



**Kaiganira v Wangati (Environment and Land Appeal 036 of 2022)
[2023] KEELC 22108 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22108 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 036 OF 2022
MAO ODENY, J
DECEMBER 6, 2023**

BETWEEN

JAMES KIBIRO KAIGANIRA APPELLANT

AND

EUNICE WAMBUI WANGATI RESPONDENT

*(Being an appeal from the ruling delivered by Hon. B. Ochieng Chief
Magistrate on 22nd September 2022 in Nakuru CM ELC No. 307 of 2019)*

JUDGMENT

1. This appeal arises from a ruling delivered on 22nd September 2022 in Nakuru CM ELC No. 307 of 2019. The appellant being aggrieved by the said ruling lodged a Memorandum of Appeal dated 12th October 2022 and listed the following grounds:
 - a. That the Learned Trial Magistrate erred in law and in fact and capriciously exercised his discretion.
 - b. That the Learned Trial Magistrate erred in law and fact in by failing to appreciate that the disputed consent dated 13th March 2020 was shallow, ambiguous and susceptible to different interpretations.
 - c. That the Learned Trial Magistrate erred in law and in fact by failing to recognize the great prejudice that would be occasioned on the appellant if the review of the disputed consent dated 13th March 2020 was not granted.
 - d. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the remedies sort on the disputed consent dated 13th March 2020 was as a result of mistake by the respondent's advocate filing the wrong consent without the knowledge of the appellant.



- e. That the Learned Trial Magistrate erred in law and in fact by failing to properly evaluate the evidence on record thus reaching an erroneous decision which violated the principles of justice, equity and good conscience.
 - f. That the Learned Trial Magistrate fundamentally erred in law when he failed to consider serious issues raised by the appellant and the discovery of new matters of evidence that would have reasonably resulted in a different decision, but unfortunately resulted into miscarriage of justice.
 - g. That the Learned Trial Magistrate erred in law and in fact by failing to recognize that the disputed consent dated 13th March 2020 was characterized by misrepresentation, suppression, concealment of material facts and negligent omission of material facts which could have been cured by review of disputed consent to make it easy for both parties to execute.
 - h. That the Learned Trial Magistrate 's finding were in violation of the rules of natural justice and his discretionary finding was wrong and cannot be sustained in law.(Sic)
2. A brief background to this appeal is that the Respondent filed a suit against the Appellant in the lower court seeking the following orders:
- a. An order of permanent injunction restraining the defendant by himself, his servants, representatives and/or agents or otherwise howsoever from entering and/or trespassing upon and/or in any other manner dealing with that parcel of land known as Bahati/Bahati Block 1/4058.
 - b. An order of eviction
 - c. Costs of this suit.
3. A consent dated 20th March 2020 was filed in court on 19th May 2020, on the following terms:
- a. By consent of both parties judgment be and is hereby entered for the plaintiff against the defendant as prayed for in the plaint.
 - b. That the defendant do vacate the suit premises on/or before 1st July 2020 and/or in the alternative the defendant be at liberty to purchase the property from the plaintiff at the current market price.
 - c. That the defendant in lieu of costs shall leave the gate and the perimeter wall intact.
 - d. The execution to issue in the event the defendant does not vacate and/or purchase the suit property.
4. The appellant then filed the Notice of Motion application dated 19th August 2021 seeking for review and a raft of orders which the trial court heard and dismissed the same vide a ruling dated 22nd September, 2022. This led to the Appellant filing the current appeal.

Appellant's Submissions

- 5. The Appellant submitted that the Learned Trial Magistrate erred in law and in fact in failing to grant an order for review of the consent judgment delivered ex parte on 20th May 2020. It was the Appellant's further submission that on 14th March 2020 the parties had a meeting but failed to reach a consensus and it was mutually agreed that a mutual consent would be presented by both parties during the hearing that had been scheduled on 18th March 2020.



6. The Appellant also submitted that the hearing did not proceed because the courts had been closed due to the covid-19 pandemic and that he never received any communication until he was served with an extracted decree that indicated that a consent dated 13th March 2020 had been adopted on 20th May 2020 before Honorable E. Kelly upon hearing both parties.
7. According to the Appellant, he was not aware of the said proceedings of 20th May 2020 as he was never served with a notice for the said date and further submitted that the consent order was obtained fraudulently and adopted unprocedurally with the intention of depriving him of his legal rights over the suit property.
8. The Appellant relied on Order 25 Rule 5 of the Civil Procedure Rules and submitted that he did not instruct his advocates to enter into the consent and that the Learned Trial Magistrate erred in failing to set aside the said consent.
9. The Appellant relied on the cases of Ridge versus Baldin (1964) Ac 40 (1963) ALL ER 60, Multiscope Consulting Engineers versus University of Nairobi and another [2014] eKLR in support of his arguments.
10. The Appellant then extensively set out the background of the appeal and relied on the cases of Housing Finance Cooperation of Kenya Limited vs Gilbert Kibe Njuguna HCC No. 1601 of 1999, Patel versus E.A Cargo Handling Services Ltd (1974) EA 75 and urged the court to allow the appeal as prayed.

Respondent's Submissions

11. Counsel for the Respondent submitted that a consent order can only be set aside on the grounds of fraud, collusion, illegality, mistake or agreement which is contrary to the policy of the court. That the Appellant signed the consent dated 13th March 2020 willingly and without coercion and relied on the cases of Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & another [2005] 1 KLR 828, Wildlife Lodges Ltd vs County Council of Narok & another [2005] 2 EA 344 (HCK).
12. It was counsel's submissions that they tried to enforce the consent order severally but the Appellant filed many frivolous applications to try and stop the execution process.
13. Mr. Maina relied on the cases of Flora Wasike vs Destimo Wamboko (1982-1988) 1KAR 625, Brooke Bond Liebiq v. Mallya 1 975 E.A. 266, J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983, Hirani v. Kassam (1 952), 19EACA 131 and submitted that the Appellant herein had failed to adduce any evidence that falls within the grounds of setting aside a consent order.
14. Counsel also submitted that the prayers that the Respondent sought for in the application in the lower court were general and ambiguous hence the dismissal. Counsel urged the court to dismiss the application with costs to the Respondent.

Analysis And Determination

15. The only issue for determination in this appeal is whether the Learned Trial Magistrate erred in law and in fact in failing to set aside the consent dated 13th March 2020.
16. It is on record and admitted by the Appellant that they had entered into negotiations to settle the matter and file a consent in court. It was the Appellant's case that they failed to agree on the consent and hence they were to discuss and come to a mutually agreeable consent to be filed in court.



17. The Appellant alleged that when the consent was adopted the courts were closed due to Covid -19 pandemic and therefore they could not have recorded the consent. It should be noted that the Chief Justice had issued guidelines of hearing matters virtually and therefore it cannot be plausible to claim that the courts were totally closed.
18. Order 25 Rule 5 provides for compromise of suits as follows:
- “Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or part of the subject matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith”.
19. This order stipulates that where parties wish to compromise a suit there must be the following:
- a. Compromise must be proved.
 - b. The court must be satisfied.
 - c. There must be a hearing of all parties concerned.
 - d. The compromise agreement must be lawful.
 - e. There must be a specific order by the court that the agreement be recorded.
20. From the record, the consent dated 13th March 2020 was signed by both parties that is the Plaintiff’s counsel and the Defendant. There is no evidence that the signature on the consent was not the Defendant’s now the Appellant.
21. In fact, the Learned Trial Magistrate in dismissing the Appellant’s application to set aside the said consent held as follows:
- “Although the defendant/applicant allege the consent order was drafted by the plaintiff’s counsel ex parte he concedes that the consent was entered into by him without duress and executed without being forced to. There is no evidence that the consent was obtained by deception, bad faith and breach of trust and the consent was very clear...in my considered view, the defendant duly signed the consent dated 13.3.20 after he read and understood the contents and confirmed the terms of negotiations. He has failed to demonstrate that the consent was obtained by fraud or collusion or by an agreement contrary to the policy of the court or that consent was given without sufficient material facts or the misapprehension or ignorance of such facts...”
22. In the case of *MUNYIRI vs NDUNGUYA* [1985] eKLR Platt Ag JA held as follows:
- “However, we may observe that as there appears to be a good deal of argument about contents of some consent judgment 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. The consent dated 13th March 2020 was signed by both parties and adopted and signed by a Magistrate, Hon. E. Kelly as per the terms of the consent. It seems that Appellant wants to renege on the consent and seek for more time to organize himself. This is evident from the application that he filed for review and other orders which was dismissed by the lower court.
24. The Appellant filed a Notice of Motion dated 19th August 2021 seeking the following orders:
- a. Spent.
 - b. That this Honorable court be pleased to stay its orders issued on 12th day of August 2021 since the same is based on the disputed consent dated 13th March 2021.
 - c. That this Honorable court be pleased to review its orders issued on 12th day of August 2021 to disclose the exact property in question and the amount due in payment by the defendant once the grey areas in the said consent dated 13th March 2020 are sorted out.
 - d. That this Honorable court be pleased to give the respondent leave to sort out the issue of legal representation since already there are two advocates improperly on record.
 - e. That upon review of the orders, the relevant parties and especially the applicant to be granted leave to settle the outstanding amount payable to the respondent by installments from the date of adoption of the reviewed consent and if possible to be done within a period not exceeding 12 months and or any further relief deemed fit by this honorable court.
 - f. That the costs of this application be in the cause.
25. The orders sought for in the application do not meet the threshold for review as per Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. One of the prayers was couched as follows:
- “That upon review of the orders, the relevant parties and especially the applicant to be granted leave to settle the outstanding amount payable to the respondent by installments from the date of adoption of the reviewed consent and if possible to be done within a period not exceeding 12 months and or any further relief deemed fit by this honorable court.”
26. This prayer does not fall under the ingredients of review and it is an admission that the Appellant entered into a consent judgment. It seems that the Appellant only needs more time to settle the debt. The best that the Appellant can do is to use the same forum they used in negotiating the settlement to ask for more time to settle the debt and not to claim that he was not aware of the consent order.
27. In the cases of Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR and Samuel Kangogo v Bhayani Nursery and Primary School [2020] eKLR the court held that a consent can only be set aside upon the applicant satisfying the court that it was entered into pursuant to fraudulent misrepresentation by the other party or there was mutual mistake on the part of the parties or that the consent violates the law.
28. Similarly, in the case of SMN v ZMS & 3 others [2017] eKLR, the Court of Appeal when dealing with the issue of setting aside consent judgments held as follows:
- “There is now a dearth of authorities on the law governing the setting aside of consent judgments, or orders, and we are grateful to counsel for citing some of them before us. Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.



The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is a necessity slightly higher than on balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High Court that he was involved in fraud or colluded with another advocate or person to subvert the cause of justice in a matter pending in court is certainly one of utmost gravity. It destroys the advocate's honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charges.....”

29. I find that the Appellant has not satisfied the court that the consent was entered into fraudulently, by duress or by misrepresentation. The said consent does not violate the law therefore the Appeal is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 6TH DAY OF DECEMBER 2023.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules

M. A. ODENY

JUDGE

