



Cross Country Ventures Limited v Nairobi City County (Environment & Land Case 86 of 2018) [2025] KEELC 4099 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4099 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 86 OF 2018**

CA OCHIENG, J

MAY 22, 2025

BETWEEN

CROSS COUNTRY VENTURES LIMITED PLAINTIFF

AND

NAIROBI CITY COUNTY DEFENDANT

RULING

1. What is before the Court for determination is the Defendant's Notice of Motion application dated the 18th February 2025 where it seeks the following Orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That this Honourable court be pleased to review and set aside the consent decree dated 26th April 2024 and all subsequent orders on such terms as the Honourable court may deem fit to grant.
 - e. That costs of this application be provided for.
2. The application is premised on grounds on its face and on the supporting affidavit of Wasonga Ogolla, the Defendant's Acting County Solicitor. He avers that the Defendant was previously represented in the matter by the firm of messrs Musyoki Mogaka & Company Advocates who drew instructions directly from it. However, sometimes in the year 2024, he was surprised to see a Decree dated the 26th April 2024, purportedly issued herein pursuant to a consent entered into on 16th February 2024, by the aforementioned advocates with advocates for the Plaintiff and which consent, was confirmed before the Court on 29th February 2024.



3. He disputes instructing the said advocates to compromise the suit and avers that the Defendant's County Attorney did not issue instructions to the said advocates to represent the Defendant in any negotiations culminating into a consent. He urges the court to regard the consent herein as fraudulent for want of instructions from the Defendant and on the basis that its effect may result in the Defendant losing ownership rights to the suit property.
4. The application is opposed by the Plaintiff vide the replying affidavit of its director, one Francis Njuguna Ndegwa. He asserts that an advocate on record has general instructions to deal with the suit as he deems fit and the Defendant is bound by the actions of its agent. Further, that the Defendant's former advocates sought instructions from the Defendant as per letter dated the 7th February 2024 in respect to this matter, which he annexed. He claims that there is no ownership dispute between the parties herein and makes reference to paragraph 3 of the Defendant's witness statement of Cecilia W. Kiogu, who is its Deputy Director of Survey, where it is admitted that the Plaintiff is the registered proprietor of Title No. LR 209/5945. He insists that the Defendant has continued to issue demand notes for rates of the property to the Plaintiff. He contends that the instant application is an afterthought meant to deny the Plaintiff the fruits of its judgment as no grounds have been established for setting aside a consent order. He reiterates that the Defendant is guilty of laches.
5. The application was canvassed by way of written submissions.

Submissions

6. The Plaintiff in its submissions relied on the case of *Flora N. Wasike v Destimo Wamboko* (1982-88) 1KAR 625 and *Brooke Bond Liebig (T) Limited v Maliya* [1975] EA 266 to argue that a consent judgment can only be set aside on grounds that would justify setting aside a contract. It insisted that an advocate has general authority to compromise a suit on behalf of their client subject to such consent being free of fraud/collusion / contrary to the policy of the court. He contends that there is no evidence that the consent herein was reached as a result of fraud. The case of *Benjob Amalgamated Limited v Kenya Commercial Bank Limited & Another* [2024] KECA 593 (KLR) was also relied upon.
7. In its submissions, the Defendant contends that the application is brought without any delay as it was filed as soon as the Defendant discovered the consent judgment on 14th February 2025 and there is no limitation of time, in claims which involve fraud and/or misrepresentation as time starts running when the fraudulent dealings are discovered.
8. It further submitted that there is nothing on record indicating that the Defendant, after receipt of its former advocates legal opinion annexed to the Defendant's replying affidavit as FNN1 advising it to settle this matter, issued instructions to the said advocates to enter into a consent as the one recorded on 16th February 2024. It contends that since the Defendant's former advocates acted on non-existent instructions, their counsel ought not be visited upon the Defendant. Further, that this court has discretion to set aside the judgment. It reiterated that it is prejudiced and stands to suffer as the Plaintiff might have gained possession of the suit property by now and might be in the process of developing it, which actions will amount to miscarriage of justice. To support its averments, it relied on the following decisions: *Bakari Shaban Gakere v Mwana Idd Guchu & 3 Others* [2022] eKLR and *Patel v EA Cargo Handling Services* [1974] EA.

Analysis and Determination

9. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivaling submissions, the only issue for determination is whether the consent decree dated 26th April 2024 should be reviewed and or set aside.



10. The Defendant has sought for the review and or setting aside of the Consent Decree dated the 26th April, 2024 arguing that it did not instruct its erstwhile Advocates to compromise this suit by the said Consent. It insists that mistake of its Counsel should not be visited upon it. The Plaintiff has opposed the instant application insisting that an advocate representing a party has general authority to even compromise a suit. Further, that the Defendant had already admitted in the pleadings that the suit land belongs to the Plaintiff. The Plaintiff annexed the legal opinion which the erstwhile Counsel had sent the Defendant encouraging it to settle this matter and copies of the rate receipts, which it pays to the Defendant.
11. I wish to reproduce the Consent dated the 8th February, 2024 which was adopted as an order of court on 29th February, 2024 culminating in the Decree dated 26th April 2024 that is in dispute herein:

“By Consent.

1. A declaration be and is hereby issued that the Plaintiff is the lawful owner of Land Parcel No. 209/5945.
2. The Plaintiff shall have exclusive possession of LR No. 209/5945.
3. The Plaintiff shall be at liberty to open/remove padlocks on the front gate to gain access to the property.
4. Each party shall bear its own costs.”

12. The principles for setting aside a consent judgment are well settled.

The Court of Appeal in *Board of Trustees National Social Security Fund versus Michael Mwalo* [2015] eKLR held as follows:

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. 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. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” Emphasis Mine

13. Further, the Court of Appeal in *Guzzini & Another v Tinga & 7 Others (Civil Appeal E047 of 2021)* [2024] KECA 493 (KLR) (26 April 2024) (Judgment) stated inter alia:

“Be that as it may, we hasten to observe that a court is not obligated to inquire into the terms on which counsel is instructed by their client in judicial proceedings. Neither can the court take upon itself to inquire into the conduct of negotiations between learned counsel leading to such consent orders. In the absence of fraud, mistake or misrepresentation, such orders stand (see *Frank Phipps & Pearl Phipps v Harold Morrison* SCCA 86 of 2008; and *Kinch v Walcott and Others* [1929] A.C. 482).” Emphasis Mine

14. On whether there was mistake of counsel, the Court observed as follows in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic.



While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

15. From a perusal of the Court record, I note the Defendant in its Amended Defence denied trespassing on LR No. 209/5945. Further, in the Defendant's Witness Statement sworn by Cecilia W. Koigu, its Deputy Director of Survey, she denied that the Defendant had converted the said land into playfields for a Nursery School nor issuing an eviction order. Further, I note the Plaintiff filed Rate Payment Receipts, Buildings Plan Approval Fee Receipt and Construction Site Board Receipt in respect to the suit land, which were issued by the Defendant. On perusal of the proceedings, it emerges that the parties agreed to resolve this matter amicably. From the averments of the deponent (Wasonga Ogolla) herein, he has not demonstrated whether there was fraud or collusion in the entry of the impugned consent. It is evident that actually the Defendant's erstwhile advocates had issued a legal opinion to it, to settle the matter after which, a consent was recorded.
16. Based on the principles set out in the aforementioned decisions while applying them to the circumstances at hand, I find that the Defendant has failed to demonstrate that his Counsel acted illegally, fraudulently and committed a mistake in entry of the impugned consent. I opine that this is not a clear case where the consent was entered into by fraud, collusion or contrary to Public Policy as claimed. In this instance, the parties and their advocates consented to compromise this suit and since there is a Decree to that effect, I hence find that there is no plausible reason proffered to warrant the review and or setting aside of the impugned Decree dated the 26th April 2024.
17. In the foregoing, I find the Notice of Motion application dated the 18th February 2025 unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF MAY 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Kimani for Plaintiff/ Respondent

Ms Anjiko for Respondent/Appellant

Court Assistant: Susan

