REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 26 OF 2002

DANIEL KIRUI.....PLAINTIFF/APPLICANT

VERSUS

GEOFFREY NJUGUNA KIMANI.....DEFENDANT/RESPONDENT

RULING

1. The Applicant in the Notice of Motion dated 14th July 2014 is Daniel Kirui. He filed the suit against the defendant on the 5th February 2002. In the said suit, he sought a declaration that the defendant who had started a construction of **Land Parcel No. Naivasha Municipality Block 2/368** and registered in his name was a trespasser and also sought an order of permanent injunction to restrain the said defendant from interfering with the suit land pending hearing and determination of the suit. He further sought an eviction order against the defendant and demolition of the structures therein.

Together with the plaint an application for injunction was filed. The court issued an order of *status quo* on the 12th March 2002.

2. The case was partly heard by Musinga J, (as he then was). However, on the 11thSeptember 2007 KaranjaMbugua & Company Advocates representing the plaintiff and Mirugi Kariuki and Company Advocates representing the Defendant entered into a consent that terminated the case. The consent order was adopted as a Judgment of the court on the 12th September 2007.

The consent judgment was in the following terms:

> *(1) That the suit herein be and is hereby marked as withdrawn and settled with no orders as to costs.*
>
> *(2) That the defendant and/or his agents or servants may resume and carry on with construction, development, use and occupation of the suit land Known as* ***Title No. Niavasha Municipality Block***
>
> ***2/638*** *and previously) referred to as Niavasha unsurveyed* ***Plot***
>
> ***No. 294****.*
>
> *(3) That the plaintiff shall sign the transfer documents for the above mentioned land in favour of the Defendant and also surrender to him the original certificate or lease and all other necessary document for the transfer and registration for the land in the Defendant's name.*
>
> *(4) That the Defendant hereby forfeits any interest that he may be having on the land next to or*

adjacent to the suit land and the plaintiff may seek to have the land allocated to him.

Bothpartiesadvocates signedtheconsentandadecreefollowed thereafter.

2. By his application dated the 14th July 2014, the plaintiff in his Prayer No. 4 sought an order that the court be pleased to set aside, vacate and or review the consent judgment and the Decree issued on the 17th September 2007, and the suit do proceed to hearing and determination on merit.

He further seeks that upon the court granting prayer 4 above, the court be pleased to restrain the defendant by himself, his servants and or agents from carrying out further developments on **Naivasha Municipality Block 2/638** until the suit is heard and determined.

3. The application is brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act**.

The grounds upon which the application is grounded appear on the face of the application, but in summary it is stated that the consent judgment was entered without instructions, and it is oppressive, that it was obtained by fraud, collusion and misrepresentation of material facts. It is further stated that the applicant was never made aware of the consent judgment by his advocate, that the said judgment was never enforced six years after its entry and he became aware of the said judgment through a replying affidavit filed in **Nakuru ELC Case No. 172 of 2014,** a case between the same parties and finally that the advocate had no authority or instructions to enter into the same. The supporting affidavit is sworn by the applicant. He depones that he was not aware that his case had been withdrawn and his Advocate never informed him of the consent judgment, and he continued to pay rents and rates for the property upto the 10th June 2014 when he visited the property and found the defendant constructing.

4. In his paragraph No. 1525 he swears that he signed some affidavits at his Advocate's offices thinking that they were to be used for filing an application for injunction only to realise that they were used for filing another suit, **Nakuru ELC No.172 of 2014** and the truth came out when the defendant served him with a replying affidavit in respect of the ELC case.

He further states that the first time he saw the consent Judgment was on the 8th July 2014. He goes ahead to blame his then advocate Mr. Karanja Mbugua and accuses him of fraud and collusion and misrepresentation of facts including filing a fresh suit without his authority.

He urges the court to allow the application, and grant an order of

injunction against the respondent as he has commenced further developments on the suit land.He has annexed to the affidavit pleadings in the **ELC Case No. 172 of 2014** between the parties herein over the same property.

5. In opposing the application, the Respondent Geoffrey Njuguna Kimani filed a replying affidavit on the 22nd September 2014.

He states his claim of ownership of the suit plot and how survey was done and the dispute that led to this suit being filed and the events leading to the consent judgment dated the 11th September 2007.

It is his averment that at all times the applicant had knowledge of the consent judgment, and that his advocate KaranjaMbugua & Co. had requested for the transfer documents that were forwarded for his execution through his advocates, Mirugi Kariuki & Co. Advocates.

He asserts that it is the applicants advocates who all along have failed to return the Transfer documents and release of the original lease to enable him enforce the judgment.

That the reason for this application is that the plaintiff's ELC case was struck out as *Res Judicata* and therefore, as an afterthought, resulted to the current application. He seeks dismissal of the applications as no sufficient reasons have been advanced to warrant setting aside of the consent judgment.

6. The Respondents submissions filed by his Advocate, Mr. Mindo are that the litigants act through their appointed advocates, that the applicant blames his advocate and not the respondent, that the court should only intervene if there is a dispute between the Advocate and the applicant where there is a dispute based on the tort of negligence or in regard to fees and not on other communication between them which is priviledged.He urges the court to leave the applicant and his then Advocates to sort their issues without involving the court.

7.Mr. Waiganjo Advocate for the applicant filed his written submissions on the 11th February 2016. He submits that the applicant had no intention of giving his property to the defendant and never gave such instructions to his then Advocate, Mr. KaranjaMbugua. Urging the court on why the consent judgment ought to be set aside, it was his submission that it is trite that an advocate has general authority to compromise a suit on behalf of his client, but such compromise ought to be for the best interest of the client, a and as the consent hereof was entered without authority, it ought to be set aside.

8.The court has considered the affidavit evidence and submissions by counsel together with authorities therein. The issues for the courts determination and as framed by the applicant could be summarized as:

a) Whetherthe consentjudgmententeredonthe 17th September 2007 ought to be set aside, vacated or reviewed.

b) Whether an order of injunction against the Respondent should be granted.

9.The principles for setting aside a consent Judgment are well settled that a consent judgment has contractual effect and can only be set aside on grounds which would justify setting a contract aside if certain conditions remain to be fulfilled. It is also trite that an advocate has a general authority to compromise a suit on behalf of his client if he acts *bona fide* and not contrary to express negative direction. See **Mohammed vs Sitieni**

In the **Hirani vs Kassam (1952) 12 EACA 131** it was held that:

"Prima facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claimingunder them and cannot be varied or discharged unless obtained by fraud or collusion, or by and agreement contraryto the policy of the court or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reasonwhich would enable the court to set aside an agreement."

10. In **KenyaCommercialBankLtdvs BenjohAmalgamatedLtd (1998) e KLR,** the above principles were reinstated.

The applicant must show existence of fraud or collusion.He has to sufficiently prove that he had not authorised his advocate to record the consent judgment, and that he was ignorant of the material facts.

I took time to give a background of this case leading to the offensive consent judgment and events thereafter. The terms of the consent Judgment are quite detailed, with the applicant giving the defendant ownership and authority to the defendant to resume construction of the plot. It also authorises the applicant to seek allocation of the adjacent plot to himself. That was on 11thSeptember 1997. In my view, such an elaborate consent must have been crafted and agreed between the applicant and his advocate.

As stated by the Respondents Advocates in his submissions, what an advocate and his client discusses is confidential. It can only be expressed in pleadings or in evidence.

11. The applicant did not tell the court what material facts he was ignorant of when the consent was recorded.He states that there was fraud and collusion. He did not disclose to the court who committed the fraud/collusion. He does not blame the respondent's Advocate or the respondent in person.

He only blames his advocate KaranjaMbugua. Collusion can only be committed by two or more parties.He has not shown in what manner fraud was committed.An allegation of fraud must be proved, so is collusion.

12. **Musinga, J in Republic vs District Lant Registrar Nandi and Another Exparte Tegenei (2005) e KLR** observed the " it isnot easy to prove that there was fraud or collusion in recording of any consent orders between advocates in the absence of their instructing clients but where such orders completely negate the interests of the instructing client and it is shown to the satisfaction of the court that the client was not even aware of the application that gave rise to the consent orders, leave alone to the recording of the orders, in the absence of any satisfactory explanation by the counsel who is accused of entering into the consent orders in question, a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent orders issued.

13. In the present matter, it is interesting that the advocate being accused of fraud and collusion Mr. KaranjaMbugua is upto date the applicant's applicant's advocate acting the the applicant in another suit filed in **Nakuru ELC Case No. 172 of 2014** between the same parties over the same subject matter. An Advocateclient relationship is one of utmost trust. The applicant submits that he did not know when he was signing documents with the said Advocate in June 2014 they were to be used in filing the ELC Case. Does he then want this court to make interefences that even **ELC case No. 172 of 2014** was filed without his knowledge and instructions to his Advocate KaranjaMbugua? If that is so, why would he continue to engage the services of an Advocate he accuses of being untrustworthy,who would fraudulently and by collusionwithother persons, comprise his interests in the cases?

14. Any logical conclusion would be that the applicant had full knowledge of the matters and circumstances prior to, and after the consent judgment was entered. The court is not convinced that for a period of seven years from the date of the consent judgment, the applicant did not know what was happeningto hiscase, and on the ground. There isno plausible explanation that when this application was bought to court in July 2014, he was not aware that **Nakuru ELC No. 172/2014** had been filed and proceedings were ongoing yet he admitted having signed the verifying affidavit. The applicant has failed to persuade the court that he had not authorised his advocate to compromise the suit in terms of the consent judgment.

15. It would have been prudent if he had sought to obtain explanation from the Advocate on the consent judgment. He did not show what action he took when the discovered the alleged fraud and collusion. He did not seek explanationby letter or other means that could have been used to show the court of the lack of authority and instructions to his advocates.

The court comes to the conclusion that the consent judgment was properly recorded with full authority and instructions by the applicant to the Advocate. The court upholds the consent Judgment dated the 11th September 2007.

16.The applicant had sought an order of Injunction against the Respondent to restrain him from further developments on the suit property.

It would be an exercise in futility for the court to proceed to interrogate the merits of otherwise of such prayer in view of its findings above.

Having upheld the consent judgment that this suit was withdrawn and settled, the there is no suit upon which an order of injunction can be issued.

17.For those reasons, the application dated 14thJuly 2014 is found to be devoid of merit. It is dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 28th day of July 2016

JANET MULWA

JUDGE