



Mwalambe & another v Freedom Limited; District Land Surveyor (Interested Party) (Environment & Land Case 132 of 2018) [2022] KEELC 14687 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14687 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 132 OF 2018
MAO ODENY, J
NOVEMBER 10, 2022**

BETWEEN

CHAI LWAMBI MWALAMBE 1ST PLAINTIFF

THOMAS LWAMBI MWALAMBE 2ND PLAINTIFF

AND

FREEDOM LIMITED DEFENDANT

AND

DISTRICT LAND SURVEYOR INTERESTED PARTY

RULING

1. This ruling is in respect of a notice of motion dated March 21, 2022, by the plaintiff/applicants seeking the following orders;
 - a. Spent
 - b. That the court be pleased to set aside a consent judgment filed in court on January 21, 2020 pending the hearing and determination of this application.
 - c. Costs of the application and suit be provided for.
2. The application was supported by the affidavit of Chai Lwambi Mwalambe and Thomas Lwambi Mwalambe sworn on the March 21, 2022 where they deponed that on January 21, 2020, their advocate signed a consent judgment with the defendant without their authority and consent.
3. The applicant deponed that by the time the consent was signed the defendant had not paid the agreed purchase price and that necessitated the filing of this application. Further that they later discovered that the defendant had obtained a title to the suit land before clearing the payment of the agreed purchase price which was issued as a result of the consent judgment herein.



4. The defendant in response filed a replying affidavit sworn by Harji Govind Ruda, one of the company's directors dated June 9, 2022 where he deponed that the consent was filed in court way back in January, 2020 and that the Plaintiffs' application is an afterthought aimed at derailing the final disposal of the matter.
5. It was the respondent's case that the applicants cannot claim not to be aware of the consent as averred more than two years down the line and further that the applicants sought to stay these proceedings hence it cannot be true that they were not aware of the consent judgment.
6. The respondent also stated that the title deed alluded to by the applicant was issued way back in 2017 and was not as a result of the consent judgment filed on January 21, 2020.
7. Plaintiffs on the cases of *Kericho Guest House Enterprises Limited v Kenya Breweries Limited* [2018] eKLR and Court of Appeal in the case of *Board of Trustees National Social Security Fund v Michael Mwalo* [2015] eKLR, where the court held 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.
8. Counsel for the respondent submitted that the application should be dismissed as the applicants' prayers are spent and cannot be granted by this court in the manner they are framed.
9. It was counsel's further submission that the application fails to meet the threshold for setting aside consent judgments executed by the representative of the plaintiffs and relied on 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 where 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.
10. Counsel therefore urge^{3d} the court to dismiss the application as the plaintiffs have not proved that the advocate did not have any authority to sign the consent.

Analysis and Determination.

11. The issue for determination is whether the applicants have met the threshold for setting aside consent judgments. 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.....”

12. Similarly, in the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co Ltd* [1982] KLR 485, Harris J held 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 material facts or in misapprehension or ignorance of such facts in general or 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 of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

13. The applicants were under a duty to produce evidence that the advocate did not have authority to enter into the consent judgment on their behalf or that she misrepresented herself in the matter or acted fraudulently. These are serious allegations against an advocate which can lead to sanctions and disciplinary action against the said advocate. It is not enough just to level allegations without proof of such allegations.
14. I notice that the impugned consent was entered into on January 21, 2020 and the title that title that the plaintiffs are complaining of was issued on October 31, 2017. It therefore follows that the title was not a product of the consent judgment as earlier deponed by the plaintiffs.
15. This application is dated March 21, 2022 while the consent judgment was recorded on January 21, 2020 which is more than 2 years. The delay in filing the application has not been explained. Equity does not aid the indolent.
16. I find that the application lacks merit and is therefore dismissed it with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF NOVEMBER, 2022.

MA 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 Judgment has been delivered online to the last known email address thereby waiving order 21 [1] of the Civil Procedure Rules.

