



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 10 OF 2017

PAUL KIPLANGAT KETER.....PLAINTIFF/RESPONDENT

VERSUS

JOHN KOECH.....DEFENDANT/APPLICANT

RULING

1. By a Notice of Motion dated 17th June 2019 filed pursuant to the provisions of Article 50 and 159 of the Constitution and Order 45 and 51 of the Civil Procedure Rules, Section 1A, 3A of the Civil Procedure Act, and all enabling provisions of the Law, the Applicant herein seeks the following orders:

- i. Spent
- ii. That leave be granted to the firm of M/s Maurice Oduor & Co Advocates to come on record on behalf of the Applicant herein.
- iii. That pending the hearing and determination of this application, there be stay of the warrants of arrest issued on 27th May 2019.
- iv. That pending the hearing and determination of this application, an order do issue staying execution proceedings emanating from the Decree herein.
- v. That the Decree herein be reviewed, varied and/or set aside.
- vi. That the execution and enforcement of and all further proceedings in relation to the judgment and Decree delivered and given herein on (sic) including without limitation the issuance (sic) warrants of arrest be set aside.
- vii. That leave be granted to the Applicant to cross examine the process server.
- viii. That costs of this application be provided for.
- ix. Any such order or further order be made as the honorable court shall deem just and expedient.

2. The Application was supported by the grounds on the face of it as well as on the supporting affidavit of the Applicant John Mugun sworn on the 17th June 2019.

3. The said Application was opposed by the Respondent through his grounds of opposition dated the 5th July 2019 to the effect that the same was an abuse of the court process, was made in bad faith to delay and the payments, was grossly incompetent, defective and bad in law as it was seeking to review and/or set aside a consent order of which the court had no jurisdiction to vary such an order the same having been entered between the parties or Counsel. Lastly, that the application was inordinately late and an afterthought and therefore ought to be dismissed.

4. The Court directed that the Application be canvassed by way of written submission to which only the Respondent complied and framed his issues for determination as follows;

- i. Whether the Applicant's advocate is properly on record to bring the application on behalf of the Applicant.
- ii. Whether the application is inordinately late.

iii. Whether the consent order can be set aside or reviewed.

iv. Whether the Applicant was served with a notice to show cause in execution of Decree.

5. On the first issue for determination the Respondent submitted that the Applicant's advocate was not properly on record to bring the application on behalf of the Applicant as the same was contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules and as such, the application dated 17th of June 2019 was legally incompetent and bad in law.

6. On the second issue for determination, the Respondent submitted that the Bill of Costs was taxed by consent on 26th September 2018 wherein the present application was filed nine months after the certificate of costs/Decree was passed. That this period was inordinately late.

7. The Respondent, on the third issue for determination, submitted that pursuant to the Code of Civil Procedure, 12th Edition, a consent Decree could only be set aside on grounds which would otherwise invalidate an agreement between parties. That the certificate of costs was issued on 26th September 2018 and a Decree issued which was followed by execution proceedings by way of Notice to Show Cause which was served upon the Applicant and a warrant of arrest subsequently issued in execution of the Decree. The present application was then filed. That the test for setting aside a consent Decree/Judgment was stated in the case of **Flora Wasike vs Destimo Wamboko 1988 KLR 429**. That the Applicant had not sufficiently demonstrated any of the grounds therein mentioned to justify the setting aside of the consent Decree dated keeping in mind that he had been represented by an Advocate who had full instructions. The Respondent sought for the dismissal of the application with costs.

Determination.

8. I have considered the Application and grounds of opposition, the proceedings herein, the written submissions by learned Counsel for the Plaintiff/Respondent as well as the applicable law. I find two issues herein arising for determination:

i. Whether the Applicant's advocate is properly on record.

ii. Whether the consent order can be set aside or reviewed.

9. On the first issue where the Defendant/Applicant seeks that the firm of M/s Maurice Oduor & Co Advocates come on record for him after judgment **and Decree** had been delivered, I find that Order 9 Rule 9 of the Civil Procedure Rules provides as follows: -

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—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”

10. The 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. The reasoning behind the provision was well articulated in the case of **S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR** where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...”

11. In the case of **Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi [2012] eKLR** the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

The court went further to quote with approval the holding by Hon. Sitati Judge, in **Monica Moraa –vs- Kenindia Assurance Co. Ltd. [2010] eKLR** where the court held as follows:

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the Applicant's advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the Applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

12. As per the provision of Order 9 Rule 9 of the Civil Procedure Rules, the correct procedure that was to be followed in the present case, 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 before filing the application to set aside the orders of the Court.

13. In the present case, the Respondent's Counsel, without leave of the Court, filed their certificate of urgency dated the 17th June 2019 wherein he purported to come on record, and sought to have the court **review, vary and/or set aside** execution of its decree of the judgment **herein including and without limitation the issuance of warrants of arrest issued on 27th May 2019**. This clearly offends the express provisions of Order 9 Rule 9 of the Civil Procedure Rules.

14. The provisions of Order 9 of the said Act do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the court and other parties.

15. Although the Respondent has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 of the Civil Procedure Rules is mandatory and thus cannot be termed as a mere technicality.

16. Having found that these procedure was not followed by M/s Maurice Oduor & Co Advocate, the said firm is not properly on record, and has no legal standing to move the court on behalf of the Defendant/Applicant.

17. On the second issue for determination herein it is not in dispute that a party to party Bill of Costs dated 31st August 2018 was by consent, by the parties Counsel, on the 26th September 2018 taxed as drawn and allowed in the sum of Ksh. 355,845/= wherein a certificate of costs was issued and the execution process began.

18. 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.

19. **Hancox JA (as he then was)** 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."

20. The Court of Appeal in the case of **Brooke Bond Liebig v. Mallya 1975 E.A. 266** held as follows:-

"A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the Court to set aside an agreement."

21. Further in **Hirani v. Kassam (1952), 19EACA 131**, the Court of Appeal with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement."

22. The Court of Appeal in the case of **Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd (1982) KLR P. 485** held that:

"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 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."

In the same case the Court further 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".

23. The Court has not been informed that the Defendant/Applicant's Counsel had no authority at all to enter into the consent which case the consent decree/judgment would have been a nullity. See **Kafuma v. Kimbowa Contractors 1974 EA (U) 91**.

24. There having been no evidence placed before this Court that the Defendant/Applicant's Counsel had no authority to enter into the consent to tax the party to party Bill of Costs, dated 31st August 2018, as drawn in the sum of Ksh. 355,845/=, I find that Counsel had authority to act for the Defendant/Applicant and had full mandate to compromise the suit as he did. The Application before me is devoid of merit.

25. Having considered both the issues for determination as herein above stated, I proceed to dismiss the Application dated 17th June 2019 in its entirety with costs.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF MAY 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE