



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 288A OF 2011

DIVISIONAL INTERGRATED

DEVELOPMENT PROGRAMMES CO. LTD.....PLAINTIFF

VERSUS

NELSON MBUVA KITHUKA

CHARLES MULOO KITHUKA

(being sued as the administrators of the of estate FREDRICK KITHUKA KISENGI)DEFENDANTS

R U L I N G

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 12th February, 2021 brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 51 Rule 1 of the Civil Procedure Rules where it sought for the following orders:

1. Spent
2. That the court do extend the time within which the Plaintiff is to comply with the written consent dated 2nd June, 2020 for a further period of 120 days.
3. That an order do issue compelling the Defendants to deliver to the Plaintiff the Land Control Board Consent, duly executed transfer forms, copies of their national Identity Cards, KRA Pin Certificates, passport size photos and any other necessary document to effect the transfer of the land known as MAVOKO TOWN BLOCK 2/90 into the name of the Plaintiff.
4. That this court do grant any other order as it deems necessary to meet the ends of justice.
5. That the costs of this application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavit of BONIFACE MUTUA MUSYOKI who is the Plaintiff's director who deposes that the Plaintiff had sued the Defendants in this suit seeking several prayers but parties herein recorded a written consent dated 2nd June, 2020 settling the matter. He refers to clause 2 (a) of the Consent indicating it was to pay the sums stated therein in eight (8) months from the date of filing the consent or on or before 28th February, 2021 whichever is earlier. He explains that the initial agreement was for the Plaintiff to dispose off the plots to raise the funds for purposes of paying the Defendants the agreed amount. He confirms the Plaintiff has been unable to dispose of the plots as the intended purchasers have been demanding to see the consents to transfer before they can enter into any transaction. He insists the Defendants have not provided the consents to transfer thus every process has stalled. Further, that the Plaintiff will be able to comply once the Defendants comply on their part by obtaining the consent to transfer. He reiterates that unless the orders sought are granted, the Plaintiff will be prejudiced because it will be deemed to be in default and lose the property when it is the Defendants who have not provided the relevant documents.

The application is opposed by the Defendants who filed a replying affidavit sworn by CHARLES MULOO KITHUKA where he deposes that this Court has no jurisdiction or power to open up, disturb, vary or override a consent order entered by the parties, purposely and on their own free will. Further, the court cannot be used to assist a party run from its obligations under a consent order which is what the Plaintiff seeks from court. He insists the consent order binds the parties eternally unless there are cogent reasons to set it aside. He refers to the consent and explains that the Plaintiff was to pay Kshs. 9,230,000/= within eight (8) months from the date of filing the consent or on or before 28th February, 2021; both dates have since passed without compliance thereto. He reiterates that the Plaintiff has breached a valid and binding agreement and the consequence is spelt out under Clause 3 of the Order. Further, that the consent was entered into after negotiations and executed freely. He avers that the allegations made in paragraph 4 – 8 of the supporting affidavit are not reasons laid down in law to set

aside or interfere with a consent order. Further, they are spurious and farfetched as they are not anchored on or captured in the consent agreement. He states that the Plaintiff is fully bound by the terms of the consent and can only seek to enforce what was agreed upon.

The application was canvassed by way of written submissions.

Analysis and Determination:

Upon consideration of the Plaintiff's Notice of Motion application dated the 12th February, 2021 including the respective affidavits and rivalling submissions, the only issue for determination is whether the court should extend the time within which the Plaintiff is to comply with the written consent dated 2nd June, 2020 for a further period of 120 days.

The Plaintiff in its submissions reiterated its averments and contends that the Defendants have not provided the transfer documents thus frustrating the consent. Further, it will comply once the consents to transfer are given and will be prejudiced if the orders sought are not granted. It insisted the court had jurisdiction to extend time in a consent. To buttress its averments, it relied on Section 3 of the Civil Procedure Act; Order 50 rule 5 of the Civil Procedure Rules as well as the case of **Committee, Holy Rosary Girls Primary School V Mick Wangila Milimo (2005) eKLR**.

The Defendants in their submissions also reiterated their averments as per the replying affidavit and insists the instant application is unsustainable as it has been overtaken by events. They contend that this court does not have jurisdiction or power to open up or vary or override a consent order entered into by the parties. To support their arguments, they relied on the case of **Sofia Mohamed V Rodah Sitienei (1992) eKLR**.

I wish to reproduce the terms of the consent hereunder: ‘

‘1) The Application dated 18th November, 2019 be and is hereby allowed as prayed.

2) The suit herein be and is hereby allowed in the following terms:-

a) The Plaintiff do pay the Defendant the balance of the purchase price of Kshs. 4,230,000/= (Kenya Shillings Four Million, Two Hundred and Thirty Thousand only) and costs of Kshs. 5,000,000/= (Kenya Shillings Five Million Only) totaling to Kshs. 9,230,000= (Kenya Shillings Nine Million, Two Hundred and Thirty Thousand Only) within Eight(8) months from the date of filing this consent or on or before 28th February, 2021, whichever is earlier.

b) The Title Deed/Certificate of Title for the suit land being the parcel of Land known as Mavoko Town Block 2/90 in the custody of court be immediately released to the Defendant's advocates herein K'Bahati & Co. Advocates be held by them pending fulfilment by the Plaintiff of clause 2(a) and to be released to the Plaintiff for his Advocate's within three (3) days upon receipt of full payment of the sum of Kshs. 9,230,000/= (Kenya Shillings Nine Million, Two Hundred and Thirty Thousand only).

c) Further, that upon full payment by the plaintiff of the total sum in Clause 2(a) above of Kshs. 9,230,000/= (Kenya Shillings Nine Million, Two Hundred and Thirty Thousand only) to the Defendants, the Defendants shall sign all necessary documents including transfers forms, consent forms, Mutations and any other document and/or form required for successful and effective transfer of all that parcel of Land known as Mavoko Town Block 2/90 to the Plaintiff and in default the Deputy Registrar of the Court do sign on their behalf.

d) Upon successful registration of L.R.No. Mavoko Town Block 2/90 in favour of the Plaintiff, he shall sign all the necessary transfer documents to transfer individual titles (subdivisions) on the property to the Buyers before the lapse of 90 days of receipt of Land Control Board consent to transfer; subject to receipt of the registration and transfer fees from the respective Buyers.

1) In the event of default of order number 2(a) hereinabove, the Defendants to proceed to execute for the sums and thereafter transfer the property directly to the Buyers.

2) Upon successful compliance with the above orders, the instant suit and Machakos (ELC) Case No. 133 of 2008 (OS) shall be marked as settled with no orders as to costs, while Nairobi ELC Case No. 153 of 2013 shall be withdrawn by the Plaintiffs therein (herein referred to as the Buyers) with no orders as to costs.’

From a perusal of the said consent, I note there is no indication that the plots emanating from the suit land was to be sold to third parties first to enable the Plaintiff raise funds to pay the Defendants. Further, there was no indication that the Defendants were to furnish the Plaintiff with various completion documents to wit: Consent of the Land Control Board, transfer forms, Identity Cards and KRA PIN Certificates etc. I note at Clause (c) of the Consent, it confirms that it is only upon full payment by the Plaintiff of the total sum in Clause 2(a) above of Kshs. 9,230,000/= (Kenya Shillings Nine Million, Two Hundred and Thirty Thousand only) to the Defendants, would the Defendants execute all the necessary documents including transfers forms, consent forms, Mutations and any other document and/or form required for successful and effective transfer of all that parcel of Land known as Mavoko Town Block 2/90. I note the said Consent held a default clause which to my mind it seems the Plaintiff seeks to defeat.

The Plaintiff now seeks extension of time and for the Defendants to furnish it with the relevant documents before making the payment.

On enlargement of time, Order 50 Rule 6 of the Civil Procedure Rules provides as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

In the case of **Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd** [1982] KLR 485. It was held that:-

“The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.”

While in the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited** [2015] eKLR, the Court of Appeal in laying down the basis for setting aside a consent judgement or order stated as follow: ‘ **The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, and agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982 - 1988)1 KAR 625, said in his judgment at page 626 - "It is now settled law that a consent judgement 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 Ltd Civ. Apps 28 of 1982 and 69 of 1983**, This Court in the case of **Brooke Bond Liebig v. Mallya 1975 E.A. 266** held:- **“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”** Emphasis mine

See also the case of **East African Portland Cement Company Limited v Superior Homes Limited** [2017] eKLR.

Based on the facts as presented while noting the plaintiff relied **on a persuasive** decision and in relying on the three Court of Appeal decisions, insofar as the Civil Procedure Rules under Order 50 gives this Court the discretion to enlarge time to undertake an event, it is my view that this remedy cannot be applied in this instance case as there has not been demonstration of fraud, collusion, or any other reason to enable the court review, vary or set aside the said consent order.

It is against the foregoing that I find the Plaintiff’s Notice of Motion application dated the 12th February, 2021 unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15TH DAY OF FEBRUARY, 2022.

CHRISTINE OCHIENG

JUDGE