parties and recorded a Consent dated September 23, 2020.
 2. The impugned consent was filed and recorded without the applicants knowledge, instructions or authorization noting that the Applicant was even as late as September 25, 2020 still discussing the terms of any contemplated Consent with Ahmednasir Abdikadir & Co Advocates. The said firm of Ahmednasir Abdikadir & Co Advocates therefore misrepresented that it had instructions to enter and record the impugned Consent as an Order of the Court.
 - 3) After various unsuccessful attempts at seeking an update concerning the progress of the matter from the firm of Ahrnednasir Abdikadir & Co Advocates, the Applicant was constrained to personally peruse the Court file where he was most surprised and dismayed to discover that his then Advocates had already recorded the impugned Consent which did not reflect the Applicant's position in this matter.
 4. Various attempts at having the said firm of Ahmednasir Abdikadir & Co Advocates explain their unethical actions have been unsuccessful as the said firm has blatantly and arrogantly refused to share any documents justifying its unethical behaviour.
 5. It is clear that the said impugned Consent was entered and filed in bad faith noting that:-
 - a. This Honourable Court has No Jurisdiction to grant the Orders sought in the impugned Consent noting that:-
 - i. Any Orders concerning the distribution of a deceased person's Estate must be issued by the



Succession Court whose jurisdiction flows from Section 2 (Application of Act) of the Law of Succession Act Cap 160;

- ii. The parties hereto have No legal mandate to deal with any of the assets of the late Christine Mithiri Mbugua (Deceased) as no Grant of Letters of Administration Intestate has been issued in respect to her Estate in Succession Cause No 1493 of 2019. Thus the impugned Consent is a grave abuse of the Court process as it is tantamount to Intermeddling with the Deceased's Estate in breach of Section 45 (No intermeddling with Property of Deceased Person) of the Law of Succession Act;
 - iii. The Estate properties in Succession Cause No 1493 of 2019 do not constitute the subject matter of the suit herein and in any event any matters relating to the said properties are sub-judice the ongoing proceedings in Succession Cause No 1493 of 2019 which proceedings were not disclosed to this Honourable Court at the material time the impugned Consent was recorded; and
 - iv. The Advocates on record for the Applicant in Succession Cause No 1493 of 2019 being Messrs Walker Kontos Advocates, were at all material times neither involved nor aware of the impugned Consent despite the said Consent having a material bearing in the Succession matter;
- b. The firm of Ahmednasir Abdikadir & co Advocates had No Instructions from the Applicant to enter, file and record the impugned Consent in this matter;
 - c. In contradiction with Paragraphs (b) and (d) of the impugned consent there is no equal distribution of the company's assets as evidenced in the Schedules thereto.
- 6) Accordingly, the Applicant has filed a formal complaint against Ahmednassir Abdullahi, of the firm of Ahmednasir Abdikadir & Co. Advocates, at the Law Society of Kenya and the Advocates Complaints Commission which complaint is pending determination.
7. In the intervening period:-
- a. The Respondents have been maliciously attempting to enforce the impugned Consent to the Applicant's prejudice despite the pendency of these particular proceedings; and



- b. The respective Counsel on record for the Respondents and Interested Parties are in any event conflicted from acting against the Applicant noting that they have acted for the Applicant's family for many years regarding various matters some of which are highlighted below:-
- i. The firm of WC Wambugu & Co Advocates, including one of its Partners, Ms Wanja Wambugu, has previously acted on behalf of:-
- A. Ndunde Investments Limited where the Applicant is a Director and Shareholder, in the case of *Assumption Sisters of Nairobi Registered Trustees & another vs National Land Commission & 9 others* [2016] eKLR and
- B. The Applicant in his personal capacity and even received a payment of KShs 100,000 for services rendered.
- ii. The firm of Munyasia & Company Advocates, including one of its partners, Ms Caroline Munyasia, has previously acted for all the beneficiaries including the Applicant:-
- A. In Succession Cause No 1835 of 2011 -Estate of the late Moses Mwangi Mbugua which relates to the Deceased's late husband and where the Applicant is also a listed beneficiary therein. It is noteworthy that both the aforesaid Estate and this Estate have overlapping assets and interests; and
- B. Concerning Mbuchia Investments Limited and even received a partial payment from the Applicant for KShs 50,000k for services rendered.
- c. In the course of acting for the Applicant, the said firms were imparted with knowledge and confidential information material to the matters in contest in these particular proceedings;
- d. Therefore, the knowledge and information received by the firms of WC Wambugu & Co Advocates and Munyasia & Company Advocates acting as counsel for inter alia the Applicant herein is privileged by reason



of the confidentiality arising from the Advocate-Client relationship.

- e. The applicant has previously written to the said firms highlighting that they are conflicted from acting against him. However, the said firms have failed to heed to his concerns by ceasing to act against him in all Court matters including this particular Court matter
- f. SOPPEC-6 (Conflict of Interest) and SOPPEC-8 (Fidelity to the Law and Due Process) of the Code of Standards of Professional Practice and Ethical Conduct as enumerated in Gazette Notice Number 5212 issued on May 26, 2017 bars the firm of Messrs WC Wambugu & Co Advocates and Munyasia & Company Advocates from acting against the Applicant or any other party in this matter as they have now attempted to do; and
- g. Accordingly, I have filed Applications in Succession Cause No 1835 of 2011 and Succession Cause No 1493 of 2019 seeking similar Orders barring the said firms from continuing to act and remain on record in the highlighted matters. The said Applications are still pending determination in the highlighted matters.

Responses

- 4. The 4th respondent, Elizabeth Wanjiku Mbugua, opposed the application through her replying affidavit dated February 24, 2022 wherein she states that the 3rd respondent is a family company and that all the respondents are children of one Christine Mithiri Mbugua (deceased) who owned 25% shares of the company. She states that all the children had knowledge of the proposed distribution of the assets of the 3rd respondent even before the demise of their said late mother. She avers that the applicant issued full instructions to the firm of M/S Ahmednassir Abdikadir & Co Advocates to act for him in the instant suit. She states that the other shareholders had acted on the terms of the consent and are in possession of their respective properties.
- 5. She further states that the applicant has not demonstrated that the consent was entered into without his consent, and further; that the firm of M/S Ahmednassir Abdikadir & Co Advocates have not been enjoined in this suit and neither have they been given an opportunity to respond to the application.
- 6. The 1st respondent opposed the application through replying affidavit dated January 25, 2022 wherein he states that the consent did not amount to a distribution of the assets of the estate of the Late Christine Mirithi Mbugua. He contends that the firm of M/S Ahmednassir Abdikadir & Co Advocates was properly on record for the applicant and that it therefore had express and implied instructions to act for the applicant.
- 7. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the setting aside of the consent order dated September 23, 2020. The is also the issue of whether the law firms of Munyasia & Company and WC Wambugu & Company should be disqualified from acting for defendants and Interested Parties respectively.



8. The applicant seeks orders to discharge the consent dated September 23, 2020 and to nullify any transactions made pursuant to the said consent on the basis that the consent was recorded without his knowledge. The applicant maintained that he did not instruct his former advocates, M/s Ahmed-Nasir Abdikadir & Co Advocates to record the consent and argues that the said law firm acted unethically and unlawfully by colluding with the defendants and the Interested Party to record the consent. The applicant faults the firm of Ahmed-Nasir Abdikadir & Co Advocates for misrepresentation.
9. The 4th respondent, on the other hand, argued that the applicant did not demonstrate that the consent was entered into without his consent and that the applicant instructed the firm of M/S Ahmednassir Abdikadir & Co Advocates to act on his behalf in the instant suit.
10. The principles governing the setting aside the consent were discussed in the case of *Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd* [1982] KLR 485, where Harris, J 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.”
11. Further in *Flora N Wasike vs Destimo Wamboko* [1988] eKLR the Court stated:-

“It is now 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 *J M Mwakio vs Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983.”
12. From the above-cited cases, it is clear that whoever seeks to interfere with or challenge a consent judgment/order must show that the same was entered into through fraud or collusion, or that the agreement was contrary to the policy of the court, or that the consent was given without sufficient material facts.
13. In the present case, I note that the ground advanced by the applicant in seeking to set aside the consent judgment is that the consent was entered into by the advocate without his instructions thus amounting to misrepresentation.
14. I have perused the record and I note that parties had on various dates, prior to the recording of the consent, informed the court of their ongoing negotiations. The negotiations culminated in the consent letter dated September 21, 2020 written on the letterhead of M/s WG Wambugu & Company Advocates. I note that the said consent letter, which was addressed to the Deputy Registrar of this court, was signed by WG Wambugu & Company Advocates and Munyasia & Company Advocates for the respondents while the law firm of Ahmednassir & Abdikadir Advocates signed on behalf of the petitioner.



15. I further note that the consent was recorded and adopted as an order of the court on September 23, 2020 in the presence of Miss Wambugu and Munyasia for the respondent while Miss Ngugi appeared for Ahmednassir SC for the applicant herein.

16. In *Stephen Kasozi and 2 Others vs People's Transport Service* [1990-1994] EA 162 it was held that:-

“If the parties before the Court admit that one of the events has happened which gives the court jurisdiction, and there is no reason to doubt the bona fides of the admission, the Court is under no obligation to make further inquiry as to the question of fact: but apart from such admission the court cannot give effect to an agreement, whether by way of compromise or otherwise, inconsistent with the provisions of the Act...As a pure statement of principle a judge may intervene when a compromise is put forward to him, but that does not entirely describe the whole position...The Court may intervene if, for instance, the authority of one of the advocates is withheld by the client to enter into the compromise. It may be that the client himself objects in court, when he discovers what has happened. It would obviously be invidious for the Court to make any order arising out of that kind of misunderstanding. But there is clearly a limit to the Court's intervention...It is not generally for the Court to impose its idea of what is best for the parties. On the one hand the early dispatch of the litigation may be of great benefit to the parties, and on the other hand, the Court may well not be aware of all the circumstances of the parties, which if known, would incline the Court to accept the compromise. The one matter of which the Court must be sure, is that the parties entered into the agreement of compromise, and that that compromise was what they thought best suited themselves. It is therefore wise for the Court, to test the acceptance of the compromise, if that is possible, and there are many authorities relating to the precautions, which should be taken, when a consent judgement is entered...After a compromise has been put forward, the Judge ought not to think that his duty lies in examining the evidence because he had not recorded all the evidence. If the learned Judge had decided to intervene rightly or wrongly, in principle she should have said so at once, and rejected the compromise. The appellants might then have called further evidence to support their case, and the respondent could have offered its defence. Having apparently accepted the compromise, the parties could only have expected that judgement for the appellants would have been entered and the damages assessed. It was not right to take them by surprise and judge the matter on part of the evidence, without intervening to reject the compromise.”

17. Similarly, in *Diamond Trust Bank of Kenya Ltd vs Ply & Panels Limited & Others* Civil Appeal No 243 of 2002 [2004] 1 EA 31, Omollo JA held that:-

“Where the consent was written on the letterheads of the advocates there cannot have been undue influence by one side over the other and more so where the Respondents came to know of the Judgement almost immediately and yet did not come to court until some 5 months later after the grace period had run out...The burden on a party who alleges that there was in fact no consent or that the consent was invalid is a heavy burden...Advocates have ostensible authority to reach a compromise on behalf of their clients.”

On his part Githinji, JA stated that:-

“So long as a counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and has apparent authority to compromise all matters connected with the action...The compromise of a disputed claim made bona fide is a good consideration and the Court cannot interfere with it unless in



the circumstances which would afford a good ground for varying or rescinding a contract between parties...The legal consequences of recoding a compromise under Order 24 Rule 6 of the Civil Procedure Rules is that the decree is passed upon new contract between the parties superseding that original cause of action...The court has jurisdiction to set aside a consent judgement it is shown to have been based on an agreement induced by misrepresentation and the misrepresentation must be shown to have in fact influenced the representee into an agreement. The conduct of the parties since the compromise was recorded is a relevant consideration in an application to set aside a compromise. Excessive delay in making an application to set aside may be construed as an affirmation of the compromise depending on the circumstances of each case. If the representee having discovered the misrepresentation either expressly declares his intention to proceed with the contract, or does some act inconsistent with intention to rescind the contract, he is bound by his affirmation...Where the consent judgement impugned has been executed the Courts are less likely to set aside the consent judgement.”

18. The principle that emerges from the foregoing case is that an advocate on record has perceived authority to compromise a suit or consent to judgment, so far as the opponent is concerned.
19. From the evidence presented before this court, it is clear that the firm of M/S Ahmednassir Abdikadir & Co Advocates acted for the applicant at all material times. There is no evidence to show that the applicant had withdrawn his instructions to the said law firm at the time the consent was recorded. There is further, no evidence to show that there was fraud or collusion so as to warrant the setting aside the consent. I note that the instant application was filed one year after the consent was recorded and that no explanation has been given for the delay.
20. In the circumstances of this case, I am not satisfied that the applicant has made out a case for the granting of the orders sought in the instant application. The applicant has not shown that the advocates in question acted without his instructions or in an unethical/unprofessional manner. All material facts were known to the parties, who agreed to compromise the suit in clear and unequivocal terms that leave no room for any possibility of mistake or misrepresentation. It is also curious to note that the applicant has not indicated if he took any action against his lawyers for allegedly acting without his instructions.
21. I further find that the prayer to disqualify the listed firms of advocates from acting for the defendants and interested parties in this case is misconceived as it is not for the applicant to determine which law firms can represent his opponents in the case. Needless to say, the right of a party to legal representation of his choice is a constitutional right which cannot be taken away at the instance of another party.
22. In conclusion, I find that the application dated October 12, 2021 lacks merit and I therefore dismiss it with costs to the respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF AUGUST 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Otieno for Plaintiff/Applicant.

Mr. Kabu for Ms Wambugu for 1st , 2nd & 3rd Defendants

Court Assistant- Sylvia

