



**Shariff & 3 others v Director of Public Prosecutions & 4 others (Petition E185 of 2021)
[2024] KEHC 12086 (KLR) (Constitutional and Human Rights) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12086 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E185 OF 2021
LN MUGAMBI, J
OCTOBER 9, 2024**

BETWEEN

**ZAIULABIDIN SHARIFF 1ST PETITIONER
ABDIRASHID ABDUL SHARIFOW 2ND PETITIONER
FESTUS NGOLUA MIBURI 3RD PETITIONER
MICHAEL KITENGE NZUVE 4TH PETITIONER**

AND

**DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT
THE CHIEF LAND REGISTRATION OFFICE (NAIROBI LAND REGISTRATION
REGISTRY) 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
CHIEF MAGISTRATES COURT AT MILIMANI LAW COURTS 5TH
RESPONDENT**

RULING

Introduction

1. By a Notice of Motion application dated 27th January 2023, the Petitioner seeks orders that:
 - a. Spent.



- b. This Court be pleased to review and/or set aside the consent Order issued on the 7th October 2021 and the Applicant be granted leave to pursue his civil cases in: Milimani ELC No. E042 of 2021, Zainulabidin Shariff -Versus- The Chief Registrar and Others, and Civil Case No. 6076 of 2020 as well as this Petition.
- c. The said files be re-opened and/or re-activated.
- d. The costs of this application be provided for.

Petitioners/Applicants' Case

2. The grounds in the Application are bolstered by the 1st Petitioner's affidavit of even date which was also sworn on behalf of the rest of the Petitioners. In addition, there is the 1st Petitioner's further supplementary affidavit sworn on the 19th July 2023 and the 2nd Petitioner's further affidavit dated 27th January 2023.
3. The context of this application is patent from the deposition of the 1st Petitioner. The 1st Petitioner states that the National land Commission allocated him plot LR No.209/3630 located in South B, Nairobi by way of a lease and was issued with a Certificate of Title registered in his name on 29th June 2020 for a lease term of 99 years, from 1st January 2003. Prior to this, the property had been allocated to the 3rd and 4th Respondents herein who transferred it to him.
4. He depones that on 6th March 2021, he received a call from the Director of Criminal Investigations (DCI) office through one of its officers, Mr. Wanga summoning him. At a meeting which he attended with his father, the 2nd Petitioner, Mr. Wanga accused him of being involved in land fraud concerning the said property. He requested to see and peruse the investigation file on the matter but this request was rejected. In fact, he asserts that the said officer pointed a gun at him and threatened that he would rot in jail if he did not return the original Certificate of title to the property.
5. He asserts that Mr. Wanga directed that they meet the next day at the CJ's restaurant to submit the Certificate of Title. He discloses that although they attended that meeting, they never took with them the original Certificate of Title, a fact that gravely enraged the said officer. The said officer demanded that they take the original Certificate of lease the next day and meet him at the land's office. Unfortunately, they were unable to attend this meeting since they had a family engagement.
6. On 6th May 2021, Mr. Wanga arrested and charged the 1st Petitioner with the offense of fraudulently registering a Certificate of Title contrary to Section 320 of the Penal Code. Upon being released on a cash bail, the Mr. Wanga continued to pressurize the 1st Petitioner by demanding for a meeting at the Lands office.
7. He avers that due the fear that was instilled in them, the 1st Petitioner attended the meeting with the 2nd Petitioner. That meeting was also attended by Mr. Billow the Registrar and Mr. Obare, the Land Officer who had signed his lease. In the meeting, Mr. Wanga demanded to be issued with the Certificate of Title. The 1st Petitioner handed over the Certificate of lease to the said Mr. Wanga and that was the last time he ever saw that certificate again. In their presence, Mr. Wanga directed and threatened the Registrar and the land officer to cancel the lease and the Certificate of title.
8. The 1st Petitioner further asserts that Mr. Wanga stated that he would cause the withdrawal of the criminal case (Case No. MCCR/E561/2021) if there was a recorded a consent in the other cases including the instant matter. Aggrieved by the unfolding events relating to a property that he had acquired legally, the 1st Petitioner stated that he elected not attend further meetings with Mr. Wanga.



9. Nonetheless, the 2nd Petitioner fearing for his life and that the 1st Petitioner presented himself for another meeting convened by Mr. Wanga where Mr. Wanga informed the 2nd Petitioner that the legitimate owner of that property had arrived from abroad and they needed to register a consent in this matter to facilitate the withdrawal of all the cases. Attempts by the 2nd Petitioner to be introduced or meet the supposed real owner were futile.
10. Due to persistent threats by Mr. Wanga; the 2nd Petitioner succumbed to the pressure and went with their former advocates to Court to record the impugned Consent. He asserts the consent was secured through duress, intimidation, cohesion and threats from Mr. Wanga. He claims that soon after, Mr. Wanga was spotted on the subject property where construction had commenced.
11. He further contends no consensus had been reached between himself and the other parties before this Consent was recorded. Even so, he asserts that the consent was recorded without his knowledge and participation. He deposed that the delay in filing this Application was occasioned by Mr. Wanga's presence in the Nairobi area which caused him fear and was thus able to bring the Application after Mr. Wanga left.
12. Reiterating the contents of the 1st Petitioner's affidavit, the 2nd Petitioner similarly reveals that in mid-2021 he received a call from Mr. Wanga. Mr. Wanga informed that he had tried to access the 1st Petitioner to no avail. When he enquired why he was looking for his son, he avers that Mr. Wanga shouted at him stating that if the 1st Petitioner did not return the original Certificate of Title to the subject property, he would rot in jail. Upon contacting the 1st Petitioner he disclosed that he was not picking Mr. Wanga's calls due to the persistent threats.
13. On his part, the 2nd Petitioner sought to understand what was happening and hence met with Mr. Wanga at Ankara Restaurant in the Nairobi CBD. He states that Mr. Wanga, rather than address him on why he was involving him with son's property started property threatening him.
14. Thereafter, Mr. Wanga summoned him to his office and arrested him. He was taken to Kileleshwa police station and arraigned at Milimani Chief Magistrates Court the following day on allegations of fraud relating to the subject property. Upon his release on bail, Mr. Wanga continued to follow and threaten him demanding that he should return the original Certificate of Title yet the Certificate was issued in his son's name (1st Petitioner) not his. That was later followed by Mr. Wanga's summon to the land registry office.
15. Subsequent to the meeting, Mr. Wanga summoned them once more to attend a Court mention which the 1st Petitioner refused to attend. The 2nd Petitioner deposes that he attended the said Court mention where the 1st Petitioner's Advocate informed Court that a consent agreement had been recorded.
16. He claims neither he nor the 1st Petitioner were aware of the said consent and only heard about it during that Court mention. He also affirms that the same was obtained under duress and the threats issued by Mr. Wanga.

Respondents' Case

17. The Respondents' response is not in the Court file or the Court online platform (CTS).
18. Equally, Mr. Wanga's Replying Affidavit dated 15th March 2023, referred to by the 1st Petitioner in his supplementary affidavit is not in the Court file or the Court Online Platform (CTS).



Parties Submissions

Petitioner's Submissions

19. The Petitioner in support of his Application filed submissions dated 24th July 2023 through Ochoki and Ochoki Associate Advocates.
20. The 1st Petitioner recounting his averments in the submissions added that Mr. Wanga had also threatened his former Advocates to stop representing him. Additionally, that Mr. Wanga in his response had failed to adduce any supporting evidence to Abdi Rashid Dakane's alleged claim over the subject property. He informs that this was the alleged legitimate owner.
21. He maintained that his former Advocate executed the letter dated 9th September 2021 without his express instructions and altogether out of duress and intimidation by Mr. Wanga. He also asserted that the consent was recorded owing to the 2nd Petitioner's attendance yet he is not the owner of the subject property neither his name on the Certificate of Title. To get his cooperation it was added that the 2nd Petitioner was arrested and charged in Court with reference to the subject property. According to him, all this was done to intimidate him.
22. He similarly submitted that Mr. Wanga's conduct was throughout geared towards subjecting them to coercion and duress to get the Certificate of Title and have the impugned consent order entered. Consequently, the Petitioner contended that the consent was obtained without the 1st Petitioner's freewill.
23. Reliance was placed in John Mburu vs. Consolidated Bank of Kenya [2018] eKLR, where the Court citing with approval the statement of the Privy Council in Pao On vs Lau Yiu Long held as follows:

"Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law and be regarded as coercion of his will so as to vitiate his consent ... In determining whether there was coercion of will such that there was no true consent it is material to enquire whether the person alleged to have been coerced did or did not protest; whether at the time he was allegedly coerced into making the contract. He did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it."

24. To further buttress his case, reliance was placed in Mohammed Ahmed Abdun & another v Mini Bakeries (MSA) Limited MSA CA Civil Appeal No. 88 of 2018 [2019] eKLR where the Court of Appeal held that:

"A contract which has been entered as a result of duress may be avoided by the party who was threatened. Duress is broadly defined in Black's Law Dictionary, 8th edition as: "a threat or harm made to compel a person to do something against her will or judgement" and as strictly as "the physical confinement of a person or the detention of a contracting party's property."

Analysis and Determination

25. It is my considered view that the only issue that arises for determination is:



Whether the Consent Order dated 7th October 2021 should be set aside.

26. The law on making consent judgments in constitutional petitions is anchored in Rule 29 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provides as follows:

Settlement by consent.

“The parties may, with leave of the Court, record an amicable settlement reached by the parties in partial or final determination of the case.”

27. The question is thus whether once a consent order is issued, the Court can review it. The Court of Appeal in *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR guided as follows:

“29. The judgment arose from a consent of the parties to the suit. 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.

30. There is a plethora of cases in the High Court and in this Court stating the law on the issue of setting aside of a consent judgment. Some of them were cited by counsel in this matter. It will suffice to refer to a few of these.

31. In *Wasike v Wamboko* the High Court at Kakamega (Gicheru J, as he then was) held -

“1. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.

2. The *Civil Procedure Act* (Cap 21) Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid ab initio and should be rescinded or that there exist circumstances to warrant varying the decree.

3. In this case, there were no grounds which would justify the setting aside of the consent judgment.

Appeal dismissed.”

32. The position is clearly set out in *Setton on Judgments and Orders* (7th Edn), Vol.1 pg 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...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 the court to set aside an agreement.”

33. This passage was followed by the court of appeal in *Brooke Bond Liebig Ltd V Mallya* [1975] EA 266 at 269 in which Law Ag P said:

“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.”

34. In *Kenya Commercial Bank Ltd V. Benjoh Amalgamated Ltd, Githinji J*, (as he then was) considered the circumstances under which a consent Judgment can be set aside and referred to and relied on the decision in *Hirani V. Kassam* [1952] 19 EACA 131 in which the above passage from Seton on Judgments and Orders was approved. (The decision by Githinji J, was reversed by this court on a different point).

“It is now well 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: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983*. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

35. In *Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd* [1982] KLR 485, Harris J correctly held inter alia, that

- a. 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 collusion 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.
- b. 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.”



28. Similarly in *Wema Foundation Trust Company Limited v County Government of Nairobi City & another* [2022] eKLR the Court citing a number of authorities noted as follows:

“7. In the Court of Appeal in the case of *Brooke Bond Liebig Ltd V Mallya* [1975] EA 266 at 269 Law Ag P said:

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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.

9. In *Hirani V. Kassam* [1952] 19 EACA 131 the Court of Appeal held;

“It is now well 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: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983*. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

29. The Court went on to note as follows:

“11. It is therefore clear from the court record that the Consent Judgment was entered into without the consultation nor concurrence of the 2nd Defendant who is a party to this this suit. Further the Court could not ascertain from the Counsel for the 1st Defendant whether they were in agreement with the consent judgment. It is trite law that the parties who would want to have the court to adopt a consent judgment must be present in court on the day when the document is presented for adoption and confirm the same to the one they both signed and agreed on.

...



The suit could therefore not be compromised without the participation of the parties concerned. In the Supreme Court of India case of Gurpreet Singh V. Chatur Bhuj Goel (1988) AIR 400 the court held that:

“Under Rule 3 as it now stands when a claim in a suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them.....”

14. The omission to obtain a written agreement from all the parties to the suit makes this matter suitable for setting aside the consent that did not meet the threshold of a contract. In the case of Munyiri Vs Ndunguya [1985] eKLR Platt Ag JA held as follows:-

“However, we may observe that as there appears to be a good deal of argument about contents of some consent judgment and orders, it would be wise to obtain the signatures of the advocates, or the parties if they are present. In this way, it will then be clear that the terms were known and agreed to, at the time the consent order or judgment was entered into, and may help to avoid later recanting by the parties themselves, which is also a well - recognized feature of life, despite instructions earlier given to their advocates...”

Nyarangi JA stated that:

The advocates should have in this case appended their signatures to the judgment or registered their disapproval of the judgment as soon it was delivered. The judge should, as a precaution have full made a and careful note of what each advocate said to him which culminated in the consent judgment.”

30. Equally, in Paul Kiplangat Keter v John Koech [2021] eKLR the Court echoing similar sentiments stated as follows:

“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...There having been no evidence placed before this Court that the Defendant/Applicant’s Counsel had no authority... I find that Counsel had authority to act for the Defendant/Applicant and had full mandate to compromise the suit as he did...”

31. The foregoing legal exposition confirms that consent order takes a binding contractual character and may therefore not be set aside unless there is proof of fraud, collusion, or an agreement reached that is contrary to the court policy and any other justifiable reason. Moreover, it is trite law that a party’s advocate has general authority to enter into a consent agreement and such consent would binding on a party in absence of fraud or collusion or where the Advocate acted contrary to the instructions.
32. In the matter herein, it is apparent that the consent agreement dated 9th September 2021 was entered into between the Petitioners’ advocate, Otwal and Manwa Associate Advocates and the 1st Respondent’s Counsel. The 1st Petitioner despite taking the position that he did not issue the



instructions for the consent agreement that culminated to the order dated 7th October 2021, has not substantiated this claim. There is no evidence for instance that he acted with dispatch to protest to his Advocate about the consent. In any case, there is no evidence either that he even took any follow up action against the said Advocates such as filing a complaint with the Advocates Disciplinary Committee or the Complaints Committee for registering a binding consent that gave away his property without instructions. In my view, the instant Application is just but an afterthought to defeat a consent that was validly entered into whose effect is legally binding on the 1st Petitioner.

33. The claim by the 1st and 2nd Petitioners which asserts that the consent agreement was entered into as a result of Mr. Wanga's threats and duress on their former advocates is unsubstantiated. If the Advocates were threatened as well, why did they not swear an affidavit to that effect? Why did they not lodge a complaint with Independent Oversight Authority (IPOA) or even report the threats to the Law Society of Kenya?
34. In *Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020)* [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) held as follows in regard to establishing claims of duress:

“ 60. A court will use its power not enforce a contract sparingly, and only in the clearest of cases in which the harm is substantially incontestable and proven. A court will decline to use the power where a party relies on abstract values of fairness and reasonableness to escape the consequences of a contract. The party who attacks the contract or its enforcement bears the onus to establish the facts. There are, however, two principles which require further elucidation. The first is the principle that public policy demands that contracts freely and consciously entered into must be honored. The second principle requiring elucidation is that of “perceptive restraint.” According to this principle a court must exercise “perceptive restraint” when approaching the task of invalidating, or refusing to enforce, contractual terms. It is encapsulated in the phrase that a “court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases.” This principle follows from the notion that contracts, freely and voluntarily entered into, should be honored.”

35. It is my considered view that the 1st and 2nd Petitioners' have failed to prove their case to set aside the Consent Order dated 7th October 2021.
36. The upshot is that this Application is dismissed. I make no orders as to costs. This file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF OCTOBER, 2024.

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L N MUGAMBI

JUDGE

