



**Ndirangu v Njuguna & another (Environment & Land Case  
E063 of 2023) [2024] KEELC 4295 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4295 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E063 OF 2023**

**JE OMANGE, J**

**MAY 9, 2024**

**BETWEEN**

**PENNINAH WANGARE NDIRANGU ..... PLAINTIFF**

**AND**

**STEPHEN NDIRANGU NJUGUNA ..... 1<sup>ST</sup> DEFENDANT**

**MARKLAND SURVEYOYS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion application dated 28<sup>th</sup> November, 2023 the Applicant sought the following orders:
  - a. Spent
  - b. That pending hearing and determination of this application this honourable court be pleased to set aside the consent dated 8<sup>th</sup> September 2023 which has been adopted by this court
  - c. That pending hearing and determination of this application this honourable court be pleased to specifically order stay of execution of eviction of the applicant from NAIROBI BLOCK NO 105/8883 against the Plaintiffs or any of her agents.
  - d. That pending hearing and determination of this application this honourable court be pleased to restrain the Plaintiff and or her agents from solely collecting rent in the properties as per clause 7 of the consent dated 8<sup>th</sup> December, 2023.
  - e. That pending hearing and determination of this application this honourable court be pleased to restrain the Plaintiff and or her agents from trespassing in the family home situated in NAIROBI BLOCK NO 105/8883 and NAIROBI BLOCK 105/8877.



- f. That pending hearing and determination of this application this honourable court be pleased to restrain the Plaintiff and or her agents from harassing the applicant and meddling with the affairs in the property known as NAIROBI BLOCK NO 105/8883 and NAIROBI BLOCK 105/8877.
  - g. That pending hearing and determination of this application the Plaintiff be ordered to return the original title deed to the property known as NAIROBI BLOCK NO 105/8883 and NAIROBI BLOCK 105/8877 for safe keeping with the applicant's advocate
  - h. Costs of the application.
2. The applicant depones that he is the husband to the Plaintiff and they jointly own the suit properties herein. He depones that he was diagnosed with bipolar depression and anxiety disorder which resulted in lapses of Judgement that affected his ability to make sober decisions. That he signed a consent with the Plaintiff dated 8<sup>th</sup> September 2023 which consent he now argues he signed when he was not in a proper frame of mind to understand the consequences of what he was signing.
  3. Upon seeking Legal Counsel, he realized that he had consented to vacate his matrimonial home located in NAIROBI BLOCK NO 105/8883 and further relinquished titles and his share of the rent collected from the suit properties herein. He deponed that he would never have consented to such terms that are unfair as the properties also belong to him.
  4. It is his contention that the Plaintiff took advantage of his mental state to have him sign the consent and present it to court. It is on this basis of this that he seeks to set aside the consent so that the matter can proceed to full hearing and be decided on merit.
  5. Counsel for the Applicant submitted that the consent entered into was contrary to the policy of this court as it is in contravention of the 1<sup>st</sup> Defendant rights, specifically Article 28 and Article 43 of *the Constitution* that affirms the right to human dignity and affordable and proper housing respectively. That the Respondent caused the Applicant to sign a consent which he did not understand would render him homeless despite his woes of being an elderly sick person who has resided on NAIROBI BLOCK NO 105/8883 most of his adult life.
  6. That the applicant's medical condition requires him to have a permanent residence in which he can access medical services with ease and his home is that place for him. A forced eviction would be detrimental to his health. It was his case that he had proved that the consent was contrary to the policy of the court decided in the case of Board of trustees' National social security Fund & Michael Mwalo (2015) eKLR which gave the circumstances under which a court can vary a consent.
  7. Counsel for the Applicant submitted that the Applicant having raised mental incapacity and as the medical reports have not been challenged there is sufficient ground to void the consent which like a contract can be voided on grounds of mental incapacity to contract.
  8. The Applicant filed a further affidavit in which he deponed that at the time of signing the consent on the 8<sup>th</sup> September 2023 he had been in the hospital two weeks prior and attached a medical report.
  9. The Respondent filed a Replying Affidavit dated 18<sup>th</sup> December 2023. She deponed that the Applicant cannot plead the issue of lack of testamentary capacity as the negotiations were carried out in the presence of both their advocates and he was well aware of the contents of the consent.
- She further deponed that the applicant in implementation of the terms of the consent had performed other obligations such as but not limited to payment of his part of their son's school fees implying that



he was well aware of the terms of the consent. He cannot therefore plead mental incapacity on certain clauses of the consent having complied with others.

10. She averred that she had purchased the suit properties subject of this suit all by herself and it was only due to the domineering attitude of the applicant that he was named as co-owner. It was her evidence that she had spent money to renovate the suit property which the applicant had neglected and had cleared rate arrears to the county government.
11. It is her contention that the Applicant is misleading the court by claiming that he will not have a home as according to the consent, he had retained some properties which are developed and which under the terms of the consent he is entitled to collect rent which he can use for his upkeep and medication.
12. The Respondents counsel in the submissions reiterated the contents of the Respondents replying affidavit. She submitted that the Applicant has not demonstrated exceptional circumstances that would warrant setting aside of the consent order that was now legally binding between the parties.
13. Counsel referred the court to the case of Board of trustees' National social security Fund & Michael Mwalo (2015) eKLR in which the court stated that there has to be evidence that the consent was obtained through fraud or omission, obtained in a manner that is contrary to laid down court procedures, given without sufficient material and for any other justifiable reason that the court might deem reasonable. She submitted that the applicant had not proved any fraud as he signed the consent by himself. Indeed, the fact that he has sworn affidavits in this case is an indication that he is aware of what he is doing.
14. Further, the Respondents counsel argued that the counsel had failed to comply with Order 9 Rule 9 and Rule 10 of the Civil Procedure Rules that require a new advocate coming on record after Judgement has been entered, to do so with leave of the court.
15. Counsel further submitted that the Defendant had not proved mental incapacity existed as at the time of signing the consent and that the medical record would not suffice. On this Counsel cited the case of Wiltshire Vs Cain held by the Supreme Court of Barbadoes that for a defence of mental incapacity to suffice, it must be shown to have existed in different forms and that the Plaintiff knew of the status of the Defendant imposing the burden of proof of this on the Defendant. She further argued that the Applicant had not proved that the Respondent knew of his mental state. She cited the case of Grace Wanjiru Munyinyi & Another Vs Gedion Waweru Githunguri & Others (2011) eKLR.
16. She submitted that the actions of the Defendant leading up to the signing of the consent and after the signing point to the fact that he is well aware of his actions as it involved making serious decisions such as swearing of affidavits, selling land and receiving proceeds.
17. The first issue the court will address is whether the application is properly before the court. Order 9 Rule 9 of the Civil Procedure Rules provides as follows: -

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”



18. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that any change of Advocates after Judgment must be by an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate.
19. The reasoning behind this provision was well articulated in the case of S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR in which the Judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”
20. In the instant case, there is evidence that there is correspondence between the former advocate on record that is the firm of Auka and Company Advocates and the current advocates on record Mwaure & Mwaure Waihiga advocates. The firm of Mwaure & Mwaure Waihiga advocates notified the firm of Auka that they were coming on record for the applicant and the firm of Auka acknowledged the same. In view of the conduct of the Counsels, I am inclined in the interest of upholding Article 159 of *the Constitution* to overlook this issue.
21. The issue for determination is whether the applicant has met the threshold for reviewing or setting aside a consent judgment. The Applicant claims lack of testamentary capacity at the time of entering into a consent dated 8<sup>th</sup> September 2023 with the Plaintiff/Respondent which consent has since been adopted as an order of the court.
22. In the case of Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269 Law Ag P said “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.  
In Hirani V. Kassam [1952] 19 EACA 131 the Court of Appeal held;

“It is now well 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:  
  
“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”
23. The Applicant produced medical documents the first being a discharge summary from Mater Hospital dated 29<sup>th</sup> January, 2023 which indicates he was treated for Depression and Anxiety disorder. A second discharge summary dated 10<sup>th</sup> October, 2023 was for treatment of pharyngitis. The third report for 23<sup>rd</sup> August, 2023 reveals he was on follow up for bi polar mood disorder.
24. On their own these reports do not prove that the Applicant state of mind was such that he lacked testamentary capacity to enter into a consent. The court is left to decipher for itself the extent to which the conditions the Applicant suffered from affect his mental capacity. It is also not clear whether the conditions render him permanently incapacitated or only during certain periods. The burden of proof was on the applicant to establish his incapacity which burden he has not discharged.



25. The 2<sup>nd</sup> Defendant herein filed a Replying affidavit dated 29<sup>th</sup> August 2023 averring that the applicant has engaged in various acts such as engaging surveyors and issuing instructions to carry out subdivisions to land parcel LR Mavoko /Block 12/150.

The presumption is then that the applicant was in full control when issuing the instructions and signing the agreement, on the 10<sup>th</sup> July 2023 two months prior to signing of the consent dated 8<sup>th</sup> September 2023.

26. It is also on record that the Applicant has executed certain aspects of the consent. Would a person with mental incapacity make such decisions? In view of the foregoing reasons, the court finds it difficult to believe that the applicant has mental incapacity as he alleges. As such the application herein is unmerited and is dismissed with costs.

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS ON 9<sup>TH</sup> OF MAY 2024.**

**JUDY OMANGE**

**JUDGE**

In the Presence of:

-Ms. Mohamed with Ms. Mutinda for 1<sup>st</sup> Defendant

-Mr. Githaiga for Plaintiff/Respondent

-Court Clerk: Steve

