



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO. 22 OF 2016

HNN.....PLAINTIFF

VERSUS

JNK.....DEFENDANT

RULING

1. This suit was brought by **HNN** the Plaintiff herein, in October 2016 seeking against the Defendant **JNK** a declaration that the parties were married under Kikuyu Customary Law; a permanent injunction to restrain the Defendant from harassing, threatening, evicting and or interfering with the Plaintiff's peaceful occupation and enjoyment of the matrimonial properties known as Plot no. xx Githiga Market, LR Nos. Githunguri/Githiga/xxxx, xxxx, xxxx, xxxx, xxxx and xxxx (hereinafter generally referred to as the suit properties); and further an injunction to restrain the Defendant from selling or transferring the said properties. Also filed contemporaneously with the suit was a motion seeking temporary orders to restrain the Defendant in the terms stated in the plaint.

2. The Defendant subsequently filed a replying affidavit admitting that he was married to the Plaintiff and that the couple had one child. Concerning the property in dispute however he asserted to have inherited the suit land comprising seven acres from his father and developing a home prior to his marriage to the Plaintiff, allegedly in 1996.

3. The events subsequent are pertinent to the determination of the matter at hand. On 30th November 2016, the parties through their advocates informed the court that they were negotiating an out of court settlement and sought time to pursue the same. The court directed them to seek mediation. On 21st June 2017, the court was told that the parties had a draft consent and were working on it but in the next scheduled date, it was reported that no settlement had been reached. The record contains a consent dated 25th July 2017 and filed into court by the parties on 26th July 2017. However it was not placed before the court or brought to the court's attention on the 26th July 2017 when the parties appeared for mention before Ngugi J, counsel for the Defendant indicating, evidently erroneously, that no settlement had been reached. Significantly, counsel for the Plaintiff was not in attendance even though he and counsel for the Defendant had executed the consent dated 25th July 2017.

4. The above notwithstanding, the Defendant on 23rd October 2017 filed a motion seeking to set aside the consent recorded on 25th July 2017 and filed on 26th July 2017. That application was withdrawn on 22nd May 2018 and the parties stated that they were "discussing" the original notice of motion by the Plaintiff with a view to recording a new settlement. On the next mention Mr. Kaburu for the Defendant confirmed that parties had substantially agreed on a proposed consent. A further mention was set for 1st August 2018. On that date Mr. Mitiambo for the Plaintiff read out the terms of the consent by the parties as follows:-

"It has been agreed as follows:

By consent:

1) the Defendant to surrender two acres of his land at Githiga market, Kiambu County (which is) to be registered in the Plaintiff's name as sole proprietor. The location of the portion to be identified/agreed;

2. the Defendant to pay Shs.100,000/= to the Plaintiff to enable her start a business for her maintenance;

3. the Plaintiff be at liberty to return to her matrimonial home at Githiga market;

4. the Defendant to surrender one of the matrimonial homes to the Plaintiff for her own portion and use;

5. this matter be mentioned on 24th September 2018 for further orders."

5. With Mr. Kaburu for the Defendant confirming the terms, the court adopted the consent as an order of the court. The two counsel countersigned the order of the court on the record of proceedings. Come the mention on 24th September 2018 and the Defendant had instructed a new counsel whose brief was held by a counsel with no instructions on further orders envisaged in the consent above. The court fixed the matter for a further mention on 25th October 2018 directing that the new counsel, Mr. Chege be present in person.

6. By that date, the new advocate for the Defendant had filed a motion dated 20th September 2018. The single prayer in the motion seeks that the consent order of 1st August 2018 be reviewed and/or set aside. On grounds *inter alia* that the Defendant's erstwhile counsel recorded the consent without the Defendant's instructions and did not consult the Defendant before doing so ; that the consent was fraudulent and mistaken; that the Defendant had no land at Githiga market available for surrender, money to pay to the Plaintiff or matrimonial home to give to the Plaintiff as per the terms of the consent. These grounds, and some of the history of the matter are captured and fleshed out in the Defendant's supporting affidavit.

7. On 30th May 2019, the Plaintiff filed an affidavit in opposition to the motion. Therein she stated that both the consents executed on 25th July 2017 and 1st August 2018 were preceded by negotiations in which the parties, their advocates and other persons participated. She attached the signed minutes/agreement of the meeting of 21st June 2018 in respect of the latter consent and a copy of the initial consent dated 25th July 2017. She defended the consent recorded on 1st August 2018 and asserted that indeed the couple owned land at Githiga market and that the Defendant is a person of means. She further deposed that the Defendant had continued to dispose of family land and enjoy matrimonial assets while using delaying tactics to frustrate her cause. She urged the court to dismiss the application.

8. By a Further or Supplementary affidavit, she asserted that the Defendant's constant change of advocates is mischievous and intended to defeat consents in the matter ; that the Defendant willingly participated in negotiations leading to the impugned consents and had not filed a complaint against his erstwhile advocate in respect of the alleged failure to obtain his instructions concerning the consent of 1st August 2018; that the two acres due to her under the said consent were to be parceled out of the land parcels LR Nos Githunguri/Githiga/xxxx to xxxx; that having left the matrimonial home in 2016 arising from the Defendant's cruelty, she has been condemned to a life of penury with her grandchild and son's widow, while the Defendant continues to delay this cause through mischief while exclusively enjoying the matrimonial assets.

9. The Defendant's submissions in support of his motion take cue from his affidavit material. It is submitted that the Defendant does not have the requisite means or own the necessary assets to enable him to comply with the terms of the consent and therefore the consent order of 1st August 2018 is mistaken and unenforceable. Further that the consent order is bad for vagueness, is therefore liable to be vitiated or rendered void. Taking issue specifically with the terms in respect of 2 acres of land said to be located at Githiga market and to be surrendered under the consent to the Plaintiff, the Defendant states that his land at Githiga market is plot no. xx Githiga market and measures an eighth of an acre; and that the consent order did not indicate the portion from which the 2 acres were to be excised. The court was therefore urged to set aside the consent.

10. For her part, the Plaintiff submitted that the Defendant had not disputed his signature on the agreement reached in the meeting of 21st June 2018. The Plaintiff reads mischief in the disclaimers upon which the application is premised, in light of the consent terms. The Plaintiff asserts that the Defendant has not established any grounds such as fraud, collusion, or ignorance of material facts to justify the setting aside of the consent. Citing the case of **Flora N. Wasike v Destimo Wamboko [1988] eKLR** regarding on the grounds upon which a consent order may be set aside, the Plaintiff submitted that the matters canvassed by the Defendant do not bring his case within those parameters. Concerning claims that the Defendant's erstwhile counsel had no authority to record the consent, the Plaintiff called to his aid the decision in **Kenya Commercial Bank Ltd. V Specialized Engineering Co. Ltd [1982] KLR 485** for the proposition that an instructed advocate has the client's implied authority to compromise and settle an action and unless a limitation on such authority by the client has been brought to the notice of the adverse party, such limitation is of no avail to the client. Finally, it was argued that the Defendant has not established the grounds in support of the motion and it ought to be dismissed.

11. The court has considered the history of this matter as set out in the first part of this ruling, and the rival affidavit material and submissions by the respective parties. The fact that the parties herein are an estranged couple and that there are several assets claimed by the Plaintiff as matrimonial property but currently in the control and name of the Defendant is not disputed. The court must determine whether the Defendant has established grounds for the setting aside or variation of the consent recorded on 1st August 2018.

12. The Defendant's motion is expressed to be brought under Order 45 rule 1 of the Civil Procedure Rules which provides that:

“Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

13. In the celebrated case of **Flora N. Wasike** the Court of Appeal (per **Hancox JA**) 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: see the decision of this Court in *JM Mwakio v Kenya Commercial Bank Ltd. Civil Appeals 28 of 1982 and 69 of 1983*. In *Purcell v F. C.*

Trigell Ltd [1970] 2 ACCER671, Winn LJ said at 676:

“It seems to me that, if a consent order is to be set aside on grounds which justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside of rectification of this order looked at as a contract...

It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in *Hirani v Kassam* [192] 19 EACA 131 at 134 as follows:

“The mode of paying the debt, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in *Setton on Judgments and Orders* (7th Edn) Vol. 1 p. 124 as follows:-

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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, on in general for a reason which would enable the court to set aside an agreement.”

14. The latter passage was also followed by the court in *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* where the court held that:

“..[A]fter the commencement of an action, the solicitor for a party has an implied general authority to compromise and settle the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the notice of the other aside.”

15. The court in the above case refused to set aside the consent order, and on appeal, the Court of Appeal held that the advocate had both the implied and ostensible general authority to bind the appellant client “in effecting the compromise”. The court adopted the judgment of the High Court and dismissed the appeal.

16. Applying the foregoing principles to the facts of this case, it is beyond dispute that the Defendant’s erstwhile advocate had the implied and ostensible general authority to bind the Defendant in compromising the action in terms of the consent. There is no evidence whatsoever that the advocate’s authority was limited in any way or that any negative instructions had been given by the Defendant to the said advocate in that regard. Nothing therefore turns on his complaint that his erstwhile counsel did not consult him. But that is not all.

17. The Defendant has not disputed that the consent recorded on 1st August 2018 was the outcome of a meeting held on 21st June 2018 attended by the parties, their advocates and other third parties. These persons and the parties appended their signatures to the agreement arrived at during that meeting [see annexure **HNN II** to the Plaintiff’s replying affidavit]. The terms of that agreement are similar to the terms eventually read to the court on 1st August 2018 and affirmed by the Defendant’s advocate. Grounds (iii) to (vi) of the motion appear to suggest that the consent was fraudulent and resulted from mistake as the Defendant had no means to satisfy the terms of the consent. The question arising is- whose mistake or fraud resulted in this consent? It is not apparent from the Defendant’s material who was responsible for the alleged fraud, which is not particularized.

18. As for the alleged mistake, it is suggested in submissions that the mistake “*arose as a result of the applicant’s advocate on record failing*” to consult his client; or to obtain his instructions. But as already observed, the terms of the consent of 1st August 2018 replicate the terms contained in the document **HNNII** which the parties, their advocates and third parties signed. The Defendant cannot surely be heard to say that he committed himself by that document to perform obligations that he knew he was incapable of, as he now purports by claiming to have no means or property. Besides, he is bound by his pleadings before this Court. By his replying affidavit filed on 24th November 2016 in response to the suit and original application, the Defendant confirmed ownership of a matrimonial home and at least seven acres of land at Githiga, some of which is developed, confirmed that he is a tea and dairy farmer and active in business. The disclaimers to the contrary in the instant motion appear merely intended to enable him escape the terms of the disputed consent.

19. The fact, emphasized by the Defendant, that the terms of the consent were somewhat imprecise cannot defeat the consent in the circumstances of this case. The parties had over a long period since the filing of the suit been engaged in negotiations, and on the date the consent was recorded, it was indicated that further consent orders were to follow. This however was not to be as the Defendant changed counsel and filed the present motion prior to the date set for such further orders. This, it must be stated was not the first time that the Defendant acted this way. On 26th July 2017, a consent had been filed into court concerning some of the disputed assets. The consent was duly signed by the advocates for the Defendant and the Plaintiff. However, the new counsel for the Defendant made no reference thereto during the mention on 26th July 2017 and misinformed the court by stating that the parties had not reached a settlement.

20. Nevertheless, on 23rd October 2017 the Defendant by his new counsel applied to set aside “*the consent recorded on 25th July 2017 and filed in court on 26th July 2017.*” On grounds *inter alia* that the consent was executed by his previous counsel while he had already instructed a new counsel, and that he had had no opportunity to consider the terms of the consent which had allegedly not been brought to his attention during negotiations. Although the application was subsequently withdrawn and parties given time upon their request, to continue negotiating, the Defendant has once more employed the same tactic upon recording the consent of 1st August 2018. He is seeking yet again to renege from a duly recorded consent. The Defendant is clearly playing the game of smoke and mirrors before this court which conduct demonstrates a cynical regard for the process of the court.

21. Apart from the first term of the consent which is somewhat imprecise for failing to identify with adequate details the parcel of land concerned, the terms numbers 2 to 4 of the consent are specific enough for performance and enforcement. That said, in term number 1 it was agreed in principle that the Defendant was to cede 2 acres of his land at Githiga market to be registered in favour of the Plaintiff. As a matter of logic, two acres of land if not existing separately, could only be excised from a larger parcel among the suit properties and without doubt, the such parcel is located within Githiga area which is the area in which the Defendant owns land. The reference to Githiga market in that term cannot defeat the term as the Defendant admittedly has several acres of land in Githiga area. The consent cannot be vitiated merely because of the failure to make specific reference to the particulars of the land parcels or assets concerned which at any rate are pleaded in the suit. There is little ambiguity there as the descriptions in the consent are sufficient to identify the intended properties. Considering the history herein, the court agrees with the Plaintiff that the present application is borne of mischief and ought not to be countenanced.

28. Having reviewed the material before me it is my conclusion that no fraud, mistake, or ambiguity in the terms of the consent and recording thereof, sufficient to justify the setting aside of the consent order, has been established. The motion filed on 20th September 2018 has no merit and is dismissed with costs. I notice that the Plaintiff had on 5th March 2019 filed an application seeking inter alia to have the Deputy Registrar sign requisite forms for the transfer of 2 acres of land to the Plaintiff in terms of the consent. I would direct that the said motion be held in abeyance given that no judgment has been entered. The court is however satisfied that in terms of the provisions of Order 25 Rule 5 (1) of the Civil Procedure Rules, the consent recorded on 1st August 2018 lawfully and effectively compromised the suit in part and the Plaintiff may, if she so desires, apply for judgment to be entered accordingly. In the meantime, the court directs that the status quo obtaining as of today's date, in respect of the proprietorship of all the suit properties herein, be maintained until further orders of this Court.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 23RD DAY OF OCTOBER 2020.

C. MEOLI

JUDGE