



**Kimani & another v Kimani & 3 others; Muigai Commercial Agencies Limited
(Interested Party); Kimani & another (Objector) (Environment & Land Case
E076 of 2022) [2023] KEELC 21283 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E076 OF 2022**

**MD MWANGI, J
NOVEMBER 2, 2023**

BETWEEN

ANDREW KIMANI 1ST APPLICANT

PEACH INVESTMENTS LIMITED 2ND APPLICANT

AND

MARY NG'ANG'A KIMANI 1ST RESPONDENT

MARY WACUKA KIMANI 2ND RESPONDENT

AUSTIN MAINA KIMANI 3RD RESPONDENT

THE LAND REGISTRAR NAIROBI 4TH RESPONDENT

AND

MUIGAI COMMERCIAL AGENCIES LIMITED INTERESTED PARTY

AND

ANDREW KIMANI OBJECTOR

PEACH INVESTMENTS LIMITED OBJECTOR

RULING

1. This Ruling is in respect of the Objector’s application dated 7th July, 2023 seeking for orders that:
 - a. The 1st Objector be granted permission to continue the Derivative Claim seeking relief on behalf of the 2nd Objector in respect of the acts and omissions by the 1st Respondent involving negligence, default, breach of duty and breach of duty and breach of trust in her capacity as a director of the 2nd Objector on such terms as the Honourable Court considers fit.



- b. The consent dated 9th June, 2023 executed between the 1st to 3rd Respondents and adopted as an order of the court on 12th June, 2023 be set aside together with all consequential orders.
 - c. The 1st and 2nd Objectors thereafter be joined to the suit as a 2nd and 3rd Plaintiff respectively.
 - d. The Court issue an order of restitution that all suit property rental income received since 12th June, 2023 by the 1st Respondent be remitted back to the 2nd Objector for proper declaration of income taxes.
 - e. The suit be set down for hearing and disposal on its own merit.
 - f. That without prejudice and in the alternative to Prayers 4 to 7, the consent be varied to require that prior to the distribution of any rental income, or any dealings on the suit property, an order that the Objectors be compensated within 90 days for their proprietary and legal interest in the suit property by the 1st to 3rd Respondents, which will be subjected to independent valuation and the Objectors be thereafter discharged from any further obligation related to the suit property.
 - g. The costs of the application be provided for.
2. The application is premised on the grounds that the 1st Respondent obtained a decree dated 29th June, 2023 which was served on the Interested Party with strict instructions to be paid all rental income on the suit property. The Objectors avers that they have legal and equitable interests in the suit property LR No. 209/9888. The 1st Objector states that he is a spouse to the 1st Respondent. That the 2nd Objector has been in uninterrupted possession of the suit property since June 2007.
 3. The Applicants state that the 1st Respondent and the 1st Objector are directors of the 2nd Objector Company and as such they owe it a fiduciary duty. The Applicants assert that unless the decree is set aside, the 2nd Objector's right in the suit property will be forfeited and it will be exposed to financial and tax penalties. The consent executed herein constitutes a transfer of the property hence the 2nd Objector will be subjected to capital gains tax.
 4. The 1st Respondent's involvement and accession to the consent constitutes a material breach of duty and breach of trust against the 2nd Objector Company. The Applicants argue that the consent was obtained by fraud, collusion, by an agreement contrary to the policy of the court and was given without the Court having sufficient material facts.
 5. They assert that the 1st Respondent was under an obligation to make full disclosure to the court of all material facts within her knowledge including the proprietary interests of the Objectors in the suit property. The 1st Respondent's failure to disclose material facts should bar her from obtaining any advantage from the ex parte proceedings which includes the ex parte consent judgement.
 6. The applicants assert that the Consent judgement infringes upon the 1st Objector's duty to receive, recover and otherwise deal with the property of one of the minors for her benefit and in her best interests. The Objectors are at the risk of significant personal and financial hardship unless the prayers sought herein are granted.
 7. The application is further supported by the Affidavit of Andrew Kimani Ng'ang'a deposed on the 7th July, 2023.

Response

8. The application was opposed by Mark Ng'ang'a Kimani, the 2nd Respondent herein. He avers that upon recording the consent in the suit and settling it, the Respondents proceeded to executing the



decree and register the suit property as the resulting decree. The instant application is therefore overtaken by events and the remedies sought by the Applicants are not available.

9. The deponent avers that the 1st Objector was always present in court when the suit was on-going. He actively participated in appointing an advocate for the 3rd Respondent but he never laid any claim to the suit property.
10. He further asserts that the prayers sought in the application are of a commercial nature and therefore this court has no jurisdiction over the kind of application made by the Objectors. The 2nd Respondent argues that the prayers sought in the application are of commercial nature and therefore the court has no jurisdiction.
11. Further, the consent recorded in the suit being a contract between the 1st and 2nd Respondents, the Applicants are not privy to it hence cannot seek to set it aside. He confirms that they executed the consent willingly and it is legally binding agreement between parties therein.
12. In addition, the claim for derivative action on behalf of the 2nd Objector is devoid of merit and it is only an attempt by the 1st Objector to convolute and expand the scope of the suit which has already settled. The applicants should file their own suit, if they have any claim as the Court has no jurisdiction to join parties to a suit after it is closed.
13. The 2nd Respondent denies that the two Objectors have had an interest in the suit property whether legal or equitable in nature in respect of the suit property. The 2nd Objector is not entitled to any rental income. Therefore, if it has declared any rental income arising from the suit property, it did so on its own frolic.
14. He states that the instant application is sub judice to Nairobi High Court Family Cause No. E054 of 2023 in which the 1st Applicant is claiming that he has a matrimonial claim on the same property.
15. The application should therefore be dismissed with costs.

Supplementary Affidavit

16. The 1st Objector filed a further affidavit deponed on the 10th August, 2023. He states that the 1st to 3rd Respondents are directors and members of the 2nd Objector each holding 1000 shares.
17. He asserts that the rental income of the suit property has always been the income of the 2nd Objector and it has been filing residential rental income tax for the suit property over the years. He states that no board resolution has ever been taken by the directors to relinquish its proprietary interest in the suit property. The Respondents were obligated to involve the 1st and 2nd Objector in any discussions regarding the property and their failure to do so is in breach of their duties as directors.

Court's Directions

18. With the agreement of the parties, the court directed that the application be dispensed with by way of written submissions. Both parties complied. The Objectors/Applicants submissions are dated 10th August, 2023 whereas the 2nd Defendant's submissions are dated 14th September, 2023. The court has had the opportunity to read the submissions which now form part of the record of this court.

Issues for Determination

19. I have considered the application, the rival affidavits and the written submissions by the learned Counsel for both parties. I find two issues arising for determination, namely:



- a. Whether the objection proceedings commenced by the Objectors herein are legally valid
- b. Whether the Applicants are entitled to an order varying, reviewing or setting aside the decree extracted on 29th June, 2023.
- c. Whether the Applicants should be joined to this suit as Plaintiffs.

Analysis and determination

A. Whether the objection proceedings commenced by the Objectors herein are legally valid

20. The Objectors herein commenced these proceedings by way of an objection filed in accordance to the provisions of Order 22 rule 50 of the Civil Procedure Rules.
21. An objection notice under the above cited rule is to be filed by any person who claims to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree. (emphasis mine)
22. Attachment refers to the seizing of a person's property to secure a judgement or to be sold in satisfaction of a judgement (Black's Law Dictionary, 11th Edition). Attachment is one of the ways that that a decree holder may use to satisfy a decree in his/her favour.
23. I have keenly perused the record of the court and I can confirm that there were no attachment proceedings in this matter at the time of the commencement of these proceedings by the Objectors. Their Objection Notice was therefore invalid. For that reason, the subsequent Objection proceedings herein too were invalid ab initio. For that reason alone I would strike out the application by the Objectors with costs.
24. As good practice demands, I will proceed to consider the other grounds in support of the application nonetheless.

B. Whether the Applicants are entitled to an order varying, reviewing or setting aside the decree extracted on 29th June, 2023

25. The Plaintiff in this case, the 1st and 2nd Defendants recorded a consent dated 9th June, 2023, which consent was adopted as Judgement of the court on the 12th June, 2023. Subsequently, a decree was extracted on the 29th June, 2023.
26. The law on variation of a consent judgment is now settled to the effect that the variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.
27. The Court of Appeal spelt out the grounds upon which a consent judgment may be set aside in the case of Board of Trustees National Social Security Fund vs Michael Mwalo [2015] eKLR as follows:

“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.”



28. In its decision in *S M N vs Z M S & 3 Others* [2017] eKLR, the Court of Appeal stated as follows:

“There is no dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us. Generally, 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.”

29. *Hancox JA* (as he then was) had also in the case of *Flora Wasike v. Destimo Wamboko* (1982 -1988)1 KAR 625, held as follows:

“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.”

30. In the instant application, the Objectors were not parties to the suit; consequently, they were not parties to the consent. A consent being a contract, the Objectors had the burden to prove fraud, collusion or offer proof that the agreement between the parties was contrary to the policy of Court.

31. The Applicants did not place before the court any such evidence.

32. It is evident from the record that the 1st Objector, actively participated in the court proceedings, supposedly representing the interests of one of the Respondents. At no time did he raise an issue about his own interests in the suit property. He cannot therefore claim that he was not aware of the proceedings before the court between the Plaintiff and the 1st and 2nd Respondents. If he was keen in protecting the interest in the suit property he now alleges, he ought to have moved the court for before the matter was finalized. At this point, the Objector/Applicants can only institute a fresh suit to pursue their alleged claims on the subject property, if any.

33. It is also noteworthy that there is a pending suit in the High Court Family Division over the same subject property and between the same parties on whether the suit property is a matrimonial property.

Whether the Applicants should be joined to this suit as Plaintiffs.

34. As already noted above, this suit is settled and closed. The Objectors are in essence seeking to re-open the suit. They have not demonstrated the appropriate grounds for such an action. The horse has already left the stable, so to speak. Conscious of the other proceedings pending before the High Court, I will refrain from any further comments in regard to this matter in order not to embarrass the hearing of those proceedings.

35. The upshot is that, the application before me is completely devoid of merits. I hereby dismiss it with costs to the Respondents and.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2023.

M. D. MWANGI

JUDGE

In the virtual presence of:

Ms Owino holding brief for Mura for the Objectors



Mr. Gitau Njuguna holding brief for Juma for the Plaintiff/Respondent

No appearance for the 1st Defendant/Respondent and 2nd Defendant/Respondent

