



Vivo Energy Kenya Limited v Kenya Railways Corporation (Environment & Land Petition 7 of 2020) [2024] KEELC 1159 (KLR) (5 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1159 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 7 OF 2020

EK WABWOTO, J

MARCH 5, 2024

**IN THE MATTER OF LICENSING AND REGUALTION OF USER OF
IMMOVABLE PROPERTY REGISTERED IN THE NAME OF A PRIVATE CITIZEN**

AND

IN THE MATTER OF RAILWAYS CORPORATION ACT CHAPTER 397 OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 10,21,22,23,25,35,40,47,50
AND 60(1) (B) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT NUMBER 4 OF 2015 BETWEEN

VIVO ENERGY KENYA LIMITED.....PETITIONER

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

BETWEEN

VIVO ENERGY KENYA LIMITED PETITIONER

AND

KENYA RAILWAYS CORPORATION RESPONDENT



RULING

1. On 23rd February 2022 the parties herein moved this court seeking to settle the Petition herein vide a consent dated 22nd February, 2022. The following terms of the said consent was adopted by the Court:-
 - “ 1. The letter dated 4th February, 2020 reference Number KR/ID-PDE/BV/FL 16 from the Respondent Kenya Railways Corporation to the petitioner and addressed as Shell Petrol (Vivo Energy) be and is hereby withdrawn and the status quo regarding the user of all that property known as Land reference Number 209/4363, Nairobi (L.R. Number 10767) preceding the issuance of the said letter be maintained.
 - ii. The Petitioner, Vivo Energy Kenya Limited, being the registered owner of All That property known as Land Reference Number 209/4363, Nairobi (I.R. Number 10767) shall continue to have peaceful, lawful and uninterrupted user of All That property known as Land Reference Number 209/4363, Nairobi (L.R. Number 10767) whereon it runs a duly licenced service station and ancillary services; and
 - iii. The Petitioner to settle the Respondent’s Advocates Costs to be agreed within seven days from the date of filing this Consent (settlement of which is hereby acknowledged).”
2. Subsequently, thereafter the Respondent moved this court vide an application dated 20th July, 2023 seeking to have the said consent set aside in its entirety and further to have the Petition heard afresh on merit. The Respondent also sought a stay of execution of the Consent Order dated 22nd February 2022 and adopted on 23rd February, 2022 and all consequential orders pending the hearing and determination of the said application.
3. The application was based on several grounds set out in the face of the application and on the supporting affidavit sworn by Stanley Gitari Ag. G.M. –Legal Services and Corporation Secretary of the Respondent sworn on 20th July, 2023.
4. The Respondent contended that the information and records which were recently discovered negates the ownership claim by the Petitioner herein and indicates that the suit is a public land and was never allocated to the Petitioner or any other entity for private use. The Respondent averred that it executed the consent with an honest but mistaken belief and or misapprehension of real facts that the Petitioner acquired a valid and legitimate proprietary interest in the suit property.
5. It was contended that there was an apparent absence of sufficient material facts on the part of the Respondent at the point when it executed the impugned consent. The mistake was further induced by material misrepresentation made by the Petitioner when it presented a fraudulent grant allegedly issued on the 1st June, 1953.
6. It was contended that the impugned consent was premised on a grant irregularly and fraudulently acquired by the Petitioner and the same is nullity on account of the well-known legal maxims, “Ex dolo malo, non oritur action and Ex turpi Causa non Oritur action” It was averred that as consequence of this impugned consent and the Petitioner’s illegal occupation of the suit property, the Respondent has suffered immense losses totally to Kshs. 2,700,000,000 due to the inability to profitably utilize its land.



7. The application was opposed by the Petitioner. The Petitioner filed grounds of opposition dated 21st August, 2023 and a Replying Affidavit sworn by Naomi Assumani, Regional Counsel and Legal Manager of the Petitioner sworn on 23rd January, 2024. It was contended that the Respondent has since derived benefit from the consent that was executed between parties and adopted before the by the court with a resultant Decree having been issued herein. It was also contended that the Respondent has not met the threshold set out in the case of Flora Wasike versus Destimo Wamboko (1982-1988) 1 KAR 625.
8. The Petitioner averred that it was the registered proprietor of all that property known as Land Reference Number 209/4363 (L.R. Number 10767 on which it has had peaceful and quiet possession thereof and continues to run a Shell branded Service Station in terms of licences issued to it by the regulations. It was contended that the Respondent has no residual rights in the suit property nor its user thereof, pursuant to special condition number eight in the grant.
9. It was averred that the Respondent was served with the Petition and through the firm of Mutei & Co. Advocates filed an answer to the Petition dated 8th June, 2020 where it did not claim being the registered owner of the property, it only sought to have the Petitioner present before it the instrument of title for inspection and confirmed that its generic letter that provoked these proceeding was targeting transactions by the Commissioner of Lands which occurred in 1994.
10. It was contended that it is close to 18 months since the consent filed herein was adopted by the Court and that the Respondent has not placed before the Court any evidence to warrant the setting aside of the said Consent.
11. Pursuant to the directions issued by this court, parties were allowed to file and exchange their written submissions in respect to the application. The Respondent filed written submissions dated 15th September, 2023 while the Petitioner filed written submissions dated 16th February, 2024 which the Court has duly considered.
12. During the plenary hearing of the application, Learned Counsel Jamal Bake submitted on behalf of the Respondent and reiterated the contents of the affidavits filed in support of the application and the written submissions. He also submitted that the Supreme Court Case of Dina Management Limited versus County Government of Mombasa & 5 Others [2023]eKLR, that Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. It was argued that Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. The Court was urged to allow the application and grant the Orders sought.
13. Learned Counsel Steve Luseno appearing for the Petitioner opposed the application and relied on the replying affidavit sworn by Naomi Assumani on 23rd January, 2024, ground of opposition and written submission filed by the Petitioner. He also added that the Dina Management Limited case (supra) was not about reopening matters settled by consent.
14. The Court has considered the application, rival affidavits filed, oral and written submissions from the parties. The Court has also considered all the authorities that were cited. The salient issue for determination is whether the Respondent has made a case to warrant this court set aside the consent judgement and decree adopted by the court on 23rd February, 2022.



15. Our courts have umpteen times articulated the criteria upon which the jurisdiction to set aside a consent order or consent judgment is exercised. In *Flora N. Wasika v Destimo Wamboku* (1988)eKLR the Court of Appeal stated thus:

“it is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or if certain conditions remain to be fulfilled which are not carried out”

16. In *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* [1982]KLR 485, Harris, J correctly held, inter alia, that –

- “1. 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.
2. 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.

In *Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another* [1998] eKLR this Court cited a passage in *The Supreme Court Practice 1976* (Vol. 2) paragraph 2013 page 620 stating:-

“Authority of Solicitor - a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (*Re Newen*, [1903] 1 Ch pp 817,818; *Little vs Spreadbury*, [1910] 2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice - see *Welsh vs Roe* [1918 - 9] All E.R. Rep 620.”

Finally in the Ugandan case of *Lenina Kemigisha Mbabazi Star Fish Ltd*(supra) the Court stated:

“The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”

17. What emerges from the affidavits filed by the Respondent is that the Respondent has obtained some information and records which negates the ownership claim by the Petitioner since it indicates that the suit property is public land.
18. The aforementioned position was vehemently contested by the Petitioner who argued that they have enjoyed quiet possession of the suit property since 6th July, 1954.
19. The Respondent also submitted that the consent order should be set aside on account of public interest. This was due to the reasons that apart from seeking to reclaim the land initially allocated to it, the suit property forms part of the approximately 200 acres land which will be used in the implementation of the Nairobi Railway City Project. It was submitted that this is a strategic project



of National importance aimed at revolutionizing the National Transport System as well as provide a liveable and sustainable urban space among other objections. The project, upon implementation will not only decongest the city but also form a major income stream for the Petition

20. While it is trite law that a consent order entered into by Counsel is binding on all parties to the proceedings the same cannot be set aside or varied unless proved that it was obtained by fraud or collusion or by agreement contrary to the policy of the court or where the consent was given without sufficient material fact, in the instant case, the Respondent is a public entity permitted to hold and acquire properties under its own name. This Court having considered the issues raised herein takes the position that a public entity seeking to set aside a consent on the basis that it has obtained new material and information ought to be heard. The Court is therefore persuaded that there is need to hear the respective parties' cases on merit and in the circumstances this Court shall proceed to set aside the Consent Order adopted by this court on 23rd February, 2022.
21. Given the foregoing, this court shall proceed to issue the following disposal orders in respect to the application dated 20th July 2023;
 - i. The Consent Order dated 22nd February 2022 and adopted as a Judgment of the Court on 23rd February 2022 is hereby set aside in its entirety.
 - ii. This Petition shall be mentioned on 15th April 2024 before the Presiding Judge, Land Division for directions on its hearing and disposal.
 - iii. Each party to bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED BY EMAIL THIS 5TH DAY OF MARCH, 2024.

E.K. WABWOTO

JUDGE

