Guzzini & another v Tinga & 7 others (Civil Appeal E047 of 2021)
[2024] KECA 493 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 493 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E047 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

APRIL 26, 2024

BETWEEN

ADOLFO GUZZINI ..... 1ST APPELLANT

ANNA TACCALITI GUZZINI ..... 2ND APPELLANT

AND

EMMANUEL CHARO TINGA ..... 1ST RESPONDENT

JOHNSON KATANA KALUME ..... 2ND RESPONDENT

KAPITA B SHENI ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

V. M. JABRON ..... 5TH RESPONDENT

KIDZIDZI PROPERTIES LTD ..... 6TH RESPONDENT

ATTORNEY GENERAL ..... 7TH RESPONDENT

LOVE ISLAND BEACH RESORT LTD ..... 8TH RESPONDENT

(Being an appeal from the Ruling and Orders of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) delivered on 31st August 2021 in E.L.C No. 174 of 2014)

JUDGMENT

1. This is a first appeal from the Ruling and Orders of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J) delivered on 31st August 2021 in ELC Case No. 174 of 2014. Apart from the Motion in determination of which the impugned ruling and orders were predicated, the scanty record of appeal as put to us excludes the pleadings in the case. In the circumstances, the precis of the appellants' appeal can only be drawn from the record as put to us.

2. The factual background as set out in the impugned ruling is that, by a Plaint dated 24th August 2014, Adolfo Guzzini and Anna Taccaliti Guzzini (the 1st and 2nd appellants respectively) sued Emmanuel Tinga, Johnson Kaluma, Kapita Sheni, V.M. Jabron, the Chief Land Registrar, Love Island Beach Resort, Kidzidzi Properties Limited and the Attorney General (the 1st to 8th respondents respectively) seeking, inter alia: a declaration that the appellants were the rightful proprietors of Plot No. 945 Watamu (the suit property), and that no other title could issue in respect of the said property or in respect of any part thereof; a declaration that the titles held by the 1st 2nd 3rd 4th 6th and 7th respondents were null and void; and an order that an independent survey be undertaken to establish the delineations of the subject properties and the extent of encroachment of parcel No. Kilifi/ Jimba/1126 on the said Plot No. 945 Watamu.

3. Gathering from the applicants' Motion and the ensuing ruling, the appellants' case was that they were the registered proprietors of the suit property, and that the titles issued to the above- mentioned respondents were null and void. Nothing more is said in the impugned ruling contained in the record before us, save that the appellants were represented in the suit by M/s. Ahmednasir Abdikadir & Company, Advocates.

4. There being no statement of defence in the record as put to us, we are likewise unable to ascertain what defence (if any) had been raised against the appellants' suit in the ELC, save that a consent judgment was subsequently recorded on 10th April 2019 in determination of the appellants' suit against the respondents.

5. The consent judgement dated 10th April 2019 was recorded by learned counsel then on record for the appellants, M/s. Ahmednasir Abdikadir & Company; Mr. Mbura (holding brief for Mr. Kilonzo) for the 1st and 2nd respondents; Ms. Munyuny (holding brief for Ms. Wasuna) for the 5th and 8th respondents; and Ms. Hanan (holding brief for Mr. Muchoki) for the "1st and 2nd interested parties", who are not identified on the record as put to us.

6. It is noteworthy that the consent in issue was recorded shortly after an independent survey report on the extent of the alleged encroachment on the suit property was filed in court by M/s. Edward Kiguru, Licensed Surveyors. The terms of the consent were recorded thus:

> "consent
>
> Whereas:
>
> a. ...
>
> b. ...
>
> c. ...
>
> d. ...
>
> e. The parties are desirous of resolving all issues relating to the two parcels of land:
>
> Now By Consent ofThe Parties It Is Hereby Resolved asFollows:
>
> 1. The disputed area more particularly identified in the aforesaid survey report by Edward Kiguru Licensed Surveyors, which area constitutes the extent of encroachment by Title No. Kilifi/

Jimba/1126 into plot No. 945 [original No. 655/12]; CR. No. 39218, be retained within the Title No. Kilifi/ Jimba/1126.

2. That delineations and boundaries of Plot no. 945 – [Original No. 655/12] be accordingly adjusted to give effect to the agreement in Number 1 above.

3. That the deed plan No. 254652 and all other necessary documentation relating to Plot No. 945 [original No. 655/12] be amended with a view of having the same reflect the current ground situation as captured in the survey report prepared by Kiguru Surveyors.

4. That a new title be issued to the Plaintiffs to reflect the amendments envisaged in Clause 1, 2 and 3 above.

5. That upon successful implementation of the terms of clause 1,2,3 & 4 above, the instant matter and all other pending court actions including but not limited to:

    a. Judicial Review Miscellaneous Application No. 29 of 2014;

    b. *Republic v Director of Survey & Another, Ex- parte Kidzidzi properties Ltd*.

    Involving the parties herein and relating to the above two parcels of land the subject of this consent, be marked as settled.

6. That each party to bear its own costs."

7. Upset by the consent judgment in issue, the appellants argue that, while the survey confirmed that part of their plot No. 945 Watamu had been encroached on by the property known as Kilifi/ Jimba/1126, the consent judgment implied that they had agreed to sign off part of their land contrary to their intention at the time of instituting the suit. According to the appellants, while a consent judgment entered on behalf of a party by their advocates is, in principle, binding upon them, the same cannot stand where it is 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.

8. The appellants contended that they were never informed that, by recording the consent judgment, they were ceding the portion of their land, which they had moved to court to recover in the first place. In an attempt to have the consent order vacated, the appellants filed a Notice of Motion dated 16th September 2020 seeking orders, inter alia: that the firm of Tonia Mwania & Associates Advocates be allowed to come on record for the appellants after judgment; that orders for stay of execution do issue against the impugned consent judgement entered on 10th April 2019 pending hearing and determination of the substantive suit; and that the proceedings of the court of 9th April 2018 leading to the consent judgement be set aside, and that the suit be set down for hearing on its merits.

9. The appellants' Motion was supported by the annexed affidavit of Adolfo Guzzini, the 1st appellant, sworn on 15th September 2020 essentially deposing to 6 grounds on which it was anchored, namely: that they filed the suit sometime in 2014 through Ahmednassir Abdikadir & Co. Advocates; that

they instructed counsel to have the conduct of the matter to its logical conclusion; that to their astonishment, the appellants, who are foreigners based in Italy, were informed that the matter was concluded on 9th April 2018 by way of a consent order, the contents and effects of which the appellants were unaware; that they became aware of the consent order when they instructed their attorney to conduct a search at the lands registry at Mombasa; that the consent order was so adverse against the appellants that it offered a substantial part of the subject matter of the suit property to the Respondents; and that their application was presented in good faith, in the interest of justice, and in order to preserve the subject matter of the suit.

10. The Motion was opposed vide the "Grounds of Opposition" dated 13th October 2020 filed on behalf of the 1st, 6th and 7th respondents. The grounds advanced in opposition to the Motion before us are: that the appellants' Motion had no merit, bad in law, incompetent and an abuse of the court process; that there was no material placed before the trial court to vacate the orders of the consent judgment entered on 9th April 2018; that the appellants were contractually bound by its terms, and that there were no vitiating factors espoused by the appellants to vary, discharge or set aside the impugned consent judgement; that the appellants' Motion sought equitable orders after unreasonable delay and acquiescence, which was juridically untenable in the circumstances; that the trial court lacked jurisdiction to entertain the Motion; and that the trial court was functus officio.

11. The 3rd respondent was equally opposed to the application. In his replying affidavit sworn on 3rd November 2020, he deponed that he owns the suit property jointly with the 2nd respondent; that the property was demarcated before they were issued with title documents in their joint names for Kilifi/ Jimba /1126; and that they subsequently sold the property to the 6th respondent and executed transfer documents to that effect.

12. In its replying affidavit sworn on 15th October 2020 by Bhupendra Meghji Shah (a director of the 7th respondent), the 7th respondent reiterated the contents of the Grounds of Opposition and asserted that the appellants' application was frivolous and without merit, and that the consent entered herein had been registered at the District Land Registry at Mombasa. The 7th respondent contended further that the impugned consent was entered into by the appellants' Advocates who had authority to enter the consent judgment as an agent of the appellants, and that the same was binding upon them.

13. In his ruling delivered on 31st August 2021, Olola, J found no merit in the appellants' Motion dated 16th September 2020 and dismissed it with costs to the respondents with this to say:

> " 21. In my view and as correctly submitted by counsels for the 1st, 6th and 7th respondents, the Applicant's previous Advocates just like the present one had an implied general authority to compromise the matter on behalf of the Plaintiffs. Speaking on the same issue in *Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd* [1982] KLR at page 485, Harris J put it this way:
>
> '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. 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 directions. In the absence of proof of any express negative direction, the order shall be binding.'

22. Similarly, in the matter before me the plaintiffs have not brought any proof of any negative directions given to their previous advocates. Having been informed of the compromise, it is difficult to see why it took them two years to learn of the contents thereof and/or before bringing the present application. It was also clear to me that the said consent order touched on other cases between the parties of which the Plaintiffs have said nothing

23. In the premises, I did not find any merit in the Plaintiffs' application dated 16th September 2020. The same is dismissed with costs."

14. Aggrieved by the learned Judge's ruling and orders, the appellants moved to this Court on appeal faulting the trial court for: failing to set aside the consent order despite the appellants having adduced sufficient grounds for setting it aside; holding that the appellants' previous advocates had full authority to enter into the said consent judgement; failing to consider the unfair nature of the consent judgement; holding that the appellants took 2 years to file the Motion setting aside the consent judgement; and for failing to require their previous advocates to provide evidence of express instructions to compromise the matter, considering the alleged unfair nature of the impugned consent.

15. Learned counsel for the appellants, M/s. Tonia Mwania & Associates, filed written submissions dated 10th August 2022 in support of the appeal. Counsel argued that the appellants are foreigners, and that they were never informed of the consent and the consequences thereof, which included signing off part of their land; that the actions leading to the encroachment on their land was fraudulent; and that it was not clear how the consent was arrived at despite the fact that the alleged fraud was apparent.

16. Counsel cited the case of *Hirani v Kassam* [1952] 19 EACA 131, submitting that, although an advocate has ostensible authority to compromise his client's case, employing such authority cannot be upheld where counsel consents to orders which are opposed to the express instructions which a client has given him; and that, if it is shown to the court that the client was not aware of the application that gave rise to those consent orders, a court of law would be entitled to conclude that there was fraud or collusion, and would not uphold such a consent order in the absence of satisfactory explanation.

17. On the authority of *William Karani & 47 others v Wamalwa Kijana & 2 others* (1987) KLR 557, counsel advanced the proposition that it is recommended that judges adopt the practice of requiring parties and their advocates to append their respective signatures to consent orders, because such a practice might reduce the risk of subsequent misunderstanding over consent orders.

18. Opposing the appeal, learned counsel for the 1st, 6th and 7th respondents, M/s. Kilonzo & Aziz, filed written submissions dated 19th September 2022. Making a case on the established principles for setting aside consent orders, counsel cited the Court of Appeal decisions in *Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 Others* [2019] eKLR; *Flora N. Wasike v Destimo Wamboko* [1988] eKLR; *Kenya Commercial Bank Limited v Specialised Engineering Company Limited* [1988] eKLR; and the High Court decision in *ARN Holdings Limited v Gestione Restoranti Affini Limited* HCCC No. 35 of 2010 at Malindi (Unreported), submitting that the consent judgement dated 9th April 2018 was entered with advocates who could compromise the suit on behalf of their respective clients; and that the evidence tendered by the 1st, 6th and 7th respondents remained unchallenged by the appellants. They urged us to dismiss the appeal with costs to the 1st, 6th and 7th respondents.

19. On their part, learned counsel for the 2nd and 3rd respondents, M/s. Komora & Associates also filed written submissions dated 2nd December 2023, submitting that the 2nd and 3rd respondents were

not party to execution of the consent orders in issue, and were never informed of the contents thereof. Counsel cited the Ugandan case of *Lenina Kemigisha Mbabazi Star Fish Limited v Jing Jeng International Trading Limited* [HCT- 00-MA-344-2012], urging this Court to consider whether the consent was obtained fraudulently in determination of the suit between the affected parties; whether the consent was contrary to the policy of the trial court; whether the consent was based on insufficient material facts; and whether the consent was based on misapprehension or ignorance of material facts.

20. The only issue that commends itself for our determination is whether the trial court erred in declining the appellants' Motion to have the consent orders recorded on 10th April 2019 set aside. Put differently, whether the trial court erred in dismissing the appellants' Motion dated 16th September 2020. Our finding on this issue turns on the settled principles enunciated in judicial decisions of this and other courts on the circumstances on which a consent judgment may be successfully challenged.

21. In *Geoffrey M. Asanyo & 3 others v Attorney General* [2018] eKLR, the Supreme Court had this to say regarding challenges against consent orders:

> "(98) In the matter before us, we thus note that neither before this Court nor any of the Superior Courts, was it argued or alleged that the Consent as filed by parties was entered into through coercion, misrepresentation and/or fraud. In essence, the elements/principles for setting aside such a consent were never alleged and/or proved." [Emphasis ours]

22. Expressing the need for caution to avoid challenges in similar cases, Platt Ag JA. had this to say in *Munyiri v Ndunguya* [1985] eKLR:

> "However, we may observe that as there appears to be a good deal of argument about the contents of some consent judgment and orders, it would be wise to obtain the signatures of the advocates, or the parties if they are present. In this way, it will then be clear that the terms were known and agreed to, at the time the consent order or judgment was entered into, and may help to avoid later recanting by the parties themselves, which is also a well-recognized feature of life, despite instructions earlier given to their advocates..."

23. According to Nyarangi, JA. –

> "The advocates should have in this case appended their signatures to the judgment or registered their disapproval of the judgment as soon it was delivered. The judge should, as a precaution have made a full and careful note of what each advocate said to him which culminated in the consent judgment."

24. We hasten to observe that the advisory sentiments expressed by

the two Judges do not by any means render consent judgments or orders worthless on account of failure by the parties or their counsel to append their signatures thereto. To our mind, they provide sound guidance. We form this view on the authority of

Brooke Bond Liebig Ltd v Mallya [1975] EA 266 at 269 where Law, Ag. P. observed:

> "A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

25. The record as put to us contains no such ground as would justify setting aside the consent judgment between the parties. Such a consent judgment or order is in the nature of a contract, which cannot,

without good reason, such as fraud, collusion or other serious impropriety that offends policy and legislation, be impeached by an order of the Court.

26. We take to mind the decision in *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR where the Court had this to say on the matter:

> " The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. 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 parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court." [Emphasis added]

27. The persuasive decision in *Wildung v Sanderson* [1897] 2 CL 534 put it thus:

> "A consent Judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is of course, enforceable while it stands, and a party affected by it cannot if he concludes, he is entitled to relief, simply wait until it is sought to be enforced against him, and then raised by way of defence. The matters in respect of which he desires to be relieved. He must, when he has completed obey it, unless and until he can get it set aside in proceedings duly constituted for this purpose."

28. It is not in dispute that learned counsel for the appellants had been duly instructed to conduct the proceedings in the trial court on their behalf. Those instructions had not been withdrawn as at the time the consent orders were recorded as an order of the court. We find nothing on record to suggest that circumstances had changed in any way so as to call into question the propriety of those orders, except for the appellants' allegation that they were not informed of its contents. But that is a matter between client and counsel. Be that as it may, we hasten to observe that a court is not obligated to inquire into the terms on which counsel is instructed by their client in judicial proceedings. Neither can the court take upon itself to inquire into the conduct of negotiations between learned counsel leading to such consent orders. In the absence of fraud, mistake or misrepresentation, such orders stand (see *Frank Phipps & Pearl Phipps v Harold Morrison* SCCA 86 of 2008; and *Kinch v Walcott and others* [1929] AC 482).

29. As observed by Lord Denning in *Cristle v Cristle* [1951] 2 All ER 574, "... when there is no change of circumstances, I do not think that the Court can alter or vary the agreement of the parties under the liberty to apply. It can only do what is necessary to carry the agreement into effect."

30. Enough of judicial authorities in defence of consent orders.

Having carefully considered the record as put to us, the impugned ruling and orders, the rival submissions of learned counsel for the appellants and for the respondents, the cited authorities and the law, we reach the inescapable conclusion that the appellants' appeal fails and is hereby dismissed with costs. Consequently, the Ruling and Orders of the Environment and Land Court of Kenya at Malindi (J O. Olola, J) delivered on 31st August 2021 in ELC Case No. 174 of 2014 are hereby upheld.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. V. ODUNGA*

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR