



**Ogona v Maro (Environment & Land Case 57 of 2018)
[2023] KEELC 17290 (KLR) (9 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 57 OF 2018**

NA MATHEKA, J

MAY 9, 2023

BETWEEN

MAULID MOHAMED OGONA PLAINTIFF

AND

JIKOMI SAID MARO DEFENDANT

RULING

1. The application is dated 31st March 2020 and is brought under Article 159 of the *constitution* of Kenya, Section 3A, 63(e) of the *Civil Procedure Act* Cap21 Laws of Kenya, Order 45 and 51 Rule 3,5 and 15 of the *Civil Procedures Rules*, 2010 seeking the following orders;
 1. That this Application herein be certified as Urgent and be heard ex-parte in the first instance and service of the same be dispensed with.
 2. That this Honourable Court be pleased to set aside the consent order dated 2nd November 2021 and received by the Court on the same day pending the hearing and determination of this Application.
 3. That this Honourable Court be pleased to set aside the consent order dated 2nd November 2021 and received by the Court on the same day pending the hearing and determination of this case.
 4. That this Honourable Court be pleased to review and set aside the consent order dated 2nd November 2021 and received by the Court on the same day and case be reopened again to be listed for hearing on merit.
 5. That the cost of the suit be provided for.
2. It is supporting by the affidavit of Jikomi Said Maro following grounds that the Defendant instructed the firm of M/s Marende Necheza & Company Advocates who was representing them and protect her interest on the piece of land known as L R Kilif1/Kijipwa/54. That on 1st July 2021 the Defendant



withdraw the services of M/s Marende Necheza & Company Advocates and instructed the firm of M/s J J Chesaro & Company Advocates who were on record in another matter seeking adverse possession on the same suit property being Malindi ELC no. 4 of 2021 (OS) - Jikomi Said Maro - vs - Maulid Mohamed Ogoni. That the firm of M/s J J Chesaro & Company Advocates thereafter filed a Notice of Change of Advocate dated 1st July 2021 on 6th July 2021 and thereafter served the same upon M/S Marende Necheza & Company Advocates on the same day. That Defendant and her Advocate were not aware of the consent filed herein as they were not served or informed until when this matter come for mention on the 28th February 2022 when the Honourable presiding Judge indicated to the advocate on record that a consent to settle and finalize the matter had been filed. That the firm of J J Chesaro & Co Advocate who are on record wrote a letter to the Land Registrar Kilifi County which letter was delivered by herself at the Lands office whereby she was informed that the Caveat to the suit property was removed.

3. That the firm of M/S J J Chesaro & Company Advocates received a letter dated 25th August 2021 from Marende Necheza & Company Advocates in this suit acknowledging receipt of the Notice of Change of Advocate dated 1st July 2021. That having acknowledged receipt of the Notice of Change of Advocate the firm of M/s Marende Necheza & Company Advocates went ahead and draw a Consent dated 2nd November 2021 thereafter filed in Court on the same day. But the same was not served on us or the Defendant. That the said consent dated 2nd November 2021 was drawn without the knowledge of the Defendant as there was no verbal or written instruction to the said advocate who was not on record to do so. Therefore, the said consent fraudulently drawn without the consent of the Defendant. The whole process of drawing the Consent and signing and thereafter stamped by Court was a fraud as the Defendant had not given instructions to M/S Marende Necheza & Company Advocates to settle and finalize the matter by consent as they were not on record by then. That the setting aside of the Consent Orders herein as sought will cause no prejudice whatsoever to the Plaintiff/Respondent
4. The Respondent/Plaintiff submitted that the defendant's Advocate on record has Respondent to the application vide Grounds of Opposition which raises points of law that the Applicant's advocate J.J. Chesaro & Company Advocates have irregularly come on record and purport to represent the defendant herein without leave of Court nor consent by the advocates on record hence the application is bad in law ab initio and ought to be dismissed with costs. That the applicant's Advocate lacks locus standi before this Honourable Court as he's in breach of and offends the provisions of Order 9 rule 9 of the Civil Procedure Rules. That the application lacks merit and is bad in law ab initio as it has been brought to Court by a party who has no leave of Court or Consent of parties to come on record. That the application offends the provisions of Order 9 rule 9 of the [Civil Procedure Rules](#) and is bad in law ab initio
5. The Defendant submits that the application filed herein dated 31st March 2022 whereby the advocate who filed the said application has purported to file the said application on behalf of the Defendant hence representing the Defendant in a matter that the firm of Marende Necheza has been on record representing the defendant and parties had recorded a consent in which it was adopted as an Order and Judgment of Court on 2nd November 2021.
6. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court.
7. It is without doubt that the firm of J.J Chesaro filed the application before this Court without having sought leave of Court to come on record for the Defendant nor any consent from the firm of Marende Necheza Advocates allowing them to come on record on behalf of the Defendants herein. . T+ he



provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. As per the provision of Order 9 Rule 9, the correct procedure that was to be followed in the present case, as the consent was adopted as an Order and Judgment of Court, was that Counsel coming on record ought to have sought leave of the Court to come on record, then file and serve the notice of change of Advocates or seek consent before filing the current application before Court.

8. This court has considered the application and the submissions therein. The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig vs Mallya* (1975) EA 266 where the Court stated that;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

9. And in the case of *Flora N. Wasike vs Destimo Wamboko* (1988) eKLR Hancox JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, and stated that;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”

10. This means then that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside. So, was this a case of fraud or misrepresentation or mistake on the part of the 2nd Respondent. The Black’s Law Dictionary defines “fraud” as;

“1. Knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime.”

Misrepresentation is defined as;

“

- “1. The Act or an instance of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.
2. The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.



And “mistake” as;

“ 1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (I) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.

11. The Applicant’s case is that the said consent and orders were obtained fraudulently without the consent of the Applicant/Defendant. This court has perused the court records and find that the Applicant/Defendant instructed the firm of M/s Marende Necheza & Company Advocates who was representing them and protect her interest on the piece of land known as L R Kilif1/Kijipwa/54. That on 1st July 2021 the Defendant withdraw the services of M/s Marende Nechza & Company Advocates and instructed the firm of M/s J J Chesaro & Company Advocates. The firm of M/s J J Chesaro & Company Advocates thereafter filed a Notice of Change of Advocate dated 1st July 2021 on 6th July 2021 and thereafter served the same upon M/S Marende Necheza & Company Advocates on the same day. The firm of M/s Marende Nechza & Company Advocates nevertheless went and filed a consent on behalf of the Applicant/Defendant of the 2nd November 2021 long after instructions had been withdrawn from them. The same was adopted as an order of the court. I find that the firm of M/s J J Chesaro & Company Advocates did not breach and/or offend the provisions of Order 9 rule 9 of the Civil Procedure Rules as they came on record before the consent was filed and the matter marked as settled. I find that the consent was entered through misrepresentation on the part of firm of Marende Necheza Advocates when they knew very well that they did not have instructions. I find this consent was entered fraudulently and must be set aside. I find that the application dated 31st March 2022 is merited and I grant the following orders;

1. The Court sets aside the consent order dated 2nd November 2021 and received by the Court on the same day pending the hearing and determination of this case.
2. The Court reviews and sets aside the consent order dated 2nd November 2021 and received by the Court on the same day and the case be reopened again to be listed for hearing on merit.
3. That the cost this application to the Applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9TH DAY OF MAY 2023.

N.A. MATHEKA

JUDGE

