



**Isiye v Anagori & 4 others (Environment and Land Appeal
E060 of 2022) [2024] KEELC 268 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 268 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E060 OF 2022
DO OHUNGO, J
JANUARY 31, 2024**

BETWEEN

MORRIS MUNAMEZA ISIYE APPELLANT

AND

JOSEPHINE KAVETSA ANAGORI 1ST RESPONDENT

PRISCILLAH CHUNGE NYAPELA 2ND RESPONDENT

RIVER NZOIA CENTRAL 3RD RESPONDENT

THE LAND REGISTRAR – KAKAMEGA COUNTY 4TH RESPONDENT

THE LAND SURVEYOR – KAKAMEGA COUNTY 5TH RESPONDENT

*(Being an appeal from the ruling and order of the Chief Magistrate's
Court at Kakamega (Hon. J R Ndururi, Principal Magistrate) delivered
on 16th December 2022 in Kakamega MCELCMISC No. E015 of 2021)*

JUDGMENT

1. The background of this appeal is that the first to third respondents herein commenced proceedings in the Subordinate Court by filing Notice of Motion dated 2nd June 2021 against the fourth and fifth respondents herein. They sought an order directing the fourth and fifth respondents herein to visit land parcel numbers Butsotso/Indangalasia/221 and Butsotso/Indangalasia/3431 to measure and demarcate the access road shared between the said parcels as per the original map and that the OCS Kakamega Police Station to provide security during the exercise.
2. Notice of Motion dated 2nd June 2021, which was filed under certificate of urgency, was placed on the very 2nd June 2021 before Hon. H Wandere, SPM who granted the orders sought. Subsequently, the fourth and fifth respondents visited the site as ordered and filed a report dated 27th April 2022. The



matter was then listed on 17th June 2022 before Hon. J R Ndururi, Principal Magistrate who adopted the report and issued final orders in terms of the report. Up to that point, the appellant was not a party to the proceedings.

3. The appellant then filed Notice of Motion dated 28th September 2022, in which he termed himself an interested party. He sought review, variation and or setting aside of the orders pursuant to which the report was adopted. He contended that he was the registered proprietor of the parcel of land known as Butso/Indangalasia/3431 and that he was neither involved in the matter before the Subordinate Court nor the site visit. When the application came up for inter parte hearing on 27th October 2022, counsel for the appellant indicated to the court that he was discussing the matter with his client. He urged the court to mention the matter on 1st November 2022. There being no opposition by counsel for the first to third respondents, the court acceded to the request and scheduled the matter for mention on 1st November 2022.
4. Ultimately, the following consent was recorded on 1st November 2022 by Mrs Chunge, Advocate for the first to third respondents and Mr Mango, Advocate for the appellant:
 1. The applicant Morris Isiye to provide an alternative access road to the respondent within 28 days from today.
 2. The applicant Morris Isiye to refund to the respondent the sum of Ksh.60,000/= being expenses incurred in the process of surveying the ancestral land.
 3. In default the respondent to be at liberty to effect the order made by this court on 11/8/2022 and the OCS Kakamega police station to provide security and execution to issue for the stated amount.
 4. That the matter be mentioned on 7/12/22 to confirm compliance.
5. The terms of the consent were dictated by Mr Mango and confirmed by Mrs Chunge. Both signed the court record. The consent was adopted, and orders made in those terms.
6. The matter did not end there. The appellant changed advocates on 28th November 2022 and shortly thereafter filed Notice of Motion dated 5th December 2022, seeking review and/or setting aside of the consent orders of 1st November 2022. Upon hearing the parties, the Subordinate Court (Hon. J R Ndururi, Principal Magistrate) delivered its ruling on 16th December 2022, dismissing the application with costs to the first to third respondents.
7. Dissatisfied with the ruling, the appellant filed this appeal on 19th December 2022, through Memorandum of Appeal dated 16th December 2022. He prayed that the ruling be set aside and be replaced with an order reviewing and/or setting aside the consent orders of 1st November 2022. He also prayed for costs of the appeal.
8. The following grounds are listed on the face of the Memorandum of Appeal:
 1. The Learned Trial Magistrate erred in fact and in law in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.
 2. The Learned Trial Magistrate erred in fact and in law in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.
 3. The Learned Trial Magistrate erred in fact and in law in ignoring the pleadings and submissions for the Appellant moreso on the issue of the consent order recorded without his instructions.



4. The Learned Trial Magistrate erred in fact and in law in making a finding that the consent was properly recorded when the appellant had proved that the same was recorded without his instructions.
 5. The Learned Trial Magistrate erred in fact and in law in holding that the appellant had not proved any of the grounds that would ordinarily vitiate a consent order when the appellant had overwhelming evidence to the contrary.
 6. The Learned Trial Magistrate erred in fact and in law in holding that the appellant clearly understood all the material facts of the matter and participated in negotiating the consent when no evidence on record proves this finding.
9. The appeal was canvassed through written submissions, which both the appellant and the first to third respondents duly filed. The fourth and fifth respondents neither filed submissions nor participated in the hearing of the appeal despite being served with notices and directions requiring filing of submissions.
10. In his submissions, the appellant identified two issues for determination: whether the consent was recorded without instructions and whether grounds that vitiate a consent were proven. On the first issue, he argued that the consent was recorded without his knowledge and consultation. Regarding the second issue, he relied on Order 25 Rule 5 of the Civil Procedure Rules as well as several authorities and argued that any compromise must be in writing and signed by all parties concerned. That the appellant having denied instructing his counsel to record the consent, the resulting consent was the advocate's and not the appellant's. Further, that the record shows that the appellant was not present in court when the consent was recorded and that since he had disowned the consent, it follows that the consent was not obtained lawfully hence an illegal contract. He added that the impact of the consent was to deprive him of the opportunity to be heard, contrary to the rules of natural justice. Among the authorities he relied on are *Samson Munikah practicing as Munikah & Company Advocates v Wedube Estates Limited* [2007] eKLR, *Flora Wasike v Destimo Wamboko* (1982 - 88) 1 KAR 625, *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR 485 and *Munyiri v Ndunguya* [1985] eKLR. The appellant therefore urged this court to allow the appeal.
11. On their part, the first to third respondents argued that the appellant and his counsel were in court on 1st November 2022 when the consent was recorded and that the appellant had not filed any complaint against his advocate alleging that the advocate acted contrary to instructions. They further contended that the authority of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* (*supra*) which the appellant relied on defeats the appellant's case since it states that a duly instructed advocate has implied authority to compromise a matter. They therefore urged the court to dismiss the appeal.
12. The principles that guide an appellate court while considering an appeal against an order made in exercise of discretion are settled. The Court of Appeal reiterated in the case of *Mombasa Cement Limited v Kitsao & 34 others* (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment) that an appellate court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion.
13. I have considered the grounds of appeal, the pleadings, the affidavits, the parties' submissions, and the authorities cited. The sole issue that arises for determination is whether the appellant made a case for setting aside of the consent orders of 1st November 2022.



14. It is trite that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside. See *Flora N. Wasike v Destimo Wamboko* [1988] eKLR. Where a consent order is made in the presence of and with the consent of counsel, it is binding on all parties to the proceedings 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 it was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement. A duly instructed advocate has implied authority to compromise a matter on behalf of his client. See *Hirani v Kassam* (1952) 19 EACA 131 and *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* (supra).
15. It is the appellant's contention that he did not instruct Mr Mango to record the consent. I have read the appellant's affidavit in support of Notice of Motion dated 5th December 2022. He deposed therein that he instructed Mr Mango to represent him in the matter. Thus, Mr Mango's general authority as counsel in the matter is not in dispute.
16. I have also read the first respondent's replying affidavit in opposition to Notice of Motion dated 5th December 2022. She deposed that the appellant was present before the Subordinate Court on 27th October 2022 together with his counsel when he sought more time to explore an amicable settlement. She further deposed that the terms of the consent were dictated loudly on 1st November 2022 in the presence of the appellant. I note that the appellant did not swear and file any affidavit to controvert the details in the first respondent's replying affidavit, which are in fact confirmed by the ruling appealed against. The record shows that the terms of the consent were dictated by Mr Mango and confirmed by Mrs Change in court on 1st November 2022. Both counsels signed the court record.
17. The consent having been recorded on Tuesday 1st November 2022 in the presence of the appellant, one would have expected that if he did not instruct his advocate to record it as he claims, he would have promptly moved the Subordinate Court the very next day to seek its setting aside. He did not do so. Instead, he changed advocates almost a month later on 28th November 2022 and filed Notice of Motion dated 5th December 2022 on 6th December 2022. Such delay is not consistent with what is expected of a party horrified by a consent recorded in his presence but without instructions. Further, as the first to third respondents have argued, the appellant should have taken disciplinary action against his advocate if his claims are true. He did not.
18. I find no fault with the manner in which the learned magistrate handled the matter. The appellant did not make a case for setting aside of the consent orders of 1st November 2022.
19. I find no merit in this appeal, and I accordingly dismiss it with costs to the first to third respondents.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Muleshe holding brief for Ms Odeck for the Appellant

Mrs Change for the first to third Respondents

No appearance for the fourth and fifth Respondents

Court Assistant: E. Juma

