



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

CIVIL DIVISION

CIVIL APPEAL NUMBER 2 OF 2020

ORGANICS 4 ORPHANS INTERNATIONAL.....APPLICANT

VERSUS

THRIVE FOR GOOD FOUNDATION.....1ST RESPONDENT

DALE PATRICK BOLTON.....2ND RESPONDENT

LINDA BOLTON.....3RD RESPONDENT

STEVE PIPPIN.....4TH RESPONDENT

DAWSON MUDENYO.....5TH RESPONDENT

AMBROSE LEMAIYAN MOOTIAN.....6TH RESPONDENT

ESTHER SIRET.....7TH RESPONDENT

SCOLA NDUKU MUNYAO T/A

MUNYAO KAYUGIRA & CO. ADVOCATES.....8TH RESPONDENT

MORRIS MUTUA KIMULI T/A

M.M.KIMUL & CO. ADVOCATES.....9TH RESPONDENT

OFFICER COMMANDING KITALE POLICE STATION.....10TH RESPONDENT

RULING

The Application

1. The application coming up for determination is the Notice of Motion dated 15th July, 2020 in which the applicant sought the following orders:-

a. That this Honourable Court be pleased to review the consent orders entered on the 30th day of June 2020.

b. That the Notice of Change of advocates filed by Odhiambo Opar & Co. Advocates on the 30th day of June 2020 be expunged from the record.

c. That this Honourable Court be pleased to set aside the consent recorded by Odhiambo Opar & Co. Advocates and Geoffrey Otieno & co. Advocates and all consequential orders made withdrawing the claim against the

defendants/respondents herein on the 30th day of June 2020.

d. That the plaintiff's suit and Notice of Motion application be reinstated for hearing and determination on merits.

e. That the interim orders given on the 9th June 2020 be reinstated and confirmed as prayed in the application dated 8th June, 2020.

f. That the costs of the application be provided for.

2. The application was supported by the affidavit of Boaz Oduor Ogollah sworn on 15th July, 2020 and on the grounds that:-

i. Consent was recorded through an underhand deal between Steve Odhiambo Opar & Co. Advocates and Geoffrey Otieno.

ii. Steve Odhiambo Opar is a stranger and was not a duly appointed or retained advocate on behalf of the plaintiff.

iii. The consent was obtained by fraud and designed to obstruct the course of justice.

iv. The consent was a willful misrepresentation which is contrary to the policy of the court.

v. The 8th and 9th defendants have previously obstructed justice in three cases filed in Kitale Courts, in the same fashion.

vi. The suit was withdrawn contrary to public policy.

vii. The suit was withdrawn in contravention of the code of ethics of advocates.

3. Though the application was duly served upon the respondents, they neither filed a response nor attended court during the inter partes hearing. The application was thus undefended and proceeded ex parte.

Submissions

4. Counsel for the applicant Mr. Kraido argued that the consent filed herein was fraudulent and was designed to obstruct the cause of justice since the advocate who sought to take over conduct of the case was unknown to plaintiff. He stated that the advocate was never appointed by the plaintiff and therefore had no instructions.

5. Mr. Kraido further stated that the notice of change filed by the said advocate was a misrepresentation to the court and clearly went against the public policy of the court which is to hear and determine cases on their merit.

6. He also stated that the applicant had met the threshold for the orders of review sought in the notice of motion by showing that the suit was not validly withdrawn or compromised and that what took place was an underhand deal between the defendant and the advocate who purported to bring this matter to an end.

7. Mr. Kraido further submitted that there was no response from the respondent and thus the application was not opposed despite the respondents having been served with the same. The applicant's allegations that the compromise or withdrawal of suit was unlawful have therefore not been controverted.

8. Counsel for the applicant also prayed that Steve Odhiambo Opar Advocate be personally condemned to pay the costs of the application since his acts are both illegal and unprofessional as they contravene **Rule 7 of the Advocates Rules** which requires the incoming advocate to notify the outgoing advocate of the change for purposes of confirming if there is any objection by the outgoing advocate about to take over.

Applicable Principles

9. In the case of *East African Portland Cement Company Limited v Superior Homes Limited [2017] eKLR* at Paragraph 17, the Court stated that:-

“A consent judgment or order has the effect of a contract and can only be set aside on grounds which would justify setting aside of a contract. Copious reference to several authorities establishing the principle was made, including: Flora Wasike vs Destimo Wamboka (1988) 1 KAR 625 and Samson Munikah t/a Munikah & Company Advocates vs Wedube Estates Limited [2007] eKLR 13. On the basis of these authorities, the court has the power to set aside or review a consent decree and can only do so upon proof of fraud, collusion, any other agreement, initial lack or ignorance of material facts.”

10. See also *James Muriungi M'mwirichia v Agnes Nthangi Mwirichia Bundi [2014] eKLR*

“A consent order at any rate can be set aside if the applying party satisfies the requirements as set out under order 45 of Civil Procedure Rules. That the applicant has to establish discovery of new and important matter or evidence or on account of some mistaken or error apparent on the face of the record or for any other sufficient reason and an application should be made without unreasonable delay. The Court of Appeal in several decisions has set out the conditions under which a consent order

can be set aside”

Determination

11. The provisions of **Order 45** was clearly brought out in the case of ***Skool Enterprises Limited versus Housing Finance Company of Kenya Limited & 3 others [2017] eKLR***. **Rule 1 of the said order provides as follows:-**

“45(1) any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

12. **In this case, I am satisfied that the provisions of Order 45 rule 1 of the Civil Procedure Rules have been satisfied and in** the circumstances, the Notice of Motion dated 15th July 2020 has merit. The application be and is hereby allowed as prayed. The consent orders dated 30th June, 2020 be and are hereby set aside to pave way for the hearing of the suit on the merits. The applicant has proved mischief and fraud on the part of the respondents. The costs of this application shall be personally borne by Steve Odhiambo Opar advocates.

13. **It is so ordered.**

Ruling delivered, dated and signed in open court here at Kapenguria on this 5th August 2020

RUTH N. SITATI

JUDGE

In The presence of:-

No appearance for plaintiff/applicant

No appearance for respondents

Mr. W. Juma - Court assistant