



Strategic Urembo Sacco Society Ltd v Badawi; Meli (Interested Party) (Environment and Land Miscellaneous Application 56 of 2021) [2023] KEELC 16523 (KLR) (21 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16523 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 56 OF 2021
NA MATHEKA, J
MARCH 21, 2023**

BETWEEN
STRATEGIC UREMBO SACCO SOCIETY LTD PLAINTIFF
AND
HAIDER SULAYMAN BADAWI DEFENDANT
AND
SHADIA MOHAMED KIPKORIR MELI INTERESTED PARTY

RULING

- 1 The application is dated March 11, 2022 and is brought under Section IA, 1B, 34, 68, and 45 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, Order 1 Rule 10(2), Order 45 and Order 51 Rule 1 of the [Civil Procedure Rules](#). Cap 21 Laws of Kenya seeking the following orders;
1. That this matter be certified as urgent and service thereof in the first instance be dispensed with.
 2. That in the interim, the Honourable Court be pleased to issue an *ex-parte* order staying the execution of the consent orders given on the January 24, 2022 and issued on the January 27, 2022 in Mombasa ELC Misc. Application No 56 of 2021 (Strategic Urembo Sacco Society Limited Haidersulayman Badawi) and (or any decree thereof pending hearing and determination of this Application inter-partes.
 3. That in the interim, the Honourable Court be pleased to issue an *ex-parte* temporary order of injunction restraining the Respondents, their agents, servants, assigns and/ or any other person whatsoever from selling, advertising for sale, offering as security and/ or evicting the interested party and her children from all that property known as CR 62863/1 (Apartment No 5, 5th Floor On Subdivision Number: 16900) Original Number: 8822/3 Section I Mainland North pending hearing and determination of this. Application inter-partes.



4. That the Honourable Court be pleased to order that Shadia Mohamed Kipkorir Meli, the Applicant herein, be enjoined as an Interested Party in the proceedings of instance, Mombasa ELC Misc. Application No 56 of 2021 (Strategic Urembo Sacco Society Limited Haider Sulayman Badawi).
 5. That the Honourable Court be pleased to vacate and/ or set aside the consent orders given on the January 24, 2022 and issued on the January 27, 2022 in Mombasa ELC Misc. Application No 56 of 2021 (Strategic Urembo Sacco * Society Limited Haider Sulayman Badawi) and/ or any decree thereof.
 6. That the Honourable Court be pleased to order that the Interested party be granted leave to file her response in respect to the 1st Respondent's Notice of Motion Application dated December 9, 2021 and/ or any other documents filed and/ or to be filed thereof.
 7. That the cost of this application be borne by the Respondents.
- 2 It is based on the annexed Affidavit of Shadia Mohamed Kipkorir Meli and grounds that on the March 9, 2022, the 1st Respondent's Chief Executive Officer one Jared Matwetwe Ondwari left with the Interested Party/ Applicant's children (Son-8yrs old and Daughter-5yrs old) who were in the custody of the Interested Party/ Applicants mother at the time, an order from this Honourable Court issued on the January 27, 2022. That the said Jared Matwetwe Ondwari was accompanied by police officers who left the Interested Party/ Applicant's children and mother with traumatizing instructions that they should vacate the house with immediate effect as the same was on sale by the bank. The children were left crying and depressed in fear of being evicted from their home. That the said orders were a consent between the 1st and 2nd Respondent which was adopted by the Court on the January 24, 2022.
 - 3 That consent the suit be compromised in the following terms the Respondent herein shall grant the Applicant immediate access to the property for all such purposes not limited to exercising its rights as a charge in making entry to value CR 62863/1 (Apartment No 5, 5th Floor on Subdivision Number: 16900) Original by itself and/or its assigned agents to access for all such purpose of valuing and all such purpose in efforts to dispose the same through sale for the recovery of the charged amounts. That the Respondent herein, its agents, assignees and all such third parties within the CR 62863/1 (Apartment No 5, 5th Floor on Subdivision Number: 16900) Original grant the Applicant vacant possession within a period of 14 days. That the Respondent will bear all such costs in granting vacant with particular regard to conveyance of all such fittings and items within CR 62863/1 (Apartment No 5, 5th Floor on Subdivision Number: 16900) Original that do not make part of CR 62863/1 (Apartment No 5, 5th Floor on Subdivision Number: 16900) Original. That in default within 14 days, that the officer commanding station Nyali police station to provide security to the applicant to grant entry and vacant possession.
 - 4 That the said consent and orders were obtained fraudulently and through non-disclosure and/ or misrepresentation of facts. That the suit property, CR 62863/1 (Apartment No 5, 5th Floor On Subdivision Number: 16900) Original Number: 8822/3 Section 1 Mainland North is matrimonial property wherein the Interested Party resides with her two children (Son 8yrs old and Daughter 5yrs old) whose father is the 2nd Respondent. That there are ongoing proceedings before the Kadhi's Court, Mombasa in Petition No E184 OF 2021 where the Interested Party is seeking division of the matrimonial properties. This is a fact well within the knowledge of the 1st Respondent's CEO Jared Matwetwe Ondwari, the 2nd Respondent and the 2nd Respondent's Advocate one Hafidh Ogendo who had curiously signed the 1st Respondent's pleadings, letters and was holding brief for the firm of Mutete John & Company Advocates in the proceedings herein. That in the said proceedings Mombasa



Kadhi's Court Petition No E184 of 2021 orders were issued on the 9th June, 2021 restraining any dealing of any nature whatsoever with the suit property CR 62863/1 (Apartment No 5, 5th Floor on Subdivision Number: 16900) Original Number: 8822/3 Section 1 Mainland North pending hearing and determination of the Petition before the Kadhi's Court.

- 5 That the proceedings herein are a fraudulent scheme by the 1st and 2nd Respondents in collusion with the 2nd Respondent's Advocate one Hafidh Ogendo aimed at rendering the proceedings before the Kadhi's Court nugatory and to disenfranchise the Interested Party of her proprietary rights over the suit property CR 62863/1 (Apartment No 5, 5th Floor On Subdivision Number: 16900) Original Number: 8822/3 Section 1 Mainland North. That there is no charge over the suit property CR 62863/1 (Apartment No 5, 5th Floor On Subdivision Number: 16900) Original Number: 8822/3 Section 1 Mainland North registered in favour of the 1st Respondent and the said property has not been offered at all as security to any financial institution. That the assertions that the 1st Respondent had offered the 2nd Respondent a loan and the suit property was used to secure the same are an illusion and an orchestrated plan to disenfranchise the Interested Party of her proprietary interest over the suit property. That the records at the lands registry, Mombasa indicate that the only encumbrance registered against the suit property as at March 10, 2022 is a caution dated May 28, 2021 by the Interested Party claiming matrimonial property beneficial interest. That the Affidavit sworn by the 1st Respondent's CEO producing annexure JMO-2 as evidence is false and the annexure thereof is a forgery. Therefore, the said 1st Respondents CEO is liable for perjury and subversion of justice. That the 2nd Respondent is on a vengeance mission with the aid of the 1st Respondents officers, in particular the CEO one Jared Matwetwe Ondwari who is the 2nd Respondent's close friend and business partner to punish and torture the Interested Party for divorcing him for his promiscuous character and instituting a suit against him for child maintenance.
- 6 The Respondents state that Notice of Motion Application dated March 11, 2022 offends Section 6 of the *Civil Procedure Act* wherein the Intended Interested Party is a Petitioner in Petition No 184 of 2021. That the Intended Interested Party has raised similar issues in this case which issues are also directly and substantially in issue in a previously instituted suit (Petition No 184 of 2021). That from the reading of Section 6 of the *Civil Procedure Act*, this Court or any Court within the territory of Kenya has Jurisdiction to entertain any such matters and issues in the matter that are directly and substantially in issue in another matter.
- 7 That the Intended Interested Party was not part of the Consent Judgement dated January 27, 2022 so as to warrant her engagement by this Honorable Court for any orders against the consent between the Respondents. That neither does the Application reveal any error or mistake apparent on the face of the pleading to warrant a substantive review. That the Intended Interested Party, being his former wife consented to the charge instrument issued by the 1st Respondent for amounts in excess of Kshs. 5,700,000.00 with interests accrued to date. That the Charge with the 1st Respondent continues to accrue interest owing to amounts owing and due which accrues an interest of 1% of the sum every year/month which nearly comes to Kshs. 684,000.00 per year. (Attached and marked HSB-I is a copy of the statement of interest from the 1st Respondent on the Charged sum). That the Intended Interested Party ought to be enjoined instead of the 1st Respondent which acquires a statutory capacity to prosecute this Appeal on its behalf. That all actions undertaken by them to remedy the situation was out of good faith and as a measure to contain the damage from becoming a hazard to himself and his family.
- 8 That the Kadhi Court at Mombasa registered a Consent Judgement entered on the August 13, 2021 before Hon Al-Muhdhar A.S. Hussein (C.K) directing the Intended Interested Party continue to reside in the suit property for three months on condition that she does not exit Mombasa township nor



remarry. (Attached and marked HSB-4 is a copy of a Consent Judgement procured in the Kadhi's Court). That orders in the form of eviction orders were issued by this court evicting himself as the proprietor of the suit property and the Intended Interested Party on the April 26, 2022 whereas the Intended Interested Party returned and continued to reside and remain unlawfully in the suit property contrary to the orders of this Court made on the April 26, 2022. (Attached and marked HSB-5 are copies of images taken in evicting the Intended Interested Party by the OCS Nyali Police Station).

- 10 The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig vs Mallya* (1975) EA 266 where the Court stated that;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

- 11 And in the case of *Flora N. Wasike vs Destimo Wamboko* (1988) eKLR Hancox JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, and stated 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.”

- 12 This means then that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside. So, was this a case of fraud or misrepresentation or mistake on the part of the 2nd Respondent. The Black's Law Dictionary defines “fraud” as;

- “ 1. Knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime.”

Misrepresentation is defined as;

- “ 1. The Act or an instance of making a false or misleading assertion about something, usu. 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.

And “mistake” as;

- “ 1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (I) the parties to a contract did not mean the same thing, or



(2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.

13 The applicant's case is that the said consent and orders were obtained fraudulently and through non-disclosure and/ or misrepresentation of facts. That the suit property, CR 62863/1 (Apartment No 5, 5th Floor on Subdivision Number: 16900) Original Number: 8822/3 Section 1 Mainland North is matrimonial property wherein the Interested party resides with her two children (Son 8yrs old and Daughter 5yrs old) whose father is the 2nd Respondent. That there are ongoing proceedings before the Kadhi's Court, Mombasa in Petition No E184 of 2021 where the Interested Party is seeking division of the matrimonial properties. The Respondents submitted that the Intended Interested Party was not part of the Consent Judgement dated January 27, 2022 so as to warrant her engagement by this Honorable Court for any orders against the consent between the Respondents.

14 It is not in dispute that there are ongoing proceedings before the Kadhi's Court, Mombasa in Petition No E184 of 2021 where the Interested Party is seeking division of the matrimonial properties. I find that the 1st Respondent concealed material facts that the suit property, CR 62863/1 (Apartment No 5, 5th Floor On Subdivision Number: 16900) Original Number: 8822/3 Section 1 Mainland North is matrimonial property wherein the Interested party resides with her two children (Son 8yrs old and Daughter 5yrs old) whose father is the 2nd Respondent, when he entered into the consent with the 1st Respondent. I find this consent was entered through nondisclosure of material facts and must be set aside. I find that the application dated March 11, 2022 is merited and I grant the following orders;

1. That the Honourable Court orders that Shadia Mohamed Kipkorir Meli, the Applicant herein, be enjoined as an Interested Party in the proceedings of instance, Mombasa ELC Misc. Application No 56 of 2021 (Strategic Urembo Sacco Society Limited Haider Sulayman Badawi).
2. That the Honourable Court vacates and/ or sets aside the consent orders given on the January 24, 2022 and issued on the January 27, 2022 in Mombasa ELC Misc. Application No 56 of 2021 (Strategic Urembo Sacco * Society Limited Haider Sulayman Badawi) and/ or any decree thereof.
3. That the Honourable Court orders that the Interested Party be granted leave to file her response in respect to the 1st Respondent's Notice of Motion Application dated December 9, 2021 and/ or any other documents filed and/ or to be filed thereof.
4. That the cost of this application be borne by the Respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

TABLE

MISC. APPLICATION No 56 OF 2021 Page 12 of 1

