



REPUBLIC OF KENYA



**Ouma & another v Chebuswa Limited (Environment & Land Case  
6 of 2016) [2022] KEELC 4864 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4864 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 6 OF 2016  
MAO ODENY, J  
SEPTEMBER 20, 2022**

**BETWEEN**

**MONICAH AKULO OUMA ..... 1<sup>ST</sup> APPLICANT**

**PAOLO TARISA INCURIA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CHEBUSWA LIMITED ..... RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated November 11, 2019, by the Defendant/Applicants seeking the following orders: -
  - a) That this Honourable Court be pleased to set aside the Consent Order dated 9<sup>th</sup> July 2018 and the main suit be reopened to enable parties participate fully.
  - b) That costs be provided for.
2. Parties agreed to canvas the application *vide* written submissions which were duly filed.

**Defendant/applicant's Submissions**

3. The application was premised on the grounds on the face of the application and the supporting affidavit of Paolo Tarsia Incuria who deponed that they were never consulted and/or informed by their former advocates about the draft consent to be recorded on July 4, 2018.
4. The Applicant gave a brief background to the application and stated that the Plaintiff instituted the present suit by way of a plaint against the Applicants for orders *inter alia*, a permanent injunction and contemporaneously filed a notice of motion application for interlocutory injunction.



5. Subsequently, the Applicants herein instructed the firm of Binyenya Thurania & Company Advocates to act on their behalf. It was the Applicants' case that sometime in 2018, they visited the suit property and found that their fence had been removed by the Plaintiffs claiming that there was a consent order marking the suit settled.
6. The Applicants' former advocate Mr. Binyenya Benjamin equally swore a Replying Affidavit in response to the application and attached copies of email correspondence between himself and the Applicants dated July 4, 2018. He averred that subsequent to the said email conversation, he further advised the Applicants of the need to settle the suit and minimize on costs which advice was communicated through telephone calls, at his office and at a restaurant identified as Bar Bar Restaurant.
7. Counsel submitted that he had full instructions and authority from the 1<sup>st</sup> Applicant to settle the matter as he did.
8. The Applicant reiterated the grounds on the face of the application and submitted that while a consent entered on behalf of a party is binding on the party, the same will not stand where it is proved that it was obtained by fraud, collusion or by an agreement contrary to the policy of the court and relied on the case of *Hiram v Kassam [1952] 19 EACA 131*. The Applicants stated that their then advocate should have advised the Applicants to append their signatures to the consent, to prove that they had a clear understanding of the same and the consequences thereof.
9. The Applicants also relied on the case of *William Karani & 47 others v Wamalwa Kijana & 2 others [1987] KLR 557*, and stated that they never participated in the consent and its contents thereto and that the consent was not even signed.
10. It was the Applicants' submission that they have satisfied the conditions for setting aside a consent order and cited the case of *Lenina Kemigisha Mbabazi Star Fish Ltd v Jing Jeng International Trading Ltd [HCT-00-MA-344-2012]* and urged the court to allow the application as prayed.

#### **Plaintiff/respondent's Submissions**

11. The Plaintiff filed a Replying Affidavit sworn by the Plaintiff's director Stefano Rocca who opposed the application and deponed that the parties herein voluntarily entered into a written consent executed on July 4, 2018 and adopted by this court on July 9, 2018. He further deponed that the present application was brought after 16 months with no sufficient explanation for the delay.
12. Counsel relied on Order 25 of the *Civil Procedure Rules* which governs withdrawal of suits and submitted that there is no existing suit upon which the application can be predicated the same having been withdrawn after a hearing date was fixed. It was counsel's further submission that the only recourse available to the applicants is filing a fresh suit and cited the cases of *Antony Kayaya Juma v Humphrey Ekesa Khaunya & another* [2004] eKLR; *Priscilla Nyambura Njue v Geovhem Middle East Ltd; KEBS {interested party}* [2021] eKLR; *Nicholas Kiptoo Korir Salat v IEBC & 7 Others*, SC App. No. 16 of 2014; *Babati Shee Mwafundi v Elijah Wambua* [2015] eKLR; and *George Mwangi Kinuthia v Attorney General* [2019] eKLR.
13. Counsel submitted that the Applicants' have not met the threshold for on whether the applicants had met the threshold for setting aside consent orders and relied on the cases of *\*Flora N. Wasike v Destimo Wamboko* [1988] eKLR; *JM Mwakio v Kenya Commercial Bank Limited* Civil Appeal 28 of 1982; *James Muchori Maina v KPLC Ltd* [2005] eKLR; *Kenya Commercial Bank LTD v Benjob Amalgamated Ltd* Nbi Civil Appeal No. 276 of 1997; *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1982] KLR 485*; *SMN V ZMS & 3 others* [2017] eKLR; and *Kitale Industries v Attorney General & County Government of Trans Nzoia* [2020] eKLR.



14. It was counsel's submission that the Applicants' previous advocate was a duly instructed advocate and had an implied authority to compromise the matter on behalf of his clients hence in the absence of proof of any express negative direction, the consent remains binding on the Applicants.
15. On the issue of the delay in filing the application, counsel submitted that the Applicants filed the application after 16 months which delay has not been explained and relied on the case of *Charles Kiptarbei Birech v Paul Waweru Mbugua & another* [2021] eKLR and urged the court to dismiss the application with costs.

### **Analysis and Determination**

16. The issue for determination is whether the Applicants have met the threshold for setting aside a consent order.
17. The principles for setting aside consent orders are well established as was enumerated in the case of *Brooke Bond Liebig vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus;

It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

18. Further in the case of *Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd* [1982] KLR 485, Harris J correctly held *inter alia*, that –

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.

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.”

19. In this case, the impugned consent dated July 4, 2018 and adopted as an order of this court on July 9, 2018 was in the following terms: -
  1. A declaration be and is hereby issued that Chebuswa Limited, the Plaintiff herein has an easement over Plot No. 10885 Malindi.
  2. The matter be and is hereby marked as withdrawn with no orders as to costs.
20. It should be noted that the Applicants' previous counsel Benjamin Binyenya swore an affidavit with details of what transpired leading to the filing of the consent to compromise the suit and the subsequent withdrawal of the suit. This shows that the applicants were aware of the consent and if they were not party to the consent they should have advised their advocate not to enter into the consent.



21. The delay in filing the application after a period of 16 months is also inordinate as no explanation has been given at all on why they did not file the application immediately after being aggrieved by the consent order.
22. It is not enough to blame the previous counsel that they did not have instructions to compromise the suit without proof of fraud, collusion or an agreement contrary to policy. The applicants have not shown that there was any collusion or fraud and have not brought any proof of any negative directions given to their previous advocates. It is evident that the applicants had been informed of the compromise via email on July 4, 2018 and that the Applicants' argument that the 2<sup>nd</sup> Applicant is too old to have made a decision on the same date is not tenable as they had a choice to respond to the email and reject the draft consent.
23. Further in the case of *The Board of Trustees National Social Security Fund —vs- Michael Mwalo* (2015) eKLR, where the Court of Appeal stated as follows;

The position is clearly set out in *Setton on Judgments and Orders* (7<sup>TH</sup> Edn), Vol. 1pg 124 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...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. "
24. This is a matter where the Plaintiff withdrew the case after entering in a consent and the same was adopted as a judgment of the court. I see no reason to upset the consent as no fraud or collusion has been proved. The application is therefore dismissed with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated March 28, 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.

