



Mwavumbani & 85 others v Msambweni Development Company (Environment & Land Case 99 of 2014) [2024] KEELC 7 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEELC 7 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 99 OF 2014
SM KIBUNJA, J
JANUARY 17, 2024**

BETWEEN

MOHAMED ABDALLA MWAVUMBANI & 85 OTHERS PETITIONER

AND

MSAMBWENI DEVELOPMENT COMPANY RESPONDENT

RULING

1. The plaintiffs' application is brought under sections 80, 1A, 1B, 3A, 63 (e) and 100 of the [Civil procedure Act](#), and Order 9 Rule 9 & 10, Order 45, Order 51 Rule 1 of the [Civil Procedure Rules](#). It seeks for inter alia, the following prayers:
 - a. That leave be granted to the firm of M/S Okore Otuoma & Co. Advocates to come on record on behalf of the Applicants herein.
 - b. Spent.
 - c. That the notice of Change of Advocates dated 6th October, 2020 filed by the firm of Steve Kithi & Co. Advocates is null and void ab ignition having been filed without instructions and all documents filed by the said firm of Advocates on behalf of the Applicants be struck out and be expunged from the record.
 - d. That the consent dated 1.10.2020 signed by the firm of Steve Kithi & Co. Advocates while purporting to act for the applicants and adopted as an order and decree of the court on 9.9.2021 is null and void ab initio having been signed by an advocate bereft of instructions from the applicants.
 - e. That the Honourable Court be pleased to unconditionally set aside, review and/or vacate the consent judgment and/or decree delivered, entered and/or obtained on 9th March, 2021 and/or any other and all consequential orders thereof ex debito justitiae and the suit be set for hearing.



- f. That this Court be pleased to give further orders and directions as it may deem fit to meet the ends of justice.
- g. That the costs of this application be in the cause.

The application is premised on the eleven (11) grounds on its face marked (a) to (k) and supported by the affidavit of Hassan Rashid Shee, one of the applicants, sworn on the 6th June 2023.

- 2. The application is opposed by the defendants through the replying affidavit of Akanga Alera advocate, sworn on the 19th September 2023.
- 3. The learned counsel for the plaintiffs filed their submissions dated the 6th November 2023 while that for the defendant filed their undated submissions. The court has considered both submissions.
- 4. The following are the issues for the court's determinations in this application;
 - a. Whether M/S Okore Otuoma & Co. Advocates should be granted leave to come on record for the plaintiffs/applicants.
 - b. Whether the firm of Steve Kithi & Co. Advocates notice of change of advocates was with instructions of the plaintiffs.
 - c. Whether the plaintiffs have met the threshold for the setting aside, reviewing and/or vacating the consent judgment and/or decree delivered, entered and/or obtained on 9th March, 2021 and/or any consequential order thereof.
 - d. Who pays the costs of the application?
- 5. The court has carefully considered the grounds, the affidavit evidence by both sides, submissions by the learned counsel for the parties, the record and come to the following determinations;
 - a. Section 80 of the [Civil Procedure Act](#) provides for review as follows:

“ Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

And Order 45 Rule 1 of the [Civil Procedure Rules](#) provides that:

“(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed



or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The main prayer in the application is for the setting aside and or reviewing of the consent of 9th March 2021 for reasons inter alia that the firm of Steve Kithi & Co. Advocates had not been instructed by the applicants to come on record for them.

b. In the case of *Paul Kiplangat Keter v John Koech* [2021] eKLR the court stated as follows:

“The law on variation of a consent judgment is now settled to the effect that 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.”

In the above case, the learned judge cited with approval the case of *Flora Wasike v Destimo Wamboko* (1982 -1988)1 KAR 625, where the court held as follows:

“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.”

The court also cited the Court of Appeal case of *Brooke Bond Liebig v Mallya* 1975 E.A. 266 where it was held that:

“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.”

The court judge also cited the case of *Hirani v Kassam* (1952), 19 EACA 131, where the Court of Appeal quoted with approval the following passage from *Seton on Judgments and Orders*, 7th edition, Vol.1 p.124 that states:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”

c. In the Court of Appeal case of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* (1982) KLR the court held that:

“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 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.”

And in the same case the Court further held that:

“ An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.”

- d. There is a contest as to whether the firm of Steve Kithi & Co. Advocates had received instructions from the plaintiffs/applicants to act for them when it filed the notice of change of advocate dated 6th October 2020 and to enter into the deed of agreement dated the 1st October 2020. The applicants’ counsel has submitted that the applicants had not given the firm of Steve Kithi & Co. Advocates any instructions. The respondent has only deposed that the said counsel had met with representatives of the applicants on three occasions. There is no evidence presented before this court to confirm that the firm of Steve Kithi & Co. Advocates had indeed received instructions from the applicants/plaintiffs to come on record for them in place of their previous counsel. The applicants have also submitted that the affidavit by the 1st plaintiff, now deceased, filed in court on 3rd June 2021, show that they had instructed Nyange advocate to challenge the appointment of Steve Kithi Advocate but the counsel failed to act. Counsel for the respondents submitted that Mr. Nyange has not filed any complaints against the notice of change and or provided any evidence in support of this claim, and blames the applicants for their own miscommunication.
 - e. The filing of the notice of change of advocate dated 6th October 2020 is prima facie, valid and effectively meant Nyange advocate stopped representing the plaintiffs as soon as the said notice of change was filed. Now that the said notice of change of advocate has been challenged to have been without instructions from the principles, the plaintiffs, the court has to determine the issue so as to establish whether the said counsel had authority to bind the plaintiffs under the impugned consent of 1st October 2020. It goes without saying that even assuming that the firm of Steve Kithi & Co. Advocates was instructed by the plaintiffs to represent them, the counsel only came on record from the date of the notice of change, that is 6th October 2020. The counsel had no authority to act for the plaintiffs before that date and definitely not on 1st October 2020 when the deed of settlement was executed. The names of the plaintiffs/claimants in the various lists annexed to the supporting affidavit are different and it is not possible to confirm who among them had met the advocate from the firm of Steve Kithi & Co. Advocates before the filing of the notice of change of advocate. It is only fair and in the interest of justice that the consent order be set aside.
 - f. The first prayer is for the “firm of M/S Okore Otuoma & Co. Advocates to come on record on behalf of the Applicants herein”. The prayer does not indicate that the firm of M/S Okore Otuoma & Co. Advocates is to come on record for them in place of any other counsel. I do not find any issue with the applicants being allowed to be represented by their counsel of their own choice as that is a constitutional right.
 - g. Section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya provides that costs should follow the events, unless otherwise ordered by the court. In this matter, though the plaintiffs/applicants have succeeded in their application, I am of the view that the costs be in the cause.
6. In the upshot of the foregoing determinations, the court finds and orders as follows;



- a. That Ms. Okore Otuoma & Co. Advocates is allowed to come on record for the applicants. The appropriate notice to be filed and served in seven (7) days.
- b. That the consent dated the 1st October 2020 signed by the firm of Steve Kithi & Co. Advocates purporting to act for the applicants in so far as it touches on this suit, and adopted as an order and decree of the court on the 9th February 2021 is null and void ab initio.
- c. That the suit be set down for mention and directions on hearing.
- d. The costs to be in the cause.

DATED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF JANUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Applicants: Mr. Arunga for Otuoma

Plaintiffs : Mr Kithi Ngombo.

Defendants : No appearance.

