



Leah v Alushula & another; Luta (Applicant) (Environment & Land Case 46 of 2017) [2023] KEELC 17011 (KLR) (25 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17011 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 46 OF 2017**

DO OHUNGO, J

APRIL 25, 2023

BETWEEN

KHAYOMBE MERCY LEAH PLAINTIFF

AND

WYCLIFF OMOTO ALUSHULA 1ST DEFENDANT

MARGARETE ANZETSE OMOTO 2ND DEFENDANT

AND

PETER KALERWA LUTA APPLICANT

RULING

1. This suit was filed on February 14, 2017, by Peter Kalerwa Luta, as the sole plaintiff. The plaint was later amended pursuant to orders made on April 30, 2020, thereby introducing Khayombe Mercy Leah, as the second plaintiff. The changes did not end there. On March 1, 2022, Peter Kalerwa Luta withdrew his case with costs to the defendants. Currently, Khayombe Mercy Leah is the only plaintiff.
2. The defendants later filed their bill of costs dated March 21, 2022. The bill was taxed by consent on October 12, 2022, at KShs 190,000 and a stay of execution for 45 days was granted by consent. Peter Kalerwa Luta did not settle the taxed costs and as a result, warrants of attachment and sale of his property were issued on November 30, 2022. The parties later appeared before the Deputy Registrar on December 9, 2022 and recorded the following consent:
 1. THAT there be stay of execution/ proclamation/ attachment of the 1st Plaintiff/judgment debtors properties subject to the following;
 - a. THAT the judgment debtor has today paid Kshs 20,000/=.



- b. THAT the judgment debtor to pay Kshs 20,000/= on or before December 10, 2022
 - c. THAT the judgment debtor to pay the balance on or before February 28, 2023.
 2. THAT the judgment debtor to pay the Auctioneers charges to be agreed upon failure to which to be taxed.
 3. THAT in default of any installment (sic) execution to issue.
3. Peter Kalerwa Luta later filed Notice of Motion dated March 8, 2023, which is the subject of this ruling. The following orders are sought in the application:
1. [Spent]
 2. [Spent]
 3. That the order of December 9, 2022 be set aside, reviewed.
 4. That the judgment debtor do settle the balance of the costs by monthly installment (sic) of Ksh 10,000/= with effect from April 2023 till payment in full.
 5. That costs be provided for.
4. The application is supported by an affidavit sworn by Peter Kalerwa Luta in which he deposed that out of the taxed costs of KShs 190,000, he had paid KShs 40,000 and that he had agreed to settle the balance by February 2023 based on a promise from the government that it would pay him monies owed to him. That since the government did not fulfil the promise, he is unable to comply with the terms of the consent orders of December 9, 2022 and is only able to raise KShs 10,000 per month from proceeds of farm produce.
5. The defendants opposed the application through a replying affidavit sworn by Wycliff Omoto Alushula, the first defendant. He deposed that they had been forced to file the bill of costs following Peter Kalerwa Luta's failure to agree on and settle their costs. That even after the consent orders of December 9, 2022 were made, Peter Kalerwa Luta verbally sought an extension but upon refusal by the defendants, he undertook to settle as per the consent but failed to. He urged the court to dismiss the application.
6. The application was canvassed through oral submissions. Counsel for the applicant argued that the applicant does not in any way plead mistake, fraud or misrepresentation but is simply stating that for reasons beyond his control, the money he had expected to receive at the time of entering the consent has not been forthcoming.
7. In response, counsel for the defendants/respondents argued that a consent can only be set aside due to mistake, fraud, or misrepresentation yet the applicant had not cited any of those grounds. Further, that the applicant had not availed anything to show that the government owes him any money.
8. I have considered the application, the affidavits, and the submissions. The principles that guide the court while considering an application to set aside a consent were discussed by the Court of Appeal in *Flora N Wasike v Destimo Wamboko [1988] eKLR*. The same Court restated the principles in *Gitonga & another (Suing as the Legal Representatives of John Gitonga Kihara) v National Bank of Kenya*



as follows:

- '70. In the seminal case of *Flora N Wasike vs Destimo Wamboko* [1988] eKLR, this Court pronounced itself on the nature of a consent order and the circumstances under which it may be set aside, and had this to say: '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.'
 71. In *Purcell vs F C Trigell Ltd* [1970] 2 All ER p 671, Winn LJ observed at p 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 knowledge of the material matters by legally competent persons'
 72. In *Geoffrey M Asanyo & 3 Others vs. Attorney General* [2018] eKLR, the Supreme Court expressed itself thus: '(98) In the matter before us, we thus note that neither before this Court nor any of the Superior Courts, was it argued or alleged that the Consent as filed by parties was entered into through coercion, misrepresentation and/or fraud. In essence, the elements/principles for setting aside such a consent were never alleged and/or proved.'
9. Thus, we do not need to reinvent the wheel. A consent cannot be varied or set aside unless it was obtained by mistake, fraud, or misrepresentation, or by an agreement contrary to the policy of the court, or for a reason which would enable the court to set aside an agreement. The applicant is not pleading mistake, fraud, or misrepresentation. Instead, his case is that for reasons beyond his control, some money which he had expected to receive from the government at the time of entering the consent has not been forthcoming.
 10. To begin with, the reasons advanced by the applicant do not fit under any of the grounds for setting aside an agreement. Even if they did fit, I am not persuaded that the applicant has demonstrated that either the national government or the county government owes him any money. Payments due from government are highly regulated and documented matters. It should not be difficult to avail credible documentary evidence to support such entitlement, if any. The letter which he annexed to his application is addressed not to him but to "Whom it may concern." Even though he argued that it is copied to him as a director of *Pekal Construction and General Contractors*, he did not produce any proof that he is in fact a director of the entity or that he would personally be entitled to the money.
 11. In view of the foregoing, I find no merit in Notice of Motion dated March 8, 2023. Consequently, I dismiss the application with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF APRIL 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

Mr Okinyo holding brief for Mr Fwaya for Peter Kalerwa Luta/Applicant

Ms Anono holding brief for Mr Atulo for the Defendants/Respondents



Court Assistant: E. Juma

ELCC No. 46 of 2017 (Kakamega) Page 2 of 2

