



**Colins t/a Akenga Kimutai & Associates Advocates v Yator & 2 others;  
Marakwet Development Association (Applicant) (Miscellaneous Civil  
Application 59 of 2022) [2023] KEELC 19204 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19204 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION 59 OF 2022**

**JM ONYANGO, J**

**JULY 27, 2023**

**BETWEEN**

**AKENGA COLINS T/A AKENGA KIMUTAI & ASSOCIATES  
ADVOCATES ..... RESPONDENT**

**AND**

**JOHN KIPCHUMBA YATOR ..... 1<sup>ST</sup> RESPONDENT**

**NIXON KIPCHIRCHIR TUM ..... 2<sup>ND</sup> RESPONDENT**

**THE KIPLOMBE GREENFIELD FARM GROUP ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**THE MARAKWET DEVELOPMENT ASSOCIATION ..... APPLICANT**

**RULING**

1. By a Chamber Summons dated 19<sup>th</sup> December, 2022 the Applicant filed an application seeking the following orders;
  - a. Spent
  - b. An order be and is hereby granted that the consent order given and issued on 5<sup>th</sup> December, 2022 be and is hereby set aside or varied by the court.
  - c. An order be and is hereby granted that the order given on 5.12 2022 and the consent contained in the Applicant’s Advocate’s letter dated 29<sup>th</sup> November, 2022 and forwarding letter dated 5<sup>th</sup> December, 2022 be stayed pending the inter partes hearing of the application.



- d. An order be and is hereby granted that the Applicant has no Advocate and client relationship with the Marakwet Development Association (MDA) by itself or its members including the 1<sup>st</sup> to 8<sup>th</sup> Petitioners in Eldoret ELC Petition No. 12 of 2020.
- e. Costs be provided for.
2. The application is anchored on the grounds set out on the face of the Chamber Summons and the Supporting affidavits of Samuel Kimosop Rotich, Paul Kasarokit Kipruto, Samuel Chemwelo and Nathan Oguye.
  3. In his affidavit sworn on 19<sup>th</sup> December, 2022 Samuel Kimosop Rotich deponed that he was the 1<sup>st</sup> Petitioner in Eldoret ELC Petition No. 12 of 2020 and he had authority to swear the affidavit on his own behalf and on behalf of the 1<sup>st</sup> to the 8<sup>th</sup> Petitioners in the Petition. That the petitioners and the 2<sup>nd</sup> Respondent in the Petition are members of Marakwet Development Association whose interests were endangered by John Kipchumba Yator, Elizabeth Cheruiyot and Allan Chelimo.
  4. He averred that the firm of Akenga Kimutai & Associates filed this matter and obtained an order without the consent, authority and knowledge of the 1<sup>st</sup> to 8<sup>th</sup> petitioners in ELC Petition No. 12 of 2020 against the 1<sup>st</sup> to 14<sup>th</sup> Respondents including the applicants herein.
  5. He further averred that the order issued on 5<sup>th</sup> December, 2022 pursuant to the letter dated 29<sup>th</sup> November, 2022 signed by the Applicant on one part and the Applicant's clients namely John Kipchumba Yator, Elizabeth Cheruiyot and Allan Chelimo needs to be set aside or varied as it was not valid nor was it binding on the members of Marakwet Development Association.
  6. He deponed that the dispute between the Petitioners and the Respondents in ELD ELC Petition No. 12 of 2020 was resolved through a consent order dated 20<sup>th</sup> April, 2022. Further, that the Petitioners and other members of Marakwet Development Association have never appointed the Applicant as their advocates.
  7. He averred that the Respondents, namely John Kipchumba Yator, Elizabeth Cheruiyot, Allan Chelimo and Kiplombe Greenfield Farm group are not the officials of and have never been given any authority to enter into any valid and binding agreement with Marakwet Development Association.
  8. In his affidavit, Paul Kasarokit Kipruto avers that he convened a meeting on 3<sup>rd</sup> December, 2022 during which he was elected together with Samuel Chemwelo and Christopher Cheruiyot Kangogo among other committee members to provide leadership and direction to the members of the Marakwet Development Association. The last meeting had been held on 3<sup>rd</sup> October, 2020 after they were served with Petition No. 12 of 2020. Before that the association had held a Special General Meeting on 2<sup>nd</sup> October, 2015.
  9. He denied that the members of the association had appointed the firm of Akenga Kimutai & Associates Advocates to represent them in the Petition and that the consent signed on 29<sup>th</sup> November, 2022 by Elizabeth Cheruiyot and Allan Chelimo and adopted by the court on 5<sup>th</sup> December, 2022 was entered into without the consent of the members of Marakwet Development Association.
  10. In opposing the application, Karanja Francis Advocate of AK Advocates LLP, formerly Akenga Kimutai & Associates Advocates swore an affidavit dated 31<sup>st</sup> January, 2023 in which he averred that the application is an abuse of the court process, an afterthought and made with utmost mala fides to the detriment of the firm of Akenga Kimutai & Associates Advocates.



11. He averred that through resolution 6 dated 5<sup>th</sup> September 2020 of a Special General Meeting held by Marakwet Development Association, the firm of Akenga Kimutai & Associates Advocates was appointed to represent the 1<sup>st</sup>, 3<sup>rd</sup> to 5<sup>th</sup> Respondents in a suit filed by the firm of Cheptarus & Co Advocates on behalf of the petitioners being ELD ELC Petition No. 12 of 2020. A copy of the said resolution is annexed to the affidavit as annexure FK1.
12. It was his further averment that none of the partners or employees of Akenga Kimutai & Associates Advocates have an interest in the suit land and the only relationship is that of client and advocate unlike the applicant's counsel who was claiming a portion of the suit land.
13. He averred that the said firm had been representing the Applicant, attending hearings and mediation sessions and they had exchanged correspondence with the Applicants and the issue of whether or not they were authorized to represent Marakwet Development Association had never arisen. That they did not solicit for work from the Association and they were approached by the officials of the association.
14. He averred that the fees was based on the value of the land which measures 700 acres at the rate of Kshs.6 million per acre and it was negotiated and agreed at Kshs.30,200,000/= after which they recorded a consent on 5<sup>th</sup> December, 2022.
15. He pointed out that the Applicant's advocates had been representing the Petitioner in Petition No. 12 of 2020 yet they now seemed to suggest that they were representing the Marakwet Development Association which is the 5<sup>th</sup> Respondent. That they had dealt with the Chairperson, Secretary and Treasurer of the association who had given them instructions on behalf of the association.
16. In response to the Replying affidavit, Samuel Kimosop Rotich, the 1<sup>st</sup> Petitioner in ELC Petition No. 12 of 2020 swore a Supplementary affidavit dated 21<sup>st</sup> February 2023 in which he deponed that Marakwet Development Association was dissolved with effect from 14<sup>th</sup> May, 2018 without the knowledge of its members including the officials and that they had only learnt about the dissolution after the consent order was issued on 20<sup>th</sup> April, 2022.
17. He disowned the extract of the resolution dated 5<sup>th</sup> September, 2020 passed in the Special General Meeting held on 3<sup>rd</sup> October, 2020 and the consent letter dated 29<sup>th</sup> November, 2022 signed by John Kipchumba Yator, Allan Chelimo and Elizabeth Cheruiyot claiming that the said officials were not elected as officials of the association. He reiterated that the association had not instructed the firm of Akenga Kimutai & Associates Advocates and stated that the said firm represented John Kipchumba Yator and his allies and not Marakwet Development Association. He termed the resolutions of 5<sup>th</sup> September, 2020 as fake and stated that this is what led to the resignation of the Deputy County Commissioner as a signatory to the association's bank account by his letter dated 16<sup>th</sup> December, 2022.
18. In his Further Affidavit sworn on 24<sup>th</sup> March, 2023 Francis Karanja Advocate averred that the Respondents sought to re-litigate a matter where the parties had entered into a consent which was already being implemented. He claimed that the application had been filed by strangers who did not exist as their clients. He averred that the client-Advocate relationship was borne out of Petition No. 12 of 2020 where Marakwet Development Association was sued by Samuel Kimosop Rotich and others. He contended that since he recognized that one of the parties herein was a society, he obtained minutes and the resolution of the association to prove that they had authority to appoint the applicant as their advocate. They also obtained a copy of the society's constitution to find out how they were governed before they filed their Notice of Appointment of Advocates.
19. He stated that he is a stranger to the assertion that Marakwet Development Association had been dissolved earlier as they had been furnished with a copy of the Certificate of Registration of the Society



and they had no reason to conduct a search to establish the status of the society. He wondered why the issue of the representation had not been raised earlier when they filed their Notice of Appointment in the Petition. He pointed out that the 1<sup>st</sup> Respondents and other respondents who gave him instructions to act for the Association had not denied that they instructed the firm of Akenga Kimutai & Associates Advocates to act for them. It was his further contention that in the pleadings in petition No. 12 of 2020 the 1<sup>st</sup> Respondent and others were described as an officials of Marakwet Development Association, yet the applicant was now claiming that they are not officials. He asserted that the consent was entered into after lengthy deliberations and there was no fraud or misrepresentation to warrant the same being set aside.

20. The application was canvassed through written submission and both parties filed their submissions which I have considered.
21. The main issue for determination is whether the consent order issued on 5<sup>th</sup> December, 2022 ought to be varied or set aside.
22. The principles for setting aside a consent order or judgment are now settled.
23. In the case of *Hirani v Kassam* [1952] 19 EACA 131 the Court of Appeal held as follows: -

“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 *J. M. Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v 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.”

24. In *Flora N Wasike v Destimo Wamboko* [1982-1988] 1 KAR 625 wherein Hancox J A quoted a section from Judgments and Orders (7th edition) volume 1 page 124 which was quoted in *Hiran v Kassam* [1952] 19 EACA 131, as follows;

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

25. In the instant case, it is common ground that the firm of Akenga Kimutai & Associates Advocates represented John Kipchumba Yator, Nixon Kipchirchir Tum, The Kiplombe Greenfield Farm Group and Marakwet Development Association, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents in Petition No. 12 of 2020. It is also not in dispute that the said suit was settled through a consent judgment entered on 20<sup>th</sup> April, 2022 and issued on 2<sup>nd</sup> September, 2022 between the firm of Akenga Kimutai & Associates Advocates and the officials of Marakwet Development Association.
26. Following the entry of the said consent judgment, the firm of Akenga Kimutai & Associates filed their Advocate-client Bill of costs in the sum of Kshs. 140,155,866 on 11<sup>th</sup> November, 2022. On 29<sup>th</sup> November, 2022 the firm of Akenga Kimutai & Associates Advocates and John Kipchumba Yator,



Elizabeth Cheruiyot and Allan Chelimo in their capacity as the officials of The Marakwet Development Association, entered into a consent that the Advocate- Client Bill of Costs be taxed at Kshs.30,200,000/= and the said consent was endorsed by the Deputy Registrar as an order of the court on 5<sup>th</sup> December, 2022.

27. It is the latter consent that is the subject of this ruling. The Applicant claims that the officials who signed the consent had no authority to instruct the firm of Akenga Kimutai & Co Advocates on behalf of Marakwet Development Association as they were not the duly elected officials of the association. It has further been contended that unbeknownst to the members, the association had been dissolved in 2018 and the 1<sup>st</sup> Respondent and other officials therefore lacked the capacity to instruct the advocates on behalf of the Association.
28. It is interesting that the Applicant is not challenging the consent judgment through which Petition No. 12 of 2020 was settled and it has only mounted a challenge in respect of the Bill of Costs. Be that as it may, I will proceed to determine whether the Applicant has satisfied the requirements for setting aside a consent.
29. In *Flora N Wasike v Destimo Wambuko* (*supra*) the Court of Appeal stated thus:

“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”

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.

In *Kenya Commercial Bank Limited v Benjob Amalgamated Limited & Another* [1998] eKLR this Court cited a passage in The Supreme Court Practice 1976 (Vol.2) paragraph 2013 page 620 stating:-

"Authority of Solicitor - a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (*Re Newen*, [1903] 1 Ch pp 817,818; *Little V Spreadbury*, [1910] 2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice - see *Welsb v Roe* [1918 - 9] All ER Rep 620."



Finally, in the Ugandan case of *Lenina Kemigisha Mbabazi Star Fish Ltd* the Court stated:

“The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as 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 apparent authority to compromise all matters connected with the action.”

30. In his Further affidavit Francis Karanja Advocate annexed a Notice of a Special General Meeting, and extract of resolutions on the Special General Meeting indicating that the elected office bearers of the association were mandated to appoint the firm of Akenga Kimutai & Associates to represent the 1<sup>st</sup>, 3<sup>rd</sup> to 5<sup>th</sup> Respondents ( in Petition No. 12 of 2020). The said resolution clothed the officials with the authority to instruct the firm of Akenga Kimutai & Associates to act for Marakwet Development Association upto the time the case was settled.
31. The revelation that the association was dissolved without the members knowledge has come rather late in the day after legal services had been rendered and the bill of costs agreed upon. There is nothing to suggest that there was fraud, collusion or misrepresentation on the part of the officials of the association. The application appears to be a ploy by the association to evade payment for the legal services provided by the firm of Akenga Kimutai & Associates.
32. I am of the considered view that the application does not satisfy the criteria for setting aside a consent judgment. Accordingly, I find no merit in the application and I dismiss it with costs to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF JULY 2023.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of;**

1. Mr. Cheptarus for the Applicant
2. No appearance for the Respondent

Court Assistant: A. Oniala

