



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

ELC NO. 22 OF 2013

AGAM INVESTMENTS LTDPLAINTIFF

-VERSUS-

VOI DEVELOPMENT CO. LTD & 2 OTHERSDEFENDANTS

RULING

1. The 1st and 2nd defendants have moved this Court vide their application dated 31st March 2015. It's premised under article 159 (2) (d) of the Constitution, Order 10 rule 11 and Order 22 rule 22 of the Civil Procedure Rules and Section 1 A, 1 B and 63 (e) of the Civil Procedure Act. The 1st and 2nd defendants/applicants are seeking the following order:

a) That the consent orders reached between the advocates of all the parties on 7th and 15' May 2013 and adopted as an Order of the Court be set aside and the matter do proceed as it was before the consents.

b) Costs of the application be provided for.

2. The application is supported by several grounds listed on the face of it and on the affidavit of Eliud Timothy Mwamunga. Amongst the grounds, it is stated that the applicants agreed to sell to the Respondent 3.6 acres of land at Kshs 1,240,000 per acre. That the Respondent failed to pay the 50% deposit within 45 days as was put in writing. Later the Respondent rushed to Court on 31.1.2013 after receiving the refund. The applicants denied instructing their advocates Ameli, Inyangu & Partners to enter into a consent that 50% of the purchase price had been paid within 45 days neither did they agree that several paragraphs of their defence be struck off.

3. The applicants stated that the advocates operated in collusion and the consent is erroneous as it did not mention the money had been refunded in full. Lastly that their defence is no defence unless the consent order striking certain paragraphs is set aside. The applicants annexed transfer of funds documents as ETM 7, 8 and 9. He deposed that they were never made aware of the consent until February 2015 when they changed advocates.

4. The application is opposed by both the plaintiff/respondent and the 3rd defendant. The plaintiff through one of its directors Surjeet Singh Basil deposed that the total purchase price was Kshs 1,240,000. He noted this was the first time the applicants were raising the issue of purchase price. The Respondent accuses the 2nd defendant of filing false affidavits and does not get punished e.g denying receiving the sum of Kshs 620,000 by 2.2.2007.

5. Mr Basil deposed that one of the consents was recorded when the 2nd defendant was in Court with his

advocate then Mr Adhoch requesting for time to consult with his client. The respondent avers the 2nd applicant is lying to state he was not aware of the consent. Mr Basil states further that he only knew Mr Adhoch from the firm of Ameli, Inyangu and Partners and none of the plaintiff's directors have contacted Mr Adhoch or any of his partners and he is deeply offended by the allegation of collusion in recording the consent.

6. The respondent concluded that the application is an after thought since the applicants have acted on the consent by allocating the 3rd defendant an alternative plot in exchange of plot No 15031/43. He urged the application to be expunged from the record with costs.

7. The Plaintiff also relied on a supplementary affidavit sworn by F. Kinyua Kamundi, advocate. Mr Kinyua deposed that the motion dated 31.3.2015 is filed by an advocate not properly on record. He also deposed that the plaintiff's directors have not made contact with defendant's advocate except for the meeting held in Voi that was aimed at negotiating and settling this matter. Mr Kinyua denied engaging in collusion with any advocate from the firm of Ameli, Inyangu and Partners in reaching the consent recorded. He reiterated the contents of the affidavit of Mr Basil more particularly that the 2nd defendant was present in Court when the consent was recorded.

8. The 3rd defendant also filed a replying affidavit through his advocate to oppose the application. Ms Catherine Gichachi advocate deposed that her client informed her which information she believes that he has never met or engaged any advocate from the firm of Ameli Inyangu and Partners at any one time. Ms Gichachi deposes that Mr Mwamunga is not truthful as he was present in Court when the consent was recorded on 7th May 2013, with the file being placed aside to enable his lawyer consult with him. She deposed further that as a result of this consent, Mr Adhoch forwarded to them on 27.5.2013 an allotment letter for plot No 15031/26. The 3rd defendant denied any form of collusion with the 1st and 2nd defendants or their advocates. He urged the Court to dismiss the motion with costs to the 3rd defendant/respondent.

9. All the parties advocates filed written submissions. The applicants gave summaries on what was the purchase price, when payments were made and refunds. They submit that once the 50% was not paid within the set time line, the letter of allotment dated 19.1.2007 became invalid. There is denial of the 2nd defendant's presence in Court when the consent was recorded or of a meeting held in Voi. It is submitted that the consent of 15th May 2015 was done without authority of the applicants. The submission also urged the Court to strike out the replying affidavit sworn by Catherine Gichachi advocate.

10. The plaintiff also made very lengthy submissions. He opened his submissions that none of the elements of fraud or mistake being principles for setting aside a consent judgement/order has been proved. He continued that the consent can only be set aside if collusion between the three law firms is proved and the same cannot be proved unless the law firm of Ameli Inyangu and Co participates. The said firm was not served with the present application to defend themselves. The plaintiff submits that the applicants were aware of this consent and partially acted on it through the letter of allotment dated 17.5.2013 issued to the 3rd defendant.

11. The plaintiff accused Mr Muthami advocate of giving evidence through submissions when Mr Muthami attempts to justify that the allotment letter was issued to the 3rd defendant on account of friendship and not on account of the consent order. The plaintiff also submitted on the issue of the purchase price and accused the applicants of being fraudsters. He submits that if Mr Adhoch acted without instructions then it is up to the applicants to seek compensation from him.

12. The 3rd defendant also submitted for the dismissal of the application. He defended the replying affidavit to be proper as it complies with Order 19 rule 3 (1) of the Civil Procedure Rules. Ms Catherine Gichachi states that she was in Court on 7th May 2013 and saw the 2nd defendant therefore she can depose to these facts. The 3rd defendant submits that the letter of allotment issued to him was in terms of the consent recorded. It is their argument that a consent order can only be set aside if there is proof of fraud or collusion which the applicants have failed. He referred this Court to the case law of

1. Joseph Kamau Njigua vs Church Commissioners for Kenya & 2 others (2014) eKLR

2. Flora Wasike vs Destimo Wamboko (1982 — 88) I KAR 625

13. In the the Flora Wasike case Supra, the Court of Appeal held that

"a consent judgement can only be set aside on the same grounds as would justify the setting aside of contracts e.g fraud, mistake or misrepresentation"

In this instant, the applicants are alleging there was collusion between his advocate and the other parties or their advocates. The issue for determination by this Court is whether that collusion has been proved. The applicants and the plaintiff delved into the details of what was the purchase price. In my view I think what is the purchase price is a non — issue for now.

14. Both the plaintiff and the 3rd defendant deposed in their affidavits that the 2nd defendant was in Court on 7th May 2013. They both say that Mr Adhoch advocate on record for the applicants sought time to consult with his client and the file was placed aside. The plaintiff deposed that the 2nd defendant and Mr Adhoch left the Court briefly and later the consent was recorded in the presence of the 2nd defendant. The 2nd defendant had not denied in his affidavit that he was present and only became aware of the consent 2 years later when the file was handed over to his present advocates.

15. The 2nd defendant however did not file a supplementary affidavit to deny the facts of his presence in Court on 7th May 2013. An attempt to deny the facts that he was in Court on the dates in question through submission has no place in law. This Court would wonder why the three persons ; Mr Kinyua, Mr Basil and Ms Gichachi would lie that the 2nd defendant was in Court on 7th May 2013. Although the Court record does not indicate he was present, often times where parties are represented by advocates their presence need not be recorded.

16. Taking into account that the 2nd defendant was present in Court, is the collusion complained of proved? In ground vii and viii, the applicants stated that they did not instruct their advocate to enter into a consent to the effect that 50% of the purchase price had been paid within 45 days of the agreement. If there were no such instructions, then his claim lie in damages against the said advocate and not other innocent parties who have benefited from that order. In the ***Flora Wasike case supra*** the Court of Appeal held that an advocate have ostensible authority to compromise a suit as far as the opponent is concerned. The firm of Ameli Inyangu & Partners were on record for the applicants when the consent was recorded. They received a letter of allotment from their clients (the applicants) which they later forwarded to the 3rd defendant as per terms of the consent. Again a contrary explanation for the issuance of allotment letter was only given in submissions and not by way of affidavit.

17. In paragraph x, the applicants stated that the advocates operated in collusion from their acts as in fact 50% of the purchase price — had not been paid. Like I stated earlier, I cannot determine what was the purchase price in an application to vary or set aside a consent as it is a matter that requires evidence. However from the documents annexed, some monies were paid to the applicants which the applicant acknowledges receipt of and even refunded.

18. Whether that payment amounted to 50% or not did not arise at the time the consent was recorded. As put by the plaintiff, it is the first time the applicants are raising the issue of the purchase price. A question that requires evidence to determine whether the entire purchase price was Kshs 1,240,000 or it was Kshs 1,240,000 per acre cannot be termed as a mistake to form a ground to set aside a consent as it goes into the substance of the suit and not the terms of the consent.

19. Further the applicants have not explained the nature of the collusion of the three advocates. In any event if the consent was entered into without his knowledge, how does he know the other advocates (for 3rd Defendant and Plaintiff) colluded or it was his own advocates initiative to enter the consent? He who alleges must prove. I find the applicants have not discharged their obligation to prove there was collusion or mistake. The application is thus found to be without merit. I hereby dismiss it with costs to plaintiff

and 3rd defendant.

Ruling dated and delivered in Mombasa this 12th day of February, 2016

A. OMOLLO

JUDGE