REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 54 OF 2010(O.S)

ARNOLD MUATHA MAINGI.....APPLICANT

VERSUS

COLLINS KITAKA KALOKI.....RESPONDENT

RULING

1. This suit was withdrawn with the consent of the parties on 3rd October, 2017. The Applicant has now filed an Application dated 11th May, 2018 in which he is seeking for the following orders:

a. That a consent order issued on 3rd October, 2017 withdrawing the suit be set aside and the matter be set down for hearing.

b. That costs be provided for.

2. The Application is premised on the grounds that the consent of 3rd October, 2017 was entered into without the Applicant's instructions and that the Applicant stands to suffer due to the said consent order.

3. In his Affidavit, the Applicant deponed that he appointed the firm of Maingi Musyimi & Associates advocates to act for him in this matter; that the said advocates entered into a consent with the Respondent to withdraw the suit and that the advocates on record did not consult him before entering into the said consent.

4. In reply, the Respondent averred that the Application does not meet the threshold of setting aside a consent Judgment; that the Applicant freely consented to the withdrawal of the suit and that the Applicant always attended court.

5. The Respondent finally deponed that the advocate who recorded the consent Judgment has not been made a party to these proceedings to confirm whether or not he had instructions to record the consent; that the current firm is improperly on record because there is a consent Judgment and that the Applicant was charged in Machakos Chief Magistrate's Court Criminal Case Number 141 of 2010 for trespass and malicious damage which was compromised after the Applicant promised not to encroach on the land again.

6. The Applicant's advocate submitted that the Applicant's previous advocate recorded a consent withdrawing the suit on the premise of collusion and deceit; that the consent was recorded without the Applicant's instructions and that the previous advocate never consulted the Applicant before recording the consent.

7. The Defendant/Respondent advocate submitted that usually, a court will not interfere with a consent Judgment except in circumstances such as would provide a good ground for rescinding a contract; that the onus of proving that assertion is on the Applicant and that an advocate who is duly instructed to act on behalf of his client has authority to act in all that pertains to the matter. Counsel relied on numerous authorities which I have considered.

8. The record shows that the Applicant filed an Originating Summons dated 11th March, 2010 in which he sought to be declared the owner of parcel of land known as Machakos Town Block 3/1155 by way of adverse possession.

9. When this matter came up for hearing on 3rd October, 2017, the Applicant's advocate informed the court that the Applicant had agreed to withdraw the suit, but was only concerned with the issue of costs. On the said date, the parties recorded a consent in the following terms:

"By consent, the suit is marked as withdrawn. The parties to agree on the issue of costs. Mention on 6th November, 2017."

10. When the matter was mentioned on 6th November, 2017, the advocates for both parties informed the court that they had not agreed on the issue of costs.

11. The Applicant now claims that he never instructed his advocate to withdraw the suit, and wants the consent that was entered into between his then advocate and the Respondent's advocate set aside.

12. The law relating to setting aside a consent Judgment or Order was laid down by the Court of Appeal in the case of ***Flora N. Wasike vs. Destimo Wamboko (1988) eKLR*** as follows:

> **"It is now 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 vs. Kenya Commercial Bank Limited Civil Appeals 28 of 1982 and 69 of 1983."**

13. Before the ***Wasike case*** *(supra),* the Court of Appeal in ***Hirani vs. Kassam (1952) 19 EACA 131***, had held 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… and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court… or if 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. It is therefore obvious from the above judicial interpretations that a court will not set aside a consent Judgment or Order except in circumstances such as would provide for varying or rescinding a contract. Indeed, it is trite that an advocate who is duly instructed to act on behalf of his client has a general authority to compromise, on behalf of his client, if he acts bona fide and not contrary to express negative directions (*See Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd (1982) KLR 485).*

15. The advocate who entered into the consent order of 3rd October, 2017 had general instructions to act for the Applicant. If indeed the said advocate did not have instructions to withdraw the suit as alleged by the Applicant, he should have been enjoined in these proceedings to explain by way of Affidavit evidence the circumstances that led him to record the consent of 3rd October, 2017. That did not happen.

16. Other than not enjoining his previous advocate in this suit, the Applicant has not shown what action he took when he discovered the alleged fraud on the part of his counsel. Indeed, there is no evidence before me to show that the Applicant has formally reported the issue of his advocate professionally misconducting himself to the Law Society of Kenya, or even a letter informing him *(the advocate)* of his intention to sue him for negligence or profession misconduct.

17. The failure by the Applicant to file a formal complaint with the Law Society of Kenya shows that the Applicant gave his former advocate instructions to withdraw the suit. The Applicant seems to have changed his mind when the Respondent insisted on being paid the costs of the suit.

18. In any event, the issue of the Applicant's former advocate having entered into the consent of 3rd October, 2017 fraudulently or in collusion with the Respondent, was to be proved by the Applicant. In the case of ***SMZ vs. ZMS & 3 others (2017) eKLR***, the Court of Appeal held as follows:

> **"The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the Appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High Court that he was involved in fraud or colluded with another advocate or person to subvert the cause of justice in a matter pending in court is certainly one of utmost gravity. It destroys the advocate's honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charges."**

19. The Applicant in this matter has not established the well known standards of setting aside a consent order. Indeed, other than making a general statement that he did not instruct his advocate to enter into the consent of 3rd October, 2017, the Applicant did not prove those allegations.

20. In the circumstances, I dismiss the Application dated 11th May, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE