



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 112 OF 2015

ANTHONY NDUNDI MWAMBIRE suing as the legal

representative of MARTHA PAUL KAZUNGU.....PLAINTIFF

VERSUS

THE BOARD OF GOVERNORS –

GEDE SECONDARY SCHOOL.....1ST DEFENDANT

COUNTY GOVERNMENT OF KILIFI.....2ND DEFENDANT

LAND REGISTRAR KILIFI.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. By this Notice of Motion application dated and filed herein in person on 14th March, 2017, the Plaintiff Anthony Ndundi Mwambire prays for a review of the consent order issued herein on 28th February, 2017. The application which is supported by an Affidavit sworn by the Plaintiff is premised on the grounds that: -

- i. The consent order is a compromise which is against the Applicant;**
- ii. Order 1 of the said consent wrongly describes the suit property as Portion o. 24159 Kilifi while the correct position is that it is Portion No. 24159 Mombasa;**
- iii. The said consent order is a compromise with the intention to unlawfully regularize the suit documents which are challenged by way of grand;**
- iv. The Applicant never instructed his prior Advocates to enter into such a consent;**
- v. The said consent order is maliciously recorded against the wishes of the family of the late Martha Paul Kazungu; and**
- vi. Unless the consent order is reviewed, the Applicant shall be highly prejudiced.**

2. But in a Replying Affidavit sworn by Stephen Nzioki Muia the Principal and Secretary to the Board of Management of Gede Secondary School (the 1st Defendant), he avers that the Applicant was present in court on 28th February, 2017 and held consultations with his then Advocate prior to the adoption of the consent.

3. The 1st Defendant, further asserts that contrary to the Plaintiff's claims the representatives for the 3rd and 4th Defendants were also present in court on the date of the consent. The 1st Defendant further avers that the Plaintiff has absolutely no interest in the suit property and his conduct is dishonest and amounts to abuse of the due process of the court.

4. I have perused and considered the Plaintiff's application and the response thereto by the 1st Defendant. From the records, the Plaintiff

filed this suit in person on 13th July, 2015. On 16th January, 2016 the Plaintiff appointed Ms Wesley John Austin & Associates Advocates to represent them in this matter.

5. Subsequently by an application dated and filed herein on 13th February, 2017, the 1st Defendant sought inter alia orders of temporary and mandatory injunction to restrain and compel the Plaintiff to vacate the suit property. On 28th February, 2017 when the 1st Defendant's application came up for hearing, the parties recorded a consent order as follows: -

1. That an Order of injunction is hereby issued restraining the Plaintiff by himself, servants, agents, beneficiaries, assignees or advocates or any of them from clearing the land, cutting down trees, erecting structures and/or interfering with the 1st Defendant's quiet possession of the suit property known as Plot No. 24159 Kilfi.

2. That the 1st Defendant/Applicant is granted leave to amend the Defence in terms of the draft amended Defence attached to the Supporting Affidavit herein.

3. That the Director of Surveys be ordered to appoint a Surveyor to ascertain the boundaries of the 1st Defendant's School.

4. That the application be marked as spent with no order as to costs.

6. Present in court when the consent was recorded were Ms Ruto Learned Advocate for the Plaintiff, Mr. Binyenya Learned Advocate for the 1st Defendant and Mr. Munga Learned State Counsel for the 3rd and 4th Defendants. It is now apparent that the Plaintiff was displeased by the first limb of the consent and he accuses his Advocate of entering into the said consent without his instructions.

7. There is no dearth of authorities on the law governing the setting aside of consent Judgements or orders. Generally, a court of law will not interfere with a consent judgement except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. In **Flora N. Wasike -vs- Destimo Wamboko (1988) eKLR**, the Court of Appeal pointed out this position as follows: -

“It is now settled law that a consent judgement 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 Ltd Civil Appeals 28 of 1982 and 69 of 1983.”

8. In the matter before me the impugned consent was entered into by the Advocate duly appointed by the Plaintiff. As it were, it is a trite principle of law that an Advocate has general authority to compromise a suit and/or issue on behalf of his client as long as he or she is acting bona fide and not contrary to express negative directions.

9. As Harris J stated long time back in **Kenya Commercial Bank Ltd -vs- Specialised Engineering Co. Ltd (1982) KLR 482: -**

“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.”

10. I have studied the consent order as a whole and considered the circumstances in which it was recorded. I am persuaded that Ms Ruto Advocate had ostensible authority to enter into the same and that she did so in the interest of her client. I find no proof to the contrary to impeach the Advocates bona fides.

11. Having so found, it follows that the Plaintiff's application is bereft of merit. It is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF NOVEMBER, 2019.

J.O.OLOLA

JUDGE