



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
ENVIRONMENT AND LAND CASE NO. 51 OF 2015

JONATHAN NAMULALA NYONGESA PLAINTIFF/APPLICANT

VERSUS

MULTI BUSINESS SHOOTERS INVESTORS LTD.....1ST DEFENDANT

FAMILY BANK LTD.....2ND DEFENDANT

THE HON ATTORNEY GENERAL.

OF THE REPUBLIC OF KENYA.....3RD DEFENDANT

RULING

[1]. The application herein is made under a certificate of urgency. The plaintiff applies that the consent orders made on 8th June 2015 be set aside. The reasons given by the appellant are that after the orders were given the applicant (who was in court on the same day) was aggrieved and he wants the orders set aside. That he had serious mis-givings with his advocate. Further that due to the sensitive nature of the dispute and the enormous amounts of money involved, justice will not be served, and finally that both advocates for applicant and respondent will be seen in bad light.

[2]. The history of this matter is that an application dated 22.4.2015 was filed in this suit. The same came before Aroni J, who gave temporary orders on 23.4.15. The matter came again in court on 6.5.2015 where the advocate of the applicant told the court that this was a land matter. The judge ordered that the file be placed before Environment and Land Court for mention on 21.5.2015 and the interim orders were extended. On that date the matter came before me and Mr. Sichangi advocate, appeared for the plaintiff and Mr. Anwar appeared for 2nd defendant while Mr. Musumba appeared for Mr. Wattanga for the 2nd defendant. Mr. Kuria State Counsel appeared for the Attorney General. The consent entered was extended and parties were given leave to file their replies within 14 days and the matter was fixed for mention on 8.6.2015.

[3]. In the meantime another application was filed on 25.5.2015 by the applicant herein against the respondents herein. I gave interim orders and ordered the applicant to serve the respondents. The matter was listed for mention on 8.6.2015. On 8.6.2015 the coram was as follows, Mr. Sichangi for the plaintiff/applicant, Mr. Makokha for the 1st defendant, Mr. Onyiso was for the Attorney General while Mr. Onkangi appeared for the 2nd defendant.

Mr. Sichangi for the applicant told the court that there were two applications dated 22.4.2015 and

22.5.2015 by the applicants. That he wished to abandon them and the costs be in the cause. He went on to say that they have agreed with Mr. Makokha learned Counsel for the 1st defendant that nobody shall be in occupation of the suit property and that, that included any tenants in the suit property. The case was then fixed for hearing on 9.12.2015. The parties agreed to comply with order 11 of the Civil Procedure Rules and exchange documents and file the same by 30th July 2015, any failure to file documents notwithstanding.

[4]. It is that consent of 8.6.2015 that is under attack by the plaintiff in his application. The application is vehemently opposed by Mr. Makokha Learned Counsel for the 1st respondent. He relied on an affidavit of Mr. Wanyonyi Waswa a director of the 1st defendant sworn on 21st June 2015. He stated that the order challenged was a consent order of four advocates. That no evidence of fraud or misrepresentation was alluded before the court to warrant the court to interfere with the consent order. He argued that a consent order is a contract. That the standards required to set it aside are high and that being aggrieved is not one of the reasons. He argued that the plaintiff has not met any of the conditions set under Order 45 of the Civil Procedure Rules. That there was no discovery of a new and important matter that was not within the knowledge of the applicants advocate when he recorded the order. That no one has been ordered to vacate the premises. That no prejudice has been shown to be suffered by the applicants. Mr. Makokha said his client would be greatly be prejudiced since he has paid Kshs. 14 Million for the property. That the applicant was not arguing that he was coerced and/or forced to make the consent but he did so freely and voluntarily. That the applicant cannot choose what order to remove or what order he thinks is not favourable to him. That Mr. Sichangi learned counsel for the applicant had full mandate and had express and implied authority to compromise the suit on behalf of his client the applicant herein. That the applicant cannot turn around and say that the learned counsel had no authority to compromise the suit. That if there is any misunderstanding between advocate and client, that this is the wrong forum for the same. Such misunderstandings cannot be used to effect other people. He argued that the issue of the advocates being seen in bad light does not arise since this is not a public interest litigation. Mr. Makokha urged the court to dismiss the application.

[5]. Mr. Munya for the bank urged the court to deal with the matter expeditiously to avoid prejudice to his client.

Mr. Sichangi, said that there was a mistake by counsel which should not be visited on his client and the suit can be heard again.

[6]. The issue for determination by the court is, can this consent order be set aside?

There is no dispute that the order herein was entered by consent *In Kenya Commercial Bank Vs. Specialized Engineering Company Ltd. [1982] KLR 485* the court held,

“An advocate has general authority on behalf of his client as long as he is acting bona fide and not contrary to express negative direction, in the absence of proof of any express negative auction, the order shall be binding.”

Further it was held that,

“A consent 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 by an agreement contrary to the policy of the court. Or where the consent was given without sufficient material facts or misapprehension or ignorance of such facts in general for reason which would enable the court to set aside an agreement.”

In the case of *Brooke Bond Leibig (T) Ltd. versus Maliya 1975 [EA] 266* it was also held that a consent order made in the presence and with the consent of counsel is binding on all the parties to the

proceedings. It cannot be varied or discharged unless it is obtained by fraud or collusion or is contrary to the public policy of the court.

[7]. The Court of Appeal in Nyeri Civil Appeal no. 7 of 2014 Samuel Wambugu Mwangi Vs. Othaya Boys High School held that a consent order has a contractual effect upon the parties. That it cannot be set aside unless there is fraud collusion or any of the reasons that can justify the setting aside of the consent as in a contract.

[8]. Likewise I find no valid reason to set aside the consent order that was made by the parties in court, all the parties were present and their advocates. A change of mind alone is not one of the reasons that can make a court of law set aside or vary a consent order of the parties.

I am not convinced that the thresholds set in Order 45 on review of the court order are met. I find this application without any merit. I dismiss it with costs to the respondents. This suit shall proceed as earlier scheduled.

DATED at BUNGOMA this 23rd day of September, 2015.

S. MUKUNYA

JUDGE