



**Chepkaitany v Kaimugul (Environmental and Land Originating Summons
9 of 2021) [2024] KEELC 361 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 361 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 9 OF 2021
JM ONYANGO, J
JANUARY 23, 2024**

BETWEEN

TAMUREI KOBILO CHEPKAITANY PLAINTIFF

AND

CHEPKAITANY KAIMUGUL DEFENDANT

RULING

1. By a Notice of Motion dated 7th June, 2023 the Defendant filed an application seeking the following orders:
 - a. That the firm of Warigi & Co Advocates be granted leave to come on record
 - b. That the consent order dated 21st December, 2021 and all consequential Orders be set aside.
 - c. That the Honourable court be pleased to stay execution of the decree issued on 25th October, 2022 pending the hearing and determination of this application.
 - d. That the costs of this application be in the cause.
2. The application is based on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on 7th June, 2023. The gist of the application is that he did not authorize the firm of J.K Birir & Company Advocates to execute any consent on his behalf admitting that the Plaintiff's claim and that the said consent was obtained fraudulently without his authority or knowledge hence it is on no legal effect.
3. The application is strenuously opposed by the Plaintiff through her Replying Affidavit sworn on 23rd September, 2023 in which she deposes that her advocate wrote to the firm of J.K Birir & Co Advocates to inquire if he had express authority from the Applicant to settle the matter, and in his response dated 22nd August, 2023 he forwarded the letter of instructions among other documents. It is therefore her



deposition that the consent was not obtained fraudulently and there is no justification to set aside the consent.

4. The application was canvassed by way of written submissions and both parties filed their submissions which I have carefully considered.

Applicant's Submissions

5. Learned counsel for the Applicant submitted that while he has not filed a consent between himself and the firm of J.K Birir & company Advocates seeking to effect the change of advocates, he has filed an Application seeking leave to come on record in place of the firm of J.K Birir & company Advocates and served the same upon all the parties as indicated in the affidavit of Service sworn on 13th June, 2023 and filed in court on 6th July, 2023. He contends that in the absence of an objection by the firm of J.K Birir & company Advocates, the said firm is not opposed to the change of advocates.
6. With regard to the consent, counsel submitted that the same was obtained without the Applicant's consent as the firm of J.K Birir & Company Advocates did not serve their Notice of Change of Advocates upon the previous Advocates M/s Wambua Kigamwa & Co Advocates in accordance with Order 9 Rule 6 of the [Civil Procedure Rules](#). It is his contention that the Respondent took advantage of the Applicant's low literacy level and colluded with the firm of J.K Birir & Company Advocates by concealing material facts of the documents he was made to sign thus dispossessing him of his property. It is his further contention that the Applicant gave his former advocate the authority to withdraw the case but not to admit the Respondent's claim.

Respondent's Submissions

7. On his part learned counsel for the Respondent submitted four issues. The first one is that the firm of Warigi & Company Advocates is not properly on record as they first filed a Notice of Change of Advocates dated 7th June, 2023 before filing the application seeking leave to come on record. The said Notice of Change was filed without a court order or a consent between the said advocates and the firm of J.K Birir & company Advocates in accordance with Order 9 Rule 9 of the [Civil Procedure Rules](#).
8. Counsel further submitted that the said Application is fatally defective as there is no affidavit by Mr. Warigi in support of the prayer to come on record.
9. Regarding the validity of the consent Order dated 21st December, 2021 counsel submitted that among the documents supplied to him by the firm of J.K Birir & Company Advocates was a letter by the Applicant instructing the said firm to take over the conduct of the matter from the firm of Wambua Kigamwa & Company Advocates and settle the matter. The said letter was signed by the Applicant in the presence of his two sons. The Applicant has not contested the validity of the said Letter of Instructions nor has he accused the firm of J.K Birir & company Advocates. Instead he states that his sons duped him into signing the Letter of Instructions to his advocates. It is counsel's submission that fraud is a serious allegation which must be proved and cannot be inferred from the facts. Counsel has placed reliance on the case of [Elizabeth K. Ndolo v George M. Ndolo](#) (1996) eKLR and [Vijay Morjaria v Nasingh Madhusingh Darbar & Another](#) (2000) eKLR.
10. Counsel further relied on the case of [Flora N. Wasike v Destimo Wamboko](#) (1988) eKLR for the proposition that an Order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them.



11. He also relied on the case of *Kenya Commercial Bank Ltd v Specialized Engineering C Ltd* (1982) KLR 485 where Harris J observed as follows:

“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, collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts.”

12. It was counsel’s submission that upon adoption of the consent as an Order of the court the Applicant went ahead and signed the Application for consent of the Land Control Board and signed the Transfer Forms. He also furnished his advocate with a copy of His National Identity card, PIN Certificate and copies of his passport size photos which conduct was consistent with the consent Order.

13. It was his submission that the application is an afterthought, which is aimed at coercing the Respondent to withdraw a suit she has filed against him at Kabarnet Court.

Analysis and Determination

14. The key issue for determination is whether the Applicants has satisfied the criteria for setting aside a consent order or judgment.

15. Our courts have time and again articulated the criteria upon which the jurisdiction to set aside a consent order or consent judgment is exercised. In *SMN v SMS & 3 others* (2017) eKLR the Court of Appeal reiterated the guiding principle thus:

“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.”

16. In *Flora N Wasike v Destimo Wamboku* (1988)eKLR the Court of Appeal stated thus:

“it is now settled law that a consent judgment 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”

17. In *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* [1982]KLR 485, Harris, J correctly held, inter alia, that –

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.



18. In *Kenya Commercial Bank Limited vs Benjob Amalgamated Limited & Another* [1998] eKLR this Court cited a passage in *The Supreme Court Practice 1976* (Vol. 2) paragraph 2013 page 620 stating:-
- “ Authority of Solicitor - a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (*Re Newen*, [1903] 1 Ch pp 817,818; *Little vs Spreadbury*, [1910] 2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice - see *Welsh vs Roe* [1918 - 9] All E.R Rep 620.”
19. Finally in the Ugandan case of *Lenina Kemigisha Mbabazi Star Fish Ltd*(supra) the Court stated:
- “ The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”
20. The Court of Appeal restated the same principles in *Board of Trustees National Social Security Fund v Michael Mwalo* (2015) eKLR and *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* (2015) eKLR.
21. In the instant case, it is not in dispute that the Applicant gave his former advocates written instructions to settle the case. He then proceeded to hand over the necessary documents to the said advocates to implement the consent order. His belated allegations that he was duped by his own sons are simply an afterthought and are not credible.
22. In view of the foregoing the application lacks merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 23RD DAY OF JANUARY 2024

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J.M ONYANGO

JUDGE

In the presence of;

1. Miss Nyaribo for the Plaintiff/Respondent
2. Mr. Warigi for the Defendant/Applicant

Court Assistant: H. Akidor

