



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 424 OF 2014

ELIONS KENYA LIMITEDPLAINTIFF/RESPONDENT

VERSUS

KISII COUNTY GOVERNMENT.....1ST DEFENDANT/APPLICANT

EXECUTIVE COMMITTEE MEMBER,

LANDS KISII COUNTY GOVERNMENT....2ND DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. What is before me is the Defendants/Applicants' Notice of Motion dated 26th February 2020 seeking to set aside the proceedings of 18th October 2018 and any subsequent orders or decree emanating from the said proceedings and the Defendants be at liberty to be heard on merit. They also pray that the draft defence and Counterclaim annexed to the Applicants' affidavit be deemed as duly filed.

2. The application is supported by the affidavit of Kennedy Chweya Onsembe, the County Attorney, Kisii County Government sworn on the 26th February 2020 in which he gives a detailed account of what transpired on 18th October 2020. The long and short of it is that he never instructed Mr. Bigogo, Advocate who apparently held his brief on the said date when the matter came up for hearing. Mr. Bigogo has also sworn an affidavit explaining the circumstances under which he held Mr. Onsembe's brief. From Mr. Bigogo's affidavit, it is clear that he was requested by a clerk from Mr. Onsembe's office to hold Mr. Onsembe's brief though the said clerk did not have full instructions from Mr. Onsembe.

3. The application has been countered by the Plaintiff through their Grounds of Opposition dated 4th March 2020, in which they state the honourable court having dealt with the matter inter partes, the court is functus officio and thus devoid of the jurisdiction to entertain or adjudicate upon this matter. They further state that the orders having been made in the presence or with the participation of the Applicants, the resultant orders cannot be vacated or set aside in the manner sought or at all. They are of the view that the Applicants are not being truthful and that they are merely intent on delaying this matter. Finally, they contend that the Defendants having been aware of the terms of the decree, the instant application has been mounted with inordinate delay and the Applicants are therefore guilty of laches.

4. In his Replying affidavit sworn on the 4th day of March 2020, Elijah Amota Onsika, the Managing Director of the Plaintiff Company depones that the suit was marked as settled in the presence and with the participation of counsel for the Defendants/Applicants, one Mr. Bigogo Onderi who held brief for Mr. Onsembe and Mr. Bigogo's actions are therefore binding on Mr. Onsembe. It is his averment that at the time the orders of 18th October 2018 were made, the Defendants had not filed a Defence in opposition to the claim and the vindication of the Plaintiff's title by the National Land Commission negates the existence of any triable issue to warrant the court's intervention.

5. The application was canvassed by way of written submissions which were duly filed by both parties.

6. In his submissions counsel for the Applicants relied on his affidavit and the affidavit of Bigogo Onderi Advocate explaining the circumstances under which he held brief for Mr. Onsembe. He contended that the matter proceeded on the 18th October 2018 without the participation of the Defendants, which is against their constitutional right to be given a fair hearing before being condemned. He urged the court to give the Applicants an opportunity to defend themselves.

7. On the other hand, counsel for the Plaintiffs submitted that the defendants are bound by the actions of their advocates. He cited the case of **Nairobi City County Government v Kenya Revenue Authority & Another (2017) Eklr** where the court relied on the case of **John**

Ongeri Mariaria & 2 Others v Paul Matundura Civil Application No. Nairobi 301 of 2003 (2004) 2 EA 163 for the proposition that clients must bear the brunt of their advocates' careless and leisurely approach to work. He accused the Defendant's counsel of being less than candid and urged the court not to exercise its discretion in the Defendants' favour.

8. It was counsel's further submission that the Applicants had not established sufficient cause to warrant the setting aside of the orders issued on 18th October 2018. He cited the case of **Esther Wamaitha Njihia & others v Safaricom Limited (2014) eKLR** where the court while relying on the case of **Patel v East Africa Cargo Handling Services Ltd (1974) E.A 75** observed that the discretion to set aside a judgment is free and the main concern of the court is to do justice to the parties before it. The court further held that the discretion is exercised to avoid injustice or hardship and not to assist those who deliberately seek to evade or obstruct the course of justice. He argued that the Applicants' intention was to mislead the court that Mr. Bigogo had no instructions to hold brief for their advocate. He maintained that the Applicants had not proved that they deserved the orders sought.

9. Having considered the Notice of Motion, Grounds of Opposition, Replying Affidavit and rival submissions, the singular issue for determination is whether the orders and decree issued on 18th October 2018 should be set aside.

ANALYSIS AND DETERMINATION

10. On 18th October 2018, this matter was listed for mention for the parties to consider whether or not to compromise the suit as the Plaintiff had intimated to court that by a letter dated 27.4.2017, the National Land Commission had confirmed that the Plaintiff was the owner of the suit property. On the said date Mr Ochwangi advocate for the Plaintiff was present while the Defendants were represented by Mr. Bigogo advocate who held brief for Mr. Onsembe, the County Attorney, for the Defendants. Mr Ochwangi once again informed the court that the National Land had confirmed that the Plaintiff was the owner of the suit property. He then prayed that judgment be entered for the Plaintiff in terms of the payers in the plaint.

11. Mr. Bigogo stated that he had no objection to prayers 1 and 2 of the Plaint being granted. The court then proceeded to enter judgment for the Plaintiff in terms of prayers 1 and 2 of the Plaint. The court further ordered that each party would bear their own costs. It is this judgment that the Defendants seek to set aside on the grounds that Mr. Bigogo did not have instruction to hold Mr. Onsembe's brief. Indeed Mr. Bigogo has sworn an affidavit stating that he was in fact requested by a clerk from Mr. Onsembe's office to hold brief for Mr. Onsembe.

12. The orders that were made on 18th October 2018 are in the nature of a consent judgment compromising the suit. This is therefore not an ordinary application for setting aside a decree or order of the court. In **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485**, Harris J correctly held inter alia, that –

1. 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.

2. 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.

13. The question that the court must determine is whether the suit was compromised with the consent of the parties. In the Supreme Court of India case of **Gurpreet Singh V. Chatur BhujGoel (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. In the case of **Protus Hamisi Wambada v Eldoret Hospital (2020) eKLR**, the court faced with a similar situation where a counsel held brief and recorded an order compromising the suit, without express instructions from his principal observed as follows:

*“The omission to obtain a written agreement from the parties 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 made a careful note of what each advocate said to him which culminated in the consent judgment.

15. In the instant case Mr. Bigogo advocate, who is an officer of this court has sworn an affidavit stating that he was instructed by a clerk

from the County Attorney's Office and not Mr. Onsembe, the County Attorney himself. There is no indication that he had instructions to compromise the suit on behalf of the Defendants as indeed the clerk would not have given him such instructions. Given the far-reaching effect of the orders recorded by the court and the apparent lack of instructions by the advocate who appeared for the Defendants, I am in the interest of justice, inclined to exercise my discretion in favour of the Defendants.

16. The upshot is that the application is merited and it is hereby granted. I set aside the judgment, decree and all consequential orders thereto. The draft Defence and Counterclaim annexed to the Supporting Affidavit is deemed as duly filed and served. However, as justice looks both ways, the Applicants shall bear the costs of the application.

Dated, signed and delivered at Kisii this 30th day of November, 2020.

J.M ONYANGO

JUDGE