



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.61 OF 2014

NYEVU KENGA WANJE.....PLAINTIFF/APPLICANT

VERSUS

ALICE BENJAMIN NGUMBA.....DEFENDANT/RESPONDENT

RULING

1. By the Notice of Motion dated and filed herein on 17th September 2018, Nyevu Kenga Wanje(the Plaintiff/Applicant) prays for Orders:-

1. That leave be granted for Nyongesa & Company Advocates to come on record for the Plaintiff in place of Katsoleh & Company Advocates since there is a consent Judgment.

2. That the purported consent Order dated 23rd February 2016 be set aside.

2. The application which is supported by an Affidavit sworn by the Plaintiff is premised on the grounds:-

i) That the Plaintiff is the registered owner of Plot No. Majaoni/Block 5A/185;

ii) That the Plaintiff filed this suit in 2014 and instructed her Advocates to consent with the Respondent to allow a surveyor to visit the suit premises and file a report. That consent was recorded in Court on 24th October 2015;

iii) That pursuant to the Order, a Surveyor visited the premises and prepared a report dated 22nd December 2015. The Plaintiff then instructed her Advocate to proceed with the matter to full hearing;

iv) That unknown to the Plaintiff her then Advocates proceeded to compromise the suit through another consent recorded in Court on 23rd February 2016. The Plaintiff only came to learn this after several unfruitful visits to her previous Advocates and when she instructed her current Advocates who proceeded to peruse the Court file on 30th August 2018;

v) That the consent recorded on 23rd February 2016 was arrived at fraudulently as the former Advocates kept on insisting that the matter was still in Court whenever the Plaintiff inquired about the same.

3. But in a Replying Affidavit sworn on 16th January 2019 and filed herein on 23rd January 2019 Alice Benjamin Ngumbao (the Defendant/Respondent) avers that she first went to Court vide ***Kilifi SRMCC No. 261 of 2016; Alice Benjamin Ngumbao & Another –vs- Harison Kenga Wanje.*** She asserts that the Defendant in the said case was a son of the Plaintiff herein and that on 13th October 2011 Judgment was entered in her favour but the Plaintiff and her son have continued disobeying the same.

4. The Respondent further avers that following the institution of this suit by the Plaintiff, the parties agreed by consent to adopt the Surveyor's Report dated 22nd December 2015 and thereby marked the matter as settled. It is her case that the consent recorded in court on 23rd February 2016 was arrived at her in both her presence and that of the Plaintiff who was represented by her Advocate in Court.

5. I have perused and considered the Plaintiff's application as well as the response thereto by the Defendant. In regard to Prayer No. 1 of the application, the parties recorded a consent in Court on 29th November 2018 allowing the firm of Nyongesa & Company Advocate to come on record for the Plaintiff.

6. The Applicant is asking the Court to set aside the consent order recorded by the parties in Court on 23rd February 2016. The said consent settled the dispute between the Applicant and the Respondent in terms of the Report prepared by the Kilifi County Government Surveyor dated 22nd February 2015.

7. The Applicant avers that while she consented to and instructed her former Advocate to allow a Surveyor to visit the suit premises and to file a Report in Court, she was dissatisfied with the resulting Report and instructed the said Advocates to proceed to fix the case for hearing. Contrary to those instructions however, Messrs Katsoleh & Company Advocates then on record proceeded secretly and fraudulently recorded a consent compromising the suit as aforementioned in line with the Surveyor's Report dated 22nd February 2015.

8. I think it is now settled that generally, a Court of Law will not interfere with a consent Judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between the parties. As the Court of Appeal stated in **Flora N. Wasike –vs- Destimo Wamboko (1988)eKLR:-**

“It is now settled law that a consent Judgment or order has contractual effect and can only be set aside, if certain conditions remain to be fulfilled, which are not carried out: See the decision of this Court in JM Mwako vs- Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.”

9. In the matter before me, a perusal of the record reveals that the trial had indeed commenced and the Plaintiff's son one Harison Kenga Wanje had already testified and concluded his testimony on 20th April 2015 before the Honourable Justice Angote who was then seized of the matter. On the said date the Plaintiff herself could not testify after her Advocate –Mr. Obaga informed the Court that she was not fluent in Kiswahili and they would need an interpreter.

10. In the circumstances, the Learned Judge granted an adjournment to 24th June 2015 when a Giriama interpreter was to be availed. However on the said 24th June 2015, Mr. Obaga, Learned Counsel for the Plaintiff/Applicant then instead informed the Court that they were waiting to confirm if the Surveyor's Report was ready and urged the Court to direct the Surveyor to prepare the Report. The Defendant/Respondent who was unrepresented conceded to the request.

11. The matter was subsequently adjourned one more time on 7th October 2015 on the basis that the Report was not ready. On 23rd February 2016 when the Survey Report was availed and a consent recorded compromising the suit in accordance therewith, the Plaintiff/Applicant was once again represented by Mr. Obaga Advocate while the Defendant/Respondent continued acting in person. It is the Plaintiff/Applicant's contention that the said consent was entered into without her instructions and was thus fraudulent and recorded without full disclosure of the information.

12. In my mind if indeed the then Counsel for the Applicant acted fraudulently and without authority, the onus fell upon the Plaintiff/Applicant to prove those assertions. Those are serious imputations bordering on crime and the Applicant needed to put some evidence before the Court that indeed what transpired could only lead to that conclusion.

13. As the Court of Appeal stated in **SMN –vs- ZMS & 3 Others (2017) eKLR:-**

“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 closure 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.”

14. As it were, the Plaintiff was closely following up on her case and she admits giving a go-ahead to her Advocate for the Survey Report which was meant to show what portions of the disputed property was occupied by which party, to be prepared. They did not proceed with their case pending its preparation. When the Report was finally availed and filed in Court, the Plaintiff claims to have disagreed therewith. Two years after the Report was filed and a consent adopted in terms thereof, she came up with this application. I am not however persuaded by her arguments.

15. As Harris J., observed way back in **Kenya Commercial Bank Ltd –vs- Specialized Engineering Company Ltd (1982) KLR 485:-**

“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 or 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.”

16. In the circumstances herein, I think I have said enough to demonstrate that I did not find any merit in the Plaintiff's application dated 17th September 2018. The same is dismissed with costs to the Defendant/Respondent.

Dated, signed and delivered at Malindi this 5th day of December, 2019

J.O. OLOLA

JUDGE