



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC CIVIL SUIT NO. 456 OF 2015**

**SABASTIAN PAUL MUINDE KATHILU.....PLAINTIFF**

(Suing through his Attorney **MARCELLA MBITHE KATHILU**)

**=VERSUS=**

**BENL DEVELOPMENT LIMITED.....DEFENDANT**

**RULING**

1. The Defendant/Applicant filed a Notice of Motion dated 4<sup>th</sup> April, 2018 in which it sought the following orders:-

**(a) Spent**

**(b) The Honourable Court be pleased to review, vary and/or set aside its ruling/decision dated 12<sup>th</sup> March, 2018 and all the consequential orders.**

**(c) Costs.**

2. This application was triggered by the proceedings of 12<sup>th</sup> March, 2018. The Plaintiff/Respondent had filed an application dated 15<sup>th</sup> February, 2018 in which he sought among other orders substitution with Marcella Mbithe Kathilu to whom he had given a power of attorney. When the application came up for hearing before Justice Eboso on 12<sup>th</sup> March 2018, the Counsel for the Applicant who was the Respondent in that application indicated that he wished to file a response to the application. The Court adjourned the application to 30<sup>th</sup> July, 2018 and granted the Respondent 14 days within which to file a response. Soon after the adjournment, the Counsel for the parties returned and informed the Court that they had a consent to record.

3. The Court then recorded that the application dated 14<sup>th</sup> February, 2018 had been allowed by consent. The effect of this consent was that Marcella Mbithe Kathilu was substituted in place of Sebastian Kathilu, the Applicant herein. It is the consent which was recorded on 12<sup>th</sup> March, 2018 which made the Applicant file the current application. The present application was placed before the Presiding Judge under certificate of urgency. The Presiding Judge directed that the application be placed before Justice Eboso on 13<sup>th</sup> June, 2018 for directions. When the file was placed before Justice Eboso on 13<sup>th</sup> June, 2018, the Judge directed that the same be heard on 2<sup>nd</sup> July, 2017.

4. On 2<sup>nd</sup> July 2018, the Applicant's Counsel raised issues before Court which included asking Justice Eboso to recuse himself from the matter. In a ruling delivered on 19<sup>th</sup> July 2018, Justice Eboso dismissed the oral application for his recusal but he nevertheless directed that the file be placed before another Judge. This is how this matter ended up before me wherein I am asked to review and or set aside the orders of Justice Eboso made on 12<sup>th</sup> March, 2018 together with all consequential orders.

5. The Applicant contends that the consent which was recorded on 12<sup>th</sup> March, 2018 is not the one which the Advocates appearing before the Court had asked the Court to record. The Applicant contends that the Court had been asked to record the following consent as regards the application of 14<sup>th</sup> February, 2018:-

**(a) That Marcella Mbithe Kathilu be allowed to give her testimony as the Plaintiff's witness; and which testimony was to be recorded first;**

**(b) That the Honourable Court be afforded an opportunity to make an inquiry into the ability of the Plaintiff to testify and/or prosecute his suit; upon which inquiry, parties will be guided by the Court's directions thereof.**

6. The Applicant further argues that the Court did not record the Proceedings and submissions made therein towards the disposal of the

application and that there are patent errors of law and facts apparent on the face of the Court's record. The Applicant therefore argues that the purported consent is erroneous, unjust and highly prejudicial to the Applicant and should be set aside as it will not cause any prejudice to the Respondent.

7. The Applicant's application is opposed by the Respondent through grounds of opposition filed in Court on 19<sup>th</sup> June, 2018 and a replying affidavit sworn on 18<sup>th</sup> June, 2018 and filed in Court on 19<sup>th</sup> June, 2018. The Respondent contends that the affidavits in support of the application herein contain falsehoods which are intended to malign the integrity of the Court and delay the finalization of this case. The deponent of the affidavit in opposition to the Applicant's application is the Respondent's lawyer. He states that on the material date, he had asked Mr. Genga an Advocate to proceed with the application which was before Court. He came into the Court room and found that the Court had adjourned the application dated 14<sup>th</sup> February, 2018 to 30<sup>th</sup> July, 2018. He in the company of Mr. Wachira and Mr. Anami who were for the Applicant herein which was the Respondent in the Application dated 14<sup>th</sup> February, 2018 went outside Court where they agreed by consent that the application of 14<sup>th</sup> February, 2018 be allowed by consent for purposes of expediting the hearing of the case.

8. After the Advocates had agreed, they went back to the Court where they requested the Judge to indulge them by revisiting the file. The Judge agreed and a consent was recorded after which the Judge allocated the case a hearing date. Mr. Njuguna contends that what the Court recorded is a true record of what transpired in Court and that the Applicant's allegations that what the Court recorded is not what the advocates had agreed on is an afterthought which is only meant to delay the case further.

9. The Respondent contends that the consent which was recorded is binding upon the parties and that the Applicant has not met the threshold for review and or setting aside the consent. The Respondent further contends that the Applicant is vindictive and has made various complaints to various bodies which complaints are meant to scuttle the hearing of this suit.

10. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions filed by the parties herein. The issues which emerges for determination are firstly whether the Applicant has met the threshold for review and or setting aside the order of 12<sup>th</sup> March, 2018 and secondly whether the consent recorded on 12<sup>th</sup> March, 2018 should be set aside.

11. The grounds for review are well set out under Order 45 of the Civil Procedure Rules. The grounds are discovery of new and important evidence which could not be produced when the decree or order was given, error apparent on the face of the record or any other sufficient reason. In the instant case, the Applicant contends that there is an error apparent on the face of the record and that there are sufficient reasons why the order of 12<sup>th</sup> March, 2018 should be set aside. In support of these grounds the Applicant argues that the Court did not record all that was submitted before it and that the Court recorded a different consent other than the one which the parties agreed on.

12. The Advocates for the Applicant namely Mr. Anami and Mr. Wachira argue that the consent which had been agreed on by the Advocates for all the parties was stated to the Court by Mr. Njuguna for the Respondent and that the Judge did not agree with the consent arguing that the Court had no capacity to determine whether the Respondent was fit to prosecute his case and that that is within the powers of a medical doctor to determine that. The Applicant's Advocate further argue that despite their spirited efforts to urge the Court otherwise, the Court went ahead to record a consent which had not been agreed on. They contend that neither their submissions nor those of the Counsel for the Respondent Mr. Njuguna were recorded.

13. I have looked at the proceedings of 12<sup>th</sup> March, 2018. The proceedings show that Mr. Genga was holding brief for Mr. Njuguna for Applicant and Mr. Anami was for the Respondent. Soon after the Judge had adjourned the application to 30<sup>th</sup> July, 2018 and granted leave to the Respondent to file a response within 14 days, the two Advocates came back and Mr. Genga indicated to the Court that they had reached a consent that the application dated 14<sup>th</sup> February, 2018 be allowed by consent. Mr. Anami was recorded as having agreed that the application be allowed. It is after this that the Court recorded that the Application dated 14<sup>th</sup> February, 2018 had been allowed by consent. Marcellah Mbithe Kathilu was substituted in place of Sebastian Paul Muinde Kathilu.

14. Though Mr. Njuguna and Mr. Wachira admit in their respective affidavits that they were present on 12<sup>th</sup> March 2018, the record only captures Mr. Genga and Mr. Anami. There is no error apparent on the face of the record regarding the proceedings of 12<sup>th</sup> March, 2018 to warrant a review. In the case of *Nyamogo & Nyamogo Advocates Vs Kago [2001]E.A 173* the Court of Appeal stated as follows:-

***“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal...”***

15. In the instant case the Applicant is claiming that the Court recorded a completely different consent whereas the Respondent claims that the consent recorded by the Court was the correct one. Following the Nyamogo case (Supra) it is clear that there is no error on a substantial point of law that stares one in the face such that there could reasonably be no two opinions as to constitute an error apparent on the face of the record. Mere allegations that the Court did not record the proper consent cannot constitute an error apparent on the face of the record. Perhaps this argument would have formed a good ground of appeal as the Applicant ultimately argues that consent is erroneous, unjust, prejudicial and contrary to the law.

16. On the second issue as to whether the consent recorded on 12<sup>th</sup> March, 2018 should be set aside, there are many decisions of the Superior Courts which hold that a consent order can only be set aside on grounds which would justify the setting aside of a contract. In the

case of Samuel Mbugua Ikumbu Vs Barclays Bank of Kenya Limited [2015]eKLR the Court of Appeal adopted the Judgment of Harris JR in the case of Kenya Commercial Bank Ltd Vs Specialised Engineering Co. Ltd 1982 KLR page 485 where it was held as follows:-

***“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 of in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.”***

In the same case the Court further held that:

***“An Advocate has general authority to compromise on behalf of his client as long as he is acting bon fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.”***

17. In the case before me, the Applicant was represented by two Advocates from two law firms who were duly instructed to act for it. One of the directors of the Applicant was present in Court. There can be no argument that the consent was recorded due to ignorance of material facts. The proceedings in this case show that the Respondent had been put in the witness box and had started giving evidence. It was observed that he had difficulties in participating in the proceedings that is why he was stood down. It thereafter emerged that he was unable to proceed and hence the application of 14<sup>th</sup> February, 2014. The Applicant cannot therefore argue that the consent was recorded in ignorance of material facts.

18. The Applicant is arguing that the Respondent is being shielded from prosecuting his case in order to avoid certain facts coming out. This is neither here nor there. This Court's concern at the moment is whether there are grounds for review of the order of 12<sup>th</sup> March, 2018 and consequential orders or set aside the consent recorded on that date. I have demonstrated herein that there are no grounds for review or setting aside of the consent. I therefore find that the Applicant's application lacks merit. It is hereby dismissed with costs to the Respondent.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 30<sup>th</sup> day of May, 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of Mr. Njuguna for Plaintiff/Respondent and Mr. Wachira for Defendant/Applicant.

Court Assistant – Hilda