



**Arusei v Bett (Environment & Land Case 14 of 2018)
[2023] KEELC 20833 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20833 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 14 OF 2018
JM ONYANGO, J
OCTOBER 19, 2023**

BETWEEN

MICHAEL ARUSEI PLAINTIFF

AND

DAVID KIPKURGAT BETT DEFENDANT

RULING

1. The Defendant moved the court vide an application dated 4th August, 2023 seeking the following orders:
 - a. Spent
 - b. That this Honourable court be pleased to review and/or set aside the consent order given on 24.6.20 and issued on 29.9.21 and adopted as a judgment of the court and any consequential orders thereto.
 - c. That the Honourable court be pleased to issue an interim order of injunction restraining the Plaintiff/Respondent, his agents, servants and or assignees from putting up structures, cultivating or in any other way interfering with all that parcel of land known as Nandi/Kaptich/712 pending the hearing and determination of this application and thereafter, the main suit.
 - d. That the costs of this application be in the cause.
2. The application is based on the grounds set out in the Notice of Motion, key among them being that the Defendant's counsel compromised the suit without proper instructions. It is also supported by the defendant's affidavit sworn on 4th August, 2023 in which the Applicant deposes that on 24th June, 2023 his former advocate entered into a consent order transferring his entire parcel of land (Nandi/Kaptich/712) measuring 6 acres to the Plaintiff without his express instructions. He contends that



- the said consent was entered through misrepresentation, non-disclosure and/or collusion between the plaintiff and his advocate. The said consent was subsequently adopted as a judgment of the court. He avers that he stands to suffer great loss if the said consent judgment is executed.
3. The application is strenuously resisted by the Plaintiff through a filed a 51-paragraph Replying Affidavit sworn on the 22nd September 2023 together with a Notice of Preliminary Objection of even date.
 4. In the Replying affidavit, the Plaintiff gives a chronology of the events leading to the signing of the consent order. The long and short of it is that the Applicant was aware of and participated in the negotiations and signed the consent on 24th June, 2023. He has annexed a copy of the said consent where the Applicant's signature appears at page 2 of the consent. The Applicant subsequently surrendered the original title deed to the Respondent's counsel together with a copy of his National Identity Card, Pin Number and 2 passport –size photos.
 5. He deposes that after the judgment was adopted as the judgment of the court they embarked on the process of transfer and the applicant applied for consent of the Land Control Board. He points out that the Applicant refused to attend the meetings of the Land Control Board despite being notified to attend on two occasions. However, the Deputy Registrar signed the necessary transfer documents as the consent judgment had provided that in the event that the Defendant fails to execute the documents of transfer, the Deputy Registrar of the Court shall execute the same in favour of the Plaintiff. The Respondent who had hitherto placed a caution on the title applied for its removal and the Land Registrar was advised to transfer the suit property to the Plaintiff in terms of the consent order. Following the transfer, the Respondent was issued with a title deed on 25th August 2023.
 6. It is deposition that the consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside unless it is proved that it was obtained by fraud or collusion which is not the case as the Applicant has not demonstrated the fraudulent acts committed by his advocate.
 7. He adds that the consent order is not against the policy of the court as court has always encouraged out of court settlement, mediation and Alternative Dispute Resolution.
 8. He points out that the application has been filed 3 years after the consent judgment was adopted by the court and the applicant has not explained why he could not have filed it earlier. He contends that the application has been overtaken by events as the judgment has already been executed. Furthermore, it is his contention that even if the consent judgment was set aside, the Applicant has no good Defence as the Respondent has been in occupation of the suit property for more than 23 years and in his Defence the Applicant admits that he relocated to Osorongai in 1997. He is therefore of the view that re-opening the case would be a waste of the court's time.
 9. In addition to the Replying affidavit, the Respondent filed a Preliminary Objection on the ground that counsel for the Applicant is not properly on record as he had not complied with the mandatory provisions of Order 9 Rules 5, 6 and 9 of the *Civil Procedure Rules*.
 10. The application was disposed of by way of written submissions and both parties filed their submissions which I have carefully considered.

Defendant's Submissions

11. In his submissions learned counsel for the Applicant contended that the consent order was a collusion between the plaintiff defendant's counsel to deprive the Applicant of the ownership rights over land parcel number Nandi/Kaptich/712 as it was signed without the participation of the Applicant. He accused the former advocate Mr. Magut of misrepresentation and non-disclosure of material facts. He



- submitted that the consent of the Land Control Board was obtained fraudulently as the Applicant was absent and the dispute was still pending in court.
12. Counsel relied on the case of *Ajit Kumar Rath v State of Orisa & others* 9 Supreme Court Cases 596 where the court set down the principles upon which the power of review can be exercised namely;
 - a. “upon the discovery of a new and important matter or evidence which after the exercise of due diligence could not be produced by him at the time when the order was made;
 - b. where there is an error apparent on the face of the record,
 - c. or for any other sufficient cause. The court further held that a review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say the power of review can be exercised if there is a patent error of law or fact which stares in the face without any elaborate argument being needed for tabling it. It may be pointed out that the expression any other sufficient reason ...means a reason sufficiently analogous to those specified in the rule”
 13. Counsel further relied on the case of Samson Munika practising as *Munika & Company Advocates v Wedube Estates Limited* Nairobi Civil Appeal No. 126 of 2005 where the court cited the case of *Brooke Bond Liebig (T) Limited v Mallya* (175) E.A 226 in which the Court of Appeal for East Africa set out the circumstances in which a judgment freely entered into by parties to a dispute in a court would be set aside:
 14. The circumstances in which a consent judgment may be interfered with were considered in *Hiran vs 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.”
 15. Counsel maintained that the defendant never instructed his former advocate to compromise the suit as provided under order 25 rule 5 of the *Civil Procedure Rules*. It was his contention that at the time of recording the consent, there were errors and mistakes on the face of the record as the consent was entered without the participation of the Applicant and the requirements for a compromise were not met. He was therefore of the view that the consent was voidable and therefore it ought to be reviewed and/or set aside.
 16. On the other hand, learned counsel for the Plaintiff submitted on three issues. The first one is whether the Applicant’s advocate is properly on record. It was his submission that the Applicant’s counsel was not properly on record as he had failed to comply with Order 9 Rules 5, 6 and 9 of the *Civil Procedure Rules* which require that a Notice of Change of Advocates be filed and served on all parties to the proceedings in the event that a party changes his advocate otherwise the former advocate shall be deemed to be the advocate for the party until the final conclusion of the matter, including any review or appeal.
 17. He submitted that since the application was filed post judgment without leave of the court, counsel was not properly on record and on that ground, the application ought to be struck out.



18. He relied on the case of *James Ndonyu Njoroge v Muriuki Macharia* (2020) eKLR where the court held that:

“Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 of the Civil Procedure Rules is mandatory and thus cannot be termed as a mere technicality. Having found that these procedure was not followed the firm of Nyiha Mukoma & Company Advocates, the said firm is not properly on record and has no legal standing to move the court on behalf of the applicant and therefor all pleadings filed by it ought to be struck out. Consequently and in the absence of such leave of the court as provided by the law, the application by Notice of Motion under Certificate of urgency dated December 13 2019 filed by the firm of M/S Nyiha Mukoma & Company Advocates is hereby struck out with costs to the Respondent”

19. It was his further contention that since the accusation of fraud against his former advocate was a serious matter, the applicant ought to have served his former advocate with the application to enable him defend himself.

20. On whether the consent ought to be set aside, counsel relied on the Nigerian case of *Samba Petroleum Co. Ltd v First City Monument Bank* (2013) LCN/6351 CA where the court held that:

“A consent judgment has high efficacy and more binding effect than an ordinary judgment and is therefore difficult to dislodge. The party seeking to rescind the terms mutually agreed upon has an arduous task and heavier duty to prove fraud and other vitiating elements”.

21. Counsel contended that the Defendant and Plaintiff met at Kipkaren Trading Centre and discussed the matter with regard to the transfer of the suit property and reached a settlement in the presence of the elders and defendant’s advocate. The parties subsequently signed the consent 24.6.20 on together with their advocates. The said consent was then adopted as a judgment of the court on 25th June, 2020.

22. Counsel relied on the case of *Munyiri v Ndunguya* (1985 eKLR where Platt J held as follows:

“However, we may observe that as there appears to be a good deal of argument about contents of some consent judgments and orders, it would be wise to obtain the signatures of the advocates or the parties if they are present. In this way, it will then be clear that the terms were known and agreed to, at the time the consent order or judgment was entered into, and may help to avoid later recanting by the parties themselves which is also a well-recognized feature of life despite instructions earlier given to their advocates.”

23. Counsel submitted that the applicant had mischievously and cunningly left out or omitted page 2 of the consent order where the plaintiff appended his signature in order to mislead the court.

24. Counsel further relied on the case of *Flora Wasike v Destimo Wamboko* where the court held that:

“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”

25. It was counsel’s contention that consent orders represent party autonomy where the court ought not to interfere with the consensus ad idem of the parties. He cited the case of Brooke Bond Liebig (supra) as well as *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* ([1982)KLR 485.



26. He submitted that the Applicant had not met the conditions in the above-mentioned authorities. He refuted the Applicant's claim that the consent was obtained fraudulently as he appended his signature to the said consent. He also contended that the Applicant had failed to enumerate the acts of fraud committed by his former advocate as fraud is serious allegation which must be proved. He further submitted that the consent order was no against the policy of the court as courts have always encouraged out of court settlements, mediation and other alternative dispute resolution mechanisms.
27. Lastly, counsel submitted that the application was filed three years after the consent was executed without any plausible explanation. He termed the delay inordinate and an abuse of the court process and urged the court to strike out the application.

Analysis and Determination

28. After a careful consideration of the application, Replying Affidavit, Notice of Preliminary Objection and the parties' submissions, the following issues arise for determination:
 - i. Whether the Applicant's advocates are properly on record.
 - ii. Whether the consent order should be set aside.
29. I will first determine if the Preliminary Objection raised by the Plaintiff should be upheld. The plaintiff raised the issue that the firm of Rioba Omboto & Co Advocates who filed the instant application on behalf of the Applicant are not properly on record as they failed to comply with order 9 Rules 5.6 and 9 of the *Civil Procedure Rules*.
30. It is not in dispute that the consent order dated 24th June, 2020 was adopted as a judgement of the court thus marking the matter as settled. It is also not in contention that the firm of Rioba Omboto & Company Advocates filed the application dated 4th August, 2023 without filing a Notice of Change of Advocates. The said application does not have any prayer seeking leave to come on record for the Applicant.

Order 9 rule 5 provides as follows:

“Where there is a change of advocate , or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-

 - a. Upon an application with notice to all the parties or
 - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”
31. The courts have held that failure to comply with the mandatory provisions of Order 9 rule 9 of the Civil Procedure Rules is fatal and renders the application liable to be struck out. This position was adopted by the Court of Appeal in the case of *Symposia Consult Limited v George Gikere Kaburu & 2 Others* (2019) eKLR and *James Ndonyu Njoroge v Muriuki Macharia* (2020) eKLR.
32. Similarly, in *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* (2012) eKLR the court held that:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of



procedure, the court may well be entitled to conclude that failure to comply therewith was deliberate”

33. In view of the foregoing, it is my finding that the firm of Rioba Omboto & Co Advocates are not properly on record for the Applicant and they had no legal standing to file this application and the same is therefore incompetent.

34. Be that as it may, I will proceed to consider whether sufficient grounds have been advanced to warrant the consent judgment entered on 25th June, 2020 being set aside. The law on setting aside of consent judgments or orders is now settled. In *Flora N Wasike v Destimo Wambuko* (1988)eKLR 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”

35. In *Kenya Commercial Bank Ltd vs 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 vs 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 vs 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 *Welsh vs Roe* [1918 - 9] All E.R Rep 620.”

Finally in the Ugandan case of *Lenina Kemigisha Mbabazi Star Fish Ltd*(supra) 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.”



36. In the instant case, the Applicant participated in the negotiations and signed the consent on 24th June, 2023. The Respondent annexed a copy of the said consent where the Applicant's signature appears at page 2 of the consent. The Applicant subsequently surrendered the original title deed to the Respondent's counsel together with a copy of his National Identity Card, PIN Number and 2 Passport –size photos. The consent provided at paragraph (c) that;

“in the vent the defendant defaults to execute the documents of transfer, the deputy Registrar of this court shall execute the documents of transfer in favour of the Plaintiff”.

37. Having surrendered his documents aforementioned, Defendant failed to appear before the Land Control Board whereupon counsel for the Plaintiff wrote to the Deputy Registrar of the Court to execute the application for consent of the Land Control Board after which the Board approved the transfer.

38. It is noteworthy that the Applicant has not denied that he surrendered his documents to the respondent's counsel. It is also curious that the Applicant filed this application 3 years after the consent was adopted as a judgment of the court without any explanation.

39. The Applicant's contention that the consent order was a collusion between his former advocate and the Plaintiff's advocate to deprive the Applicant of his land is not borne out by the facts as he fails to disclose when he discovered the consent and what action he took.

40. As stated in Lenina Kemigisha Mbabazi Star Fish Ltd counsel who is acting for a party has full control over the conduct of the trial and apparent authority to compromise the case. Further, and as correctly submitted by counsel for the Plaintiff, the consent judgment is not against the policy of the court as Article 159 2(c) enjoins this court to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. In this regard, courts have fully embraced Alternative Dispute Resolution Mechanisms.

41. All in all, I am not satisfied that the Applicant has satisfied the conditions for setting aside the consent order dated 24th June, 2020.

42. The upshot is that the application lacks merit and it is hereby dismissed with costs to the Plaintiff/ Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 19TH DAY OF OCTOBER 2023.

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J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Murgor for the Plaintiff/Respondent

2. Mr. Melilei for the Defendant/Applicant

Court Assistant: H. Akidor

