REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. E012 OF 2021 (O.S)

IN THE MATTER OF THE LAND SALE AGREEMENT DATED 19/4/2013

AND

IN THE MATTER OF LR NUMBER MBEERE/MBITA/2087

AND

IN THE MATTER OF EMBU ELC NO. 54 OF 2021

BETWEEN

FAUSTINA NJERU NJOKA.....PLAINTIFF/RESPONDENT

VERSUS

KIMUNYE TEA FACTORY LIMITED.....DEFENDANT/ APPLICANT

RULING

1. Before the court is a notice of motion dated 6 .10.2021, and filed on 7.10.2021 by the Defendant. The Application is expressed to be brought under Articles 159(2) of the Constitution, Sections 1A, 1B, 3 & 3A of the Civil Procedure Rules and Order 51 Rule (1) of the Civil Procedure Rules and all other enabling provisions and the inherent powers and jurisdiction of the court of the law.

APPLICATION

2. The Applicant is KIMUNYE TEA FACTORY LIMITED who is the Defendant in the suit while the Respondent is FAUSTINO NJERU NJOKA, the Plaintiff in the suit.

The motion came with five (5) prayers but prayers 1, 3 and 4 are now moot. The prayers for consideration are prayers 2 and 5 and they are as follows:

> 2) **THAT** the consent order dated 7.7.2021 and filed herein on 8.7.2021 and the resultant decree dated 8.7.2021 be set aside in their entirety and the same be expunged from the court record.
>
> 5) **THAT** the costs of this motion abide in the suit.

3. The application was supported by grounds interalia, that the directors that passed the resolution pursuant to which the consent order was filed were not authorized and lacked capacity to bind the company. It is alleged that the said directors had already left the office and there was a new board of directors in place. The actions of the said directors purporting to pass the resolution were termed as irregular, unlawful and fraudulent.

4. According to the applicant, the consent letter and the upward variation were based on an overvalued and/or fraudulent valuation report. Pegging the sale price on the basis of lapse of time was said would amount to double enrichment to the respondent to the extent that he had been in possession and use of the land and had derived benefit from it. The lapse of time was further said not to have been caused by or in control of the applicant and would be unjust to punish it for acts not of it's making. The applicant submitted that the constituted board of directors had resolved to set aside the said consent.

5. With the application is filed a supporting affidavit dated 6.10.2021, sworn by Evans Muchiri, who avers to be the applicant's factory unit manager. He relied on the grounds on the application and further submitted that the board of directors of the applicant had resolved to purchase land parcel Mbeere/Mbita/2087 registered in the respondent's name for a consideration of Kshs. 250,000/=per acre via sale agreement dated 19.4.2013. The transfer was subsequently effected in favour of the applicant but before payment of the balance of the purchase, the land was subject to numerous court dispute which were eventually determined.

6. However due to the delay occasioned by the cases, the respondent is said to have demanded variation of the consideration to a higher amount and filed suit seeking to repudiate the sale agreement. The board resolved to negotiate the purchase price and recorded consent in court with a higher reviewed purchase price of Kshs. 700,000/= per acre from the initial amount of Kshs. 250,000/= per acre which amount was to be paid within 90 days.

7. The terms of the consent order were said to be oppressive and punitive to the applicant's shareholders who are said to be tea farmers and it was argued that it's only fair, just and equitable that the consent be set aside to enable the farmers get value for their money. To the application is attached among other documents resolution dated 26.2.2013 to purchase the property, sale agreement dated 19.4.2013 for purchase of the land, resolution dated 10.6.2021 for settlement of the dispute and a copy of the CR12 dated 4.5.2021.

RESPONSE

8. The application was opposed by the respondent by way of grounds of opposition and preliminary objection dated on 21.10.2021 and filed on even date. It was submitted that the order was recorded by consent in writing by the advocates on record and according to the respondent the same was binding on all parties and could not be varied unless obtained by way of fraud. It was argued that that there was no evidence adduced by the applicant to prove fraud, misconduct or breach of professionalism on the part of his former advocate in the manner in which the consent was recorded.

9. It is averred that, by entering into the consent the advocate had mitigated the anticipated damage, loss and expense in favour of the applicant and according to the respondent the consent favors the special interest of the applicant and the public at large. It is argued that the applicant's board of management gained nothing from the judgment/decree passed and the allegations for fraud were said to be flivorous allegations. The application has been said to be an act calculated to delay and defeat justice.

10. The respondent avers that the consent had a 90 day stay of execution which lapsed in September and it is contended that within the stay period the applicant never expressed displeasure with the consent terms. The legal provisions relied upon by the applicant are said to be a misappropriation and misapprehension of the Constitution and the Rules of the Civil Procedure and it is argued that the court lacks the appropriate legal mandate to grant the relief sought. It's said that the applicant prior to recording of the consent had failed to file defence hence the justification behind the filing of the consent.

11. On the preliminary objection it was argued that the application was a non-starter, legally impotent, dead at birth, frivolous, vexatious and an abuse of the court process.

SUBMISSIONS

12. The application was canvassed by way of written submissions. The respondent filed his submissions on 9.11.2021. He argued that the applicant had an obligation to seek a relief that will serve the interests of justice and not the relief sought in prayer 2 which was said to be vexatious, fictitious and ambiguous. It is said that the legal provisions under which the application is brought do not support the granting of the relief sought by the applicant. According to the respondent, the effect of misquoting of the legal provision renders the entire application as incompetent, misconceived, flavorous and an abuse of the court process. The error was argued to be fatally defective on the application and one deserving of it to be dismissed with costs.

13. It was submitted that the law relating to grant or refusal to grant a consent order was clearly set out in authorities and reliance was made to the case of **Kenya Commercial Bank Limited & Another Civil Appeal No. 276 of 1997 w**hich cited with approval the case of **Flora Wasike Vs Destimo Wamboko (1988) IKAR** where it was stated that a consent order could only be set aside on grounds that would justify setting a contract aside.

14. Further reliance was made to the case of Civil Appeal No. 205 of 2014, **SMN Vs ZMS, MWS, The Director of Public Prosecutions and the Chief Magistrate Nakuru** which cited with approval **Civil Appeal Case No. 25 of 1986, Kasmir Wesonga Ongoma & Another Vs Ismael Etoicho Wanga** where it was held that a consent order made in the presence of counsel could only be varied or discharged if obtained by fraud or collusion. According to the applicant, the only basis when a consent order may be set aside is on prove of fraud and it was argued that the court should consider this basis alone in determining the present application.

15. The applicant submitted that the consent order was obtain lawfully and without any malpractice on the part of the advocates representing the parties. Fraud was said to be a tort that required high standard of proof and that it ought to be proved beyond reasonable doubt and not on a balance of probability. The allegations of fraud by the applicant were said to be levelled against it's own board of directors and according to the respondent, a person or legal entity was incapable of defrauding itself as fraud could only be committed against a 2nd or 3rd party and not against self. An assumption was made that if any fraud was committed by the directors as alleged then that was an internal and administrative matter which should not be allowed to affect the decree.

16. The applicant on it's part filed submissions on 12.11.2021. It was argued that the application before the court was unchallenged and uncontroverted by virtue of the fact that the respondent had failed to file a replying affidavit but instead had filed grounds of opposition and preliminary objection. In support of this, it relied on the Court of appeal case in **Civil Appeal No. 95 of 2016** where it was stated that failure to file a replying affidavit can only mean that those facts are admitted.

17. It was further submitted that the grounds of opposition revealed no pleaded issues of law, had failed to mention any single statute and contained matters of facts without any supporting evidence. An arguments was made that grounds of opposition should be limited to issues of law and not allegations of facts and/or evidence. To put this point across reliance was made to the court of appeal case in **Civil Appeal No. 95 of 2016** and the case of **Leisure Lodges Limited Vs Dr. Lalit D. Kotak**. The applicant urged the court to disregard the motion before it as according to them, the grounds of opposition filed were incompetent and did not meet the threshold contemplated under Order 51 Rule 14 of the Civil Procedure Rules.

18. With regards to the preliminary objection, it was submitted that the same was incompetent, hollow and unmerited. It was argued that a preliminary objection should raise a pure point of law and the party raising it should expressly plead the law in which it is relying on. Reliance on this was made on the case of **Mukisa Bisquit Manufacturing Co. Limited Vs West End Distributors Ltd (1969) EA** the court of Appeal.

19. Further reliance was made to the case of **George Oraro Vs Baker Eston Mbaja Hccc No. 85 of 1992** and the case of **Mehuba Gelan Kelil & 2 Others Vs Abdulkadir Abdilhim & Others (2015) eKLR** to argue that any matter that requires the court to investigate facts cannot be raised in a preliminary objection.

20. It was argued that courts have set the threshold required to set aside a consent judgment and the applicant relied on the case of **Flora N. Wasike Vs Destimo Wamboko in Civil Appeal No. 81 of 1984** which set out the test to be met for setting aside of a consent order. The applicant maintained that the directors who passed the resolution were not authorised and lacked capacity to bind the applicant company. They relied on the CR 12 for the company which listed nine directors and contended that the persons who signed the consent judgment were not the said directors.

21. The applicant submitted that the purported resolution was irregular, illegal and fraudulent and argued that where a judgment is tainted with fraud then the court has jurisdiction to set aside the judgment. They relied on the case in Civil Appeal No. 66 of 2015 and averred that they had met the threshold set out as the consent judgment was fraudulent and against the wider interest of the applicant company and it's shareholders.

22. The applicant ultimately contended that the application had merit and that the consent judgment and resultant decree ought to be set aside unconditionally and the matter proceed to full hearing on merit.

ANALYSIS AND DETERMINATION

23. Before I proceed to determine the matter, I find it worthwhile to give a brief genesis of the application. The applicant by way of board resolution dated 26th February 2013 entered into an agreement for the purchase of land parcels Nthawa/Gitiburi/2440,1548 & Mbeere/Mbita 2087. The consideration for the land was agreed to be Kshs. 21,066,750/= and 10% deposit was paid upfront pending completion of the transaction. Before payment of balance of the purchase price, a dispute arose that saw the parties engage in several legal battles on ownership of the property.

24. The issue on ownership was eventually resolved in 2019 but the balance of the purchase price remained unpaid which prompted the respondent to file an application seeking to pursue the balance of the purchase price among other orders. By way of consent dated 7th July 2021, the parties agreed that the applicant would pay to the respondent Kshs. 49,457,500/= as balance of the purchase price within (90) ninety days and a result judgment was entered on 8th July, 2021 on those terms.

25. On 6th October, 2021 an application was filed before me seeking to set aside the consent judgment. It was argued that the directors who had passed the resolution which was the basis of the consent terms entered between the parties for payment of Kshs. 49,457,500/= as balance of the purchase price, lacked capacity to do so as they had ceased being directors of the company at the time of passing the resolution. A CR 12 was attached to the application as evidence that there were new directors of the company who had now passed a board resolution dated 1.10.2021 to set aside the consent order and to procure another advocate to represent them in the matter. I also wish to point out that during the pendency of this suit the plaintiff/respondent died and was subsequently substituted with his wife.

26. I have considered the application as filed, the response and the rival submissions by the respective parties. There are three issues that commend themselves for determination before me which are:

i) Whether the court was moved under the correct provision and the implication of it on the application?

ii) Whether the application is properly defended?

iii) Whether the consent order entered on 8th July 2021 should be set aside?

Whether the court was moved under the correct provision and the implication of it on the application?

27. The applicant moved this court seeking to set aside consent order entered by court on 8th July 2021 which according to them was based on an unauthorised, irregular, unlawful and/or fraudulent board resolution. The court was invoked under the provisions of Article 159(2) of the Constitution, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules. According to the respondent, the provisions relied upon by the applicant are irrelevant and renders the application fatally defective and one that ought to be dismissed with costs.

28. I note that indeed the provisions relied upon by the applicant do not specifically relate to setting aside of consent judgment. However, does this render the application fatally defective? I believe not, citation of a wrong provision when moving the court does not in any way

render the application fatally defective. The Supreme Court in the case of ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*** **[2013] eKLR**, while addressing this issue stated as follows:

> *"The question then is, whether this omission is fatal to the applicant's case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite [the relevant provision] will not be fatal to the applicant's cause."*

29. It therefore follows that failure to cite a relevant provision does not in any way render the application defective and the court shall proceed to determine the application on it's merit.

Whether the application is properly defended?

30. The application before the court was defended by the respondent by way of grounds of opposition and preliminary objection. The applicant on it's part has argued that failure by the respondent to file a replying affidavit resulted to the application being unchallenged and uncontroverted. The legal provision on ways of opposing an application is **Order 51 rule 14 of the Civil Procedure Rules** which provides that;

"Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

31. The applicant has opposed the application herein by way of grounds of opposition and preliminary objection. From the provisions of Order 51 rule 14, it is evident that the mode elected by the respondent to oppose the application is one recognised and allowed by the law. Nonetheless there is need to review the grounds of opposition and preliminary objection filed by the respondent to determine whether they are merited. I will start with the preliminary objection which was filed by the respondent.

(a) A preliminary objection: and/or;
(b) Replying affidavit; and/or
(c) A statement of grounds of opposition;

32. It is trite law that a preliminary objection should be confined to points of law and not otherwise. See **MUKISA BISCUIT MANUFACTURING CO. LTD –VS- WEST END DISTRIBUTORS LTD (1969) EA 696**. In my view, the applicant's preliminary objection raises issues that would warrant the court to scrutinize the pleadings and to call evidence to substantiate the veracity of the said averments. The preliminary objection therefore falls short of the requirements as envisaged in the Mukhisa Case.

33. I now move to the grounds of opposition adduced by the respondent. It is argued that the grounds of opposition as filed do not contain a single statute and they contain matters of facts without supporting evidence. According to the applicant, failure to respond to the application by way of replying affidavit rendered the averments in the application uncontroverted. A perusal of the grounds of opposition shows that the said grounds largely respond to the averments in the application, simply put they address issues of fact.

34. I have considered the court of appeal authority relied upon by the applicant in **Civil Appeal No. 95 of 2016** in the case of **Daniel Kibet Mutai & 9 others v Attorney General [2019]** eKLR where the court cited with authority the case of **Peter O. Nyakundi & 68 others v Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR** which stated

> *"As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath.*

35. Further in the case of **Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR** the court held as follows:-

> *"The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant''.*

36. From the authorities I have cited above, grounds of opposition are to be deemed as general averments and do not deny or respond to issues in an application. A preliminary objection and grounds of opposition though means of opposing an application they are not to be used when one intends to deny allegations in an application. In my view a replying affidavit would best serve to deny issues raised in an application. It has been held that where a replying affidavit is not filed then in essence the averments in an application are deemed as uncontroverted and unchallenged. In considering the mode of opposition opted to by the respondents and the averments therein I find that the issues in the application are not rebutted and the application stands unopposed.

37. However, though having held as such, the application by the applicant should not be deemed as having been allowed. This court has a duty to consider the application and proceed to determine it on it's merits.

Whether the consent order entered on 8th July 2021 should be set aside?

38. The threshold to be met for setting aside of a consent order was well stated in the case of **Lazarus Kirech v Kisorio Arap Barno [2018] eKLR Eldoret E &L Case No. 26 of 2013 where it was stated as follows;**

> *"It is trite law that a consent order can be varied where it is proved that it has been obtained by fraud or collusion or by an agreement contrary to public policy of the court or the consent was given with sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement".*

39. Further in the case of ***Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR***, the Court of Appeal stated as follows:

> *"A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court."*

40. The applicant herein submitted that the court order the subject of this application was entered into pursuant to a board resolution which is said to have been irregular, unlawful and fraudulent. It is argued that the directors who passed the resolution lacked capacity to bind the company as they had ceased been directors at the time of passing the resolution. A CR12 dated 4th May 2021, which lists the directors of the company at the time has been produced. Also relied upon by the applicant is a board resolution dated 10th June, 2021 which approved settlement of the court matter between the respondent and the applicant in the terms as entered in the consent the subject of this application.

41. The resolution is duly executed by persons stated to be directors of the company. I have reviewed both documents and it is clear that the parties who executed the resolution going by the CR12 before me, were not directors of the company as at the time of passing the resolution. The persons who executed the resolution were former directors of the company. In the circumstances therefore does this warrant the court to set aside the consent order entered into by the parties? I note that the applicants have pleaded fraud on the part of the said directors whose actions are said to have been fraudulent, irregular and unlawful. There is also the contention on the valuation report which the former directors are said to have relied upon to arrive at the figure of Kshs. 49,457,500/= for payment of the parcel of land. The report as well is said to have been fraudulent.

42. Allegations of fraud are deemed as serious allegations which require to be strictly proven. It is trite law that when one raises an allegation of fraud they have a duty to particularize such allegations and to prove it. I note that the applicant has not particularized such allegation of fraud in their application. However, the applicant as evidence of fraud has placed before the court a CR12 which shows that the directors who signed the consent were former directors and therefore lacked authority to pass the resolution.

43. On whether their acts were fraudulent, unlawful and irregular. I am guided by the provisions of the Companies Act 2015. Section 133 of the Companies Act provides as follows; "*The acts of a director are valid even if it is later discovered that*

> *(a) the appointment of the director was defective; or*
>
> *b) the director-*
>
> *(i) was disqualified from holding office;*
>
> *(ii) had ceased to hold office; or*
>
> *(iii) was not entitled to vote on the relevant matter"*

44. As alluded above, the directors who passed the resolution the basis of the consent order were former directors of the company. As at the time of passing the resolution, the said directors purported to have authority to act on behalf of the company and the counsels on record for both parties together with the applicant relied on such authority to enter into consent with the applicant. According to the provisions of Section 133 of the Companies Act, by virtue of the fact that the information about the directors having ceased office has come to knowledge of the parties after the resolution has been passed, then their actions at the time of passing the resolution are valid.

45. It is trite law that any person dealing with a company in good faith has no obligation to confirm whether the person dealing on behalf of the company has authority to transact on it's behalf especially if the person has previously had such authority and there was no notice or doubt as to question such capacity. It is worth noting that the respondent to the suit has previously engaged with the applicant on reliance of resolution passed by it. The parties had engaged in purchase of land pursuant to a resolution passed by the applicant, the applicant had also appointed it's previous counsel equally on strength of a resolution passed by the applicant. In my view the respondent and counsels on record had no reason to doubt the validity of the resolution to enter into consent between the parties.

46. It is also interesting to note that the applicant's current directors going by the CR 12 were the company's directors as at May 2021, the resolution the basis of the consent judgment was passed in June 202 and the consent judgment entered in July 2021. From the time the applicant's became directors to the time the consent judgment was entered was a period of two months. To me two months is a long period of time for the applicant to have familiarized themselves with the happenings of the company including but not limited to legal matters in court. The company further had an obligation to notify all parties dealing with it of changes in the directors even through an advertisement in the local dailies. I have reviewed the applicant's application and no such notice or warning was given to the respondent not to transact with the former directors and the applicant is therefore partly to blame for this.

47. It is evident that the applicant did not notify the respondent of the change in the directors. However even then such changes should have

been brought to the attention of the advocate on record acting on behalf of the company. The respondent had engaged with the former counsel on behalf of the applicant and being that his appointment was valid and he had not ceased being an advocate of the company then any consent entered into on behalf of his client is binding upon the parties. This was as held in the case of **Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485, Harris, J** correctly held, inter alia, that -

> ***"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."***

48. I find that the applicant has not met the threshold for setting aside of a consent order, all the allegations on fraud on the consent judgment and the contested valuation have not been proven. The other grounds that would warrant setting aside of a consent judgment have also not been proven. I find the application lacks merit and the same is dismissed with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 15TH DAY OF FEBRUARY, 2022.

A.K. KANIARU

JUDGE

15.02.2022