



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 64 OF 2013

JOEL MWANGI KAIRANGA:.....PLAINTIFF

VERSUS

- 1. JOYCE WANJIKU MATHARA:.....1ST DEFENDANT**
- 2. BENSON WAMALWA BWANAMO.....2ND DEFENDANT**

RULING

1. This is a ruling in respect of a notice of motion dated 7.3.2015 and amended on 12.8.2015. The notice of motion seeks to set aside a consent recorded on 22.4.2015 in which the plaintiff/applicant's suit was withdrawn with costs to the defendant/respondents.
2. The applicant had instructed the firm of M/S Simiyu Wafula & Co. Advocates who filed a suit on his behalf on 29.5.2013. The respondents filed their defence on 4.7.2013. ON 18.2.2015 the respondents filed a notice of motion in which they sought dismissal of the suit on grounds that the same had been filed by an advocate who did not have a practicing certificate. This application was set down for herein on 12.3.2015. The application was not heard on 12.3.2015 as counsel for the parties indicated to court that they were negotiating with a view to recording consent. The counsel for the parties finally recorded a consent on 22.4.2015 withdrawing the suit with costs to the respondents.
3. The respondents proceeded to file their bill of costs which was also disposed off by consent on 7.7.2015. The applicant contends that when he got information that his advocate had compromised the suit without his knowledge, he came to court and perused the record and indeed confirmed that his case had been withdrawn and that he had been condemned to pay costs to the respondents. It is at this time that he filed the current notice of motion seeking to set aside the consent on the ground that he did not instruct his advocate to do so and that his advocate had misled him into believing that he had the capacity to represent him when he knew that he did not have capacity to do so at the time of filing the suit.
4. The first, respondent has opposed the applicant's application based on replying affidavit sworn on 17.8.2015 and a further affidavit sworn on 15.10.2015. The first respondent depones that she has authority of the second respondent to swear the affidavit. The respondents contend that the applicant has been in the picture all through and that he wanted the case withdrawn with no order as to costs. They further contend that he filed this application in order to avoid payment of costs to them.
5. The respondents further contend that the applicant has filed two applications which are unsupported and that the same have been brought under wrong provisions of the law. They all argue that the applicant's application is incomprehensible.
6. I have carefully considered the applicant's application as well as the opposition to the same by the respondents. The application herein was filed by the applicant in person on 7.8.2015. The same was amended on 12.8.2015 before the same was placed before the vacation judge in Eldoret. In as much as the applicant's application may not be clear enough, the fact remains that the point he is

- raising is clear. He is contending that he did not instruct this advocate to compromise the suit through a consent. He has also indicated that when he instructed his advocate, the advocate did not tell him that he had no practicing certificate. There was therefore the issue of misrepresentation which is clearly captured in his supporting affidavit and grounds in support of the notice of motion.
7. It is clear that once the issue of failure to have a current practicing certificate was raised in the respondents application of 18.2.2015, the applicant's lawyer did not oppose the same. He instead went into the process of negotiations with counsel for the respondents which process led into the consent of 22.4.2015 in which the applicant's suit was withdrawn with costs. It is clear that the suit was withdrawn because of the application by the respondents which challenged the capacity of the applicant's lawyer to file the suit. There is nothing to suggest that the applicant's lawyer consulted the applicant before the suit was withdrawn. The applicant's lawyer had already misrepresented himself to the applicant as one who had the capacity to represent him and therefore he would not have advised the applicant that he was going to withdraw the suit with costs.
 8. The only issue for determination in this application is whether the consent recorded on 22.4.2015 can be set aside. The law is clear that a consent order can only be set aside on grounds which may lead to setting aside a contract. One such ground is misrepresentation or lack of capacity. In the present case, there was misrepresentation on the part of counsel for the applicant who made the applicant believe that he had the capacity to file the pleadings for him. When this capacity was challenged, the advocate for the applicant went ahead to withdraw the suit without informing the applicant. The consent entered herein cannot therefore be allowed to stand. The suit itself is based on serious allegations of fraud on the part of the first respondent in collusion with other parties. A court of law cannot allow a party to benefit from a fraud in which he/she is involved when the same has been brought to the attention of the court in the form of pleadings and documents which allegations have not been denied.
 9. There was an argument by counsel for the respondent that there will be no useful purpose served by the court setting aside the consent because the pleadings themselves were filed by an advocate who did not have a practicing certificate. For a long time, courts have been striking out pleadings and documents signed by advocates without current practicing certificates. This matter was settled by the supreme court in Petition No. 36 of 2014 between the National Bank of Kenya -vs- Anaj Warehousing Ltd, which overturned the decision in civil Appeal No. 119 of 2002 between National Bank of Kenya Ltd -vs- Wilson Ndolo Ayah cited by advocates to strike out pleadings prepared or filed by Advocates without practicing certificates. I therefore find no merit in counsel's argument. This is a clear case where the consent recorded on 22.4.2015 ought to be set aside. I therefore allow the applicant's application with the result that the consent recorded on 22.4.2015 is hereby set aside with all its consequential orders. The applicant shall have costs of this application.

It is so ordered.

Dated and signed at Kitale on this 18th day of January,2016.

E. OBAGA

JUDGE.

In the presence of Mr. Chebii for defendants/Respondents and the Applicant in person.

E. OBAGA

JUDGE

18/1/2016