



**Muli v Waruingi & another (Environment & Land Case  
E026 of 2020) [2024] KEELC 409 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 409 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E026 OF 2020  
CA OCHIENG, J  
JANUARY 31, 2024**

**BETWEEN**

**BENSON MUIA MULI ..... PLAINTIFF**

**AND**

**DAVID MATHERI WARUINGI ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 21<sup>st</sup> March, 2023 where he seeks the following orders:-
  1. Spent
  2. That this Honourable Court do order for stay of execution of the consent dated 15<sup>th</sup> March, 2023 and adopted on 15<sup>th</sup> March, 2023 and any subsequent Decree pending the hearing of this Application inter-parties.
  3. That this Honourable Court do order for stay of execution of the consent dated 15<sup>th</sup> March, 2023 and adopted on 15<sup>th</sup> March, 2023 and any subsequent Decree pending the hearing of this Application.
  4. That pending the hearing inter parties of this Application, this Honourable Court do order reinstatement of all the caveats registered pursuant to orders dated 10<sup>th</sup> February, 2021 issued on 20<sup>th</sup> day of January, 2021 on all the resultant subtitles from subdivision of LR No. 12715/716 as captured under Clause 1 of the filed and adopted consent.
  5. That pending the hearing and determination of this Application, this Honourable Court do order for reinstatement of all the caveats registered pursuant to orders dated 10<sup>th</sup> February, 2021



issued on 20<sup>th</sup> day of January, 2021 on all the resultant subtitles from subdivision of LR No. 12715/716 as captured under Clause 1 of the filed and adopted consent.

6. That this Honourable Court do set aside the consent dated 15<sup>th</sup> March, 2023 and adopted on the 15<sup>th</sup> March, 2023 and this matter do proceed to full hearing.
  7. That this Honourable Court do reinstate the injunctive orders dated 10<sup>th</sup> February, 2021 and issued on 20<sup>th</sup> January, 2021 pending hearing and determination of this suit.
  8. That the cost of this Application be provided.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Francis M. Kalwa Advocate where he deposes that he has personal conduct of this matter on behalf of the Plaintiff. He confirms that on 20<sup>th</sup> January, 2021, the Court issued injunctive orders restraining the 1<sup>st</sup> Defendant from interfering with the suit land. He claims they agreed to an out of court negotiation and the Plaintiff accepted to compromise the suit since his wife and brother were unwell. He explains that they met with the 1<sup>st</sup> Defendant including his advocate after which they entered into a consent wherein the 1<sup>st</sup> Defendant had agreed to pay the Plaintiff Kshs. 6,000,000 so long as he retained the suit lands. Further, that the 1<sup>st</sup> Defendant's advocate had issued a professional undertaking to that effect. He contends that after entry of the consent, the 1<sup>st</sup> Defendant's advocate lied that they were processing the Kshs. 6,000,000 and were awaiting for certain bank approvals. Further, that the 1<sup>st</sup> Defendant has failed to pay the Kshs. 6,000,000 and the 1<sup>st</sup> Defendant's advocate rudely informed him that his client had got what he sought and they could report the matter to the Police if they wanted. He reiterates that the Plaintiff's acceptance to compromise the suit was based on facts alluded above and it was unfortunate that the 1<sup>st</sup> Defendant's advocate had employed dirty tricks to defeat justice. Further, that the Plaintiff by vein of the said consent has lost his land and without compensation.
  3. The 1<sup>st</sup> Defendant opposed the instant Application by filing a Replying Affidavit sworn by David Matheri Waruingi where he deposes that there is material non-disclosure on the part of the Plaintiff. He claims to be the registered proprietor of land parcel numbers LR 12715/716 subdivided into subplots of 12715/15407-15410; 12715/15412-15433; 12715/15435-15445. He avers that the Plaintiff was arrested by the DCI on 15<sup>th</sup> October, 2022 and charged with falsification and forgery of documents vide Mavoko Criminal Case No. MCCR/E980/2022. He contends that it is the Plaintiff who sought to settle the matter out of court and admits meeting him including his advocate. Further, that they negotiated the terms of the consent and agreed that the Plaintiff's lawyer's fees would be paid after conclusion of the case, adoption of the consent and disposal of the property. He confirms that subsequently a consent dated the 15<sup>th</sup> March, 2023 was drafted and executed by both the Plaintiff's Advocate and his Advocate. Further, that it is the Plaintiff's Advocate who filed the consent which was later adopted as an order of the Court. He further confirms that together with the Plaintiff, they were present in court when the consent was adopted. He avers that his Advocate issued a professional undertaking to the Plaintiff's Advocate for payment of Kshs. 6,000,000 together with an undated cheque. He reiterates that the Plaintiff's Advocate seeks to enforce the professional undertaking in court and this is wrong. He reaffirms that the Application has been overtaken by events since the caveats have been withdrawn and Decree executed.
  4. The Plaintiff filed a Further Affidavit sworn by Benson Muia Muli where he reiterates his averments and insists that the Court had already issued orders of injunction on 10<sup>th</sup> January, 2021 restraining the 1<sup>st</sup> Defendant from interfering with the suit land. Further, that the 1<sup>st</sup> Defendant sought to set aside the said orders vide his Application dated the 24<sup>th</sup> February, 2021 which was dismissed for want of prosecution. He claims the 1<sup>st</sup> Defendant subdivided the suit land during the pendency of this suit



culminating in his filing an Application seeking to cite him for contempt. He explains how he was persuaded to negotiate the matter out of court and confirms he was to be paid for the suit land as well as Kshs. 6,000,000 being the advocate's legal fees. He highlights how the 1<sup>st</sup> Defendant's advocates told them he was to get the Kshs. 6,000,000 and later discovered he had lied to them. He denies accepting to compromise the suit on the grounds that he did not own the suit land and insists that the 1<sup>st</sup> Defendant's advocate convinced him to the said settlement through fraud and misrepresentation.

The Application was canvassed by way of written submissions which was only filed by the Plaintiff.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective affidavits as well as the Plaintiff's submissions, the only issue for determination is whether the consent dated the 15<sup>th</sup> March, 2023, filed in court on 16<sup>th</sup> March, 2023 and adopted as Judgment of the court on 16<sup>th</sup> March, 2023 should be set aside.

The Plaintiff in his submissions reiterates his averments as per the respective affidavits and insists that the impugned consent should be set aside. He submits that the consent which is the subject of the instant Application is tainted with immeasurable elements of deceit and contrary to the policy of the courts. Further, that there were serious acts of fraud and misrepresentation. He further submits that at the point of execution and adoption of the consent, the Plaintiff was under the impression that the 1<sup>st</sup> Defendant's Advocate has already received the Kshs. 6,000,000. He avers that there was non-disclosure of material facts since the 1<sup>st</sup> Defendant and his Advocate did not disclose that they did not have funds and that the undertaking including the cheques were issued to deceive him. To support his averments, he relied on the following decisions: *Brookbond Liebig v Mallya* (1975) EA 266 as cited in the case of *Duncan Onyango Odera v Mary Adhiambo Wesonga & Eliud Otieno Odingo* Civil Appeal No E 078 of 2021 and *Flora N. Wasike v Destimo Wamboko* (1988) eKLR.

6. The Plaintiff herein had filed a Plaint dated the 23<sup>rd</sup> November, 2020 seeking to be declared *bona fide* owner of land parcel number LR 12715/716, cancellation of the title held by the 1<sup>st</sup> Defendant in respect to the said land as well as a permanent injunction restraining the 1<sup>st</sup> Defendant therefrom. The 1<sup>st</sup> Defendant in his Defence dated the 7<sup>th</sup> February, 2022 insisted that land parcel LR No. 12715/716 belonged to him and it is the Plaintiff who had trespassed thereon. The 1<sup>st</sup> Defendant also sought to be declared the owner of LR No. 12715/716, cancellation of the title held by the Plaintiff as well as orders of permanent injunction restraining the Plaintiff from the said land. The matter was set down for hearing severally but the 1<sup>st</sup> Defendant failed to attend court. Later, the Plaintiff and 1<sup>st</sup> Defendant negotiated the matter out of court and recorded a consent dated the 15<sup>th</sup> March, 2023 that was adopted by the Court on 16<sup>th</sup> March, 2023 which forms the fulcrum of the dispute herein. I will proceed to reproduce the terms of the consent hereunder:-

### **By consent**

1. That the 1<sup>st</sup> Defendant, David Matheri Waruinge be and is hereby declared to be the beneficial and registered owner of all that parcel of land being LR No. 12715/176 subdivided into subplots 12715/15407..... 12715/15445.
2. That any title deed being held by the Plaintiff in the name of the Plaintiff Benson Muia Muli to the suit land being LR No. 12715/176 be and is hereby declared null and void and is hereby cancelled.



3. That the Orders of the Honourable Court dated 10<sup>th</sup> February, 2021 issued on the 20<sup>th</sup> January, 2021 be and are hereby discharged and set aside.
  4. That the caveats registered pursuant to the orders dated 10<sup>th</sup> February 2021 issued on the 20<sup>th</sup> day of January, 2021 on all the resultant subtitles from subdivision of LR No. 12715/176 in clause 1 above be and is hereby lifted.
  5. That the 2<sup>nd</sup> Defendant shall implement the orders herein.
  6. That the 1<sup>st</sup> Defendant shall pay the Plaintiff the costs of the suit, which amount shall be agreed between the parties.
  7. That this consent be and is hereby adopted as a Judgement of the court.”
7. The Plaintiff claims the consent order dated the 15<sup>th</sup> March, 2023 which was adopted by the court on 16<sup>th</sup> March, 2023 should be set aside but the 1<sup>st</sup> Defendant has opposed the same insisting that the Decree emanating therefrom has since been executed. It is not in dispute that the Plaintiff and 1<sup>st</sup> Defendant negotiated an out of court settlement on how to compromise the instant suit. It is further not in dispute that the Plaintiff and 1<sup>st</sup> Defendant’s Advocate entered into a consent dated the 15<sup>th</sup> March, 2023 which was filed and adopted as Judgment of the court on 16<sup>th</sup> March, 2023 in the presence of the parties and their advocates. What is in dispute is the Plaintiff’s claim that the consent was entered through fraud, deceit, material non-disclosure and it is against the policy of the court.

On setting aside Consent Judgment, the Court of Appeal in the case of [Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited](#) [2015] eKLR, stated as follow:-

The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Hancox JA (as he then was) in the case of *Flora Wasike v Destimo Wamboko (1982-1988)* 1 KAR 625, said in his judgment at page 626 -"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 v Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983*, This Court in the case of *Brooke Bond Liebig v Mallya 1975 E.A. 266* held:- “A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”

8. See also the decisions in [Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others](#) [2019] eKLR and [Cheruiyot v Korir](#) (Civil Appeal 131 of 2017) [2021] KECA 222 (KLR) cited the case of [Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd](#) [1982] KLR 485.

From the facts before Court, there is no demonstration that there was undue influence or fraud during the negotiations before entry into the impugned consent. I note it is actually the Plaintiff’s Advocate who filed the consent in court. Further, the 1<sup>st</sup> Defendant’s Advocate even issued a professional undertaking on the payment of the Kshs. 6,000,000 which as a court, I opine is enforceable. It is my considered view that since this the consent was a contract between



the parties and there is a Decree to that effect, the Plaintiff still has a recourse to execute the same as well as enforce the professional undertaking.

9. Based on the facts as presented while relying on the decisions I have cited above, I find that this is not a Clear case where the consent was entered into by fraud, collusion or contrary to Public Policy as claimed. In this instance, the parties and their advocates consented to compromise this suit and since there is a Decree to that effect, it can be executed. From the foregoing, I am unable to set aside the Consent Judgment dated the 16<sup>th</sup> March, 2023.

In the circumstances, I find the Notice of Motion Application dated the 21<sup>st</sup> March, 2023 unmerited and will disallow it, but make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31<sup>ST</sup> DAY OF  
JANUARY, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

