



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO 356 OF 2017

WEMA FOUNDATION TRUST COMPANY LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAIROBI CITY.....1ST DEFENDANT

THE HONORABLE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. This ruling is in respect of an oral application made by Counsel for the 2nd Defendant on 20/01/2021 seeking the following orders:

a) That the consent executed into by the Plaintiff and the 1st Defendant and proposed to be filed in court on 20/01/2021 to be adopted as an order of the court be set aside together with consequential orders

b) The suit be set down for hearing and disposal on merit

2. Both the Counsel for the Plaintiff and the Counsel for the 2nd Defendant canvassed the application through brief oral submissions. The 1st Defendant did not attend court.

Brief Facts

3. This suit was commenced by way of plaint dated 30/05/2017. The plaintiff claims to be the owner of all that parcel of land known as LR No. 209/20170 situate in Nairobi. That through an agreement dated 17/08/2011 the plaintiff avers that they entered into a public private partnership in relation to the suit property. The plaintiff avers that the 1st Defendant, (Nairobi City Council) the predecessor of the 1st Defendant to build and operate a market for a period of 45 years. The Plaintiff contends that their interest was registered at the Ministry of Lands against the 1st Defendant's title. Further that the Defendants had now purported to invite bids for construction of the said market namely Mwariri market vide an advertisement published in the local dailies on 26/05/2017 despite the existence of the agreement dated 17/08/2011 and therefore the action of the 1st Defendant was a breach of contract. On 18/01/2022 the plaintiff contend that they have recorded a consent with the 1st Defendant and therefore the court needs to enter a consent judgment since they are no longer willing to prosecute the matter.

4. The Counsel for the 2nd Defendant objected orally to the consent judgement and sought to have the matter set down for hearing. Counsel for the 2nd Defendant noted that they were not privy to the Consent entered into since they had not been served and they requested for more time in order to have an opportunity to consider the proposed consent. Counsel for 2nd Defendant further submitted they strongly objected to the consent between the plaintiff and the 1st Defendant since the suit property is public land and the 2nd Defendant who is the Attorney General is the custodian of public land. Ms. Fatma Counsel for the 2nd Defendant submitted that there were no negotiations regarding any settlement and neither the 2nd defendant nor its advocate was aware of the existence of the said consent.

5. In their oral response the plaintiff through their advocate Ms. Karumba contended that the claim was for breach of contract by the 1st Defendant against the plaintiff. Further that the plaintiff had filed a claim against the 1st Defendant but the 1st Defendant is now willing to settle the matter out of court. It was the counsel's submission that since the consent had already been recorded, the plaintiff is no longer interested in the suit as its rights were now fully protected. The Plaintiff contended since this was a contractual agreement between the 1st Defendant and the Plaintiff the 2nd Defendant is not in any way affected by the consent. The 1st Defendant did not attend court.

Analysis and Determination

6. The issues for determination is whether the proposed consent needs to be adopted as the consent judgment by the court. Whether the 1st Defendant should pay the plaintiff Ksh 700,000,000. This is a case where the Counsel for the 2nd Defendant has raised an objection to the consent order being adopted by the court. On 18/11/2021 a consent order between the plaintiff and the 1st defendant was recorded and now the parties want the court to adopt it as an order of the court which is the subject matter of the application.

7. In the Court of Appeal in the case of **Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269 Law Ag P said:**

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

8. In **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485**, Harris J correctly held inter alia, that –

1. A consent order entered into by counsel is 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 limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

9. In **Hirani V. Kassam [1952] 19 EACA 131** the Court of Appeal held;

“It is now well 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 J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the 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 or rectification of this order looked at as a contract.”

10. From the court record, there is a statement of Defence by the 1st Defendant dated 27/10/2021 and the Consent Judgment dated 18/11/2021. The 2nd Defendant did not file any documents relating to the consent although this was explained at the court appearance on 18/01/2022 where the Counsel for the 2nd Defendant stated that they were not consulted and or not served with the consent.

11. It is therefore clear from the court record that the Consent Judgment was entered into without the consultation nor concurrence of the 2nd Defendant who is a party to this this suit. Further the Court could not ascertain from the Counsel for the 1st Defendant whether they were in agreement with the consent judgment. It is trite law that the parties who would want to have the court to adopt a consent judgment must be present in court on the day when the document is presented for adoption and confirm the same to the one they both signed and agreed on.

12. This case will only benefit from the fact that the 1st defendant was not in court when the consent was being proposed for adoption as the order of the court. Further the 2nd Defendant was not consulted and upon receiving a copy of the proposed consent judgment objected to its adoption. I will therefore give the 2nd Defendant the benefit of doubt. The court is not buying the assertion of the interested party’s counsel that the consent does not in any way touch on the interest of the 2nd Defendant. Further the proposed Interested Party had even withdrawn from the case vide their application dated 6/12/2021. This is a preposterous proposition which does not hold water. The 2nd Defendant is the Attorney General of the Republic of Kenya and the suit property is public land as the Counsel asserted.

13. The 2nd defendant having disowned that consent and the 1st defendant being absent from court it follows the court will be required to interrogate further the proposed consent judgment. The suit could therefore not be compromised without the participation of the parties concerned. In the Supreme Court of India case of **Gurpreet Singh V. Chatur Bhuj Goel (1988) AIR 400** the court held that :

“Under Rule 3 as it now stands when a claim in a suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them.....”

14. The omission to obtain a written agreement from all the parties to the suit makes this matter suitable for setting aside the consent that did not meet the threshold of a contract. In the case of **MUNYIRI vs NDUNGUYA [1985] eKLR** Platt Ag JA held as follows:-

“However, we may observe that as there appears to be a good deal of argument about contents of some consent judgment and orders, it would be wise to obtain the signatures of the advocates, or the parties if they are present. In this way, it will then be clear that the terms were known and agreed to, at the time the consent order or judgment was entered into, and may help to avoid later recanting by the parties themselves, which is also a well- recognized feature of life, despite instructions earlier given to their advocates...”

Nyarangi JA stated that:

The advocates should have in this case appended their signatures to the judgment or registered their disapproval of the judgment as soon it was delivered. The judge should, as a precaution have full made a and careful note of what each advocate said to him which culminated in the consent judgment.

15. Given the foregoing the Court will grant the prayer of the 2nd defendant and defer adoption of the Consent Judgment to allow all the parties to reach a consensus on the consent or list the suit for hearing.

16. Costs to be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2022

.....

MOGENI

JUDGE

In the presence of

Ms Juliet Karumba for the Plaintiff

Mr. Kocieyo Titus for the 1st Defendant

Mr. Eredi holding brief for Ms Fatma for 2nd Defendant

Mr. Vincent Owuor - Court Assistant