



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 1125 OF 1997

PHILAN HOLDINGS LTD. PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL. 1ST RESPONDENT

ABDULLA HUSSEIN. 2ND RESPONDENT

NAALMDAR PARSMOTLANMDAI. 3RD RESPONDENT

AND

ABDUL MAJID SULEIMAN. INTERESTED PARTY/APPLICANT

(As legal representative of the Estate of Abdul Aziz Suleiman.)

RULING

The Application for determination by this Honourable Court is the one dated 6th August, 2014 brought by way of a Notice of Motion.

It is expressed to be brought under Order 24 Rule 4 (1) and Order 51 Rule (1) of the Civil Procedure Rules and Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya.

The Applicant seeks the following orders: -

- a. THAT** the interested party/Applicant be allowed to be enjoined in these proceedings as the legal representative of the Estate of ABDUL AZIZ SULEIMAN Deceased who was an interested party herein.
- b. THAT** this Honourable court be pleased to set aside and/or vacate the consent filed herein on 9th April, 2008 together with all its consequential orders and reinstate the objection which had been filed herein by the said deceased, ABDUL AZIZ SULEIMAN.
- c. Costs of the Application be provided for.

The Application came up for hearing on 16th February, 2015 before Justice Mabeya who gave directions that the same be disposed off by way of written submissions to be highlighted. He also gave directions that the Preliminary Objection to the Application dated the 12th February, 2015 be argued as grounds of

opposition to the motion.

The parties appeared before me on the 4th November, 2015 for highlighting of the submissions.

Mr. Kitheka Advocate appearing for the interested party argued his case and hereunder is a summary of his submissions.

That the interested party be enjoined as a legal representative to the estate of his deceased brother Abdula Aziz who was the original interested party in the matter but who is now deceased. The interested party is the legal representative to the estate of his deceased brother and he has legal capacity to do so by virtue of a grant of letters of administration and it is only fair that he be enjoined to protect the interest of his deceased brother.

He further submitted that the cause of action survived the deceased.

The Applicant has sought for the orders entered on 9th April, 2008 be set aside for the reason that the consent was entered irregularly without the knowledge and/or consent of the Original Interested Party who is now deceased.

The original interested party before his demise had raised an objection which objection was compromised by a consent order on 9th April, 2008. He prayed that the consent order be vacated and the matter be heard on merits for failure to do so will result in miscarriage of justice.

He took issue with the process through which the Respondent (Philan Holdings Limited) obtained interest in the said property as having been irregular in that the decision in SRM CC. No. 406 of 1992 which gave the property to Philan Holdings Limited was quashed by the decision of Justice Ole Keiwua in High Court Misc. No. 583 of 1995.

Mr. Mungata on his part relied on the submissions and replying affidavit filed on 9th July, 2015.

On the Preliminary Objection he argued that the Application is fatally defective for the reason that the Applicant is not a party to the proceedings. In prayer 1 of the Application, the Applicant is seeking for an order to substitute his deceased brother and in the next prayer, he is seeking to set aside substantive orders made on the 9th April, 2008. On this point, he relied on the case of **Francis Osoro Vs Nyaboke Ogalla 2012 eKLR**, where the court found that you cannot mix the two prayers in the same Application. In his submission, the defect is not merely a matter of procedure but it's a substantive defect that goes to the root of the matter. You have to be a party first before you can seek substantive relief and on that ground alone, he urged the court to dismiss the Application.

The Application is frivolous and an abuse of the Court process as it was made 6 years from the date the order sought to be set aside was made. Six years is a long time to render the delay inordinate and the delay has not been explained.

The original interested party died four (4) years after the consent order had been entered into and according to him, this is not reasonable conduct of a party. The order of 9th April, 2008, disposed off the matter and the court is being told to re-open a concluded matter.

It is a rule of fairness that litigation should come to an end and it will be extremely prejudicial to the other parties to re-open the matter and that would take them many years back. He submitted that the Application has no merits. He referred to the case of **Flora N. Wasike Vs Waboko (1982) –KAR** on the Principles of setting aside a consent judgment wherein the Court of Appeal said; a consent judgment can only be set aside on grounds of fraud, mistake or misrepresentation. The onus of proof is on the Applicant seeking to set aside the consent order.

He told the court that it was not enough for the Applicant to say he belief the consent was entered without

the knowledge of his brother, the original interested party. Fraud has to be proved. In the **Wasike** Case, where an advocate is seized of a matter, he is believed to have ostensible authority to compromise the suit. The Advocate for the Original Interested Party was present when the consent was recorded and it is not for the court or the other party to ensure the authority of the Advocate to act or compromise the suit and even if the Advocate for the Original Interested Party had no authority to compromise the suit, it is not enough for the court to set aside the consent order.

He further argued that the property does not belong to the estate of the Original Interested Party such interest having been extinguished in the year 1992. He cited Civil Case Number 402 of 1996 wherein the City Council of Nairobi (then) obtained judgment against the registered proprietors for rent arrears and in execution of that judgment, Philan Holdings Limited in the year 1994 bought the property.

Thereafter, the City Council of Nairobi applied for a vesting order which was issued in Civil Case No. 406 of 1996 but the Original Interested Party took issue with that order in Misc. Appl. No. 583 of 1995 on account of jurisdiction in that the lower court did not have jurisdiction to issue the same. Justice Ole Keiwua quashed the order but Khan Holdings Limited applied to the High Court for a vesting order which culminated to the consent dated 9th April, 2008, the effect of which was to allow a vesting order. There has never been a challenge on the Resident Magistrate's judgment in SRM Civil Case No. 406 of 1992.

On her part Miss Maina Advocate associated herself fully with the submissions made by Mr. Mungata. She relied on the submissions filed on the 8th May, 2015 and the grounds of opposition filed on 23rd September, 2014.

She submitted that there was inordinate delay in bringing the Application and the delay has not been explained.

She further submitted that the consent judgment was properly entered into and she referred to the case of **Brooke Bond Vs Malio 1975 E.A.** where the court held that any consent order entered into, in the presence of an advocate is binding unless it was obtained by fraud or collusion. The Applicant was not a party to the consent and what he is telling the court is hearsay and unsubstantiated claim. The Original Interested Party died four years after the consent had been entered into and if he was not agreeable to it, he was at liberty to challenge it which he did not. Equity does not aid the indolent.

In his brief reply Mr. Kitheka Advocate submitted that the Original Interested Party was not aware of the consent before he died.

I have carefully read the Affidavits and the submissions filed in this matter in support of and in opposition to the Application under consideration. I have also considered the oral submissions made by the learned counsels.

The dispute herein started way back in the year 1992. From what I gather from the pleadings and the submissions, the genesis of this matter is ownership of property known as L.R. 209/2566 situate within Nairobi Central Business District. The said property was sold to Philan Holding Limited at a public auction.

A Resident Magistrate's Court in Civil Case No. 406 of 1992 issued a vesting order over the said property in favour of Philan Holdings Limited. The order was challenged in the High Court in Misc. Civil Application Number 583 of 1995 on the ground that the Resident Magistrate's court lacked jurisdiction to issue the order. The Application was heard by Justice Ole Keiwua who quashed the said order on the 21st November, 1997.

Philan Holdings Limited thereafter moved the High Court in Misc. Civil Application Number 1125 of 1997 for a vesting order which was duly given on the 9th day of April, 2008 by way of a consent that was filed in court. The effect of that consent was to vest the property in Philan Holdings Limited. With this consent, one would have reasonably expected that the dispute had been brought to an end but this was not

to be.

On the 8th day of August, 2014, the Applicant herein filed the present Application seeking the orders that I had stated earlier on, in this ruling.

Mr. Mungata Advocate filed a Notice of Preliminary Objection on the 13th February, 2015 on the grounds that: -

a. The Application is fatally defective for purporting to seek substantive orders.

b. The Applicant has no locus to seek setting aside of a consent judgment.

Though Justice Mabeya had on 16th February, 2015 given directions that the Application and the Preliminary Objection be heard together, the counsel for the Applicant did not submit on the Preliminary Objection but instead he concentrated on the Application itself.

On his part Mr. Mungata submitted at length on the Preliminary Objection and relied on the case of **Marko Vs Nyagwoka Ogora Alias Kennedy Kemoni Bwogara HCCC No. 1271 of 1993**. I am, however, not persuaded by Mr. Mungata's submission in support of the Preliminary Objection. The position may have been so, some years ago but with the New Constitution 2010, the legal position with regard to legal technicalities has changed tremendously.

Article 159(2) (d) provides that: -

“Justice shall be administered without undue regard to procedural technicalities”

The Court of Appeal in its recent decision in the case **JMK Vs MWM & MFS Civil Appeal No. 15 of 2015** at Mombasa pronounced itself on the legal position regarding the issue at hand when dealing with a similar situation and made a finding that a party can apply to be joined in the proceedings and in the same Application pray for other substantive orders.

In the premises aforesaid, I find that the Preliminary Objection has not merits and I dismiss the same.

Having dismissed the Preliminary Objection, I now turn on the merits of the Application. The court is being asked to set aside a consent order. Courts have held on several occasions that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation. See the case of **Flora N. Wasike Vs Destimo Wamboko**.

The Applicant herein alleges that there was fraud. It was a mere allegation that was not proved or explained. The Advocate for the Applicant told the court that the Original Interested Party was not made aware of the consent until he died. It is worth noting that the Original Interested Party was represented by an Advocate in the proceedings when the consent was entered into. On record for him as per the court record was Sharad Rao Advocate who not only signed the consent but also duly stamped the same.

In doing so, he compromised the Original Interested Party's case. This was articulated in the case of **Flora N. Wasike** where the court held: -

“An Advocate would have ostensible authority to compromise a suit or consent to judgment so far as the opponent is concerned.”

The consent herein was entered into during the lifetime of the interested party and he died four (4) years after the consent had been filed in court.

Though it is alleged that he was not aware of the consent this court does not believe the applicant on that. A period of four years is a long time for a party who had a case in court not to have been concerned about

what was going on in the case. One of the grounds in support of the Application is that the Original Interested Party was bedridden for a very long time. This fact is not contained in the Applicant's Affidavit in support of the Application and his advocate did not submit on it and, therefore, no evidence was tendered to court in support of that.

On the allegation of fraud, this court finds that it is just a mere allegation without any evidence to support it. It is not enough to merely allege fraud without any material particulars.

Lastly, the issue of inordinate delay in bringing this Application was raised by the counsels for the Respondents. The consent that the Applicant seeks to have set aside was filed on 9th April, 2008. This is more than seven (7) years since the consent was filed and more than three years from when the Original Interested Party passed away at least going by the submissions made by the learned counsels. The Applicant is the brother to the Original Interested Party and the property the subject matter of this suit is family property. This being the case, the Applicant herein ought to have been aware of this case all along even when his brother, the interested party was still alive yet it took him a period of more than three (3) years after the death of his brother to move the court.

The Applicant did not even attempt to explain the delay. I agree with counsels for the Respondents that the delay is inordinate and litigation has to come to an end.

In the premises aforesaid, I grant prayer 2 of the Application dated 6th August 2014 and I disallow prayer 3. Costs of the Application are awarded to the Respondents.

Dated and delivered at Nairobi this 10th day of December, 2015.

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L. NJUGUNA

JUDGE

In the presence

..... for the Applicant.A

..... for the Respondents.

..... for the Interested Party.