



**Chirchir & 2 others (Suing for and on Behalf of Themselves & Keres Self Help Group) v Moi & 2 others (Environment & Land Case 27 of 2022) [2024] KEELC 5382 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5382 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 27 OF 2022**

**MAO ODENY, J  
JULY 23, 2024**

**BETWEEN**

**SAMMY KALINY CHIRCHIR ..... 1<sup>ST</sup> PLAINTIFF  
MICHAEL CHEBON ..... 2<sup>ND</sup> PLAINTIFF  
MICHAEL CHIRCHIR KORIR ..... 3<sup>RD</sup> PLAINTIFF  
SUING FOR AND ON BEHALF OF THEMSELVES & KERES SELF HELP  
GROUP**

**AND**

**HON. GIDEON KIPSIELEI TOWET'T MOI ..... 1<sup>ST</sup> DEFENDANT  
NAKURU DISTRICT LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT  
DIRECTOR OF SURVEY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 1<sup>st</sup> November, 2023 by the Applicants seeking the following orders:
  - a. Spent.
  - b. Spent.
  - c. That the Honourable court be pleased to review, vacate and set aside the consent of parties dated 25<sup>th</sup> May, 2023 filed in court on the 29<sup>th</sup> May, 2023 and to reinstate the suit herein for hearing and determination on merit.
  - d. The costs of the application be provided for.



2. The application is grounded on the supporting affidavit of Michael C. Korir the 3<sup>rd</sup> applicant herein who deponed that the 1<sup>st</sup> respondent colluded with Simon Kipsang Yator who was a plaintiff in this suit to file a fraudulent notice of change of advocates and consent purporting to mark the matter settled.
3. The Applicant further stated that they objected to the filing of the notice of change of advocates and the consent vide a letter to the Deputy Registrar dated 21<sup>st</sup> May, 2023. That Simon K. Yator was no longer a party to this suit as an amended plaint dated 24<sup>th</sup> April, 2023 filed in court where he was replaced with the 1<sup>st</sup> applicant herein.
4. It was the Applicant's case that following the removal of the said Simon from the suit, he could therefore not instruct M/s Kipkoech Terer & Co. Advocates to file a notice of change of advocates or the consent as he had no capacity. Further that they never participated in any negotiations with the 1<sup>st</sup> respondent culminating to the matter being marked as settled.
5. The applicant deponed that the notice of change of advocates and consent were fraudulently recorded by the parties through collusion in a bid to avoid hearing and determination of the matter and urged the court to allow the application and set down the case for hearing.

### **1<sup>st</sup> Respondent's Case**

6. The 1<sup>st</sup> Respondent filed a replying affidavit sworn on 27<sup>th</sup> November, 2023 where he deponed that the suit was compromised by virtue of the consent letter dated 25<sup>th</sup> May, 2023 and served upon the Plaintiffs' advocates on 30<sup>th</sup> May, 2023.
7. The respondent stated that the application is defective as the applicants' advocates were not properly on record and further that the Applicants blame their previous Advocates for recording a consent without their authority but have failed to provide any proof of any disciplinary action initiated against the said advocates.
8. The 1<sup>st</sup> respondent urged the court to dismiss the application with costs as it has been brought in bad faith and further stated that the plaintiffs have been issued with their title deeds thus the substratum of the suit is spent.

### **Applicant's Submissions**

9. Counsel for the Applicants reiterated the contents of the supporting and further affidavit and submitted that vide an amended plaint and Simon Kipsang Yator was removed as a Plaintiff hence could not take any action in the matter. That his action of instructing M/s Kipkoech Terer & Co. Advocates amounted to a collusion with the 1<sup>st</sup> respondent hence the filing of the consent was fraudulent.
10. It was counsel's submission that the suit was a group matter and one individual could not terminate the suit without the group resolution or consent of the other plaintiffs. Further that there were interested parties who were to be joined in the suit.
11. Mr. Gai submitted that the notice of change of advocates and the resulting consent were irregular and that Order 9 of the *Civil Procedure Rules* would not be applicable. Counsel urged the court to allow the application as prayed and reopen the case for hearing and determination.

### **1<sup>st</sup> Respondent's Submissions**

12. Counsel identified two issues for determination, first, whether the applicants can vitiate the consent order and secondly whether the applicants' advocates are properly on record. On the first issue he



- submitted that a consent judgment could only be set aside on grounds of misrepresentation, fraud or mistake, which have to be specifically pleaded and proved.
13. Counsel relied on the case of *Sandra Grimmet & Another V Benedict Ndigirigi Gichubi* [2010] eKLR and submitted that it is trite law that litigation has to come to an end at some point and that the applicants cannot purport to resurrect a matter that they voluntarily settled.
  14. Counsel argued that a consent order is binding on all parties unless proved to have been obtained fraudulently, by an agreement contrary to the court policy or misrepresentation and relied on the cases of *Inter Countries Importers & Exporters Ltd V Teleposta Pension Scheme Registered Trustees & 5 Others* [2019] eKLR and *Flora N. Wasike V Destimo Wamboko* [1988] which reiterated the case in *Brooke Bond Liebig Ltd V Mallya* [1975] EA 266. It was counsel's submission that the applicants did not produce any material evidence of fraud, misrepresentation or mistake.
  15. On the issue of whether the applicants' advocates are properly on record, counsel submitted that the application is fatally defective as suit having been settled in its entirety by way of consent, failure of the applicants' advocates to seek leave to enter appearance or procure the consent of the previous advocates on record is irregular.
  16. Counsel relied on Order 9 Rule 9 of the *Civil Procedure Rules* and submitted that if a litigant wish to change counsel after judgment, he is required to procure the consent of the outgoing counsel or have the change effected through a court order.
  17. Counsel further relied on the case in *Stephen Mwangi Kimote V Murata Sacco Society* [2018] eKLR and submitted that the applicants continue to act in total disregard of the rules and that they failed to provide any proof of any disciplinary actions against their previous advocates.

### **Analysis and Determination**

18. The issues for determination are as to whether the firm of M/s Kipkoech Terer & Co. Advocates were properly on record for the Applicants when the consent was filed and whether the consent order dated 25<sup>th</sup> May, 2023 was procured legally, fraudulently or through misrepresentation, whether the consent should be reviewed, varied and/or set aside.
19. It is on record that vide an amended Complaint dated 24<sup>th</sup> April 2023, Simon K. Yator ceased to be a Plaintiff. Simon K. Yator instructed the firm of M/s Kipkoech Terer & Co. Advocates to file a Notice of Change of Advocates. He was not the only plaintiff in the suit; therefore, he could not purport to represent the other plaintiffs without their authority. Having ceased to be a plaintiff in this suit, he therefore did not have capacity to take any action in the suit let alone instruct an advocate to file a notice of change of advocates.
20. By the time M/s Kipkoech Terer & Co. Advocates filed the notice of change of Advocates Simon K Yator had already been substituted by the current 1<sup>st</sup> plaintiff and was represented by the firm of M/s Ochieng Gai & Co. Advocates. It follows that Order 9 of the *Civil Procedure Rules* would not be applicable as the notice of change was irregular.
21. Order 9 Rule 5 of the *Civil Procedure Rules*, provides as follows:

“ A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered



the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

22. The Notice of Change of Advocates filed on 24<sup>th</sup> May, 2023 appointing the firm of M/s Kipkoech Terer & Co. Advocates to act for the applicants was not properly on record as Simon K. Yator had already been substituted hence was not a party to the suit. He therefore did not have any authority to instruct the advocates who purported to file a consent marking the suit as settled.
23. Furthermore, it is on record that Ochieng Gai Advocate for the Applicant wrote a letter dated 24<sup>th</sup> May 2023 to the Deputy Registrar complaining about having been served with a purported notice of change of Advocate by M/s Kipkoech Terer & Co. Advocates while he was still on record. He further informed that court about the amended plaint, which had replaced Simon k. Yator as a Plaintiff. The letter further urged the Deputy Registrar not to endorse the notice as he was still on record with the instructions by the plaintiffs.
24. This letter should have raised a red flag and urged the parties to appear in court to confirm whether they had given such instructions to change their advocates on record and file a consent to mark the matter as settled.
25. In the case of *Board of Trustees National Social Security Fund versus Micheal Mwalo* [2015] eKLR the Court of Appeal held as follows:

“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.”
26. Similarly, in the case of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR Hancox JA cited Setton on Judgments and orders (7<sup>th</sup> edition) Vol 1 page 124, and reiterated that:

“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 the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”
27. Finally, in the case of *Hirani V. Kassam* [1952] 19 EACA 131 the Court of Appeal held that:

“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: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-

“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.”
28. I have considered the application, the submissions on record and find that the consent and the Notice of change of advocates was procured through misrepresentation as Simon K. Yator was not a party



to this suit by the time the same was recorded. The notice of change of advocates is hereby expunged from the court record and the consent set aside with costs to the Applicant. This matter is therefore reopened for hearing and determination on merit.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 23<sup>RD</sup> DAY OF JULY 2024.**

**M. A. ODENY**

**JUDGE**

