



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 21 OF 2012

CHURCHIL OMOLLO BODO.....PLAINTIFF

VERSUS

REV. LUKIO OTIENO.....1ST DEFENDANT

REV. WALTER OKEYO.....2ND DEFENDANT

RULING

1. Rev. Lukio Otiemo and Walter Okeyo, the Defendants, seeks through the notice of motion dated 19th March 2018 to have the consent judgment dated 30th June 2016 be set aside and the suit set down for interpartes hearing. The application is based on the five (5) grounds on its face marked (a) to (e) summarized as follows;

a) That counsel on record for the parties had on the 8th April 2016 recorded a consent allowing the suit in its entirety against the Defendants.

b) That counsel then on record for the Defendants did not have instructions to compromise the suit, and therefore the consent was entered without their knowledge and authority.

c) That the consent was recorded through collusion and hence is fraudulent.

The application is supported by the affidavit sworn by Reverent Walter Okeyo, the 2nd Defendant, on 19th March 2018.

2. The application is opposed by Churchill Omollo Bodo, the Plaintiff, through the replying affidavit sworn on the 27th April 2018, denying any collusion or fraud in the recording of consents.

3. The Counsel for the Defendants and Plaintiff filed their written submissions dated 1st October 2018 and 19th September 2018 respectively.

4. The following are the issues for the court's determination;

a) Whether the Defendants have demonstrated that the consent they seek to be set aside was entered through collusion and or fraud.

b) Whether the Defendants' Counsel on record had authority to enter into the said consent.

c) Who pays the costs.

5. The Court has carefully considered the grounds on the notice of motion, rival affidavit evidence, written submissions and come to the following findings;

a) That the record confirms that this suit was commenced by the Plaintiff against the Defendants vide the plaint dated the 25th July 2012, and filed with the Court on the 27th July 2012, through M/s Kowinoh & Company Advocates. The prayers are for declaration that the award in the Tribunal case No. 47 of 2006, and Appeal Committee Case No. 76 of 2008 and decree in Kisumu CMC Land case No. 9 of 2008 were made without jurisdiction and hence a nullity.

b) That through the memorandum of appearance dated 4th October 2013, and filed on the 8th October 2013, M/s Meshack Okoth

Obura & Company Advocates came on record for the Defendants. That the Defendants filed their statement of defence through their said Counsel dated the 24th October 2013, and filed on the 4th November 2013.

c) That the Counsel for the Plaintiff applied for Judgment through their letter dated and filed on the 31st October 2013, on the Defendants failing to file their defence. That the letter of consent dated the 8th April 2016, and duly signed by Counsel on record for both parties, was filed with the Court on the 17th June 2018 through receipt number 7544663 of the same date. The record shows that the consent was endorsed or adopted as an order of the court on the 30th June 2016. The consent addressed itself to all the prayers in the plaint dated the 25th July 2012. The consent is as reproduced herein below:

“ 8/4/2016

The Deputy Registrar

Environment & Land Division

High Court of Kenya

P.O. BOX 126

KISUMU

Dear Sir,

RE: HIGH COURT ELC NUMBER 21 OF 2012

CHURCHILL O. BODO VS REV. LUKIO OTIENO & REV. WALTER OKEYO

Kindly record the following consent between the parties herein in the case file,

1. “That by CONSENT it is agreed that the award in KISUMU EAST/WEST LAND DISPUTES TRIBUNAL CASE NUMBER 47 OF 2002, NYANZA LAND DISPUTES APPEALS COMMITTEE case No. 76 of 2008 dated 21st July, 2011 and the order and/or Decree in KISUMU CMCC land Case Number 9 of 2008 was made without jurisdiction and in breach of the law and are therefore a nullity.

2. That all the orders made pursuant to the said KISUMU EAST/WEST LAND DISPUTES TRIBUNAL CASE NUMBER 47 FO 2006, NYANZA LAND DISPTUES APPEALS NO. 76 OF 2008 and KISUMU CMCC LAND case No. 9 of 2008 dated 5/10/2011 be and are hereby nullified and set Aside.

3. That there be no orders as to costs.”

Yours faithfully,

(SIGNED)

KO’WINOH & COMPANY

(ADVOCATES FOR THE PLAINTIFF)

(SIGNED)

MESHACK OKOTH OBURA & COMPANY

(ADVOCATES FOR THE DEFENDANTS)”

d) That the Defendants have confirmed that the Counsel who signed the consent on their behalf had been instructed to come on record in this case by themselves. That there is no evidence tendered by the Defendants that they had limited their instructions to their Counsel in any way and that they had communicated such limitation or restriction if any, to the Plaintiff. That the Counsel for the Plaintiff referred to the decision of Harris J, in **Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd [1982] KLR 485** cited by the Court of Appeal with approval in **Board of Trustees National Social Security Fund vs Micheal Mwalo [2015] eKLR** where it was 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 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 fact 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.”

That Counsel for the Defendants had also cited the case of the **Board of Trustees National Social Security Fund vs Michael Mwalo (Supra**, in their written submissions in addition to two others, on what must be established before a consent order or judgment can be set aside.

e) That having considered the affidavit evidence by the Defendants and the grounds on the motion, the Court does not find any evidence tendered to show the existence of any collusion between their Counsel on record, and the Plaintiff or his Counsel in the entering of the consent to compromise the suit that they seek to set aside. The Court further finds no evidence of fraud, misapprehension or mistake that can be said to have led to the entering and filing of the consent, and upon which the court could set it aside.

f) That the Defendants did not question the capacity of their then Counsel on record in any of the grounds on the motion or their deposition in the supporting affidavit. They had also not questioned their advocates' capacity from the time they filed the memorandum of appearance, to the time the consent order was filed and entered. That in any case, the Defendants had not notified the Plaintiff, and or his Counsel, and for that matter the Court that their Counsel on record had not taken out the practicing certificate. That it is therefore strange that Counsel now on record for the Defendants submitted at paragraph 8 that upon their writing to the Law Society of Kenya, they were advised that the advocate had not taken out the **“...practicing certificate hence not allowed to practice. Hence, all his actions were fraudulent.”** That the Court has found that part of the submission on the lack of practicing certificate strange as the Defendants are the ones who instructed the said counsel to enter appearance for them, file their defence and indicated their **“address for the purposes of this suit shall henceforth be care of Meshack Okoth Obura & Co. Advocates....”** That the Defendant cannot now disown the consent that was duly signed and filed through their advocates on record. That the Defendants may possibly consider pursuing whatever relief of damages if any that they believe they may have against the Counsel.

6. That flowing from the foregoing, the Court finds no merit in the Defendants' notice of motion dated the 19th March 2018 and the same is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY 2019

In the presence of:

Plaintiff Absent

Defendants 2nd present

Counsel Mr. Odeny for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE