



REPUBLIC OF KENYA



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Ngugi v Kanyaga; Gatu (Interested Party) (Environment & Land Case 194 of 2016) [2024] KEELC 6832 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6832 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 194 OF 2016
JM MUTUNGI, J
OCTOBER 17, 2024

BETWEEN

CONSOLATA NYAWIRA NGUGI PLAINTIFF

AND

CHARLES GATU KANYAGA DEFENDANT

AND

GRACE NJERI GATU INTERESTED PARTY

RULING

1. This Ruling is in respect of the Intended Interested Party's Notice of Motion application dated 19th October 2023. The Applicant prays for the following Orders:
 1. The Honourable Court be pleased to set aside the consent order dated 8th March 2017 executed between the Plaintiff's and the Applicant's Counsel and filed in court on 16th March 2017 and adopted as an order of the Court together with all the consequential orders.
 2. The Honourable Court be pleased to reinstate and set down the application dated 20th February 2017 for hearing.
 3. That costs be provided for.
2. The application is predicated on the grounds outlined on the body of the application and the Supporting Affidavit sworn by Grace Njeri Gatu. She states that the Defendant is her husband and the legal owner of Land Parcel Kiine/Rukanga/4895. She stated that she had instructed the law firm of M/S C.S Macharia Advocates to file the application dated 20th February 2017. She averred that after the matter took off without a progressive report her then Advocate on record on inquiry informed her the matter had been transferred to Embu due to the unavailability of dates at Kerugoya ELC Court.



She further stated after she followed up she was advised that the matter was still pending in court and she would be informed once a date was scheduled.

3. The Applicant further stated that her husband, the Defendant, was later sued in Wang'uru ELC Case Number E003 of 2020 (*Consolata Nyawira Kinyanjui v Charles Gatu Kanyaga*). The Applicant averred that her previous Advocate had advised her that the matter had been transferred to Wang'uru for a hearing. She stated she learnt about the existence of the consent order on 12th October, 2023 while attending court for the hearing of Kerugoya ELC Appeal Number 13 of 2023 (*Charles Gatu Kanyaga v Consolata Nyawira Kinyanjui*) when upon reviewing the file, she found a consent order withdrawing her application dated 20th February, 2017 which she avers she had not authorized her then Advocate to withdraw. She prays that the consent be set aside and the application dated 20th February, 2017 be reinstated for hearing.
4. In response to the application, the Plaintiff/Respondent filed her Replying Affidavit on 9th February 2024 where she averred that the Applicant had been well aware of the ongoing case and the events leading to the consent filed by her Advocates. The Plaintiff refuted the Applicant's claim that she was unaware of the consent withdrawing her application stating the Applicant was not being truthful as she was aware and that her intention was to mislead the Court. The Plaintiff averred there was a valid consent signed by all the parties. The Plaintiff stated that it was the Applicant's Advocates M/s C. S. Macharia & Co. Advocates who in fact facilitated the drawing of the consent. The Plaintiff averred the application dated 20th February 2017 having been lawfully withdrawn by consent could not be reinstated as it was no longer before Court. The Plaintiff asserted that a consent made by mutual agreement can only be revised with the consent of all parties involved or by the Court in the case of mistake, fraud, or undue influence. The Plaintiff stressed that there was no allegation of fraud, mistake, or undue influence regarding the consent. The Plaintiff pointed out the Applicant had not lodged any complaint against her previous Advocate for any professional misconduct.
5. The Plaintiff/Respondent further averred that ELC Case Number E003 of 2020 was a suit seeking the eviction of the Defendant and his family from the suit land, as they refused to move out of the land notwithstanding a settlement agreement signed by the Defendant in the presence of his children and witnesses.
6. The Plaintiff contended the Applicant had not approached the Court with clean hands as she was fully in the picture during the purchase of the suit land by the Plaintiff and that she had deliberately misrepresented facts with a view of misleading the Court.
7. The Plaintiff/Respondent explained that during the purchase of the suit land he in fact paid part of the purchase price to the Applicant's joint account with her husband/Defendant held at Equity Bank Kenya Ltd and hence it was not true that the Applicant was not aware of the sale of the property.
8. The Plaintiff/Respondent further averred the Court orders being challenged were no longer applicable, as the property was already registered in her name and contended the instant application was frivolous, vexatious, and an abuse of the Court process and ought to be dismissed.
9. The Applicant filed a Further Affidavit on 15th February 2024, affirming that the Respondent had indeed deposited Kshs. 1,000,000/- into her joint account with the Defendant but averred the same was in regard to the sale of 1 ½ acres out of 5 acres in L.R No. Kiine/Rukanga/4895. She stated her husband was not selling the whole parcel of land as that would have left the family destitute. She averred that it was after she discovered her husband had been manipulated by the Plaintiff that she sought legal advice and filed the application dated 20th February, 2017 which she denies she consented to have withdrawn. The application was argued by way of written submissions. The Applicant filed her submissions dated



20th February, 2024 through the Firm of Kiguru Kahiga & Co. Advocates while the Respondent filed her submissions dated 14th March, 2024 through the Firm of H. T & Associates.

10. The Applicant in her submissions reiterated that she had not instructed her then Advocate on record to enter into a consent to withdraw her application dated 20th February, 2017 and that the said Advocate failed to advise her regarding the content of the consent entered into. She contended she was misled by her previous Advocate regarding the status of her matter whenever she sought to be briefed. She averred the consent was entered into a collusion to her detriment. She placed reliance on the Case of the Board of Trustees National Security Fund –vs- Michael Mwalo (2015) eKLR where the Court of Appeal 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 collusion or by an agreement contrary to the policy of Court.”

11. The Applicant also placed reliance on the Case of Michael Mowesley –vs- Kazungu Sana Sana; Abdulrehman Mohamed Basheik & 2 Others (Interested parties (2022) eKLR where the Court held a consent order/Judgment may only be set aside where it is shown there was concealment of material facts in obtaining the consent Order/Judgment.
12. The Plaintiff/Respondent in her submissions contended that the consent being impugned by the Applicant was freely entered into between the parties and was signed by the Applicant’s Advocate. The Respondent argued that the Applicant was aware of the sale of the suit land as she had signed a spousal consent and some of the purchase money was paid into their joint Account with the husband and the purchase price was utilized by the Defendant to purchase alternative land for the family. The Plaintiff thus submitted the Applicant had resulted to deliberate misrepresentation that she was unaware of the sale and that her family would be rendered destitute to seek sympathy of the Court. The Respondent submitted the Applicant had no clean hands and was undeserving of the Court’s discretion.
13. The Plaintiff/Respondent further submitted that an application to set aside and/or vary a consent order could only be granted if it was demonstrated special circumstances existed such as fraud, collusion and/or if the agreement was shown to have been contrary to statute or public policy. In support of the submission the Respondent relied on the Case of Board of Trustees National Social Security Fund –vs- Michael Mwalo (2015) eKLR and Samson Munikah & Co. Advocates –vs- Wedube Estates Ltd C.A. No. 126 of 2005. It was her submission that the Applicant had not proved that there were any special circumstances to warrant the Court to interfere with the order made by consent of the parties.
14. The Respondent further in her submissions asserted that the Applicant’s denial that she had not given her Advocate instructions to enter into the consent lacked any conviction. The Plaintiff submitted that upon the Applicant’s then Advocate being served with the Plaintiffs Replying Affidavit dated 3rd March, 2017 which was in response to the Applicant’s application dated 20th February, 2017 it must have become evident that the Applicant’s application was in futility as it was clear she had given spousal consent and that the husband (family) of the Applicant had been facilitated to purchase an alternative parcel of land being Kiine/Rukanga/3603 as per the consent to transfer exhibited. The daughter of the Applicant in fact swore an Affidavit affirming the Applicant, who was her mother was privy to the sale transaction with the Plaintiff and she had executed a spousal consent authorising the transaction to proceed.



15. The Advocate of a party is the agent of such party, and the Court, and, indeed the Advocates of the other parties and/or the parties themselves deal with such an Advocate as the representative of the party he represents with authority to take decisions on behalf of such party which bind the party. If the Court has to question or doubt the authority of every Advocate appearing before it to represent a party, the Court would be faced with an insurmountable task of validating the authority of every Advocate. It is for that reason, why under Order 9 Rule (1) of the Civil Procedure Rules provision is made for parties to appear in person, by recognized agent and Advocates. Where a party chooses to be represented by a recognized agent and/or by an Advocate, such agent and/or Advocate is deemed to have the ostensible and/or implied authority to act for the party and take such decisions as would be permissible in exercise of such authority unless it is shown or demonstrated there was limitation in regard to such authority.
16. The Plaintiff relied on the Case of Kenya Commercial Bank Ltd –vs- Specialized Engineering Ltd (1982) 485 where Harris, J held that a solicitor in this case an Advocate has a general authority to compromise on behalf of his client if he acts bonafide and not contrary to express negative direction.
17. In the preset matter there was no evidence adduced by the Applicant to suggest her Advocate, Mr. C. S. Macharia was not acting bonafide and/or acted contrary to a negative express direction of the Applicant. It is of note that the impugned consent order was dated 8th March, 2017 and was adopted by the Court on 16th March, 2017. The application seeking its setting aside was not filed until 25th October, 2023 more than 6 years later. In the 6 years since the consent was filed, the Applicant appears not to have been concerned about the case where she had applied to be joined as a party. If she had been diligent she would have known the case had been finalized. The averment by the Applicant that she was advised the file had been transferred to Embu ELC is not borne out by the record as the file had only been transmitted to Embu ELC for the duty Judge to give directions on the Applicant's Notice of Motion dated 20th February, 2017. The Judge at Embu, Angima J, gave directions on 23rd February, 2017 and inter alia directed the Applicant's said application be heard interpartes on 16th March, 2017 before the Judge at ELC Kerugoya. It was on the said date, 16th March, 2017 that the consent order dated 8th March, 2017, drafted by the Applicant's own Advocate was adopted by the Court.
18. Upon evaluation of the application, the record and the submissions of the parties, I am not persuaded to exercise my discretion in favour of the Applicant. The application dated 19th October, 2023 by the Applicant has the hallmarks of being an afterthought on the part of the Applicant. It lacks any merit and the same is ordered dismissed with costs to the Plaintiff/Respondent.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 17TH DAY OF OCTOBER 2024

J. M. MUTUNGI

ELC - JUDGE

