



Hathing Self Help Group (with a membership of 293 members and suing through the registered officials) & 3 others v Co-operative Bank Housing Cooperative Society Ltd (Environmental and Land Originating Summons E001 of 2021) [2022] KEELC 4853 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4853 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2021
A NYUKURI, J
SEPTEMBER 21, 2022

BETWEEN

HATHINGE SELF HELP GROUP (WITH A MEMBERSHIP OF 293 MEMBERS AND SUING THROUGH THE REGISTERED OFFICIALS) 1ST PLAINTIFF
JAMES NZERU MUSEMBI 2ND PLAINTIFF
DANIEL MUTINDA NDWIKI 3RD PLAINTIFF
HARRISON MUTUNGA WAMBUA 4TH PLAINTIFF

AND

CO-OPERATIVE BANK HOUSING COOPERATIVE SOCIETY LTD DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion application dated November 25, 2021 by the Plaintiffs/Applicants seeking the following orders;
 - (a) Spent.
 - (b) Spent.
 - (c) Spent.
 - (d) Spent.
 - (e) That the firm of Swan Advocates do furnish written instructions by the Plaintiffs to represent them in these proceedings.



- (f) That this honourable court do set aside the consent orders dated November 5, 2021 and the subsequent decree extracted thereof dated November 16, 2021 on such terms as the court deems fit and expedient.
2. The application is anchored on the supporting affidavit of James Nzeru Musembi sworn on November 25, 2021. The Applicants' case is that James Nzeru Musembi, Daniel Mutinda Ndwiki and Harrison Mutunga Wambua being registered officials of the Plaintiff which is a self help group, were authorized to instruct the firm of Kalwa & Co. Advocates to represent them in a meeting held on January 4, 2021, and subsequently instructed the said firm to represent the Plaintiff.
 3. They also stated that *status quo* orders were granted by this court pursuant to the Plaintiffs' application dated January 18, 2021, and that the matter was mentioned severally and a ruling date was to be fixed when the matter was to come up for mention on November 24, 2021. The Plaintiff's officials also stated that when they appeared in court on November 24, 2021, they were surprised to learn that their suit had been concluded without their knowledge. That upon perusing the court file they learnt that the firm of Swan Advocates had without authority or instructions filed a Notice of Change of Advocates placing them on record for the Plaintiff. That the said firm did not serve the firm of Kalwa & Co. Advocates with the Notice of Change of Advocates, which was the reason why Mr. Kalwa Advocate appeared before the court on November 24, 2021.
 4. The Plaintiffs stated further that they also learnt that the firm of Swan Advocates had filed a consent which declared them as trespassers and that they be removed from the suit property in 7 days. The Plaintiff also contended that the consent filed herein was fraudulently filed to defeat justice as the Plaintiff never instructed the firm of Swan Advocates and that the said firm failed to inform the Plaintiff of the consent.
 5. It was the Plaintiff's position that they were desirous of pursuing their case as they had been on the suit property for more than 12 years. The Plaintiff denied instructing Mr. Nyangayo Advocate from the firm of Swan Advocates.
 6. The application is opposed. Harrison Mutunga Wambua, through the firm of Swan Advocates filed a replying affidavit sworn on January 17, 2022. He stated that the Plaintiff's suit is founded on fraud and should be dismissed with costs and criminal proceedings taken against James Nzeru Musembi and Daniel Mutinda Ndwiki. He denied signing the affidavit in support of the Originating Summons. He also stated that he also learnt of the existence of ELC No. 42 of 2020 in which he alleges that his signature was also forged.
 7. Mr. Harrison Mutunga Wambua further stated that when he learnt of the fraud where his signature was forged, he instructed the firm of Swan Advocates to compromise the matter and bring it to its logical conclusion. He maintained that he had the full mandate of the Plaintiff to compromise this suit. He pointed out that the list of the Plaintiffs members attached to the application was not authentic as no such members exist. He therefore sought that the application be dismissed.
 8. The Defendant also opposed the application. John Kimutai Ngeno, the Defendant's manager filed a replying affidavit sworn on December 9, 2021. The Defendant's case was that despite orders of status quo issued by this court on February 9, 2021, the Applicants continued putting up permanent structures on the suit land and purported to subdivide the suit land and sell the same to unsuspecting third parties, which led to the arrest of the Plaintiff's members as the construction was without permission of the County Government of Machakos.
 9. Further, the Defendant asserted that the Plaintiff instructed the firm of Swan Advocates to represent them in the place of Kalwa Advocates who filed a Notice of Change of Advocates on October 19, 2021



- and that the application on record is incompetent as the firm of Swan Advocates had not been joined to these proceedings and the court cannot issue orders against a person who is not a party to the suit.
10. The Defendant further stated that the allegations against Swan Advocates amount to gross misconduct which had not been substantiated by the Applicants and that the Defendant would suffer grave injustice if they are denied quiet possession of the suit property.
 11. The Defendant's position was that the Plaintiff compromised the suit voluntarily and therefore there is no justification of setting aside the consent order. According to the Defendant, the Plaintiff has an intention of frustrating the affairs of the Defendant as a similar suit being ELC Case No. 42 of 2020 was dismissed and this suit is merely a strategy for forum shopping. The Defendant contended that the Applicants have not met the conditions for setting aside a consent order.
 12. The Defendant was of the view that as the Applicants blamed their former advocates, their remedy lay against him only. Further, that the Defendant has on the strength of the impugned consent order, taken possession of the suit premises, issued notices to vacate to illegal squatters and engaged the services of a contractor to secure the premises from further invasion and will suffer irreparable harm if the orders issued are renege.
 13. James Nzeru Musembi filed a Supplementary Affidavit in a rejoinder to the Replying Affidavits of Harrison Mutunga Wambua and the Defendant's affidavit. He stated that there was no response filed by the firm of Swan Advocates stating that they entered the impugned consent with the Plaintiffs' instructions and therefore instructions by the 1st Plaintiff did not grant the said firm authority to represent the other two officials of the Plaintiff. The Defendant further stated that there was no retainer between the Plaintiff and the firm of Swan Advocates.
 14. As regards the Defendant's response, James Nzeru Musembi deposed that there was fraud and collusion in the recording of the consent herein as service of an eviction notice could not be 7 days as that would be against established human rights principles. He maintained that by recording and concealing the impugned consent it demonstrates that there was malice, ill will and intention to cause suffering to the Plaintiff's members.
 15. He deposed further that he withdrew ELC Case No. 42 of 2020 before this suit was filed. He denied that the Defendant was in possession of the suit property as this court stopped the eviction. He also denied disobeying court orders. He urged the court to uphold substantive justice to all parties.
 16. On December 14, 2021, this court directed parties to file submissions in respect of the application. On record are the Plaintiff/Applicant's submissions filed on February 14, 2022 and the Defendant's submissions filed on January 21, 2022, which I have considered.

Analysis and Determination

17. I have carefully considered the application, the supporting affidavit, the replying affidavits, the supplementary affidavit as well as the submissions of parties and authorities cited. The sole issue for determination is whether the Plaintiff/Applicant has met the threshold for setting aside the consent order emanating from the consent dated November 5, 2021.



18. Principles for setting aside consents are well settled. In the case of *Intercountries Importers and Exporters Limited vs. Teleposta Pension Scheme Registered Trustees & 5 Others* [2019] eKLR, the Court of Appeal held as follows;

“Essentially, the above cited authorities are clear that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside.”

19. Consents entered into by counsel on behalf of their clients are binding on the clients unless it is shown that there was fraud or collusion, that there was no consensus between the parties, on grounds of public policy or for reasons that would enable the court to set aside such consent.

20. In the case of *Flora N. Wasike vs. Destimo Wamboko* [1988] eKLR the court stated as follows;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 a court set aside an agreement.”

21. The Plaintiff/Applicant’s case is that their advocate on record is and has always been Kalwa & Co. Advocates, and that the Plaintiff has never instructed the firm of Swan Advocates. When this matter came up for further directions on November 29, 2021, this court ordered the Applicant to serve the firm of Swan Advocates with the application. One of the prayers sought in the application at the interim stage was that the firm of Swan Advocates do furnish written instructions by the Plaintiff to represent them in these proceedings or to compromise the suit. I note that the firm of Swan Advocates was served with both the application and the mention notice which is why they filed the replying affidavit sworn by Harrison Mutunga Wambua the 3rd representative/official of the Plaintiff in this matter. In fact, on January 18, 2022, Mr. Nyangayo from the firm of Swan Advocates appeared representing the 3rd official of the Plaintiff.

22. I must point out that although the Plaintiff had sought for the firm of Swan Advocates to file evidence of instructions from the Plaintiff to represent them in these proceedings and to enter into consent, none was filed or furnished. I also note that this suit was filed by the firm of Kalwa & Company Advocates on January 18, 2021. I however note that the firm of Swan Advocates filed a Notice of Change of Advocates on October 19, 2021. Thereafter, on November 5, 2021, the impugned consent was filed and on 8th November Mr. Nyangayo wrote to the court requesting for a mention date at the earliest opportunity to adopt the consent. Ultimately on 16th November Mr. Nyangayo for the Plaintiff and Mr. Muema for the Defendant appeared before court for the adoption of the consent.

23. The Plaintiff through James Njeru Musembi and Daniel Mutinda Ndwiki insist that the firm of Swan had no instructions to represent them in these proceedings or record the consent dated November 5, 2021. Their contention is that there is no retainer between them hence no agency relationship.

24. The *Black’s Law Dictionary* 11th Edition defined retainer as follows;

“A client’s authorization for a lawyer to act in a case. A fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter. A lumpsum fee paid by the client to engage a lawyer at the outset of a matter. An advance payment of fees for work that the lawyer will perform in the future.



25. Essentially a retainer creates a client-advocate agency relationship and a retainer need not be written, it may be implied from the conduct of the parties and the circumstances of the matter. In the case of *Omulele & Tollo Advocates vs. Mount Holdings Limited* [2016] eKLR, the Court of Appeal held as follows;

“In *Halsbury’s Laws of England*, (Supra) at page 13 paragraph 763, the concept is also defined thus:-

The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor’s retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment.... From the above definition, “retainer” covers a broad spectrum. It encompasses the instructions given to an advocate as well as the fees payable thereunder. A retainer need not be written, it can be oral and can even be inferred from the conduct of the parties. However, if there is no evidence of retainer, except a statement from the advocate, which a client contradicts, the court will treat the advocate as having acted without authority from the client. (See *Halsbury’s Laws of England*, (supra) at page 14 paragraph 765).

26. Having considered the affidavit of Harrison Mutunga Wambua, I note that it is his position that the did not instruct the firm of Kalwa Advocates to file this suit and that the inclusion of his name herein was by fraud. If that were the case, then this suit would not be his case, but the case of Plaintiff through James Nzeru Musembi and Daniel Mutinda Ndwiki, who are named as Applicants herein. If the case was not filed by the said Harrison Mutunga Wambua, it would be absurd for him to settle the case by way of consent in the terms he did, which he did not file in the first place.

27. The Applicant has stated that it has a membership of 293 members, and none of those members instructed the firm of Swan advocates. There is no evidence from the firm of Swan Advocates to show that they had written instructions from the Plaintiff’s members or that the Plaintiff by its conduct did retain the said firm.

28. The Plaintiff is a Self Help Group with several members. It therefore follows that the Plaintiff is not one and the same person as Harrison Mutunga Wambua. In the absence of evidence of retainer, I find and hold that the firm of Swan Advocates entered into the consent dated 5th November 2021 without instructions from the Plaintiff to represent them in these proceedings and to enter into the consent.

29. The Plaintiff has contended that the consent was predicated on fraud and collusion. The *Black’s Law Dictionary* 11th Edition define fraud as follows;

“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.

30. John Willard, in “*A Treatise on Equity Jurisprudence* 147 (Platt Potter e.d. 1879) defined fraud as follows;

“Fraud has been defined to be any kind of artifice by which another is deceived. Hence all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is to be considered as fraud.”

31. It is therefore clear that where a person cheats to gain an advantage over another, that amounts to fraud.



32. On the other hand, collusion is defined in the Black's Law Dictionary 11th Edition, to mean;

“ An agreement to defraud another or to do or obtain something forbidden by law”

33. From the affidavit of Harrison Mutunga Wambua, it is clear that there was no instruction from the Plaintiff for the firm of Swan Advocates to enter into the impugned consent. The allegation by the said Harrison Mutunga Wambua that on realising that he was included in a suit that he did not file, he instructed the firm of Swan Advocates to compromise the suit in terms of the impugned consent, shows that indeed there was collusion between Harrison Mutunga Wambua, the firm of Swan Advocates and the Defendant to come up with the impugned consent, as a person who is a stranger to a suit cannot compromise a suit he knows nothing about in a suit touching on over 200 members of a Self Help Group.

34. In the premises, I am satisfied that the consent dated November 5, 2021 and adopted in court on November 16, 2021 was procured by fraud and collusion and I proceed to set aside the consent orders made on November 16, 2021.

35. The upshot is that the application dated November 25, 2021 is allowed. The consent orders dated November 5, 2021 and the subsequent decree dated November 16, 2021 be and are hereby set aside with costs to the Plaintiffs/Applicants.

36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 21ST DAY OF SEPTEMBER 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Muumbi for the Respondents

Mr. Kalwa for the Applicants

Court Assistant – Josphine Misigo

