



Magua & another & another v Munene & another (Environment & Land Case E231 of 2021) [2024] KEELC 14185 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEELC 14185 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E231 OF 2021**

**MD MWANGI, J
JULY 12, 2024**

BETWEEN

MOSES CHELEE MAGUA & ANOTHER 1ST PLAINTIFF

JOSEPH GITAU KUNGU 2ND PLAINTIFF

AND

IAN MUKORA MUNENE 1ST DEFENDANT

LAND REGISTRAR NAIROBI CENTRAL 2ND DEFENDANT

((In respect of the 1st Plaintiff's application dated 14/03/2023 seeking to set aside or vary the decree issued on 18th November, 2021 and all other prior and subsequent orders issues thereafter amongst other orders).))

RULING

1. This suit was initiated vide the plaint dated 29th June, 2021. It was filed in the names of the two Plaintiffs, Moses Chege Magua and Josephat Gitau Kungu. The verifying affidavit accompanying the plaint was deposed on 29th June 2012 by Moses Chege Magua of ID No. 12xxx96 who described himself as the 1st Plaintiff, well versed with the facts of the case and therefore competent to swear the affidavit.
2. It was pleaded in the plaint that the Plaintiffs were the registered owners of a parcel of land known as LR No. 89/42 measuring as proximately 21.77 hectares (hereinafter referred to as "the suit property). The Plaintiffs alleged that they acquired the suit property as a lease from the Government of Kenya paying an annual rent of Kshs. 124,000/- per annum, with effect from 1st June 2000. They accused the 1st Defendant of encroaching into the suit property. Despite demand and notice of intention to sue being issued to it, the Defendant had adamantly refused to vacate the suit property necessitating the filing of this suit.



3. The Plaintiffs sought for orders of eviction against the 1st Defendant from the suit property and demolition of the structures erected thereon.
4. On 10th November, 2021, the Plaintiffs and the 1st Defendant, through their respective Advocates, appeared before Justice Angote and informed the Court that they had agreed on a consent which they had reduced into writing and filed in Court. They requested for its adoption by the Court.
5. The consent which was adopted by the Court on 10th November 2021, was dated 8th November, 2021. It was signed by Biketi & Company Advocates for the 1st and 2nd Plaintiffs and Judy Thongori & Co. Advocates for the 1st Defendant.
6. The consent compromised the entire suit. The suit was settled in the following terms: -
 1. The title No. IR 226/750/1 registered on 24th February, 2021 to Moses Chege Magua and Joseph Gitau Kungu be and is hereby cancelled and or revoked as the said property is owned by and registered in the name of Munene Estates Limited.
 2. The Plaintiffs' Advocates Biketi & Company Advocates do surrender the original title to No. IR 226750/1 registered in the names of Moses Chege Magua and Joseph Gitau Kungu to the Chief Land Registrar Nairobi Central for cancellation and or revocation within 3 days of execution of this consent.
 3. No orders as to costs.
7. On 16th March, 2024 the law firm of Owang & Associates filed a Notice of Motion application dated 14th March, 2024 on behalf of the 1st Plaintiff, under certificate of urgency seeking amongst other orders, an order to set aside or vary the decree issued on 18th November, 2021 and all prior or subsequent orders issued thereto. Further that the entire proceedings relating to this suit be declared nullity ab initio due to fraud.
8. The application by the 1st Plaintiff was majorly premised on the premises that the law firm of Biketi & Co. Advocates instituted the suit on behalf of the Plaintiffs without their knowledge and authority sometimes in June, 2021. The law firm was further accused of proceeding without the Plaintiffs' knowledge and or the Plaintiffs' permission to record a consent judgment in Court on 10th November, 2021.
9. It was alleged that the Plaintiffs did not participate in the proceedings leading to the consent order and the decree herein and the proceedings ought to be declared a nullity. The 1st Plaintiff's signature appearing on the pleadings filed by the law firm of Biketi & Company Advocates was alleged to have been forged. The Plaintiffs denied instructing the said Law Firm to act on their behalf and or institute these proceedings on their behalf.
10. The application was supported by the affidavit of Moses Chege Magua sworn on 14th March, 2023. In the affidavit, the deponent reiterated the averments on the face of the application insinuating that the consent order and the proceedings in this matter were instituted fraudulently by the law firm of Biketi & Company Advocates and ought to be set aside.
11. The Court in its directions of 16th March, 2023 directed service of the application on all the parties as well as on the Advocate previously on record for the Applicants trading in the name and style of Biketi & Company Advocates.
12. The 1st Defendant/Respondent, through the Law Firm of Judy Thongori & Company Advocates responded to the application by the Plaintiffs by way of grounds of opposition dated 22nd March, 2023.



In the grounds of opposition, the 1st Respondent asserted that the prayers sought in the application before the Court had since been overtaken by events as the decree that the Applicants sought to stay had already been executed. It was the 1st Respondent's further ground that the genuine title in respect to the suit property, the subject matter of this suit was registered in the name of Munene Estates Limited and had since been distributed in Nairobi High Court Succession Cause No. 1511 of 2007, *{in the matter of the Estate of Samuel Munene Gitau (deceased)}*.

13. With leave of the Court, the 1st Respondent filed a replying affidavit sworn by one, Ian Mukora Munene on 24th April, 2023. In the affidavit, the deponent deposes that the consent in this matter was recorded after the Plaintiffs conceded that Munene Estates Ltd was the rightful and registered owner of the suit property. The Applicants surrendered their fake title to the Nairobi Lands Registry for cancellation after the recording of the consent.
14. In an interesting development, Joseph Gitau Kungu, the 2nd Plaintiff/Applicant, filed an affidavit sworn on 13th June, 2023 in which he deposed that he had indeed instructed the Law Firm of Biketi & Company Advocates to act on behalf of the Plaintiffs to protect their interest in the suit property and institute this suit. He asserted that they (the Plaintiffs) subsequently instructed the Advocate to negotiate a settlement culminating in the consent dated 8th November, 2021 whose terms were read and explained to them by the Advocate. They instructed him to proceed and have it recorded as an order of the Court. The Advocate thereafter surrendered the title they held over the suit property to the Land Registrar at the Nairobi Central registry for cancellation and revocation.
15. The 2nd Plaintiff stated that on his part, he willfully accepted the terms of the consent.
16. The application dated 14th March, 2023 that had initially been filed on behalf of the two Plaintiffs was subsequently amended by removing the 2nd Plaintiff as an Applicant, leaving the 1st Plaintiff as the sole Applicant.
17. Nick Biketi Malenya, an Advocate of this Court too filed a replying affidavit sworn on 3rd October, 2023 in response to the 1st Plaintiff's amended Notice of Motion on 21st August, 2023. The Advocate asserted that he acted on the instructions of the two Plaintiffs in filing this suit and recording the consent that compromised the suit. The Advocate made reference to the affidavit sworn by the 2nd Plaintiff on 20th January, 2023 where he had expressly admitted instructing Biketi & Company Advocates to act on their behalf. He termed the application before the Court as an afterthought actuated by personal vendetta.

Directions by the Court

18. The Court directed parties to file written submissions. All the parties save for the 2nd Plaintiff complied and filed their respective submissions which were highlighted before the Court on 22nd April 2024. The record of the highlights as well as the submissions form part of the record of the Court and I need not replicate them in this ruling.

Issues for Determination

19. Having carefully considered the amended application, the responses by the Respondents, the submissions filed by the parties, and the highlights by the parties through their Advocates on 22nd April 2024, the core issue in the 1st Plaintiff's amended application under consideration is whether the consent entered into in this matter was entered into lawfully and with the authority of the Plaintiffs.
20. The 2nd Plaintiff, Joseph Gitau Kungu renounced the application dated 14th March, 2023. He swore an affidavit to that effect confirming instructions to the law firm of Biketi & Company Advocates.



21. The plaint filed in this case as already pointed out earlier on, is supported by a verifying affidavit sworn by Moses Chege Magua, the 1st Plaintiff in this case and the Applicant herein. He alleges that his signature was forged. He alleges fraud. In determination the core issue as identified above the Court will have to determine whether the 1st Plaintiff/Applicant has proved fraud.

Analysis and Determination.

22. The law on setting aside a consent judgment or order is well spelt out. In the case of the *Board of Trustees of NSSF v Michael Mwalo* (2013) eKLR, the Court stated that;

“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.”

23. In *SMN v ZMS & 3 others* (2017) eKLR, restated the above position. Hancox J.A, too in *Flora Wasike v Destimo Wamboko* (1982-1986) 1KLR, upheld the same position.

24. The Court of appeal of East Africa was of the same position too as early as 1975 where in *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266 at 269, Law Ag P stated that:

“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.”

25. The 1st Plaintiff/Applicant alleges fraud as the ground upon which he seeks to set aside the consent recorded in this matter.

26. The law is clear on allegations of fraud. He who alleges proves. When it comes to fraud, the same must be specifically pleaded and proved.

27. Tunoi J in *Vijay Morjaria v Nansingh Madhusingh Darbar & Ano* (2000) eKLR stated it in the following words;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, off course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled Law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

28. Regarding the standard of proof of fraud, the Court of Appeal in *Kinyanjui Kamau v – George Kamau* (2015) eKLR held that,

“It is trite Law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008], KLR (G & F) 742, wherein the Court stated that; “... we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary Civil cases, namely proof upon a balance of probabilities; but the burden of proof



on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases ...”
In cases where fraud is alleged, it is not enough to simply infer fraud from the facts”.

29. The application herein merely alleged fraud and forgery. He did not proceed to the next step of proving the same. He left it upon the Court to infer fraud from the fact. Fraud/forgery must be distinctly on a standard obviously higher than that required in ordinary civil cases.
30. One more issue that the Court needs to address is the 1st Plaintiff’s denial of having instructed the law firm of Biketi & Co. Advocates to represent him in this case.
31. In the case of *Mereka & Co. Advocates v Zakhem Construction* (2014) eKLR, the Court held that a retainer need not be in writing. It can be oral and can even be inferred from the conduct of parties.
32. In this case, the 2nd Plaintiff with whom the 1st Plaintiff jointly filed the case with has expressly admitted instructing Biketi & Co. Advocates on his own behalf and on behalf of the 1st Plaintiff whereas the 1st Plaintiff alleged that his signature in the documents filed in this case was forged. This allegation by the 1st Plaintiff remains that, a mere allegation as it has not been proved. The burden of proof was on him. He failed to discharge it.
33. Considering all the circumstances of this case there is sufficient evidence that the Plaintiffs indeed instructed Biketi & Company Advocates to file the suit and act for them in this case.
34. Having made a finding that Biketi & Company Advocates were duly instructed, the next consideration is whether they had the authority to record the consent as they did on behalf of their clients. A duly instructed Advocate in the course of conducting the cause is clothed with implied general authority to compromise and settle a suit.
35. In *Kinuthia Eston Maina & 3 Others v Coffee Board of Kenya* (2015) eKLR it was held that:
“a duly instructed advocates has an implied general authority to compromise and settle a suit. A client cannot avail himself of any limitation by him of the implied authority unless such limitation was brought to the notice of the other side.”
36. The Court of Appeal in *M & E. Consulting Engineers Limited v Lake Basin Development Authority & Another* (2015) eKLR held *inter alia* that:
“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. The Court also held that an advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.”
37. Justice Mativo J (as he then was) too while handling a similar matter and citing the above cases in the matter of *Priscilla Nyambura Njue -vs- Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR stated that:
“.... an advocate in the course of conducting the cause is clothed with authority to compromise a suit in which he has been retained as counsel. Two, express authority is not needed for a counsel to enter into a compromise within the scope of the suit. Three, where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. Four,



unless his authority to act for his client is revoked and such revocation is notified to the opposite side, he has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client. Five, the authority to compromise is implicit in the appointment unless it is expressly countermanded, and that, whether there is express authority conferred by the power or not. From the above principles, it is my view that the argument that the advocate had no authority to withdraw the case is legally frail and unsustainable. In any event, it was an afterthought coming as it does after the Supreme Court reversed the Court of Appeal decision.”

38. The 2nd Plaintiff confirm giving express authority to the Advocates to record the consent. The 1st Plaintiff denies giving any authority to the Advocate. From the above cited authorities, express authority is not needed for an Advocate to enter into a compromise within the scope of the suit unless, his authority to act for his client is revoked and such revocation notified to the opposite side.

39. The upshot from the foregoing is that the consent entered into in this matter was regular and lawful. The 1st Plaintiff has not established lawful grounds to impeach the consent and the resultant decree. His application is therefore without merits and is hereby dismissed with costs to the Respondents.

40 It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF JULY 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Sore for Biketi & Company Advocates

Ms. Ndirangu for the 1st Defendant

Mr. Owang’ for the 1st Plaintiff

N/A for the 2nd Plaintiff

Court Assistant: Yvette.

M.D. MWANGI

JUDGE

