



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC N0 265 OF 2017

KELVIN NJIURI MWAURA.....PLAINTIFF/RESPONDENT

VERSUS

MWANGI MWAURA.....DEFENDANT/APPLICANT

RULING

1. The Defendant filed an application under sections 1, 2, and 3A of the Civil Procedure Act and Order 45 and 51 of the Civil Procedure Rules seeking, *inter-alia*, that the consent order made on the 7th November 2017 be reviewed and/or set aside.
2. The application is premised on the grounds that;
 - a) That the Defendant did not issue instructions towards consenting to the order.
 - b) That the advocate a Mr. Gikandi holding brief did not consult the Defendant before entering the order by consent.
 - c) That after leaving Court the advocate informed the Defendant's son who was present in Court that the Court had directed that the parties to agree and mention the case on 21.11.2017.
3. The application is supported by the affidavits sworn by Mwangi Mwaura, Joel Ngure Mwangi and Wokabi Mathenge.
4. The Defendant deponed that his advocates at the time Mathenge Wokabi & Co Advocates were unable to attend Court and requested Mr. Gikandi, Advocate to hold their brief with instructions to seek an adjournment because the Defendant was unwell. That on the said date, he sent his son Joel Ngure Mwangi to attend Court so that he could brief him of the proceedings of that day. That his son informed him that his Advocates on record were absent but were represented by one Mr Gikandi, Advocate who informed him that the Court had directed the parties to explore settlement and that the matter was fixed for mention on the 21.11.2017.
5. That being dissatisfied with the services of Mathenge Wokabi he changed his advocates and instructed a new firm of Wangari & Co, Advocates. That on 21.11. 2017 he was informed by Mr. Gacheru advocate who held brief for his advocates on record that a consent order was recorded on the 7.11.2017 between the advocate for the plaintiff and Mr. Gikandi. That he did not give any such instructions to Messrs Mathenge Wokabi or Mr. Gikandi on the 7.11.2017 as he was not in Court and neither contacted him in respect to such instructions at all. That all he was informed by his son was that on 7.11.2017 Mr. Gikandi had reported to him that the Court had directed the parties to settle the matter out of Court. That there are triable issues and urged the Court to review and/or set aside the consent order so that the matter may be determined on its merits.
6. In a further affidavit filed on the 9.2.2018, the Defendant gave a history of his representation in the matter. That upon service of summons in this case, he instructed the firm of Mbiyu Kamau who filed a Defence and Set-Off but later advised him to instruct another lawyer since he Mbiyu Kamau, Advocate had acted for both parties in the transaction and had been named as the Plaintiff's witness. That it is then that he instructed the firm of Wokabi Mathenge & Co.
7. Further, that he has been advised that the said Robert Maina Gikandi had no practicing certificate for the year 2017 as he was under suspension by the Law Society of Kenya. He has attached a photocopy of the Law Society of Kenya status report on the said Advocate marked MM1. That due to his suspension with the Law Society of Kenya, he should not have acted as such and the consent he purported to enter is therefore null and void. He beseeched the Court to set aside the consent order so that the dispute may be determined on its merits.
8. Joel Ngure Mwangi the Defendant's son deponed that his father the Defendant was unwell and he attended Court on his behalf on 7.11.2017. That after the case was dealt with by the Court, Mr. Gikandi who held the brief of Mathenge Wokabi Advocates informed him that the parties were to explore an out of Court settlement and that the matter would be mentioned on the 21.11.2017. That it is on the 21.11.2017 that he learnt that the said advocate had entered a consent order on 7.11.2017 to the effect that the Defendant deposits some money in Court. That he knows that the Defendant did not give instructions to the law firm of Wokabi Mathenge or Mr. Gikandi to record

any consent.

9. Wokabi Mathenge, Advocate deponed that she had instructions from the Defendant to conduct his defence in this case and on the 7.11.2017; she instructed Robert Maina Gikandi, Advocate to hold her brief in the case with express instructions to seek for an adjournment as the Defendant was unwell. That at no time did she instruct the said Advocate to enter into any consent order. That the Advocate later informed her that the matter had been adjourned to the 21.11.2017 to allow parties to explore an out of Court settlement. But when the Defendant's son visited the Court registry to pay Court adjournment fees he was informed that a consent order had been entered requiring the Defendant to deposit Kshs 202,600/- in Court and the Defendant then sought to know the details of the consent order which she knew nothing about.

10. Ben Mwangi, Advocate acting for the Plaintiff while describing the events of the 27.11.2017 deponed that the consent order was recorded in Court to the effect that the Defendant do pay the Plaintiff a sum of Kshs 202,600/- as admitted in the pleadings and the parties were to either agree on the disputed balance of Kshs 24,200/-, issues on breach and costs or in default the same would be determined by the Court. That the consent was freely recorded and was informed by the pleadings and the advocates admission that the amount of Kshs 202,600/- was held by the firm of Mbiyu Kamau, Advocates for onward transmission to the Plaintiff.

11. Further, he stated that there are no grounds for setting aside or review of the consent. That it could be a case of professional misconduct on the part of Mr. Gikandi the advocate that represented the Defendant on the instant date and that legal remedies are available in law to the Defendant if he wishes to pursue the matter.

12. On the 17.1.2018, the Defendant's advocates applied for witness summons against Robert Maina Gikandi. That the said Advocate did not honour the witness summons despite being served with the said summons on 23.1.2018.

13. In his submissions filed on the 13.2.2018, the Defendant restated the grounds of review /setting aside as; the Defendant did not issue instructions to record the consent order; the said Advocate was not qualified to record the said consent as a result of which the said consent is null and void in that respect.

14. Relying on the case of **Samson Munikah Vs Wedube Estate CA No 126 of 2005**, the Defendant submitted that Mr. Gikandi acted contrary to policy by recording a consent when he was not qualified to do so. That the consent was given without material facts as the amount of money the consent order directs to be deposited is held by Ms. Mbiyu Kamau & Co. Advocates. He also cited other grounds that vitiate a consent.

15. The Plaintiff submitted that when the matter came up on 7/11/17 Counsel for the Defendant informed the Court that he required to make a call to Mr. Mbiyu Kamau, Advocate with whom the money was deposited before proceeding to record the consent based on admission. That he did call Mr. Mbiyu Kamau in his presence and Mr. Mbiyu Kamau, Advocate gave a go ahead to the Defendant's Advocate on record to record the consent.

16. The Plaintiff further submitted that the Kshs.202,600/= is admitted in both the Defendant's Statement of Defence dated 15/4/13 and Para 3 of the intended amended Defence dated 13/12/2017. That this application is a furtherance of mischief employed by the Defendant not to honour the refund of the monies already in admission.

17. That there was neither fraud nor mistake in the manner in which the consent was recorded. He relied on the following cases to support his case;

a) Eldoret Civil Appeals Nos. 43 and 153 of 1986 (consolidated) Karania & 47 others vs. Kijana & 2 others

b) Nyeri Civil Appeal No. 60 of 1983 Munyiri vs. Ndunguya

c) Nairobi Civil Application No. 1 of 2015 Samuel Mbugua Ikumbu vs. Barclays Bank of Kenya

d) Nakuru H.C. Civil Case No. 435 of 1997. John Ongwano Nyawaya vs. Joseph Owalo & Another

e) Nyeri ELRC Case No. 49 of 1987 Joseph Murimi Karitu vs. Martin Muriuki Mugo

18. Having considered the application, the rival submissions and the legal authorities annexed in support of the application the issues for determination are:-

A. Whether the consent recorded on 7/4/17 should be set aside.

B. Who meets the cost of the application?

19. The background of the case is that the Plaintiff and the Defendant entered into an agreement for sale over 0.5 acres Loc. Kangari/1874 for the purchase price of Kshs 300,000/=. The Plaintiff alleges to have paid Kshs. 226,800/= out of which the Defendant has admitted Kshs. 202,600/= in his Statement of Defence. It would appear that the parties blame one another for the collapse of the transaction. In the said transaction, the firm of Mbiyu Kamau & Co. Advocates and in particular Mr. Mbiyu Kamau Advocate acted for both parties in the transaction and even drew the Agreement for sale. It is commonly stated by both parties and rightly so (now that they had a joint lawyer, Kamau Mbiyu) that the money was deposited with the firm of Mbiyu Kamau, the joint Advocate for the parties for onward transmission to the Plaintiff towards refund of the purchase price.

20. There is no dispute on the admission of Kshs. 202 600/=. The said joint Advocate Mbiyu Kamau wrote to the Plaintiff on 13.3.13 informing him that the Defendant has deposited the said sum with his law firm towards refund to him less liquidated damages. Para 8 of the intended amended Defence contains a similar admission of the sum due to the Plaintiff. The said law firm also acted for the Defendant who filed his Defence to the instant suit.

21. On the 7/11/17 the parties recorded a consent as follows;

(a) By consent Judgement be entered in favour of the Plaintiff as against the Defendant for the admitted sum of Kshs.202, 600/=.

(b) The sum contested of Kshs. 24,200/= plus the issue of breach of contract and issue of payment of costs be decided by the Court upon hearing of both parties.

(c) Parties to continue discussing issue No. (b) and mention on 21/11/17 whether they will have arrived at a consent.

22. The point of contention by the Defendant is that the consent was recorded by an unqualified person in Mr. Gikandi who acted for the Defendant and on account that his practicing certificate had been suspended. Secondly that the said Advocate recorded the consent without any material facts and thirdly that the Defendant did not issue any instructions to Mr. Gikandi to record a consent.

23. It is trite law that a consent judgement can only be set aside in circumstances similar to those that can vitiate a contract. These are fraud, or collusion, misrepresentation of facts; agreement contrary to public policy or consent was given without sufficient material facts or in his application or ignorance of material facts or in general, for a reason, which would enable the Court set aside an agreement. See **Hirani vs Kassam (1952) 19 EACA 31**.

24. As to whether the said Mr. Gikandi advocate had instructions to compromise the suit as he did by recording a consent order, the Defendant has vehemently averred that he gave no instructions to the said advocate neither Ms. Wokabi Mathenge as deponed as much in her affidavit. In other words, Mr. Gikandi received no instructions from neither the principal (Defendant) or the agent (Ms. Wokabi, Advocate). It is to be appreciated that the general rule is that advocates as fiduciaries are duty bound to act in the best interest of their clients. The sum of Kshs 202,600/- is admitted in the pleadings of the Defendant including the draft amended Defence on record. It therefore does not form an issue between the parties in this case. By recording a consent in respect to the sum of Kshs 202,600/- Mr. Gikandi cannot be said to have acted fraudulently or guilty of misrepresentation or collusion or any other conduct or deed that could vitiate a contract. The said sum being admitted binds the Defendant by his pleadings and cannot be heard to say that he gave no instructions on part (a) of the consent. This part of the suit was disposed by the conduct of the Defendant that is to say admission in the pleadings.

25. In respect to part (b) of the consent, no judgement was recorded in respect to the contested sum of Kshs 24,600/-, breach of contract and costs of the suit. These are items left for trial or further settlement by the parties. Since this part of the consent did not dispose of any rights of the parties, likewise there was no fraud collusion misrepresentation or any other conduct that would vitiate a contract on the part of Mr. Gikandi in this respect.

26. On the whole, the Court finds that the affidavit sworn by the Plaintiff's Advocate to be the accurate representation of the matters that happened in Court on 7/11/18 than the affidavits of the Defendant, his son and Advocate now on record.

27. As to whether the consent is invalid because of suspension of Mr. Gikandi's practicing certificate, the Court has been urged to examine the suspended practicing certificate and hold so. Section 34B of the Advocates Act Cap 16 states as follows;

“(1) ...

(2). Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practicing certificate.

(3). For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate”.

A consent is a document that falls in the category and/or group described in section 16(3) above evidencing a disposition of a right in this case.

28. Section 9 of the Advocates Act gives the qualifications needed to practice as an advocate as follows;

“Subject to this Act, no person shall be qualified to act as an advocate unless—

(a) he has been admitted as an advocate; and

(b) his name is for the time being on the Roll; and

(c) he has in force a practicing certificate;

(d) deleted by Act No. 9 of 2000, s. 57, and for the purpose of this Act a practicing certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60(4)”.

29. Section 34 on the other hand states that an unqualified person not to prepare certain documents or instruments;

“(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

(a) relating to the conveyancing of property; or

(b) for, or in relation to, the formation of any limited liability company, whether private or public; or

(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or

(d) for the purpose of filing or opposing a grant of probate or letters of administration; or

(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or

(f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument”.

Section 34 B states as follows;

“(1) A practising advocate who is not exempt under section 10 and who fails to take out a practising certificate in any year, commits an act of professional misconduct.

(2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practising certificate.

(3) For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate”.

The import of the sections cited above is that the provisions prevent the taking of instructions, drawing and preparation of documents by an unqualified person. The remedy for breach would be visited on the unqualified person both in criminal and civil action. The unqualified person must not be a beneficiary of a wrong that he engaged in. The section however is silent on what happens to the documents prepared by the unqualified person.

30. What is the effect of the consent recorded in Court by Mr. Gikandi whose practicing certificate was under suspension? In the case of **National Bank of Kenya Ltd versus Anaj Warehousing Ltd (2015) eKLR** the Supreme Court of Kenya proceeded to state that the full purport of the provisions in section 34 could only be gathered by reading the provisions alongside Section 2 and Section 10 of the Advocates Act the latter which does not make reference to the requirement of a practicing certificate. The Supreme Court then posed the following questions at paragraph 53 as thus; “ What is the real intention of section 34 of the Advocates Act" Is it aimed exclusively at advocates “without practicing certificates”, or persons who are not advocates within the terms of section 2,12 and 13 (regarding qualification) of the Advocates Act” . Does one cease to be “an advocate” on account of not taking out a practicing certificate" Or does one remain “an advocate” but “one who is not qualified to perform the tasks of an advocate”.

31. The supreme Court in the **National Bank of Kenya Ltd case** observed in answer to the above question as below;

“[48] the facts of this case, and its clear merits, leads into a finding and the proper directions in law, that, no instrument or document of conveyance becomes invalid under section 34(1) (a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non- advocates or advocates whose names have been struck off the roll of advocates, shall be void for all purposes” (emphasis is mine).

It must be remembered that the above case reverses the appellate decision in the case of **National Bank of Kenya vs Wilson Ndolo Ayah civil Appeal No. 119 of 2002 (unreported)** which had invalidated documents prepared by an advocate without a practicing certificate.

In the case at hand Mr. Gikandi is said to have recorded a consent at such a time that his practising certificate was under suspension. Applying the above dicta, the consent therefore cannot be said to be null and void by dint of such suspension of the 2017 practising certificate.

32. From the foregoing analysis, the Court finds that the application has no merit and it is dismissed.

33. The Defendant shall meet the costs of this application.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 10TH DAY OF MAY 2018.

J. G. KEMEI

JUDGE