



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAKURU
ELC NO 121 OF 2014

MUNIR ALI OMAR (Suing as the Legal Administrator of
the Mestate of the Late Ali Omar)**PLAINTIFF**

VERSUS

SAID AZUBEDI ABDALLA.....**1ST DEFENDANT**

NAKURU LAND REGISTRAR**2ND DEFENDANT**

R U L I N G

1. The defendant/applicant vide an application dated 24th October 2019 inter alia sought the following substantive orders: -

1. That this Honorable court be pleased to substitute the Applicant/1st Defendant herein who is now deceased with FEISAL SAID being the personal representative of the estate of SAID AZUDEDI ABDALLA deceased.

2. That this honorable court be pleased to set aside vary and/or review its orders issued on 16th July, 2019 expunging the duly signed and filed consent dated 22nd November 2018.

2. The application was expressed to be brought under Article 159(2) (d) of the Constitution, Sections 3A and 80 of the Civil Procedure Act and order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. The application was founded on the grounds set out on the face of the application and the affidavit sworn in support by Kiongo P. Murimi advocate. The application is premised on the grounds that, the 1st defendant died on 25th February 2019; that the said Feisal Said took out letters of administration ad litem to be able to proceed with the suit on behalf of the 1st defendant; that before the 1st defendant's death he had recorded consent on 22nd November 2018 which was filed in court on the same date; and that when the consent came up for adoption by the court on 16th July 2019 the court expunged the same from the record. The defendant applicant avers that the consent was duly executed by the parties advocates and contends that the expunging of the consent was in error and /or a mistake since no application was made by either party to have the same expunged. The applicant avers that the grounds upon which a consent can be vitiated did not exist and it was therefore erroneous for the court to expunge the consent that had been validly entered into.

3. The plaintiff Munir Ali Omar filed a replying affidavit dated 29th July 2020. While the plaintiff had no objection to the 1st defendant being substituted by one FEISAL SAID, he was opposed to the expunged consent being reinstated on record. He averred that as the plaintiff and as administrator of the estate of the late Ali Omar he was never consulted and never authorized his previous advocate to enter into the consent. He averred that his previous advocate acted on his own and the consent was prejudicial to the interests of the beneficiaries as its effect was to determine ownership of the parcels of land in question which are registered in the name of the plaintiff and in respect whereof the plaintiff is in possession. The plaintiff respondent further contended that the referenced consent had not been approved and /or adopted by the court as an order and/or judgment and consequently had not become an order.

4. Though the parties were on 4th February 2021 given directions to file written submissions in regard to the application by the 1st defendant, only the 1st defendant's written submissions filed on 25th March 2021 are on record. The 1st defendant in his filed submissions argued that the plaintiff/respondent's advocates were properly on record when the consent was entered into and hence the advocate was deemed to have authority to represent the plaintiff. The 1st defendant relied on the case of *Flora N. Wasike –vrs- Destmo Wamboko (1988) eKLR* where inter alia the court of appeal held that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract on account of fraud or misrepresentation. The court also held an advocate had ostensible authority to compromise a suit or consent to judgment, so far as the opponent is concerned.

5. The 1st defendant/applicant also placed reliance on the cases of *Board of Trustees National Social Security fund -Vrs- Michael Mwalo (2015) eKLR AND Kenya Commercial Bank Ltd –vs- Specialized Engineering Co. Ltd (1982) KLR 485* where the courts equally held that a court of law would not interfere with a consent judgment or order unless there are exceptional circumstances as would provide a good ground for varying or rescinding a contract between the parties such as fraud, collusion and/or misrepresentation as would enable the court to set aside an agreement.

6. In the instant matter, the 1st defendant submitted the parties had signed a valid and binding consent which had a contractual effect. The applicant argued it was erroneous for the court to expunge the consent when there was no formal application by either of the parties to annul the consent. The applicant argued that this was an error on the face of the record that would justify the review and/or setting aside of the court order expunging the consent of the parties.

7. The consent that is the subject of the contest was dated 22nd November 2018 and was filed on the same date. The same was on the following terms:-

CONSENT

We the undersigned would be grateful if you Honour recorded the following-

By consent this suit be and is hereby withdrawn with no orders as to costs.

DATED AT NAKURU THIS 22nd NOVEMBER 2018 GEOFREY OTIENO & CO ADVOCATES FOR THE PLAINTIFF
MURIMI, NDUMIA, MBAGO & MUCHELA ADVOCATES FOR THE 1ST DEFENDANT

8. This consent was never endorsed and/or adopted as an order of the court. After it was filed the matter was listed for mention for purpose of adopting the consent as an order of the court on 18th June 2019, 3rd July 2019, 16th July, 2019. On 16th July 2019, the plaintiff's advocate notified the court that the plaintiff had disowned the consent. The court made the ruling that has provoked the present application in the following terms:-

“ It is apparent that parties no longer wish to be bound by the consent. It has also been disclosed that the 1st defendant is deceased. That being the position the consent signed on 22nd November 2018 and filed on the same date is hereby expunged....”

9. It is evident from the record that the court listed this matter on three occasions when the issue for consideration was the adoption of the consent that had been filed. Depending on the circumstance the court could either adopt and/or decline to adopt the consent. The court was called upon to exercise its discretion. When one of the parties to the alleged consent disowned the consent, the court in my view properly exercised its discretion to decline to adopt the consent as an order of the court. Until the consent had been approved and adopted as an order of the court, it had not become an order of the court and hence the authorities cited by the 1st defendant applicant in support of his submissions were inapplicable. The plaintiff is the party who stood to be affected if the consent was given effect as he would be left with no suit as the consent was seeking the withdrawal of the suit. He has denied having given his previous advocate instructions to enter into the consent and impliedly he wishes to proceed with the prosecution of his suit. I do not consider that any party will suffer any prejudice as each will have an opportunity to ventilate their respective cases at the trial.

10. Save for prayer (2) of the Notice of Motion dated 24th October 2019 relating to the substitution of the 1st defendant which was granted by the court, I find no merit in the application and the same as relates to setting aside and/or review of the orders issued on 16th July 2019 is dismissed.

11. The costs of the application shall be in the cause.

12. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF SEPTEMBER 2021.

J M MUTUNGI

JUDGE