



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 815 OF 2013**

**EAST WEST HOLDINGS LIMITED.....PLAINTIFF**

**- VERSUS -**

**JEAN WANJIKU HUTCHINSON.....1<sup>ST</sup> DEFENDANT**

**(Sued in her capacity as administratrix of the Estate of Raphael**

**Alfonso Hutchinson (deceased) and also beneficiary of such estate)**

**ELIZABETH HUTCHINSON.....2<sup>ND</sup> DEFENDANT**

**(Sued in her capacity as administratrix of the Estate of Raphael**

**Alfonso Hutchinson (deceased) and also beneficiary of such estate)**

**ALISON HUTCHINSON.....3<sup>RD</sup> DEFENDANT**

**ARLENE HUTCHINSON.....4<sup>TH</sup> DEFENDANT**

**ROBERT ANDREW HUTCHINSON.....5<sup>TH</sup> DEFENDANT**

**JEAN ELIANOR ALBRITTON.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion Application dated the 26/01/2022 brought pursuant to Order 13 Rule 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law, the Defendant/Applicant seeks the following orders:

- 1. THAT Judgment in this suit be entered for the Defendant's against the Plaintiffs own admission to the Defendants.**
- 2. THAT judgement in this suit be entered as per the terms accepted/admitted by the plaintiff as follows;**
  - a. That Judgment be and is hereby entered for the Plaintiff against the Defendants for Kenya Shillings Thirty-Three Million (Kshs. 33,000,000/=) all-inclusive in full and final settlement of this suit.**
  - b. That the Defendants Advocates fees are hereby agreed at Kenya Shillings Two Million Five Hundred Thousand (Kshs.2,500,000/=).**
- 3. That the injunction issued on 8<sup>th</sup> July, 2013 restraining the Defendants from selling, charging, letting, or parting with possession of L.R. No. 21/1/39 (which includes parcel C and D be and is hereby discharged.**
- 4. That the said Judgment amount be paid in six (6) months or as soon as the sale is completed.**
- 5. That payment of the Judgement amount be paid from part of the proceeds of sale from one of ½ acre plots.**

**6. THAT costs of this suit and this application be awarded to the Defendants.**

2. The application is premised on the attached affidavit in support and based on the following summarized grounds; that the plaintiff has admitted and or accepted terms of settlement of this suit. It is the Defendant/Applicant’s contention that through correspondences, the plaintiff has agreed to compensation. They aver that the negotiated terms in effect compromise the suit in totality and the issue of execution in the event of default by the defendants was the only pending matter to be agreed upon. The Defendants aver that they are ready and willing to liquidate the agreed amount within six (6) months.

3. The application was opposed by the Plaintiff/Respondent who filed a Replying Affidavit dated 14/2/2022 to controvert the Defendant/Applicant’s averments. The Plaintiff/Respondent deponed that they admit that there were out of court negotiations on the matter all undertaken without prejudice basis and thus privileged. The negotiations failed as the Defendant/Applicants declined to accept the Plaintiff/Respondent’s terms/offer. Further, the Plaintiff/Respondent avers that the partial acceptance cannot be accepted thus the parties have not reached at any agreement. It is their contention that both parties contemplated and understood that once a suitable consent is arrived at, the same will be reduced into a consent and endorsed in court. They contend that none was arrived at. It is their contention that the instant application is a ploy to prolong the hearing and determination of the suit.

**Analysis and Determination**

4. The application was argued by way of written submissions. The Plaintiff/Respondent filed its submissions on 14/02/2022 and the Defendant/Applicant filed theirs on 18/02/2022. I have considered the application herein, the rival affidavits, and the annexures. I have also considered the written submissions of both counsels. The issue that commends itself for determination is whether the Applicant merits the prayers sought in the application.

5. This suit had been set down for hearing. **Order 25(2) of the Civil Procedure Rules, 2010** approves of a withdrawal of suit after a hearing date has been fixed only if there is a written consent filed, signed by all the parties. However, for a consent judgment to be entered into, it has to be clear that the terms are known and agreed to by the parties themselves. The Defendant/Applicants themselves admitted that the issue of execution in the event of default by the defendants was the only pending matter to be agreed upon. This means that there is no consensus. All the material facts have to be known to the parties who then willingly consent to compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. The parties herein have knowledge of pending issues prior to entering into a settlement. Full and final settlement in my view, signifies a clear intention on the part of the parties that they have agreed on all issues and factored in prior negotiations. That is not the case in this present application.

6. It is settled law that a consent judgment has a contractual effect and just like my brother Judge Okong’o stated in his ruling on 31/10/2019, I cannot force terms of a consent. A Consent is in the form of a contract. It binds the parties. See the case of **Flora N. Wasike vs Destimo Wamboko [1988] eKLR** and **James Muchori Maina vs. Kenya Power & Lighting Company Ltd [2005] eKLR**. There is a reason why both parties have to sign a consent and be present in court for the same to be recorded and adopted as an order of the Court.

7. For the foregoing reasons, I find that the Notice of Motion dated 26/01/2022 has no merit and hereby dismiss it with costs to the Plaintiff/Respondent. Further order, **hearing to proceed on 2/03/2022** as earlier slated.

8. It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2022**

.....

**MOGENI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant