



**Odhiambo v Land Registrar Uasin Gishu County; Beru & 12 others (Interested Parties)
(Miscellaneous Application E034 of 2022) [2024] KEELC 4371 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4371 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEOUS APPLICATION E034 OF 2022**

JM ONYANGO, J

MAY 29, 2024

BETWEEN

CLEMENT ODHIAMBO APPLICANT

AND

THE LAND REGISTRAR UASIN GISHU COUNTY RESPONDENT

AND

SIMON BERU & 12 OTHERS INTERESTED PARTY

RULING

1. This ruling is in respect to a Notice of Motion application dated 24th April, 2023 and filed on the same date under Certificate of Urgency. It is brought by the Interested Parties who seek the following orders from court:
 - a. Spent
 - b. Spent
 - c. There be stay of execution of orders granted on 8/3/2023 pending inter partes hearing and or further orders of the court.
 - d. The orders granted on 8/3/2023 be reviewed, set aside and/or vacated.
 - e. Costs be borne by the Respondents
2. The Application is based on the grounds adduced on the face of the Motion and was filed alongside the Supporting Affidavit of Simon Beru Imoli, the 1st Interested Party herein sworn on 24th April, 2023. Mr. Imoli deponed that he is the Chairman elected by all members of Ishieywe Self-Help Group (hereinafter referred to as “the Group”) who had been instructed by the members thereof to file the present Application on their behalf. That it had come to his knowledge that the Applicant had



- obtained ex parte orders on 8th March, 2023, copies of which he obtained by making copies from the court file, mandating him to transfer Land Parcels No. Soy/Soy Block 10(Navillus)/2636, 1897, 2576, 2532, 2139, 1901, 1714, 1637, 2550, 2493, 2418, 64 and 69 (the suit properties).
3. The 1st Interested Party deponed that the Applicant alleged that the other officials were dead and he being one of the officials should be allowed to transfer the properties on their behalf. Mr. Imoli deponed that in fact the Applicant was not an official of Ishieywe Self-Help Group and that he failed to disclose to the court that there are various disputes pending in court over the transfer of the suit properties. That the Applicant also failed to disclose to the court that vide an ex parte Application dated 3rd May, 2018 he had obtained similar orders on 23rd September, 2018 which were set aside by a ruling delivered on 10th September, 2019 and the said ruling had neither been reviewed, vacated nor set aside.
 4. It is the Interested Parties' case that the Applicant's aim is to overreach and otherwise render the pending suits and orders touching on the suit properties nugatory and/or academic. He deponed further, that the Applicant moved this court for substantive orders through a Miscellaneous Application effectively evicting the Interested Parties and other parties in the various pending suits over the suit properties and was set to appear before the Land Control Board to obtain consent for transfer of the Land. He averred that the Application herein is in contempt of court and is seeks to circumvent court orders. That it is therefore only fair, just and expedient that the Application herein be allowed and the orders granted to the Applicant be reviewed, set aside or vacated.
 5. The Applicant opposed the Application vide a Replying Affidavit sworn on 4th May, 2023 where he deponed that the Interested Parties have no claim whatsoever over the suit properties herein. He insisted that he is the Chairman of Ishieywe Self-Help Group and the allegation that the 1st Interested Party holds that position is misleading and the Affidavit sworn by him is without capacity/authority ought to be struck out. He asserted that he, alongside other officials who are all deceased were mandated to effect the transfer of land purchased by the Group to its bonafide members. Further, that the Interested parties have not shown how the order issued on 6th March, 2023 affects them personally or their interest in the suit properties.
 6. The Applicant stated that the Applicants were always aware of this suit as their Advocate then, Magare Musundi & Co. Advocates had been notified of it and he is the one who advised him to file this Miscellaneous Application after confirming that the suit properties had no pending case in court. He deponed that the Interested Parties are litigious busy bodies who do not wish other members to enjoy their proprietary rights because some of the parcels they lay claim to have disputes that are yet to be resolved. He deponed that he approached the court with clean hands in an attempt to transfer parcels that had no dispute to bona fide members while awaiting determination of the disputes involving other parcels but the Interested Parties keep sabotaging the process for no valid reason.
 7. The Applicant indicated that he was aware of the pending suits in court but they relate to different parcels and not the suit properties herein. The Applicant declared that the Interested Parties have obtained title documents pursuant to transfers effected by him and the other officials before their demise. That they should not therefore sabotage the process for other members who have no title yet their parcels have no disputes. The Applicant averred that there are the 2000 members of the Group, and the Interested Parties need to state how they will be prejudiced by the orders issued herein otherwise their claims remain baseless and should be dismissed. Further, that the orders sought will greatly prejudice bonafide owners of the suit properties thus the orders sought are vehemently opposed, and he urged the court to dismiss the Application with costs.
 8. On 15th May, 2023 the 1st Interested Party, Mr. Simon Beru Imoli, swore a Further Affidavit in response to the Applicant's reply. He deponed that he is a member of the Group, directly affected by the



Applicant's action thus entitled to protect his interests. That the Applicant has not demonstrated that he is an Official of the Group with mandate to execute transfer documents on behalf of the group or deceased persons or that he will be transfer the land to qualified members who have already paid full shares and survey fees. The 1st Interested Party averred that the Applicant is a former Official who was suspended in 1999 together with his entire team due to misappropriation of funds and they were replaced in 2000. That they were restrained from selling and/or dealing with the Group's properties including land parcel No. 64 and 69 which are part of the suit properties herein.

9. The 1st Interested Party indicated that the current officials, of whom he is the Chairman, were elected in 2017 pursuant to a court order dated 24th March, 2017 and that the Applicant has no authority to transact on behalf of the Group. That due to his integrity issues, the Applicant's intention is not in good faith and he has in fact allocated himself the Group's land parcel No. 62 and 70 despite a court order restricting the same. That the suit properties are registered in the names of the former officials in trust and he wants to transfer them to himself and to other people who are not qualified members of the group, at the expense of bonafide members. That the Applicant has not revealed to the court the persons to whom he intends to transfer the suit properties.
10. The 1st Interested Party insists that the current suit is meant to circumvent and defeat the hearing and determination of Misc. Application No. 11 of 2018 in which the Applicant obtained similar order that were later set aside. That the Applicant obtained the orders by executing a consent with the Interested Parties' Counsel on record in Misc. App. No. 11 of 2018 at a time when neither they nor their Counsel were a party to this suit. That Misc. App. No. 11 of 2018 is still pending in court and he has engaged new advocates who may not be aware of that matter, and if he was indeed acting in good faith he would have obtained the orders through Misc. App. No. 11 of 2018 and not filed a fresh Miscellaneous Application.
11. The 1st Interested Party urged that the Applicant intends to obtain orders that will enable him transfer the Group's land to himself at the peril of other members and he intends to obtain the orders to defeat justice. Mr. Imoli declared his personal interest in Parcel No. 64 and denied the Interested Parties' knowledge of the Applicant's Annexure 1 and 2 as their views were never sought. Mr. Imoli also denied knowledge of the suit herein and averred that the firm of Magare Musundi & Co. Advocates did not represent them in the Application that gave rise to the impugned orders. That the said firm had no instructions to so consent, moreover, they were not parties to the suit. The 1st Interested Party averred that there were people settled on and in occupation of the suit properties that the Applicant wants to transfer without their knowledge and authority.
12. By leave of court obtained on 29th June, 2023 the Applicant was allowed to file a Response to the Interested Parties' Further Affidavit. He swore a Supplementary Affidavit on 30th June, 2023 where he deponed that Mr. Imoli had not provided evidence that he was recognised by the relevant Ministry as the Group's Chairman because the Minutes attached are not sufficient to show that he is a trustee. That if indeed the 1st Interested Party had an interest in any of the suit properties, he ought to have filed a claim and annexed evidence but was instead pursuing a personal vendetta against the Applicant. The Applicant denied any interest in any of the suit properties but admitted that he ceased being the Group's Chairman in 1996. He further averred that the group was never registered because due to the change in its objectives whereby it ceased being a self-help group. That consequently, the suit properties, which are subdivisions of Land Parcel Nos. Soy/Soy Block 10(Navillus) 35, 62, 63 & 64 and which were bought by the Late Francis Juma, were registered in their personal capacities to be held in trust for the former members of the Group.



13. The Applicant explained that there have been various ownership disputes pending in different courts but there is no general order issued affecting all parcels of land belonging to the former members of the Group. Pointing out that Parcel Nos. 62 and 70 were not part of the suit properties herein, he deponed that he met with Plot Owners of the former Ishieywe Group on 15th May, 2023 and they agreed that he would transfer the land they had occupied for over 23 years to them. He averred that the titles that had been issued in respect thereof were declared to have been obtained fraudulently and were to be cancelled and registered in his name and those of two other deceased officials. Thus, he seeks to have Parcel Nos. 64 and 69 registered in his name for onward transmission to bonafide purchasers.
14. The Applicant further deponed that Parcel 64 is owned by different former members and that he was willing to stop any transaction thereon if the 1st Interested Party established his interest in the said parcel. That whereas the averments in the Interested Parties' Affidavit paints him in bad light as someone who wishes to steal people's land, his only wish is to help former members of the Group get their title deeds for land they have occupied for over 23 years. He deponed that he was aware of the pending suits which is why he approached the firm of Magare Musundi & Co. Advocates to ascertain whether their clients had any interest in the 13 suit properties herein and to go ahead and obtain the consent order.

Interested Parties' Submissions

15. The Application was canvassed by way of written submissions. The Interested Parties' Submissions are dated 14th June, 2023 and Counsel submitted that under Article 159(2)(a), (b) and (d) as well as Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, this court is mandated to resolve disputes justly guided by the principle of justice and prevent abuse of the court process. He submitted that by virtue of Section 8 of the *Civil Procedure Act*, the Applicant is barred by reason of Miscellaneous Application No. 11 of 2018 from instituting the current suit. In view of that, Counsel argued that setting aside and/or vacating the orders of 6th March, 2023 and issued on 8th March, 2023 will ensure justice to the interested Parties and other members of the Group.
16. Counsel for the Interested Parties submitted that failure to set aside and/or vacate the orders would be unjust because: (a) the orders are substantive in nature and lock out the Interested Parties and members of the Group from being heard contrary to the tenets of natural justice. (b) That due to the Applicant's past fraudulent acts, he is likely to transfer the suit properties to himself thus unjustly enriching himself to the detriment of members of the group. (c) That the members of the Group already in occupation of the suit property will be dispossessed and suffer loss and damage without being heard. (d) It will render Miscellaneous App. No. 11 of 2018 that is still pending in court nugatory and a mere academic exercise. Counsel thus urged the court to vacate or vary the impugned orders as prayed. Counsel submitted that costs follow the events and in that case the Interested Parties are entitled to the costs of this Application.

Applicant's Submissions

17. The Applicant's Submissions were filed on 18th September, 2023 and Counsel submitted that a consent order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside. He relied on *Flora N. Wasike vs Destimo Wamboko* (1988) eKLR and *Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd* (1982) KLR 485 where it was held that:

“A consent order entered into by counsel is binding on all the 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.”

18. Counsel argued that the Interested Parties did not dispute that they were initially represented by the firm of M/S Magare Musundi & Co. Advocates, which firm was also representing the Interested Parties in the present suit and in other related suits. Counsel submitted that the Applicant confirmed from the said advocate that the suit properties herein were not in dispute and with the consent of the said advocate and the A.G moved the court through this suit for leave to transfer the land. That consequently, the consent was executed by their said Advocates and therefore binds them notwithstanding that they are now represented by another firm in the suit. It was submitted that Samuel Beru Imoli is not an official of the Group because Ishieywe Self-Group no longer exists since its registration was not renewed, Mr. Imoli thus should not be allowed to transfer the land to the former members.
19. Counsel further submitted that the Interested Parties had not demonstrated what their interest in the suit properties is, and even Simon Imoli did not explain what his interest in Parcel No. 64 is. That the list of persons living on the suit properties who the Interested Parties intend to transfer the land to are the same people who instructed the Applicant to assist them get title to their land. Counsel submitted that none of the Interested Parties have demonstrated that the consent order was obtained by fraud or collusion thus the same should be upheld. Counsel argued that the Interested Parties’ only concern is that they were not parties to the suit yet they were involved in the suit through their advocate who later signed the consent. Counsel submitted that the Applicant’s intention is to transfer the suit properties to their owners. That the Interested Parties did not satisfy the conditions for setting aside the consent order thus the application should be dismissed with costs. He on *Kericho Guest house Enterprises Limited vs Kenya Breweries Limited (2018) eKLR* and *Flora N. Wasike vs Destimo Wamboko (Supra)*.

Interested Parties’ Supplementary Submissions

20. The Interested Parties filed Supplementary Submissions on 26th January, 2024 where he raised five issues. The first issue argued by Counsel is that there is no evidence that Miscellaneous Application No. 11 of 2018 was ever heard and determined, and that the same is still pending in court. Secondly, Counsel submitted that the Consent Order has locked the Interested Parties out of the proceedings, thus it flouts and offends the Interested Parties right to be heard contrary to Article 50 of *the Constitution* of Kenya, 2010. Thirdly, Counsel pointed out that at the time the orders were made, the Interested Parties were not parties to this suit. That the Interested Parties have an interest on the suit properties which interest can be determined in Misc. App. No. 11 of 2018. Counsel submitted that the Interested Parties are at liberty to challenge the consent because it does not address their concerns and grievances.
21. Counsel relied on *Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd (Supra)*, arguing that the consent is only binding on parties to the proceedings. The Interested Parties were not joined to the suit herein and cannot be bound by the consent entered into on their behalf. Counsel also submitted that the firm of M/s Magare & Musundi & Co. Advocates are not on record in the suit herein and it is inconceivable that they would enter a consent on behalf of the Interested Parties, who were themselves not Parties to this suit. That under Order 9 Rule of the Civil Procedure Rules, an Advocate can only participate in proceedings by filing a Notice of Appointment. Without it, the Advocate is a stranger in the proceedings and any document they execute is null and void and cannot form part of the court record which is the position of the consent order herein. Counsel submitted that for the above reasons, the Applicant was not justified to seek to rely on the consent order. Counsel reiterated that the consent order should be set aside, reviewed and/or vacated.



22. The Applicant's then filed another set of submissions on 30th January, 2024 setting out the background of the dispute and asserting that the matter herein is not res judicata as Misc. App. No. 11 of 2018 was not heard and determined in finality. That the Applicant chose to abandon the application since some of the properties therein were in dispute in various courts and opted to file this fresh application for parcels that were not disputed by anyone and had no ownership squabbles. Counsel then submitted that no valid reason has been advanced for setting aside a valid consent order. Reiterating his earlier submissions, Counsel urged that the Interested Parties' Application be dismissed with costs to the Applicant.

Analysis and Determination

23. After reading the Interested Parties' Application, Affidavits filed in support thereof and in opposition thereto as well as the rival submissions filed herein, this court finds that the sole issue for determination is whether the applicant has met the threshold for reviewing or setting aside a consent order.
24. The import of the Application before this court is that the Interested Parties seek to challenge the consent order recorded on 6th March, 2023 and granted on the 8th March, 2023. It has been held repeatedly that a consent order has higher binding effect than an ordinary order and is therefore more difficult to dislodge. The law is that a consent entered into by parties can only be set aside in clear cases of fraud, misrepresentation, coercion and the related vitiating factors of contracts. The party seeking to rescind the terms mutually agreed upon bears the very heavy burden of proving fraud and/or other vitiating elements. In *James Muchori Maina vs Kenya Power & Lighting Company Ltd* [2005] eKLR the court observed as follows:

“Consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of *Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd*, Nairobi Civil Appeal No. 276 of 1997, wherein the Court of Appeal applied the reasoning in the case of *Flora Wasike vs Destimo Wamboke* (1988) 1 KAR 625 at page 626 where Hancox JA (as he then was) stated-

‘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.’

That consent was binding on the parties, and can only be set aside as enunciated above by the Court of Appeal. That consent still being intact on record cannot be challenged in this appeal.”

25. Similarly, in *John Waruinge Kamau vs Phoenix Aviation Limited* [2015] eKLR the court considered the circumstances in which a consent order can be set aside and stated:-

“The circumstances under which a consent order may be set aside are grounds which would justify the setting aside of a contract, or if the conditions required to be fulfilled by the agreement have not been fulfilled. The grounds for setting aside contracts are fraud, coercion, mistake or misrepresentation”.



26. In *Flora N. Wasike vs Destino Wamboko* [1988] KLR the Court of Appeal held thus:-

“It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in *Hirani v Kassam* (1952) 19 EACA 131, at 134, as follows:

“The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in *Setton on Judgments and Orders* (7th edn), 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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

27. A Consent entered into between parties is deemed to be tantamount to a contract between the said parties and will have the same binding force as a contract. As such the Court cannot interfere with the terms of a consent unless circumstances are shown to exist that would amount to grounds for rescinding a contract. Some of these grounds include fraud and misrepresentation. In this respect, this Court takes note of the definition given of the word “fraud” in *Black’s Law Dictionary* which describes it as: -

“Knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases especially when the conduct is wilful it may be a crime.”

28. The *Black’s Law Dictionary* also defines “misrepresentation” as: -

“1. The act or an instance of making a false or misleading assertion about something, usually with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion. 2. The assertion so made; an incorrect, unfair or false statement; an assertion that does not accord with the facts.”

29. In the instant suit, the Applicant approached the Court alleging that he was the only living official of the Group. The Interested Parties however informed the court that this is not the true state of affairs. That the Applicant was in fact no longer an official of the Group and that he and the team he served with had been replaced as officials of the Group. Annexure 2(a) to the Interested Parties Further Affidavit is a letter dated 6th October, 1999 suspending the Applicant from his duties in line with the Group’s constitution. Annexure 3 thereof is a letter from the Ministry of Home Affairs, National Heritage, Culture and Social Services dated 14th February, 2000. In the said letter, the Department of Social Services, Uasin Gishu District wrote about a change of trustees of the Group, indicating that the Applicant in this suit and his team had been suspended for misappropriation of the group’s funds.



30. This Court has also seen the Minutes of the Special General Meeting convened by order of Court issued in Civil Suit No. 337 of 2013 on 19th April, 2017 where the Applicant in this suit had sued members of the group. The meeting was attended by the local administration including the Deputy County Commissioner, Eldoret West-Soy among others, but notably the Applicant was not in attendance. It is at this meeting that new officials were elected with Mr. Simon Boru Imoli, the 1st Interested Party, elected as the Chairman. To add to that, the Applicant admitted that he ceased being the Group's Chairman in 1996. The allegation at paragraph 2 of the Supporting Affidavit that the Applicant in the suit is the Chairman elected by Members of the Ishieywe Self-Help Group was thus a misrepresentation aimed at deceiving the court. It is not farfetched to deduce that the Applicant's intention was to mislead the court into issuing the orders sought.
31. That aside, Paragraph 15 of the Supporting Affidavit indicated that the Applicant was set to appear before the Land Control Board on 27th April, 2023 for purposes of obtaining LCB Consent to transfer the suit properties. On 27th April, 2023 when the Parties appeared before this Court, the Applicant's Advocate informed the court that the Applicant had in fact appeared before the LCB on 25th April, 2023 and had obtained consent to transfer the land, contrary to his earlier averments, made under oath. This marks yet another incidence of misrepresentation against the Applicant in this suit.
32. The Applicant further averred in his Supplementary Affidavit that he met with Plot Owners of the former Ishieywe Group on 15th May, 2023 and they agreed that he would transfer the land they had occupied for over 23 years to them. However, the Application that gave rise to the impugned orders is dated 29th July, 2022 and was filed in court on 1st August, 2022 long before the said meeting took place. So on whose behalf and/or benefit was he acting on when he filed the Exparte Notice of Motion? It is clear that this meeting was an afterthought concocted in a bid to sanitize the Applicant's actions herein. It does not bode well for the Applicant that the Interested Parties had already filed this Application seeking to have the impugned consent orders set aside when the meeting was held.
33. Another matter that this court needs to address is that of representation of the Interested Parties in this suit. It is not in dispute that an advocate has general authority to compromise a matter on behalf of his client but he has to act bona fides and in the best interests of his client. Seton on Judgments and Orders, 7th Edition, Vol. 1 page 124 states 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.”
34. This principle also applies in Kenya and it was re-stated in the case of Kenya Commercial Bank vs Specialized Engineering Company Limited [1982] eKLR, where the court held that:-
- “...the solicitor for a party has an implied general authority to compromise and settle the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the notice of the other side. This decision is accepted as authoritative by the editors of the Supreme Court Practice (1979), vol 2 para 2013, where it is stated that 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.”



35. However, an advocate cannot enter into a binding consent if such advocate acted without authority or instructions of the client. The principle that an advocate has authority to compromise and settle a matter on behalf of their clients can only hold where the said advocate has been duly instructed and is properly on record. The Applicant's contention is that the said firm of Advocates is the Interested Parties' Advocates having been on record for them in Miscellaneous Application No. 11 of 2018, thus he argues that the said firm represented the Interested Parties in this suit. He justifies this by stating that even the pleadings annexed to the Interested Parties Affidavits were drawn by the said firm of Advocates. Apart from the mere allegation by the Applicant, he has not availed any evidence to show that the said firm of Advocates had instructions to represent the Interested Parties or to enter into the Consent on their behalf.
36. The Interested Parties however allege that the firm of Advocates who executed the Consent Order on their behalf did not have instructions to act for them. At paragraph 5 of their Supporting Affidavit, they averred that the order was granted without notice to them, they were not parties to the suit yet the consent order affects them directly. It is clear from the face of the instant Application that the Interested Parties were not sued and the Land Registrar Uasin Gishu was sued as the only Respondent. At the time the consent was presented in court and adopted as an order thereof, they were still not parties to this suit, and this remained so until they applied and were joined in the capacity they now appear. If they were not parties to the suit, their contention that they did not know about this suit is viable. It also follows therefore that they could not have instructed Counsel to act for them or to execute any consent on their behalf. In *Hirani vs Kassam* (1952) 19 EACA 131 at page 134 the Courts cited a passage from *Seton on Judgments and Orders* 7th Edition, Volume 1 page 124 which stated as follows:-
- “... Although an advocate has ostensible authority to compromise his client's case, employing such authority cannot be upheld where counsel consents to order which is diametrically opposed to the express instructions which a client has given him ... and if it is shown to the Court that the client was not even aware of the application that gave rise to those consent orders, leave alone having consented to the recording of the orders, in the absence of any satisfactory explanation ... a Court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the Consent Order issued.”
37. It is not clear therefore on whose instructions the firm of Magare Musundi & Company Advocates was acting when they executed the Consent that was adopted in court. Just because an advocate represented a party in another matter does not mean that they will automatically represent them in a subsequent case even if the cases are related. A party is at liberty to retain an Advocate who acted for them in a previous suit. However, an advocate cannot just file a pleadings in a subsequent suit on behalf of his former client without the client's instructions. In the same breadth, a litigant should not be barred from instructing a new Advocate of their choice in a separate suit. The fact remains that Miscellaneous Application No. 11 of 2018 is a separate suit from this current suit, and even if the Interested Parties were to opt to continue being represented by the same advocate, fresh instructions ought to have been issued.
38. In any event, it is for the Interested Parties to choose who will represent them in this suit and it is not up to the Applicant to determine who their advocate in this suit will be. See *William Audi Ododa & another vs John Yier & another* [2007] eKLR, where the court held that each party to a case has the right to choose his or her own advocate. In that case, the court held that not even the courts can tell litigants which advocate should or should not act in a particular matter. If even the courts have no authority to dictate a party's choice in legal representation, I do not see how a fellow litigant can have such power.



39. As to whether the firm of Magare & Musundi Advocates had instructions to consent, the Applicant's advocates herein wrote to the firm of Magare Musundi on 27th April, 2022 seeking information on the suit parcels of land. The Applicant's Advocate then asked whether they could draft a consent authorising their client to transfer the properties. The firm of Magare Musundi responded through the letter dated 4th July, 2022 signed by D.K.N. Magare, and there is no indication that the said Advocate sought the instructions of the Interested Parties before giving the information contained therein.
40. In any event, having acted for the Interested Parties in Miscellaneous Application No. 11 of 2018 in which the Applicant sought for and obtained similar ex-parte orders as in this suit, which orders the Interested Parties successfully applied to be set aside, the said advocate ought to have known that it is likely they would oppose any action by the Applicant to transfer the properties. It is obvious that the orders herein are not in the best interests of the Interested Parties seeing as some of the parcels in this suit, were subject of the Order issued in Miscellaneous Application No. 11 of 2018. The order in the Misc. App. No. 11 of 2018 was in respect of being Soy/Block (Navillus) 64 and 69, as well as Soy/Block (Navillus) 1636 to 2665 which range encompasses all the parcels herein. It goes without saying that the Interested Parties' interests were not considered when the consent was entered into as the consent clearly negates their interests. In *Republic vs District Land Registrar Nandi & another Ex-parte Kiprono Tegerei & another* [2005] eKLR,
- “Although an advocate has ostensible authority to compromise his client's case, employment of such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which he has been given by a client in a matter. It is not easy to prove that there was fraud or collusion in recording of any consent orders between advocates in the absence of their instructing clients but where such orders completely negate the interests of an instructing client and it is shown to the satisfaction of the court that the client was not even aware of the application that gave rise to those consent orders leave alone having consented to the recording of the orders, in the absence of any satisfactory explanation by the counsel who is accused of entering into the consent orders in question, a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent orders issued.”
41. In the absence of documentary evidence to show that the firm of Magare Musundi and Company Advocates had instructions to act for the Interested Parties, the same would appear to have been a misrepresentation which resulted in the impugned consent being adopted by this court.
42. It is also not true that the Applicant herein abandoned Misc. App. No. 11 of 2018 in favour of filing this suit as he would want this court to believe. A perusal of the said file reveals that after delivery of the ruling on 10th September, 2019 setting aside the exparte order in that suit, the court directed the Applicant to serve all Interested Parties but the Applicant did not comply. Nothing was done on the file for over a year and the court issued a Notice to Show Cause on 19th May, 2021 which was listed for hearing on 2nd June, 2021. On the said date, the Applicant failed to give justifiable reason for his inaction and the suit was dismissed for want of prosecution. As already explained, the exparte order obtained in Misc. App. No. 11 of 2018 also touched on some of the suit parcels of land herein. Yet the Applicant never disclosed this suit or the many other suits that have been filed in various courts relating to properties owned by the Ishieywe Self-Help Group. This is material non-disclosure for which a consent may be set aside/vacated.
43. It is noteworthy also that the said consent was adopted on 6th March, 2023 in the presence of the Applicant's Advocates only. The AG who appeared for the Land Registrar as well as Counsel



purported to act for the Interested Parties were not present. The question remains as to whether a consent order can be adopted in the absence of one party thereto or their counsel. In *Republic vs Mutunga & 3 others; Bandari Investment Company Limited (Interested Party); Munga & another (Exparte Applicants)* (Environment and Land Judicial Review Miscellaneous Application 7 of 2017) [2023] KEHC 23785 (KLR), the court held that:-

“In *Brooke Bond Liebig (T) Ltd vs Mallya* [1975] EA 266 in which a passage from Seton on Judgments and Orders, 7th Edition, Vol. 1 p. 124 was quoted with approval, it was held that the presence of counsel is imperative. The Court observed that:

‘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 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’.

Similarly, in *Wema Foundation Trust Company Limited vs County Government of Nairobi City & Another* [2022] eKLR, it was held:

‘...It is trite law that the parties who would want to have the court to adopt a consent judgment must be present in court on the day when the document is presented for adoption and confirm the same to be the one they both signed and agreed on’.

44. The court explained that the rationale for such attendance is so that the court can avoid scenarios such as this, where a party claims that they were not aware of the consent. It is therefore clear from the court record that the Consent was entered into without the consultation nor concurrence of the Interested Parties who were not even a party to this suit. Since a consent order is based on agreement between the parties to the consent then the doctrine of privity of contract must apply. This is because any party who was not privy to the consent cannot sue on it or be liable under the contract. For that reason, it must be clear that the Parties to the consent are in agreement with it. Yet, in this instance the Court could not ascertain from Counsel who was purported to act for the Interested Party whether they are indeed the ones who executed the consent or not.
45. Furthermore, a person cannot be deprived of their legal rights in proceedings to which they are not a party. This means that unless duly summoned to appear in legal proceedings and plead their case, a person not a party to such proceedings is assured that a order made therein will not affect his legal rights, more so a consent order. I am guided by the Court of Appeal case of *Patrick Omondi Opiyo T/ A Dallas Pub vs Shaban Keah & Another* [2018] eKLR where their Lordships stated as follows:

“Service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal systems applaud. Where therefore judgment is entered against a party who has not been served and hence not been heard, such judgment will be set aside *ex debito justitiae*.”

46. It is not in doubt that the suit parcels of land were registered in the name of the Applicant and the Deceased Officials in trust for the members of Ishiywe Self-Help Group. As the Officials and Members of the Group, any orders issued or made herein will directly impact them. The consent order authorising transfer of the suit parcels of land could therefore not be made without their participation in this suit. For the foregoing reasons, I am satisfied that this is a case in which the ends of justice



dictate that the consent order be set aside and/or vacated. Accordingly, this court makes the following determinations;

- i. The Interested Parties' application dated 24th April, 2023 is found to be meritorious.
- ii. The Consent Order dated adopted on 6th March, 2023 and granted on 8th March, 2023 be and is hereby set aside and/or vacated.
- iii. The Interested Parties shall bear the costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 29TH DAY OF MAY 2024

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J.M ONYANGO

JUDGE

In the presence of;

1. Miss Oduor appearing alongside Mr. Were for the Applicant
2. No appearance for the Respondent

Court Assistant: Brian

