



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.8 OF 2016

ABDALLA MOHAMED ISSA.....PLAINTIFF

VERSUS

CHRISTOPHER MUMBA KAMBI & 18 OTHERS.....DEFENDANTS

RULING

1. The Suit against the 19 Defendants herein was filed by the Plaintiff on 14th January 2016. Thereafter on 17th February 2016 the Defendants filed a Memorandum of Appearance through the Law Firm Nyakoe Macharia & Company Advocates. Shortly thereafter on 23rd February 2016 the same Law firm filed a Written Statement of Defence on behalf of the Defendants.
2. Subsequently the parties commenced the process of pre-trial and the matter was mentioned before the Deputy Registrar of this Court a couple of times before it was certified ready for hearing on 30th October 2017. The Defendants said Advocates did not attend Court on any of the occasions the matter was in Court.
3. On 22nd February 2018 a letter dated 19th February 2018 addressed to the Deputy Registrar of the Court and printed on the Letter head of Messrs Kilonzo & Aziz Company, the Advocates for the Plaintiff herein was filed at the Registry. The said letter reads in the relevant portion as follows:-

Re: Malindi ELC No. 8 of 2016

Abdalla Mohamed Issa –vs- Christopher Mumba Kambi & 18 Others

We M/s Kilonzo & Aziz Company Advocates & Michira Messah Advocates for the Plaintiff and Nyakoe Macharia & Company Advocates for the Defendants would most be grateful if the following order was recorded by consent.

BY CONSENT

1. Pending the hearing and determination of this Suit, an injunction order be and issued(sic) restraining the Defendants, family members, servants, agents, from further dealings, selling, constructing, trespassing into, intermeddling, encroaching, building, laying new foundations, marking boundaries and/or putting new beacons on the Portion No. 371 Malindi.
2. That the Plaintiff Mohamed Abdalla Issa to assume possession of those areas which are vacant and/or open on Portion 371 Malindi as identified by a qualified land surveyor.
3. That the Officer Commanding Malindi Police Station to enforce this (sic) orders.

Signed

Kilonzo & Aziz Company

Advocate for the Plaintiff

Michira Messah

Advocates for the Plaintiff

Nyakoe Macharia & Company

Advocates for the Applicants (sic)

4. Thereafter, on 13th March 2018, the matter came before me for mention. On the said date Mr. Kilonzo and Mr. Michira Advocates represented the Plaintiff while one Mr. Abdulatif Advocate appeared holding brief for Mr. Nyakoe for the Defendant. Upon being urged by the Advocates present, this Court proceeded to adopt the consent captured as per the letter dated 19th February 2018 aforesaid, as an order of this Court.

5. The Defendants are however not amused by what transpired in Court on that date. By Notice of Motion dated and filed herein on 21st June 2018, and filed on their behalf by Messrs A.M. Omwancha & Company Advocates, they now ask the Court for the following:

2. That this Honourable Court be pleased to issue an order of temporary stay of execution of the consent orders issued on 13th March 2018;

3. That this Honourable Court be further pleased to issue summons to Mr. Abdulatif Advocate who purported to hold brief for Mr. Nyakoe Advocate to appear in Court and to confirm whether he was instructed to hold brief for Mr. Nyakoe Advocate;

4. That this Honourable Court do issue an order directing the Directorate of Criminal Investigations Malindi to investigate the purported written consent dated 19th February 2018 and in particular the forged signature of Mr. Nyakoe Advocate;

5. That upon inter-partes hearing, this Honourable Court do declare the consent Order as adopted herein to be null and void and to review and set aside the same;

6. That upon confirmation by the Court that the three Advocates being Mr. Kilonzo, Mr. Michira Messah and Mr. Abdulatif acted unprofessionally and fraudulently in misleading this Honourable Court to adopt a forged Written Consent, they be cited for contempt and be punished accordingly under the Provisions of the Advocates Act; and

7. That the costs of this application be borne by the Plaintiff.

6. The Defendants' application is supported by an affidavit sworn by Christopher Mumba Kambi (the 1st Defendant) and is premised on the grounds:-

i. That the manner in which the said consent was drafted was unprocedural, fraudulent and a sham as Mr. Nyakoe Advocate never appended his signature thereon neither did he actively engage in the discussions leading thereto and the resultant consent is false and fictitious;

ii. That Mr. Nyakoe Advocate has denied in total that he instructed the said Mr. Abdulatif to sign any consent on his behalf or to hold his brief in the matter on 13th March 2018 when the consent was adopted.

iii. That the Defendants have never at any given time instructed Mr. Nyakoe or any other Advocate to enter into a consent in respect of this matter and it is vital that the orders issued on 13th March 2018 be reviewed and/or set aside.

7. In response to the said Application, the Plaintiff has filed a series of Affidavits herein on 13th July 2018. In his own Affidavit sworn on the same day, the Plaintiff avers that on or about 19th February 2018, he received a call from one Samson Nyangena, a clerk of Nyakoe Macharia & Company Advocates informing him that some of the Defendants in this matter wanted to purchase some portions of the land in dispute wherein they had put up structures.

8. It is the Plaintiff's case that in the company of his employee Riziki Hamisi Athman, they met the said clerk who telephoned Mr. Jared Nyakoe Advocate in Nairobi and they agreed to execute a consent provided Mr. Nyakoe was paid a sum of Kshs 100,000/- prior to the recording of a consent.

9. The Plaintiff further avers that the three of them thereafter proceeded to Mr. Kilonzo Advocates office where they informed the Advocate of the development. Mr. Kilonzo then called Mr. Nyakoe on phone where upon their agreement, Mr. Kilonzo drafted an appropriate consent order. The draft consent was taken thereafter by Mr. Nyakoe's clerk to the offices of Ogero Ogeto & Company Advocates where Mr. Ogeto Advocate executed it on behalf of Mr. Nyakoe.

10. The Plaintiff's position is supported by an Affidavit of verification sworn by his employee Riziki Hamisi Athman and Mr. James Ogero Ogeto Advocate. It is Mr. Ogeto Advocate's recollection that Mr. Samson Nyangena, a clerk at Nyakoe Macharia Advocates had previously requested him to sign documents on behalf of their law firm as Mr. Nyakoe was in Nairobi. The Advocate avers that he signed the document because Mr. Nyakoe was aware of the same and had previously asked him to execute the same and hold his brief in Court.

11. I have considered the Defendants' application and the response thereto. Order 25 Rule 5 of the Civil Procedure Rules provides for the compromise of a suit, and states that where the Court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement or

compromise, it shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter Judgment in accordance therewith.

12. The effect of such action was that the consent order becomes an order of the Court upon being endorsed by the Court. A consent order or Judgment has a contractual effect and can only be set aside on the grounds that would justify the setting aside of a contract, or if certain conditions remain to be fulfilled, which are not carried out.

13. The grounds for setting such aside are where the consent order or Judgment was 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement....

14. In the matter before me, the Defendants have attacked the consent order endorsed on 13th March 2018 on the grounds that it was fraudulent and a sham as Mr. Nyakoe Advocate who was then acting for them in these proceedings never appended his signature thereon nor did he actively engage in the discussions leading to the resultant consent. The Plaintiffs however contend that Mr. Nyakoe Advocate was consulted and that the Advocate gave instructions leading to the recording of the consent and its endorsement in Court.

15. In a brief 6-paragraph Affidavit sworn on 21st May 2018 and in support of the Defendant's application herein, Mr. Jared N Nyakoe Advocate makes oath and states as follows:-

1. That the file in respect of this matter was handed over to the Defendant's on 6th day of March 2018 when I ceased to represent them.

2. That I have also seen the consent order issued on 13th day of March 2018 and I confirm and aver that I did not at all take part in the proceedings on the said date because I was in Nairobi and was not even aware that the matter was coming up for either hearing or mention.

3. That I further aver that I did not instruct Mr. Abdulatif who purportedly held my brief on the 13/3/18 as I indeed did not have instructions to proceed in any way with the matter leave alone the instructions towards the said consent.

5. That the said Mr. Abdulatif Advocate who is not known to me proceeded to hold my brief without my instructions.

5. That I now swear this affidavit in support of the application to set aside the consent order dated the 13th day of March 2018 as it was illegally obtained.

6. That what is deponed to above is true to the best of my knowledge, information and belief.

16. I have perused and considered the record herein. It is evident that between the time the Defendants filed their Statement of Defence in February 2016 and the time the consent was endorsed on 13th March 2018, this matter had been in Court at least five times. In all those occasions, no one appeared in Court representing Messrs Nyakoe Macharia & Company Advocates. This was probably because even though the said firm of Advocates has a physical address in Malindi, their main base of operation was in Nairobi from where Mr. Nyakoe swore the Affidavit aforementioned.

17. As it were, Mr. Nyakoe Advocate does not deny that Mr. Samson Nyangena who is said to have contacted the Plaintiff for negotiations towards the consent was his Court clerk based at his Malindi office. Neither does he deny in that Affidavit or any other that he had instructed Mr. Ogeto Advocate to act for him and or execute documents including the letter dated 19th February 2019 on his behalf. As it turned out, it is Mr. Ogeto who in turn instructed Mr. Abdulatif Advocate to hold brief herein.

18. Even more revealing, the said Advocate does not deny that he received a sum of Kshs 60,000/- from the Plaintiff on or around the date the consent was recorded herein. According to the Plaintiff, Mr. Nyakoe when consulted about the consent had insisted that he be paid the sum of Kshs 100,000/- before his endorsement thereof.

19. In his Affidavit of Verification filed herein on 13th July 2018, the Plaintiff's employee, the said Riziki Hamisi Athman has deposed that on various dates between 30th May 2018 and 10th June 2018, the Plaintiff gave her sums totaling Kshs 60,000/- which amounts she sent to the said Advocate through the Mpesa mobile money transfer system. In support of that contention, she has annexed a Statement of her Account from the Mobile Service Provider Safaricom which shows that the said amount was paid to one Jared Nyaumah Nyakoe, who is presumably the former Defendants Advocate.

20. The Defendants' current Advocate on record Mr. Omwancha while admitting that those monies were paid, submitted that the previous law firm was compromised. While that may be so, it only goes to show that the Defendants former Advocates were fully in the picture when the consent was being prepared and/or when it was recorded in Court.

21. Indeed, while the Defendants purport that their former Counsel was not fully engaged in negotiations leading to the recording of the consent, the List of Documents filed by the Plaintiffs herein on 18th September 2017 tell a different story. That List contains various letters authored by the said Nyakoe Advocate from August 2013 in which he invites the Plaintiffs Advocates Messrs Michira Messah to have the Land surveyed for purposes of facilitating a settlement herein.

22. In one letter dated 13th July 2015 addressed to the Plaintiff in person, the previous Advocates wrote as follows:-

RE: PLOT NO. 371 GROUP 5762 MALINDI

We refer to the above captioned property registered in the name of Mohamed Abbas Abdulla (deceased).

We have been informed that you are the administrator of the estate of the said Mohamed Abbas Abdulla and have all the original documents regarding the Plot and the estate.

The purpose of writing this letter is to kindly request you to come to our offices on the 22nd July 2015 at 3 p.m. because we have clients to buy part of the Plot and will be coming to our offices then (sic).

Also carry with you the original title deed and any other related documents including a current search and the grant of letters of administration.

.....”

23. In another letter dated 24th August 2013, the Advocates inform the Plaintiff that they are agreeable to his surveyors to go ahead to document the property at his cost and that they both have a joint report at the end of the exercise.

24. In the result I am satisfied that despite the denials, Messrs Nyakoe Macharia & Company Advocates participated in the execution and recording of the consent. As was stated in *Kenya Commercial Bank Ltd –vs- Specialised Engineering Company Ltd(1982) KLR:-*

“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.”

25. In the same case(Kenya Commercial Bank Ltd, above) the Court stated 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.”

26. In the circumstances before me, I was not satisfied that the Advocates formerly on record did not participate in the consent and/or that there was any fraud in execution and recording of the same. As at the time the said consent was recorded, the said Advocates were properly on record as they had neither filed a notice to cease acting nor was there any notice of Change of Advocates on record.

27. The upshot is that I did not find merit in the Defendant’s application. The same is dismissed with costs to the plaintiff.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE