



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 74 OF 2010

PETER SOLACHERPLAINTIFF

VERSUS

ROMANTIC HOTELS KENYA LIMITED.....1ST DEFENDANT

JOSEPH BRUNLENHNER.....2ND DEFENDANT

RULING

1. By Notice of Motion dated 20th November, 2018, the Applicant/Plaintiff herein has moved this court under Order 45 (i) and section 1 of the Civil Procedure Act, for orders, inter alia

(a) spent;

(b) order given on 30.8.2012 and issued on 1.8.2016 consolidating this case with HCC No. 20 of 2011 (Malindi) Romantic Hotels Kenya Ltd v Peter Solacher T/A Petley's landing and HCC NO 111 of 2008 Peter Solacher T/A Petley's Landing V Diani Peak Ltd be reviewed to the effect that the cases be de-consolidated for separate hearing and determination by courts with the requisite jurisdiction.

(c) The trial of this case HCC No.84 of 2010 proceeds on the basis of the evidence already on record.

2. The motion is supported by grounds advanced on the face of the application and in the affidavit in support by Mr. ANTONY MASILA which are reproduced herein for their full purport;

(a) That the consolidation of this suit with HCCC No. 20 of 2011 and HCCC No. 111 of 2008 was a mistake and an error on the record because the dispute in this case is purely a commercial transaction while in HCCC NO. 20 of 2011 and HCCC No 111 of 2008 the disputes are on the right to use or occupy land in a landlord-tenant relationship.

(b) The High Court lacks jurisdiction to entertain HCCC NO. 20 of 2011 and HCCC NO. 111 of 2008 by virtue of Article 165 and 162 (2) of the Constitution.

(c) The issues and parties in this case and HCCC NO.20 of 2011 and HCCC No. 11 of 2008 are not similar.

(d) That the consent order purporting to consolidate the suit was obtained ex-parte by the Respondents in HCCC NO. 20 of 2011

(e) That hearing and determining the case as a single action will taint the trial with nullities.

3. In response to the application dated 20th November, 2018, the Respondent filed a replying affidavit sworn by JACKLINE CHEPKIRUI CHEPKWONY on the 7th December, 2018, in which she avers follows;

(a) The application is an abuse of the court process since the matter is part-heard and the plaintiff has already closed its case.

(b) The Plaintiff /Applicant consented and had no objection to the consolidation of the matters and the subsequent transfer to Mombasa for hearing.

(c) That the said suits are inter-related and they involve the same parties, the same premises and the Defendant /Respondent is claiming a set off/center claim against the Plaintiff/ Applicant in HCCC No. 20 of 2011 and HCCC NO. 111 of 2008

(d) The Applicant is guilty of laches having brought the said application after 7 years.

(e) The Applicant has failed to satisfy the conditions for review.

(f) That HCCC NO. 111 OF 2008 has been missing from the court registry and the Applicant instead of applying for reconstruction, has opted to file this present suit.

(g) The Defendant/ Respondent will be prejudiced if the application is allowed.

4. On 17th December, 2018, the parties counsel were directed to urge the application by way of written submissions.

5. The submissions by the Applicant/Plaintiff are dated 8th February, 2019 and filed on 11th February, 2019 while those by the Respondent/Defendant are dated 21st January 2019 and filed on even date.

APPLICANT/PLAINTIFF'S SUBMISSION.

6. In their submissions, the Applicant made a case in support of their application by stating that the dispute in the instant case is purely circumstantial in which the plaintiff claims moneys loaned to the Defendant/Applicant while in HCCC NO 20 of 2011 and HCCC No.111 of 2008, the disputes are on the right to use or occupy land in a land lord-tenant relationship on a property known as Petleg Inn Hotel Building.

7. According to the Applicant/Plaintiff, the High court lacks jurisdiction to try HCCC NO. 20 of 2011 and HCC No. 111 of 2008. They have cited Articles 165(5) and 162 (2) of the Constitution which vests jurisdiction to try disputes on right to occupy and use of land to the Environment and Land Court. He also cited the case of REPUBLIC VRS KARISA CHENGO & 2 OTHERS (2017) e KLR and CARMELLA WATHUGU KARIGACA VRS MARY NYOKABI KARIGACA (1997) eKLR.

8. He submitted that this case does not have similar or substantial questions of law or fact similar with HCCC NO. 20 of 2011 and HCCC No. 111 of 2008. That the issues in HCCC N. 20 OF 2011 relate to the nuisance issues while in HCCC NO 111 of 2008 relate to the alleged breach of a lease. This case is about a dispute over a loan given and not repaid.

9. The Applicant has also submitted that the parties in the suit are not the same in that Diani Peak Ltd who is the 1st Defendant in HCCC No 111 of 2008 is not a party in the suit while JOSEPH BUNLEHNER who is the 2nd defendant in this case is not a party in HCCC No. 20 of 2011 and HCC NO. 111 of 2008. In fact the two are not litigating under any part in those matters.

Further, the Applicant/Plaintiff has submitted that the claim that the consent order purporting to consolidate the suits was obtained, is misleading the court.

10. In conclusion, the Applicant submits that the hearing and determination of the case as one action will taint the proceedings with ultra-vires and nullities and that the order consolidating the cases will not serve any useful legal purpose.

RESPONDENT'S SUBMISSIONS

11. In response to the Applicant's/Plaintiff's application dated 7.12.2018, the Respondent denied that he obtained orders for consolidation before Hon Lady Justice C. Meoli ex-parte since the Plaintiff /Applicant wrote a letter to the defendant counsel and copied to the Defendant counsel that they had no objection to the consolidation of the matter and the matter being brought to Mombasa for hearing annexed as JCC1. This is what Hon. Justice Meoli considered in making the order for consolidation.

12. According to the Respondent, the suits are inter-related as they involve the same parties, the same premises and the Defendant/Respondent is claiming a set off/ counter –claim against the plaintiff/Applicant in HCCC No 20 of 2011 and HCC No. 111 OF 2008.

13. The Respondents submitted that the Applicant is guilty of laches as the said application was brought after section (7) years. This is because the order by Honourable Lady Justice C Meoli was made on 30.8.2012 so that the Applicant's application amounts to abuse of the court process. He submits that the delay has not been explained and the matter has proceeded with the Plaintiff/Applicant closing his case. That these is no new evidence, or error appearing on the face of the record nor any other sufficient reason adduced by the plaintiff/Applicant to warrant review of the said order.

14. The Respondent stated that the file HCC No.111 of 2008 went missing from the court registry and it has not been traced to date. The Respondent regrets that instead of the Plaintiff/Applicant filing for reconstruction of the file, it opted to file the current application, which he believes is an abuse of the court process.

15. Also, the Respondent submitted that if the application is allowed, it would prejudice the Defendant and the whole process since plaintiff will have to be recalled to come and testify which will be a waste of judicial time as these will be multiplicity of suits.

16. The Respondent urged the court to direct the plaintiff/applicant or on their own motion to file for reconstruction of a skeleton file so that the case can proceed as the court had directed that the case would proceed once HCCC NO. 111of 2008 has been traced and placed before court.

ANALYSIS AND DETERMINATION

17. To determine the application dated 20th November, 2018, this court has considered the prayers the applicant seeks, the grounds upon which it is premised, rival submissions, cited authorities and the law by the respective parties. In doing this, the following issues arise for determination.

(a) Whether the Applicant has satisfied conditions of setting aside a consent order.

(b) Whether the Application for review is merited.

18. With regard to whether the Applicant has satisfied the conditions of setting aside a consent order, it is trite that a consent order is treated by law as a contract between parties so that to review and or set it aside, the law requires that the rules that apply for setting aside or revoking a contract apply in setting aside a consent order or judgment.

19. In the case of KENYA COMMERCIAL BANK LTD VRS SPECIALIZED ENGINEERING CO. LTD (1982) KLR 485, Harris .J correctly held inter-alia , that ;

“ A consent order entered into by consent is a 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 in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2 A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitations by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side”.

20. In the case of FLORA WASIKE –VRS- DESTIMO WAMBOKO (1988) e KLR, the court of appeal approved and opinion exposed in SETTON on JUDGMENTS AND ORDERS (7th Edition) Vol.1. Page 124 that;

“Prima facie, any order made in 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, or in general for a reason which would enable the court to set aside an agreement”.

21. Accordingly, consent orders can only be varied or set aside by consent of the parties, or by the court on ground on which a contract can be varied or set aside, to wit, grounds of fraud, misrepresentation, illegality or lack of authority. In view of the circumstances of this case, the Applicant alleged that the consent order purporting to consolidate the suits was obtained ex-parte by the Respondent by false representation.

22. In reply, the Respondent, through the replying affidavit to the application for review produced a letter dated 24th August, 2012, addressed the Respondent and copied to the Deputy Registrar, Mombasa, wherein the Applicant states that they had no objection to the consolidation and the matter being forwarded to Mombasa for hearing.

23. The Applicant has not filed a further affidavit to challenge the averments and documents produced in the replying affidavit sworn on 7th December, 2018.

24. In fact, the Applicant has not even disnuded the letter dated 24th August 2018, which allegedly originated from them. As a result thereof the issue of consent order and the issue of representation remain just but allegations, and allegations alone cannot be relied on by this court in varying a consent order. The Applicant ought to have tendered evidence to show that there was either fraud, misrepresentation illegality or lack of authority. Unfortunately in this case, no evidence was tendered by the Applicant to controvert the Respondent's evidence.

25. It is therefore this court's finding that the Applicant has not met the threshold of setting aside a consent order and a result, the prayers fails.

26. On the second issue of whether the application for review is merited, the parameters of who may lodge a review application as well as how that application is to be determined, are set out under Order 45 Rule 1 of the Civil Procedure Rules which states as follows;

1 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 decreed or order, may apply for a review of judgment to the court which passed the decree **or made the order without unreasonable delay**".

27. One thing is clear in this application the last sentence in the provision of Order 45 rule 1 (1) (b) reads"may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.

The logical question that follows here is:

Has the present application been made without unreasonable delay?

The issue for determination is whether or not the Applicant unreasonably delayed in filing the present application.

It is worth noting that the consent order subject of this application, was made before Hon. Lady Justice C Meloli on 30.8.2012, which is about 6 years at the time of filing the instant application. According to the Respondent this is delay in bring such application and it has not been explained, especially after the Plaintiff/Applicants had already closed its case. His averment has not been controverted by the Applicant in any way.

28. Under normal circumstances, it should not take and application more than 6 years to file an application for review in court. It would require an explanation to justify a delay of more than 6 years. In the case of MBOGO GATUIKU VRS A.G HCCC NO 1983 of 1980, High Court, Nairobi, Mwere J in emphasizing the need to file application for review without delay stated that "even a delay of a day or two call for an explanation"

In the case of JOHN AGINA VRS ABDULS WAMAD SHARIE ALWI, Civil Appeal No 83 of 1992 (1992) LLR 5734 (CAK), COCKAR AKIWUMI AND TUNOI (JJA) had this to say;

" An unexplained delay of two year in making and application for review under Order 44 Rule 1 Now order 45 Rule 10 is not the type of sufficient reason" that will earn sympathy from any court (Emphasis added)

The court of appeal (OMOLLO, OKUBASU & GITHINJI (JJA) in the case of FRANCIS ORIEO & ANOTHER VRS JACOB KUMALI MONGALA Civil Appeal No 149 of 2000 (201) LLR 4720 (2005) 2 KLR 307 succinctly stated;

"In and application for review

" In an application for review an Applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at the time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason AND must importantly the applicant must make the application for review without unreasonable delay.

29. This court is alive to the fact that under section 80 of the Civil Procedure Act, discretion donated to court is unfettered, but for this discretion to be exercised in favour of the Applicant, the application for review must be based on the grounds specified under Order 45 or on any sufficient reason but in either case, **the applicant must be made within a reasonable time.**

30. To my mind, the delay of 6 year is a long period, and indeed unreasonable. I find the Applicant has not provided any explanation for this delay, and in the absence thereof, this is not a proper case for this court to exercise its discretion in favour of the Applicant.

31. In the regard, I find useful guidance in the court of appeal decision in the case of RICHARD NCHAPAI LEIYANGU VRS IEBC & 2 OTHERS Civil Appeal no 18 of 2013, where the court expressed itself as follows;

"We agree with the Noble principles which go further to establish that the court's discretion to set aside exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assert a person who deliberately seeks to obstruct or delay the course of justice"
(Emphasis added)

Furthermore, Article 159 (2) (b) of the Constitution of Kenya, 2010 propounds that in exercising judicial authority, the courts and tribunals shall not delay justice".

32. On the issue of jurisdiction, I believe the same ought to be brought in a proper way for this court to determine it on merit, and not in an application for review.

33. With the foregoing discussion in respect of the application dated 20.11.2018 this court is persuaded that the scales of justice tilt in favour of the Respondent.

34. Having so found as herein above stated, the court finds that this is not a proper case for it to exercise its discretion in favour on the Applicant and that the application dated 20th November, 2018 does not satisfy the grounds for review.

Accordingly, the said application is hereby dismissed in it's entirely with costs to the Defendant /Respondent.

Ruling delivered, signed and dated this 27th day of March, 2019

LADY JUSTICE D. O. CHEPKWONY

JUDGE