



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO.302 OF 2015 (O.S)

ALBRIGHT HOLDINGS LIMITE.....PLAINTIFF/APPLICANT

-VERSUS-

UBA KENYA LIMITED.....DEFENDANT/RESPONDENT

-AND-

SULTAN PALACE DEVELOPMENT LIMITED.....PURCHASER

RULING

1. The Advocates in this matter Oluch-Olunya & Associates, Mohammed Muingai & Company and Gikera & Vadgama entered into a consent dated **5th March 2018**. By that consent the Advocates, inter alia, consented to injunction being issued, pending the hearing and determination of this suit, to stop the sale of units/apartments amongst which were units/apartment **CSAA 3-002** and **CSAA3 -101**.

2. The principles of setting aside a consent have been discussed in various authorities. In the case; **Wasike –vs-Wamboko the High Court at Kakamega** (Gicheru J. as he then was) held:-

“1. A consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract to be fulfilled which are not carried.”

3. The Court of Appeal in the case; **Board of Trustee National Social Security Fund –vs- Micheal Mwalo [2015] eKLR**, referring to a text book stated:-

“The position is clearly set out in Setton on Judgements and Orders (7th Edition) Vol. 1 page 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... 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.”

4. With the above in mind the application by **Notice of Motion** dated **29th August 2018** had to be brought with the above principles in mind.

5. That Notice of Motion is filed by the Plaintiff, but on closer scrutiny it would seem it is brought by the Advocate of the Plaintiff. The prayers sought are that the unit/apartment **No. CSAA 3-022** and **CSAA3 -101** be released from the injunction issued by **Justice Ochieng** on **9th November 2017**.

6. The basis of seeking the discharge of the injunction is to enable the advocate of the Plaintiff to conclude the sale of those unit/apartments and to use the proceeds of that sale to settle certain undertakings he had given as an advocate.

7. The application is opposed by the Defendant on the ground that the same seeks to set aside the consent.

DETERMINATION

8. The application in my view does and must fail. It fails because the same seeks to set aside a consent of three advocates, which cannot be varied or discharged unless obtained by fraud or collusion or by consent of all parties. There is no suggestion that there was any fraud or collusion, the only basis the advocate for the Plaintiff gave to set aside the injunction is so that he can sell the unit to enable him meet professional undertaking given by him.

9. The Application, for the reasons given, has no merit. It is dismissed with costs to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE