



Kitwili & another v Kitonga & another; Kiburu (Interested Party) (Environment & Land Case 34 of 2018) [2023] KEELC 16746 (KLR) (27 February 2023) (Ruling)

Neutral citation: [2023] KEELC 16746 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 34 OF 2018
BM EBOSO, J
FEBRUARY 27, 2023**

BETWEEN

SAMSON MWANZIA KITWILI 1ST PLAINTIFF

ROBERT MUTUKU KITWILI 2ND PLAINTIFF

AND

BISHOP ARTHUR KITONGA 1ST DEFENDANT

DIRECTOR OF SURVEYS 2ND DEFENDANT

AND

JOSEPH KURIA KIBURU INTERESTED PARTY

RULING

1. This suit was initiated by the plaintiffs in their capacity as joint administrators of the estate of the late William Kyumba [hereinafter referred to as 'the deceased']. It was their case that in 1990, they sold to the 1st defendant 27 acres out of Land Reference Number 9631/2. The 1st defendant paid them purchase price in full. Subsequently, in 1993, the 1st defendant undertook a survey of the land to excise the 27 acres purchased from them. The survey culminated in Deed Plan Number 182078. They were unhappy with the deed plan and wanted the survey exercise carried out afresh to excise the 27 acres. They alleged irregularities on part of the 1st and 2nd defendants in the impugned survey. They further alleged that the 1st defendant undertook the survey without their consent or authority.
2. The 1st defendant filed a statement of defence dated February 21, 2018, in which he averred that the impugned survey was carried out by the deceased. He contended that since he was not the registered proprietor of Land Reference Number 9631/2, it was not possible for him to undertake the survey. He denied the alleged irregularities and stated that since the deceased was alive at the time of the impugned



survey, the consent or authority of the plaintiffs was not necessary. He urged the court to dismiss the suit.

3. On October 11, 2019, Joseph Kuria Kiburu brought an application dated October 17, 2019, seeking to be joined in the suit as an interested party. His case was that he had purchased 5 acres out of the suit property from one Rairi Kabua Kituale, the wife of the registered proprietor of land Reference Numbers 9696/32/1 and 9631/2. Besides the application for joinder, he also brought a second application of even date, seeking an interlocutory injunction restraining the plaintiff and the defendants against trespassing on, wasting, constructing on, alienating or otherwise interfering with or dealing with Land Reference Numbers 9631/1 and 9631/2. On November 12, 2019, Gacheru J granted the interested parties' plea for joinder.

4. On January 21, 2020, a consent order was recorded before Gacheru J in the following terms:

' By consent of the parties:

1. That the 1st defendant does release the sum of Kshs 3,500,000 to the 2nd defendant within 7 days from the date hereof.
2. Upon payment and acknowledgement of Kshs 3,500,000 by the 2nd defendant, the 2nd defendant shall stand discharged and shall withdraw his claim against the plaintiffs and against the 1st defendant.
3. Pending acknowledgement and payment of Kshs 3,500,000 the status quo subsisting in LR 9632/1 and LR 9632/2 shall prevail.
4. The matter shall be mentioned in the next 14 days to confirm compliance and for the purposes of recording a final consent to compromise the suit between the plaintiff and the 1st defendant.'

5. The plaintiffs, the 1st defendant, and the interested party subsequently presented to the court a duly executed amended consent dated December 4, 2020. The amended consent was adopted by Gacheru J on June 23, 2021. The amended consent dated December 4, 2020 provides as follows:

' By Consent:

1. That the 1st defendant do release the sum of Kshs 3,500,000 to the interested party (Joseph Kuria Kiburu) within 7 days from the date hereof.
2. That upon payment and acknowledgement of Kshs 3,500,000 by the interested party (Joseph Kuria Kiburu) the interested party shall stand discharged and shall withdraw his claim against the plaintiffs and against the defendants.
3. That pending acknowledgement and payment of Kshs 3,500,000, the status quo subsisting in LR 9632/1 and LR 9632/2 shall prevail.
4. That this matter be mentioned on March 3, 2021 to confirm compliance and for the purposes of recording a final consent to compromise the suit between the plaintiff and the 1st defendant.

6. It does appear that the 1st defendant did not pay the sum of Kshs 3,500,000 to the interested party as agreed through the amended consent. Consequently, the interested party brought an application dated August 23, 2021, seeking contempt orders against the 1st defendant. The application was heard



and disposed through a ruling rendered by this court on November 12, 2021, in which the court made a finding to the effect that the 1st defendant was in contempt of the amended consent order dated December 4, 2020 and adopted on June 23, 2021. The matter was set down for sentencing but this was not done because parties engaged in further negotiations and urged the court not to pronounce a sentence. Parties further informed the court that they had agreed to dispense with the personal attendance of the 1st defendant.

7. On February 24, 2022, parties reported that there had been partial payment of the sum stipulated in the consent and they had agreed on how the balance was to be paid. On the same day, parties recorded the following further consent:

' By Consent

1. The outstanding amount of Kshs 3,300,000 shall be paid by the 1st defendant to the interested party in instalments of Kshs 500,000 every month payable on the 15th day of every month commencing from the month of March 2022 until the entire sum is paid in full.
 2. In default, the interested party shall be at liberty to execute.
 3. The interested party to have costs of the application dated August 23, 2021 borne by the 1st defendant.
8. Against the above background, the 1st defendant brought a notice of motion dated November 9, 2022 seeking the following orders:
1. That the amended consent order dated December 4, 2020 and which was adopted as an order of the court on June 23, 2021 be set aside.
 2. That the warrant of sale of property dated October 28, 2022 and the proclamation of the attachment of movable property by Chador Auctioneers dated November 3, 2022 be set aside.
 3. That any court decree issued in favour of the interested party be set aside.
 4. That costs of this application be provided for.
9. The application was supported by the 1st defendant's affidavit sworn on November 9, 2022. It was canvassed in the virtual court through brief oral submissions on January 17, 2023. The interested party opposed the application through a replying affidavit sworn on January 13, 2023 and brief oral submissions. The said application dated November 9, 2022 is the subject of this ruling.
10. The case of the applicant is that the amended consent dated December 4, 2020 was adopted when his advocate was away. He adds that the consent was recorded to facilitate release of the sum of Kshs 3,500,000 by his advocate to the interested party but by the time the consent was adopted, the funds that his advocate was holding had been put to other uses. He further contends that through a letter dated February 25, 2022, the plaintiff varied the terms of the agreement which they had reached, hence it became impossible for him to continue insisting on the offer to purchase the property in question. The applicant adds that since this suit has not been heard and determined, the interested party is at liberty to pursue his claim.
11. The interested party opposes the application. The case of the interested party is that the applicant was privy to the consent and has always been aware of the terms of the consent. He adds that the applicant



- made a partial payment in terms of the consent and entered into a further consent on payment of the balance. The interested party contends that the application is an attempt to delay the finalization of this suit and to perpetuate contempt for the court. The interested party urges the court to dismiss the application. The plaintiffs supported the interested party's position.
12. I have considered the application; the response to the application; and the parties' respective submissions. The key question to be answered in the application is whether the applicant has satisfied the criteria for setting aside a consent order.
 13. The principle upon which our courts exercise the jurisdiction to set aside consent orders are well settled. The Court of Appeal outlined the principle in *Flora N Wasike v Destimo Wambuku [1988] eKLR* in the following words:

' 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.'
 14. The High Court [Harris J] outlined the above principle in [*Kenya Commercial Bank Ltd v Specialized Engineering Co Ltd \[1982\] KLR 485*](#) in the following words:

' A consent order entered into by counsel is binding on all 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 misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.'
 15. Suffice it to state that, the jurisdiction to set aside a consent judgment or order is guided by clear principles. The jurisdiction is not exercised whimsically or capriciously. With the above principle in mind, I turn to the key question in this ruling.
 16. There is no dispute about the fact that the material consent was a tripartite instrument that was voluntarily executed by the plaintiffs, the 1st defendant, and the interested party. Although the 1st defendant's advocate did not attend court when the matter came up for adoption of the signed consent, the 1st defendant was aware of the court session and he did not challenge the adoption. Indeed, he not only performed the consent partially but also entered into a subsequent consent on February 24, 2022, undertaking to satisfy the award contained in the amended consent through monthly payments of Kshs 500,000. It is the subsequent consent of February 24, 2022 that gave the interested party the right to enforce the award through execution.
 17. Has the applicant placed before this court evidence that satisfy the criteria for setting aside a consent? Has he demonstrated a proper legal basis upon which this court can properly set aside the consent? I have examined and reflected on the grounds and evidence set out in the supporting affidavit and in the submissions by counsel for the applicant. The contention that the amended consent suffers some defects because counsel for the applicant was not in court when the signed amended consent was adopted by the court cannot hold. I say so because, firstly, what was placed before the court was a signed tripartite consent. The applicant was aware of the adoption and he never challenged it at the time. Instead, the applicant partially satisfied the consent and went a step further to record a further consent on how he was going to fully satisfy the amended consent. The subsequent consent recorded on February 24, 2022 gave the interested party the liberty to enforce the amended consent through execution.



18. The applicant's position is that this court can liberally interfere with the consent on the basis that this suit has not been heard hence the interested party will have the opportunity to ventilate his claim during trial. I do not agree with that view. The essence of the consent was to fully and finally settle the interested party's claim over the suit property. With the interested party's claim settled through the consent, the interested party had no right to seek leave to file pleadings in the suit. Put differently, the interested party's claim was fully compromised. What therefore remains to be adjudicated in this suit is the plaintiff's claim against the 1st defendant. It is therefore not correct that the interested party will still have the opportunity to ventilate his claim during trial. Put differently, the claim which the interested party had over the two titles was compromised through the consent. All that the interested party needs to do is to recover the unpaid balance of the sum of Kshs 3,500,000 through execution.
19. Looking at the evidence presented to the court, there is no proper basis to warrant the exercise of the court's jurisdiction to set aside the impugned consent. What emerges from the evidence placed before this court is that the applicant does not appear to appreciate the fact that the powers of the court to set aside a consent order are guided by clear principles and cannot be exercised whimsically or capriciously. The applicant seems to take the view that he can present a consent to this court, cause the consent to be adopted, file a further consent to implement the preceding consent, and after that, casually walk out of the consent as and when he deems appropriate. Regrettably, our civil justice system does not permit that.
20. For the above reasons, it is the finding of this court that the applicant has failed to satisfy the criteria upon which our courts exercise jurisdiction to set aside consent orders or consent judgments. Consequently, the 1st defendant's application dated November 9, 2022 is rejected and dismissed for lack of merit. The applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 27TH DAY OF FEBRUARY 2023

B M EBOSO

JUDGE

Mr Mwangi for the 1st Defendant

Mr Nyamu for the Interested Party

Court Assistant: Hinga

