



Boit (Suing as the Administrator and Legal Representative of the Estate of the Late Samuel Kipler Boit) v Chumo & 3 others (Environment & Land Case 47 of 2015) [2024] KEELC 5083 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5083 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 47 OF 2015**

**EK MAKORI, J
JULY 4, 2024**

BETWEEN

SARAH CHELEL BOIT (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE SAMUEL KIPLER BOIT) PLAINTIFF

AND

**MIRRIAM CHEROP CHUMO 1ST DEFENDANT
ISMAEL HASSAN 2ND DEFENDANT
THE LAND REGISTRAR, COAST REGISTRY 3RD DEFENDANT
HUSNA ALI ABDALLA 4TH DEFENDANT**

RULING

5. The first applicant/respondent filed a crucial application dated 11 April 2024. This application, of utmost importance, sought to set aside the consent entered by counsels in this matter dated 4 October 2023, which compromised the application dated 19 September 2017, a significant event that sought dismissal of the current suit for want of prosecution. The withdrawal of the application for dismissal by consent paved the way for the hearing of this matter on merit.
6. The application is supported by the affidavit deposed on 11 April 2024 by the 1st defendant/applicant
7. The motion is fiercely opposed. The respondent's replying affidavit, dated 4 June 2024, is attached.
8. The application was canvassed by way of written submissions.
9. The Applicant's main grievance is that when the matter came for the hearing of the application dated 19 September 2017, Ms. Amina Bwanadi, who was holding brief for Mr. Obaga for the applicant, had



no authority from the said Mr.Obaga, who had personal conduct of the matter nor the applicant to enter the impugned consent. According to the applicant, she acted without instructions and due care in the applicant's best interest. Due to the preceding, the applicant seeks orders dated 4 October 2023 to be set aside, the application dated 19 September 2017, prosecuted on merit.

10. The respondent vehemently contends that there is nothing to show that Ms. Amina Bwanadi, learned counsel, acted in bad faith, was mistaken, or misrepresented facts in entering the consent dated 4 October 2023; hence, the application should be dismissed. This starkly contrasts with the applicant's position.
11. The parties cited several weighty judicial authorities on what the Court needs to consider before setting aside the consent entered herein by the parties.
12. The issues I frame for determining this application are whether the consent entered on 4 October 2023 should be set aside and who should bear the costs of the present application.
13. Consent orders can ordinarily be set aside if the following conditions are met as enunciated by Mogeni J. in the case of Wema Foundation Trust Company Limited v County Government of Nairobi City & another [2022] eKLR:

“In the Court of Appeal in the case of Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269 Law Ag P said:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

8. In Kenya Commercial Bank Ltd V 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.

9. In Hirani V. Kassam [1952] 19 EACA 131, the Court of Appeal held;

“It is now well 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: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676: -



“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order lo

14. In this matter, the consent herein was entered by advocates—the compromised application sought to have the plaintiff’s claim struck out for want of prosecution. As can be noted, this is an old matter that was filed sometime in 2015. It needs to be out of our judicial system anyway. It represents a backlog pending before this Court, and therefore, the application for dismissal in the Court’s eye was germane and welcome. But then the parties, through their counsels, agreed to have the application withdrawn to pave the way for a merit-based hearing of this suit. It is said Ms Amina Bwanadi, learned counsel, could not do so because she had no express instructions from the lead counsel for the applicant, Mr. Obaga, nor the applicant. It is alleged she did not act in the applicant’s best interest. But, based on the materials before me, nothing has been brought forth to show that learned counsel colluded with the respondent’s counsel, misrepresented facts, or was mistaken or acted fraudulently to the applicant’s detriment in entering the consent. This can also be inferred from the parties’ conduct after the consent. A hearing of the suit has been placed on the following dates: 26 September 2023, 4 October 2023, 23 November 2023, 13th February 2024, and 30 May 2024. The issue of the impugned consent on all those dates was never raised. I believe this application is an afterthought tailored to stall the hearing of an otherwise old lawsuit pending before this Court.

15. The upshot is that the application dated 11th April 2024 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 4TH DAY OF JULY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms Mbaabu for the Plaintiff/Respondent

Ms Oloo holding brief for Mr. Kilonzo for the 4th Defendant

Mr. Lianza holding brief for Mr. Shimaka for the 1st Defendant/ Applicant

Happy: Court Clerk

In the Absence of:

Mr. Munga for the 3rd Defendant

