



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 337 OF 2016

JULIUS MOTOKAA

ARELA.....PLAINTIFF/APPLICANT

VERSUS

STEPHEN

MUGWIRA.....DEFENDANT/RESPONDENT

RULING

Julius Motokaa Arela (hereinafter referred to as plaintiff/applicant) had sued **Stephen Mugwira (hereinafter referred to as the defendant/respondent)** on 16.11.2016 for a declaration that the plaintiff is the duly registered owner of land parcel number Residential Plot 17/96/65 Sub-Plot No. 138 Zone C Site Shauri Yako Estate measuring approximately 0.03125 Ha and a permanent injunction restraining the defendant, its agents, servants or any other person acting under it from trespassing, damaging, interfering or acting in any other way contrary to the plaintiff's title to land parcel number Residential Plot 17/96/65 Sub-Plot No. 138 Zone C Site Shauri Yako Estate measuring approximately 0.03125 Ha. He further prays for costs of this suit.

On the 19.12.2016, the suit was withdrawn by consent of the Advocates. The plaintiff now prays that the consent orders made on 19.12.2016 be discharged and the entire suit be re-admitted for hearing and the applicant be granted leave to file its further reply to the respondent's replying affidavit dated 24.11.2016. The application is based on grounds that the plaintiff never instructed the advocate on record to withdraw the suit and that applicant has a good and meritorious claim. He blames the previous counsel for failure to update him on the matter. He personally made an attempt to peruse court file but could not get the injunction until he engaged another advocate.

In reply to the application, the defendant states that the application is an afterthought, malicious and an abuse of the process of court. The suit was withdrawn by consent of all parties. The status quo that was in place was vacated by the withdrawal of the suit.

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**,

The Court of Appeal 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.”

In **Hirani v. Kassam (1952), 19EACA 131**, this Court with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:

“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.”

In a situation where the Advocate has no authority at all to enter a consent judgment, the consent judgment will be a nullity. This, however, cannot be construed to mean that the general authority given to an Advocate to act on behalf of his client in a matter allows for his conduct in all matters with an exception to entering consents. As adopted from common law, an Advocate who is duly instructed to act on behalf of his client has authority to act in every single thing that pertains to that matter even, enter consents on his or her behalf.

The extent of authority of a solicitor to compromise is set out in a passage in the **Supreme Court Practice 1979 (Vol.2) paragraph 2013 page 620** as follows:-

“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.” (Emphasis by underline)

The variation of a consent judgment at the instance of counsel's conduct can only succeed due to the general factors that would vary an agreement. The Court of Appeal in the case of **Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd (1982) KLR P. 485** and 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.

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”.

I have considered the application and the rival submissions and do find that though there is no evidence that the applicant never instructed the advocate to enter into consent, and that there is no evidence of fraud, collusion, misrepresentation and that the consent was against any policy of court. However, I do find that the said withdrawal affected the interests of the plaintiff who had obtained an order of status quo and it appears that there is confusion in representation as the plaintiff claims that he did not instruct the firm of Mwaka and Company advocates to file the suit. Moreover, that the reinstatement of the order is necessary to enable the plaintiff access the seat of justice. The defendant suffers no prejudice if the suit is reinstated. Ultimately, I do allow the application by setting aside the consent entered on 19th December 2016 and do order that the status quo be maintained as at today the 3rd of October, 2017.

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF OCTOBER, 2017.

A. OMBWAYO

JUDGE