



**Kibuna v City Council of Nairobi & 4 others (Environment & Land
Case 529 of 2018) [2023] KEELC 17170 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17170 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 529 OF 2018**

**LN MBUGUA, J
APRIL 27, 2023**

BETWEEN

JEDIDAH NGINA KIBUNA PLAINTIFF

AND

CITY COUNCIL OF NAIROBI 1ST DEFENDANT

ABRAHAM MWANGI NJIHIA 2ND DEFENDANT

MORRIS GITONGA NJUE 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

VERA MWASI 5TH DEFENDANT

RULING

1. The Plaintiff's application dated 6.12.2022 is for determination. She seeks orders that judgment on admission be entered against the 1st and 2nd Defendants as prayed in the re-amended plaint dated 18.1.2020. She also seeks costs for the application.
2. The application is based on grounds on its face and on the Plaintiff's supporting affidavit sworn on 6.12.2022. She deposes that on 28.7.2006, the 2nd Defendant and herself recorded a consent to the effect that the 2nd Defendant herein has no claim over the land known as LR No. Nairobi Block 63/493, thus this court should issue judgment based on the said admission.
3. The application is opposed by the 1st Defendant *vide* its grounds of opposition dated 26.1.2023. It states that the 1st Defendant's liability can only be determined at the trial hereof.
4. The 2nd Defendant opposes the application *vide* grounds of opposition dated 14.2.2023 and a replying affidavit sworn on even date. He contends that he was allocated Plot No.230 at Jamhuri Phase 1 by



- the 1st Defendant. Subsequently, he took possession and was issued with a lease then registered as proprietor of Nairobi Block 63/493 which he transferred to the 4th Defendant.
5. He contends that neither him nor his Advocate signed the consent dated 28.7.2006 and at the time it was allegedly signed, he had already sold his interest in the suit property to the 4th Defendant.
 6. The 4th and 5th Defendants also opposed the application by way of grounds of opposition dated 11.1.2023. They state that the prayers sought are misplaced since the plaint was amended.
 7. In rejoinder, the Plaintiff filed a replying affidavit sworn on 30.1.2023 reiterating the contents of her affidavit in support of her application.
 8. The matter was canvassed by way of written submissions.
 9. The Plaintiffs' written submissions are dated 1.1.2023. She avers that the 2nd Defendant has not unequivocally challenged the validity or accuracy of the consent document dated 28.7.2006 to the effect that he voluntarily signed the same, thus there is an admission. He adds that the 2nd Defendant's defence filed on 14.12.2022 is flawed.
 10. The 1st Defendant's submissions are dated 17.2.2023. While it filed grounds of opposition to the Plaintiff's application, its submissions are filed in support of the application. It submits that the suit property was initially known as Plot Number 230 and together with other plots, they formed the Jamhuri Phase II scheme. In 1992, it allocated the said plot to the Plaintiff *vide* a letter of allotment dated 27.10.1992 and it was assigned LR No. Nairobi/Block /63/493 when Jamhuri Phase II Scheme was surveyed.
 11. It is the 1st defendant's submission that it has not aggrieved the Plaintiff in any way, thus it does not oppose the application dated 6.12.2022 to the extent that no order as to costs is awarded in favour of the Plaintiff against it.
 12. The 2nd defendant filed written submissions dated 14.2.2023. He submits that the Plaintiff has not met the threshold to be granted judgment on admission and that the consent dated 28.7.2006 was not signed by all counsels for the parties. He relies on the case of [*Express Automobile Kenya Limited v Kenya Farmers Association Limited & another*](#) [2020] e KLR, the case of [*Endebess Development Company Limited v Coast Development Authority*](#) [2018] eKLR, [*Momanyi v Hatimy & Another*](#) [2003] E.A, [*Choitram v Nazari*](#) [1984] KLE 327 as well as the case of [*Cassam v Sachchania*](#) [1982] KLR 191.
 13. The 4th and 5th Defendants filed submissions dated 19.1.2023. They argue that the consent signed in July 2006 had no legal consequence since the suit property was registered in favour of the 5th Defendant who had purchased the same from the 4th Defendant. It also submits that in the plaint dated 9.2.2009 and further amended on 18.9.2009, the Plaintiff seeks orders only as against the 4th and 5th Defendants who were not party to the consent dated 28.7.2006.
 14. They also argue that during hearing of the Plaintiff's case, the Plaintiff attempted to produce the consent dated 28.7.2006 as an exhibit but the move was rejected by the court and as pleadings stand, there is no judgement capable of being entered as against the 1st and 2nd Defendants in line with the consent.



15. The issue for determination is whether judgment on admission should be entered against the 1st and 2nd defendants. The Plaintiff annexed a consent dated 28.7.2006 to her instant application. Clause 1 of the consent states;
- “Judgement be entered against the 2nd Defendant in terms of the plaint dated 11.12.2001 and further that the 2nd Defendant has no claim over the land known as L.R No. Block 63/493.”
16. Clause 2 of the consent reads as follows;
- “That the 3rd Defendant may, subject to the hearing and determination of this suit and/or further orders of this court rectify the register as prayed by the 1st Plaintiff in prayer (d) of the plaint dated 11.12.2001 and filed on the same date.”
17. The consent is then executed by the Advocate for the Plaintiff and the 2nd Defendant. It is not executed by the 3rd Defendant whom clause 2 of the consent gives obligations. A perusal of the record indicates that on 28.7.2006, the Deputy Registrar of this Court recorded the said consent as an order of the Court. It has not been set aside or appealed against.
18. Order 13 rules 1 and 2 of the *Civil Procedure Rules* provides for judgment on admission. In *Express Automobile Kenya Limited v Kenya Farmers Association Limited & another* [2020] eKLR, the Court stated that;
- “In law an admission should reflect a conscious and deliberate act of the person making it, showing an intention to be bound by it. As for the court, the power to enter judgement on admission is not mandatory or peremptory; it is discretionary. The court is bound to examine the facts and prevailing circumstances keeping in mind that a judgement on admission is a judgement without trial which permanently denies a remedy to the sued party by way of an appeal on merits.”
19. The record indicates that on 29.01.2009, the parties in the suit entered into another consent. They all agreed to amend their pleadings to bring out all the issues. The 2nd Defendant never amended his defence within 14 days from 29.01.2009.
20. In *Flora N. Wasike v Destino Wamboko* [1988] eKLR the Court stated that:
- “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.....”
21. The findings of this court are that the court cannot enter judgment allegedly on admission when there is another consent judgment which has not been set aside. Secondly, it is noted that one of the grounds in support of the application is that the 2nd defendant did not file a statement of defence on the re-amended plaint. The consequences of failing to defend a claim are well spelt out under Order 10 of the *Civil Procedure Rules* where Judgment is only entered in relation to a liquidated claim. See- *Peter Karanja Kamani v Isaac Mwangi Kimani* [2018] eKLR.
22. Finally, I find that the trial is already under way and the case is very old, there is need to focus on the main trial in order to have a closure of the matter. Further there is a delay of close to 17 years from the time of the alleged consent in year 2006 which has not been sufficiently explained.



23. In the end, I find that the application is not merited. The same is hereby dismissed. Costs thereof shall abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Maina for Applicant/ Plaintiff

Katila for 1st Defendant/Respondent

Ondabu for 2nd Defendant/Respondent

Njeru for 3rd Defendant/Respondent

Court assistant: Vanilla

