



REPUBLIC OF KENYA
IN THE ENVIRONMENT LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 655 OF 2013

NGECHA PROPRIETORS LIMITED.....PLAINTIFF

VERSUS

ECOBANK (K) LIMITED.....DEFENDANT

RULING

The Plaintiff, following his application dated **29th April 2015** was granted injunction orders stopping the advertised sale of his property **LR. No. 12715/2182 Syokimau**. The Plaintiff seeks further orders that:-

1. *Spent*
2. *Spent*
3. *The court be pleased to find and order that:*
 - i. *The Consent letter signed between Ms. Ombete & Co. Advocates and Kale Maina & Bundotich Advocates for the Defendants dated 12th March 2015, was signed without consent and knowledge of the Plaintiff.*
 - ii. *The letter was a misrepresentation of the principle agreement of the parties being the Plaintiff and Defendants directly agreed.*
 - iii. *The letter has been breached to a large extent and it is not enforceable.*
4. *The Court do therefore set aside the consent letter and all consequential orders and/or actions arising from the said letter.*
5. *Costs of the motion be provided for.*

The application is premised on grounds that the contents of the consent letter are in complete variance with the terms agreed upon by parties and amounts to a complete misrepresentation. Further, that the consent was signed without the knowledge and consent of the Plaintiff which the Defendant seek to enforce which will lead to undue enrichment on the Defendant.

The application is supported by an affidavit sworn **Joseph Siro Mosioma**, the Managing Director of the Plaintiff. He deposes that the Plaintiff holds an account with the Defendant and in **2004**, it was granted a

facility of **Kshs. 750,000/-**. Subsequently, the said account became overdrawn and the Plaintiff deposited title to the suit property with the Defendant wherein, upon the latter registered a memorandum of charge as security. It was his deposition that after discussions with the Defendant, it was agreed that the Plaintiff shall pay **Kshs. 1.6 Million** in full and final settlement of the debt payable in two instalments of **Kshs. 900,000/-** and **Kshs. 700,000/-**. On **17th May 2013**, the Plaintiff paid the 1st instalment of **Kshs. 900,000/-**

It is deposed that further discussions were held by the parties where it was agreed, as captured in the Plaintiff's letter addressed to the Defendant dated **11th March 2015**, *inter-alia*, that Judgment be entered against the Plaintiff for the amount **Kshs. 650,000/-** all inclusive payable within **14 days** of the date of entry of Judgment. The consent between the parties was signed and filed on **13th March 2015**. The deponent stated that, the Plaintiff deposited the amount of **Kshs. 650,000/-** with the Defendant on **27th April 2015**.

Despite payment of the agreed amount albeit out of the agreed time period, the deponent states that they learnt of an advertisement for sale of the suit property by the Defendant on **28th April 2015**. Upon inquiry from the Plaintiff's advocate, he learnt that the consent filed in Court contained a clause that he did not consent to, to wit,

v. In default of the payment of above mentioned amount within the timelines in Clause (iii) the bank to relist the customer with the Credit Reference Bureau and to proceed to advertise the property for sale to recover all amount owing to it prior to this consent.

The deponent contends that the consent is at variance with the terms negotiated with the Defendant and that he was not consulted by his advocates on the change in the consent terms thus a complete misrepresentation of the agreement. The deponent maintained that the Defendant was acting in bad faith, out for self-enrichment and therefore it would be just that the sale does not proceed.

Elizabeth Hinga, Head of Remedial Management with the Defendant swore a Replying Affidavit on **30th April 2015**, in response to the application. She deposed that the Plaintiff by a letter dated **17th February 2015** proposed to pay **Kshs. 650,000/-** in full and final settlement of the Defendant's claim. After a series of negotiations, the proposal was agreed and reduced into a consent order filed in Court on **13th March 2015**. On **24th March 2015**, the Plaintiff wrote to the Defendant requesting for an additional 5 days to enable it settle the agreed sum. However, the Plaintiff failed to honour the consent order and in terms of Clause v thereof, the Defendant instructed the auctioneers to sell the property. Further, that the Defendant in a letter dated **9th April 2015** informed the Plaintiff of the breach of the terms of the consent.

The deponent admitted that the Plaintiff did pay **Kshs. 650,000/-** to the Defendant but stated that the said payment was made outside the agreed time frame and therefore, pursuant to the consent order, the Plaintiff was required to pay the full outstanding loan as at **27th April 2015** and not **Kshs. 650,000/-**. The deponent denied the Plaintiff's allegation that the terms of the consent were varied and deposed that it knew that the property was charged to the Defendant and would remain as security until the agreed sum was duly paid within the timelines set out in the consent order. Further, that by virtue of the letter dated **9th April 2015**, the Plaintiff was aware of the intended sale. The deponent contended that there was no basis set out to bar the sale of the property and or set aside the consent order since the said consent was filed with the full knowledge of and instructions of the Plaintiff, and that the consent was properly signed.

The application was canvassed by way of written submissions which I have carefully considered and also appreciated the authorities cited. Other than the interim orders of injunction, there is the issue whether the consent judgment entered into between the parties should be set aside. The bone of contention is "Clause V" of the consent which the Plaintiff contends was not agreed upon by the parties and that his advocate, without his authority consented to and that the same amounts to misrepresentation. In support of his averment, the Plaintiff referred to a letter dated **11th March 2015** addressed to the Defendant suggesting the terms of the consent judgment. Indeed on perusal of the same, Clause V reads:

“In default, execution to issue”

In response, the Defendant deposed that the Plaintiff’s letter dated **11th March 2015** was an offer and not an agreement between the parties. Further, that there was no evidence tendered to show misrepresentation, that the consent as procured fraudulently or that the Advocates were coerced into accepting the terms of the consent order.

The question arising is whether the Plaintiff has met the threshold required in setting aside consent judgments. The standard was re-stated in the case of **Flora Wasike V. Destimo Wamboko (1982 – 1988) IKAR 625** where the Court held that;-

“It is now settled that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, for example, fraud, mistake or misrepresentation or if certain conditions remain to be fulfilled, which are not carried out.”

I have perused the consent judgment. It has been signed by the counsels for both parties. The Plaintiff contends that “**Clause v**” of the consent agreement was not agreed upon and that his advocate later admitted to him that the terms of the consent changed at the behest of the Defendant. This averment is not supported by an affidavit sworn by the M/s L.M. Ombete Advocate. The letter relied on by the Plaintiff clearly states that it is a suggestion and further asks whether the Defendant approves of the said terms. There is nothing to show that “**Clause V**” was sneaked in without the Plaintiff’s authority or its advocate’s knowledge. It is also trite that Advocates act on behalf of their clients and any consent entered into in their presence is prima facie binding. This was the holding in the case of **Brooke Bond Liebig (T) Limited – vs- Maliya (1975) E.A. 266** where the Court held that:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all the parties to the proceedings or action, and 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 material facts, or in misapprehension or in ignorance of material facts, or in general for reason which would enable the court to set aside an agreement.”

On the foregoing, it is my finding that the Plaintiff has failed to establish that the consent was obtained by fraud or collusion or misrepresentation to warrant the setting aside of the consent judgment.

This finding notwithstanding, it is noteworthy that the Plaintiff has since settled **Kshs. 650,000/-** owed to the Defendant. The payment was made out of time frame but before the property was advertised for sale. This payment has been admitted by the Defendant. Juxtaposing these facts with the principles of injunction, I do find that there is justification to safeguard the suit property pending the determination of the suit. Disposing off the same will, in my view, cause irreparable injury to the Plaintiff. This court is not in doubt and even if it was, the balance of convenience tilts in favour of the Plaintiff who has since settled **Kshs. 650,000/-** owed to the Defendant.

The upshot of this ruling is that the Plaintiff’s application is partly allowed to the extent that the Defendant is restrained from advertising for sale, disposing off, transferring or in any way alienating the suit property pending the hearing and determination of the suit or until further orders of this court. Costs of the application shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this **31st** day of **July,2015**

L.GACHERU

JUDGE

In the Presence of:-

Mr Wathome holding brief for Mr Namanda the Plaintiff/Applicant

M/s Mathenge holding brief Mr Bundotich for the Defendant/Respondent

Nyangweso: Court Clerk

L.GACHERU

JUDGE