



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.413 OF 2017

MATHENGE GITONGA & CO. ADVOCATESPLAINTIFF

VERSUS

KABATIA & CO. ADVOCATESDEFENDANTS

CHARLES SC. KIBERUT1ST INTERESTED PARTY

JULIUS KIPKOECH BOLEI.....2ND INTERESTED PARTY

CHEPKOK CHEMJOR.....3RD INTERESTED PARTY

KIPCHILIS BARGORET.....4TH INTERESTED PARTY

ALFONSE KIPRUTO CHESEREM &

CORNELIUS K, CHESEREM.....5TH INTERESTED PARTY

JOHN K. CHELELGO.....6TH INTERESTED PARTY

CHEPYATOR CHEPKWONY.....7TH INTERESTED PARTY

JOHN CHELELGO.....8TH INTERESTED PARTY

ESTHER GABON ROTICH.....9TH INTERESTED PARTY

STEPHEN K. KIPRONO.....10TH INTERESTED PARTY

NICHOLAS KOMBO KANGOGO.....11TH INTERESTED PARTY

STEPHEN K. CHEMITEI.....12TH INTERESTED PARTY

RICHARD K. CHEBIL.....13TH INTERESTED PARTY

MOSES KIPTUI CHESEREM.....14TH INTERESTED PARTY

ALBERTINE KIPKEMEI.....15TH INTERESTED PARTY

DAVID CHERUTICH.....16TH INTERESTED PARTY

FRANSIS KOKOYO CHESAINA.....17TH INTERESTED PARTY

RAYMOND NG'ETICH18TH INTERESTED PARTY

MICHAEL B. TOROITICH	19 TH INTERESTED PARTY
LWANGA KIPCHUMBA TALLAM	20 TH INTERESTED PARTY
JOSEPH C. CHELUGUI.....	21 ST INTERESTED PARTY
RYMOND CHEBII.....	22 ND INTERESTED PARTY
JOHN CHEMJOR.....	23 RD INTERESTED PARTY
JUMA CHESARO.....	24 TH INTERESTED PARTY
ROTICH DINA	25 TH INTERESTED PARTY
WILLIAM K. LOTIS.....	26 TH INTERESTED PARTY
JOHN KAPSIR KIPTUL.....	27 TH INTERESTED PARTY
HENRY ROTICH.....	28 TH INTERESTED PARTY
AUGUSTINE BARGORET.....	29 TH INTERESTED PARTY
WILSON KELWON KIBET.....	30 TH INTERESTED PARTY
ROSE K. KIPRONO.....	31 ST INTERESTED PARTY
JOHN K. CHEPKWONY.....	32 ND INTERESTED PARTY
KIPRUTO KENDAGOR.....	33 RD INTERESTED PARTY
JOSEPH KIBOR CHEMJOR.....	34 TH INTERESTED PARTY
CLARA TERIKI KIPLAGAT.....	35 TH INTERESTED PARTY
MAGDALENE J. KIGEN.....	36 TH INTERESTED PARTY
MUSA KIPTURMET.....	37 TH INTERESTED PARTY
PHILIP CHESEREK.....	38 TH INTERESTED PARTY
CLEMENT KIPTOO CHEPKURUI.....	39 TH INTERESTED PARTY
SOLOMON C. KANDIE.....	40 TH INTERESTED PARTY
JOSEPH KAMUREN CHELAGAT KIPKEBU &	
JOSPHINE JEROTICH KIPKEBUT	41 ST INTERESTED PARTY
MICHAEL K. KIMALEL.....	42 ND INTERESTED PARTY

RULING

1. This ruling is in respect to two preliminary objections raised in respect of two applications filed by the interested parties namely:-

a) The application dated 26th May 2019 in which the applicants/interested parties seek orders that:

1. Spent

2. That the 1st up to 42nd interested parties herein be and are hereby joined in this suit as interested parties.

3. *That the consent order entered on 28th day of February 2019 and issued on 5th day of March, 2019 be and is hereby opened for renegotiation with representation or interested parties and/or be set aside.*

4. *That this honourable court be pleased to issue an order that the sum of Kenya shillings one Hundred and Thirty Nine Million Three Hundred and Forty Five Thousand (Kshs 139,345,000) held by Mathenge Gitonga & Co. Advocates together with the sum of Kenya Shillings One Hundred and Ninety-Seven Million Five Hundred and Seventeen Thousand Eight Hundred and Seventeen (Kshs 197,517,817.00) held in joint names of the advocates be transferred to an interest earning account to be held in the joint names of the three advocates representing the parties.*

5. *That the firm of Chesikaw & Kiprop Advocates be granted leave to appear for the interested party.*

b) The application dated 4th June 2019 wherein the applicants interested parties seek orders that:-

a) Spent

b) That the Honourable court be pleased to reinstate Civil Case No. 413 of 2017.

c) That this Honourable court be pleased to enjoin John Wataki, Paul Kamau Wataki, Joseph Chemutai Chelugui, Margaret Wangamwa Maina and Solomon Cheopkangor Kandie as interested parties to this suit.

d) That the court be pleased to revoke the consent entered into the by the plaintiff and the defendant and subsequently recorded as a consent order filed in court of the 23rd February 2019.

e) That the cost of this application be borne the defendants.

2. A summary of the applicants' case is that they were the plaintiff's clients in a land purchase transaction in which the defendant made a professional undertaking to the plaintiff to secure the purchase price which undertaking was not honoured thereby leading to the filing of the instant suit to enforce the professional undertaking. Judgment was subsequently entered in favour of the plaintiff.

3. At the execution of the judgment, however the plaintiff and the defendant entered into a consent which consent is now the subject of the two applications.

4. The applicants/interested parties contend that the plaintiff did not seek their consent at the time he recorded consent with the defendant. In response to the two applications, the plaintiff/respondent filed 2 similar notices of preliminary objection dated 10th June 2019 and 19th June 2019 in which he set out the following grounds of objection.

1. The suit herein was brought by way of an originating summons for enforcement of a professional undertaking issued by one advocate (defendants) to another (the plaintiff).

2. The applicants are not advocates of the High Court, hence they have no locus standi in the present proceedings at all.

3. The substantive proceedings in the High Court was finalized on 18th October 2018, when the High Court entered judgment in favour of the plaintiff. The decree has been enforced. The High Court is functus officio as there is nothing pending for determination.

4. The present application is incompetent in that the applicants have sought for substantive prayers without having been granted the leave of court to be joined in the proceedings.

5. The consent dated 28th February 2019 being impugned by the applicants was entered into between the two parties in the proceedings. The applicants not having been parties in the proceedings as at 28th February 2019 have no locus standi to urge the application herein.

6. The application is speculative and misconceived in that the loss of interest presumed has not happened. This honourable court cannot issue orders in vain and for a non-existent wrong.

5. The applicants filed a response to the preliminary objection as follows:-

1. That the intended interested parties application does not raise issues which the court had already determined in the main suit but seeks to set aside a consent order that the parties entered after judgment.

2. That the plaintiff ought to have sought instructions from the intended interested parties before recording the consent dated 28th February 2019.

3. That advocates do not act on their own volition but on instructions from their clients.

4. That the honourable court has the authority to hear and determine the application within the provisions of Order 45 Rule 1 of

the Civil Procedure Rules 2010.

5. That the plaintiff was acting on the instructions of the intended interested parties.

6. That the professional undertaking the subject matter of this suit is purely for the benefit of the intended interested parties.

7. That the consent order entered on 28th February 2019 adversely affects the intended interested parties since they did not give instructions on the same.

8. That on the principles set out in the decision of the Supreme Court of Kenya in *Trusted Society of Human Rights Alliance Vs Mumo Matemo and 5 others* [2015]eKLR this honourable court is obliged to do justice to the intended interested parties under the Provisions of Article 48 and 159(2) (a) and (b) of the Constitution.

9. That enjoining the intended interested parties will not occasion any prejudice to the parties.

6. Parties thereafter filed written submission to the preliminary objection.

Respondent's submissions

7. M/S Kyalo & Associates Advocates for the plaintiff submitted that following the delivery of the judgment on 18th October 2018 and execution thereof having ensued by way of garnishee proceedings that led to the impugned consent order of 23rd February 2019, the court became *functus officio* and is therefore incapable of pronouncing itself further in respect to the substantive suit.

8. It was submitted that the intended interested parties cannot purport to have an interest in a matter that has already been adjudicated upon and the decree perfected.

9. It was also submitted that the entered parties have no locus standi to be enjoined in these proceedings in view of the fact that the nature of a professional undertaking is that it only binds the advocate who made it as against the advocate in whose favour it was made. For this argument, counsel relied on the decision in the case of *Daniel Ochieng Ogola T/A Ogola Okello & Company Advocates v George Mugoye Mbeya t/a Mugoye & Associates Advocates & Another* [2016] e KLR wherein the case of *D.K. Thuo & Co. Advocates v Njagi Wanjeru & Co. Advocates* HCCC No. 209 of 2008 and the court held:-

“In the first instance, it should be noted that the professional undertaking was between the advocates, and none of the clients was party to the undertaking.....The undertaking was of a purely professional nature between the advocates as advocates, and is enforceable between them as such.”

10. It was submitted that the interested parties are not capable of becoming substantive parties to a suit for enforcement of a professional undertaking.

11. Counsel further submitted that no sufficient grounds had been advanced or the setting aside of the consent order of 18th October 2018 and the prayers sought by the applicants are speculative.

Intended interested parties' submissions.

12. M/S Chesikaw & Kiprop advocates for the intended interested parties submitted that the doctrine of *functus officio* is not applicable in this case.

13. For this argument, counsel relied on the decision in *Raila Odinga & 2 Others v Independent Electoral Boundaries Commission* [2013] e KLR in which the doctrine of *functus officio* was discussed.

14. Counsel submitted that the interested parties have the *locus standi* to be enjoined in this case in view of the fact that they have shown an identifiable stake in the suit as they are the ones who instructed the plaintiff in the matter.

15. M/S Waweru Kihara & Co. Advocates, also acting for the intended interested parties, reiterated the submissions of M/S Chesikaw & Kiprop advocates on the issues of the court being *functus officio* and locus standi of the interested parties.

16. Counsel submitted that the preliminary objection falls short of the threshold set for a solid preliminary as were outlined in the case of *John Mundia & Others v Cecilia Muthoni Njoroge & Another* [2016] eKLR. It was submitted that the preliminary objection is not strictly on matters of law and is therefore unmerited.

Analysis and determination

17. I have carefully considered the preliminary objection raised to the intended interested parties' applications dated 26th May 2019 and 4th June 2019.

18. I have also considered the intended interested parties' response to the preliminary objection and the parties' submissions together with the

authorities that they cited. The main issue for determination is whether the preliminary objection is merited. Underlying the main issue are the questions whether the court is functus officio in this matter, whether the intended interested parties have the locus standi to file the applications and lastly, whether sufficient grounds have been set out for the setting aside of the consent order recorded on 27th February 2019.

19. The court considered the definition of a preliminary objection in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** and held as follows:

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

This was followed up by the judgment of **Sir Charles Newbold** in the same case:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

20. This court must now consider whether the issues raised in this Preliminary Objection are matters of fact or law. I have perused the reasons advanced in the Preliminary Objection. I find that the issues of locus standi, setting aside of consent orders and whether upon the conclusion of a case a court becomes *functus officio* are all points of law which this court can determine at this preliminary stage.

21. In the present case, it was not disputed that the case between the plaintiff and the defendant was determined through a judgment recorded in favour of the plaintiff and that the matter then proceeded for the execution of the decree through garnishee proceedings which were subsequently compromised through the impugned consent of 27th February 2019.

22. The intended interested parties contend that the plaintiff entered into the consent without seeking their instructions. The question that arises is if this court is *functus officio* following the entry of the judgment and the consent on the issue of execution. I have perused the impugned consent order and I note that it is worded as follows:-

1. That the warrants of attachment, the proclamation notice dated 13th February 2019 and subsequent removal of the attached goods by the 2nd respondent, Peter Muchume Gachie T/A Regent Auctioneers and or any other agent of the 1st respondent be and is hereby lifted.

2. That the parties hereby agree that the auctioneer shall proceed to tax his bill of costs.

3. That the sum of Kshs 139,345,00.00 deposited by Kagwe Tea Factory at Equity Bank, Community Supreme Branch, Account number 018xxxxxxxxx, in the joint names of KMK LAW LLP and TRIPLEOKLAW LLP be and is hereby released to the plaintiff and the transferred to the following bank account.

Account Name: Mathenge Gitonga Advocates.

Bank Name: Equity

Bank Branch: Kilimani Supreme

Account Number: 147xxxxxxxxx

4. That the plaintiff, Mathenge Gitonga & Co. Advocates, shall hold the said sum of Kshs 139,345,000,00 in the said account pending the hearing and determination of the defendant's intended Appeal to the Court of Appeal against the judgment of the court delivered on 24th October 2018. The plaintiff undertakes not to release the said sums to the individual vendors.

5. That the parties hereby agree to party-party costs in the suit in the sum of Kshs 6,058,133.00 ("the Agreed Costs") which amount shall be paid from the joint bank account. The plaintiff authorizes the transfer of the agreed costs to the plaintiff's advocate whose bank account details shall be provided upon the consent being adopted as an order of the court. The said costs shall abide the outcome of the intended appeal.

6. That notwithstanding (5) above, the plaintiff shall have the option of taxing his bill of costs within a reasonable time. If the costs taxed are lower than the agreed costs, the plaintiff shall refund the difference to the defendants, and if the costs taxed are higher than the agreed costs, the defendant shall pay the difference to the plaintiff.

7. That the balance of Kshs 197,517,817.00 held at Equity Bank, Community Supreme Branch, account number 018xxxxxxxxx shall be transferred to Equity Bank, Kilimani branch to be held in the joint names of the advocates for the parties pending the hearing and determination of the defendant's intended appeal to the Court of Appeal against the judgment of the court delivered on 24th October 2018 which amount plus interest shall be released to the successful party upon the determination of the appeal.

8. That the plaintiff's application dated 22nd February 2019 ("Garnishee application") seeking to attach the sum of Kshs 278,690,000.00 in Equity Bank Limited, Supreme Centre Branch number 018xxxxxxxxx be and is hereby marked as withdrawn.

9. That the Garnishee, Equity Bank Limited, in the Garnishee application shall be served and shall comply with this order.

23. The respondent argued that the court is *functus officio* upon the conclusion of the case and cannot be called upon to open up the matter. In *Telkom Kenya Ltd v John Ochanda* [2014] e KLR, the Court of Appeal, while relying on *Jersey Evening Post Ltd v AI Thani* [2002] JLR held as follows:

"A court is *functus* when it has performed all its duties in a particular case.....proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

24. In the present case, I find that judgment having been entered in the suit and execution of the decree undertaken through garnishee proceedings that culminated in the impugned consent of 27th February 2019, the court is *functus officio* and cannot reopen the case on the basis that the intended interested parties were not consulted when the consent was recorded. My take is that the allegation that the plaintiff entered into the consent without the clients' instructions is a new matter which the clients can take up with the plaintiff in a separate suit.

25. The bottom line is that the dispute before the trial court was a case pitting the plaintiff against the defendant for breach of professional undertaking for which the plaintiff was within his rights to enter into a consent with the defendant if he deemed it to be the most appropriate cause of action.

26. Turning to the orders to revoke/set aside the impugned consent order, I note that a simple reading of the terms of the order shows that not only was judgment recorded in favour of the plaintiff following the defendant's breach of his professional undertaking, but that the issue of execution for the decretal sum was also settled with the depositing of the decretal sum in the joint accounts of KMK Law LLP and Tripple OK Law LLP pending an intended appeal.

27. The question which arises is whether this court can set aside or revoke the said consent order. The conditions under which a court can set aside a consent order or judgement are set out in **Setton on Judgments and Orders** (7th Edn), Vol.1 pg 124 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...

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."

28. The above passage was adopted by the Court of Appeal in *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266 at 269 in which it was held:

"A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

29. 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.

30. In the instant case, I find that the applicants did not place any evidence to show illegality in the consent giving rise to this application save for the claim that they were not consulted before the consent was recorded. I find that the decision in the *Kenya Commercial Bank Ltd v Specialised Engineering Co.* case (supra) is applicable in this case. One can say that the applicants' advocate had their implied general authority to enter into the impugned consent as it has not been shown that a contrary position was brought to the attention of the defendants herein. Furthermore, it has not been proved, by the applicants, that there was connivance, misrepresentation or fraud at the time the consent was recorded so as to justify the applicants' prayer for its revocation.

31. Turning to the issue of the applicants have the locus standi to file the instant application, I note that Order 1 Rule 10(2) of the Civil Procedure Rules states;

"The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be

struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.

32. Black's Law dictionary defines an interested party as *a party who has a recognizable stake (and therefore standing) in a matter*. In the present case, the applicants contend that they have an interest in the matter as the defendant's clients. I therefore find that they have the locus standi to file the application. However, my finding on the issue locus standi notwithstanding, I have already found that the court is *functus officio* and that the application does not meet the conditions for setting aside consent orders.

33. The upshot of what I have stated hereinabove is that the two preliminary objections are merited and I therefore allow them with the result that the applications dated 26th May 2019 and 4th June 2019 are hereby struck out with costs to the plaintiff.

Dated, signed and delivered in open court at Nairobi this 28th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kiptop for the 1st batch of the interested parties.

Miss Songok for Mbobu for the plaintiff.

Miss Leila for Muthee for defendant

No appearance for 2nd batch of interested parties

Court Assistant - Sylvia