



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 95 OF 2009

PATRICK MUTHENGI MALUKI.....PLAINTIFF

VERSUS

PETER K. WATUTA

LAWRENCE MWANGIDEFENDANTS

RULING OF THE COURT

1. Before this court is a Notice of Motion dated 14th February, 2017 seeking the following orders:

(a) That the court be pleased to grant leave to the law firm of Messrs. R.M. Mutune & Co. advocates to come on record for the plaintiff in place of Messrs. Lawrence Mwangi & company advocates.

(b) That the court be pleased to stay these proceedings pending the hearing and determination of this application.

(c) That the court be pleased to set aside the consent entered into on 21st July, 2016 between the firms of J. K. Mwalimu & Company Advocates and Lawrence Mwangi and Company advocates.

(d) That the court be pleased to set aside the order made on 2nd February, 2017 requiring the plaintiff to pay a sum of Kshs. 20,000/= per month pending the hearing and determination of this Application.

2. The motion is supported by the affidavit of the plaintiff sworn on 14th February, 2017 and the grounds on the body of the motion. The reasons advanced for the application were that this suit was dismissed on 16th November, 2012 and the Hon. Judge Dulu in his ruling ordered the plaintiff's advocate Lawrence Mwangi to pay the costs of the suit and also the defendant's costs. That the advocates then on record J. K. Mwalimu & Company Advocates and Lawrence Mwangi and Company advocates entered a consent in court on 21st July, 2016 indicating that the plaintiff was the one to bear the costs of the suit contrary to what the court's ruling had stated. That the plaintiff was never contacted prior to the recording of the consent. That he was served with a notice to show cause and appeared in court on 2nd February, 2017 and the court ordered that he risks being committed to civil jail if he does not pay a sum of KShs. 20,000/- on or before 27th February, 2017. That the entire amount sought from the plaintiff is to the tune of KShs. 122,904/- and risks being jailed. That the plaintiff lost touch with Lawrence Mwangi and that necessitated the suit to be dismissed. He contended that the mistake of his advocate should not be visited upon him.

3. In response thereto the 1st defendant through Grace M. Nyaata advocate in conduct in this matter filed a replying affidavit on 21st March, 2017. She contended that the 2nd defendant was at the time of entry of consent on record for the plaintiff and it is presumed that the consent was entered on instructions of the plaintiff. That the plaintiff has not made any complaint against the 2nd defendant to demonstrate that he acted without instructions. That the plaintiff was served with a notice to show cause in the first instance on 24th October, 2016 but never made the present Application. That he admitted to having perused the court record sometime in November, 2016 but failed to act with speed. That in the circumstances an inference is drawn that the 2nd defendant acted on the plaintiff's instructions.

4. The 2nd defendant filed a replying affidavit on 4th April, 2017 contending that he travelled to the U.S.A. for studies which thing he informed the plaintiff who should have been prudent enough to follow up on his case. That the matter was dismissed while he was away. That the plaintiff informed him that the 1st defendant is his uncle and he would be able to settle the matter amicably with him. That had the Plaintiff not instructed him the plaintiff could not have gone ahead to record the consent on 2nd February, 2017.

5. It was the plaintiff's submissions that the wordings of the consent were clear such that it was binding upon the 2nd defendant and not the plaintiff. He further submitted that the consent order cannot be binding upon him since the same was not entered upon his authority. He relied on **Republic v. District Land Registrar Nandi & another ex parte Tegrei & another [2005] 1 KLR 521** and **Brooke Bond Liebig (T) Ltd v. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266**. That a consent can only be varied in the event that it was obtained by fraud, collusion or by agreement contrary to the policy of court.

6. The 1st defendant was in agreement with the Plaintiff that a consent can only be set aside if it was obtained by fraud, collusion or by agreement contrary to the policy of court but maintained that the 2nd defendant acted upon the plaintiff's instruction.

7. It is evident from the record that the ruling of Judge Dulu instructed for payment by the 2nd defendant personally and not the plaintiff. The 2nd defendant has not demonstrated how he got instructions or established that he got instructions from the plaintiff to record a consent to the effect that the said payment be paid by the plaintiff. In the circumstances, I draw an inference that the consent was entered without the plaintiff's knowledge. It is common practice that agreements of payments between advocates and clients are always made in writing. I would have expected the 2nd defendant to have tendered such evidence which he did not. He merely stated that had he not been instructed he could not have gone ahead to record the consent of 2nd February, 2017. I find it would have been prudent for the 2nd Defendant to have secured an agreement or any document from his erstwhile client on the question of who was to pay the Defendant's costs following the dismissal of the Plaintiff's suit vide the Ruling dated 16/11/2012 by Justice Dulu. However the conduct of the Plaintiff in failing to rebut the allegations contained in the replying affidavit of his erstwhile advocate and further entering into a second consent on 2/2/2017 makes his Application for review not convincing at all. Indeed a consent 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 by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or a misapprehension or ignorance of such facts which would enable the court to set aside an agreement. The courts are always reluctant to set aside consents obtained whereby learned counsels are involved because of the long held position that the Advocates are the duly recognized agents or representatives of the parties and more particularly where the Advocates have not filed Application to cease acting for the parties. In the case of **KENYA COMMERCIAL BANK LTD vs SPECIALIZED ENGINEERING CO. LTD [1982] KLR 485** the Court held as follows:-

“An Advocate has general authority to compromise on behalf of his client as long as he is acting bonafide and not contrary to express negative direction. In the absence of proof of any express negative directions, the order shall be binding.”

8. The 2nd Respondent filed a replying affidavit in which he categorically deponed that he had the

Plaintiff's instruction to enter into the consent dated 21/07/2016. The conduct of the Plaintiff/Applicant towards this matter has led me to believe that even though his erstwhile Advocate did not avail a document from the Plaintiff authorizing him to enter into the consent, reveals that indeed the Plaintiff had knowledge of what was happening. First and foremost the Plaintiff failed to file a rebuttal to the assertions by his erstwhile Advocate by filing a response or further affidavit in reply so as to dislodge the claim that instructions had flown from him. Secondly, the Plaintiff confirms that he did peruse the court file way back in November, 2016 and learnt of the consent but failed to raise any objections to his Advocate until now. Again the court record for the 2/2/2017 reveals that the Plaintiff himself agreed to pay the amounts sought in the Notice to show cause by way of instalments. The Plaintiffs current Advocate was in attendance and this is what the Plaintiff said:-

“I can pay on part time basis. I earn about Kshs.50,000/=. I have a family. I ask to pay Kshs.10,000/= per month. I am a lecturer. I lecture at the University of Nairobi.”

Pursuant to the Plaintiff's undertaking aforesaid, the Deputy Registrar then ordered him to start making payments by instalments of Kshs.20,000/= per month.

9. From the foregoing it is therefore quite clear that the Plaintiff had been aware of the genesis and progress of his case all along and therefore I am unable to find that his erstwhile Advocate did not have authority to enter into the consent now complained of. The second consent entered on 2/2/2017 in the presence of the Plaintiffs present Advocate put paid to his claim that the earlier consent had been obtained without his express instructions. The Plaintiff therefore is estopped from trying to avoid the two consents and deny their existence. The Plaintiff appears to be blowing hot and cold at the same time. I find the Plaintiff is not candid on his onslaught against his erstwhile Advocates. Suffice to say that all this time the Plaintiff had not lodged any complaint of impropriety against his former Advocates to the Complaints Commissions or any other authority regarding the Advocates lack of instructions to enter into the consent now being challenged. I find the two consents are not tainted with any insincerity or illegality or inconsistent with the policy of the court and therefore there is no reason to disturb them.

10. In the result, it is the finding of this court that Plaintiff's Application dated 14/02/2017 lacks merit. The same is ordered dismissed with costs.

Dated, signed and delivered at MACHAKOS this 29th day of September 2017.

D. K. KEMEI

JUDGE

In the presence of:

Kyalo for Nyaata for 1st Defendant

Mutune for Plaintiff

C/A: Kituva