



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL CAUSE NO. 34 OF 2009

KAHAGI NDIRANGU.....PLAINTIFF/APPLICANT

VERSUS

KENYA POWER AND LIGHTING COMPANY.....DEFENDANT/RESPONDENT

RULING

This application is dated 27th May, 2013 and seeks Orders:

1. That Court do REVIEW the Consent Orders entered on 6.7.2011 and issued on 10.7.11, and allow the Applicant to amend the plaint to reflect the true value of the parcel of land subject therein and matter be heard on merit.

IN THE ALTERNATIVE

2. That the court do order the defendant to compensate the Plaintiff/Applicant for the subject herein at Kshs.7.4 million as valued.
3. That costs be provided for.

Parties put in written submissions.

The consent in question is dated 3.7.2009. It is signed by Charles Kariuki and Company, Advocates for the plaintiff and D. J. Mbaya, Advocates, for the defendant. It reads as follows:

1. By consent of the parties and their advocate, judgment be and is hereby entered for the plaintiff against defendant for Kshs.2,650,000/=
2. Costs of the suit to be agreed or taxed.
3. The plaintiff to transfer L.R. No.NYAKI/MUNITHU/1068 to the defendant Kenya Power and Lighting Company Ltd Immediately.
4. The amount above (1) to be paid within 10 days from the date of the transfer of the above parcel of land and in default execution to issue to recover the amount, cost and interest.
5. The Interim Orders be and are hereby discharged on filing of this consent.”

The Applicant/Plaintiff submitted that the consent which is the subject matter in this application did not take into account the true value of the subject land herein **OR** it was in ignorance of a material fact in that whereas the agreed price was Kshs.2.65 million, the true price reflected in the attached valuation report is in excess of Kshs. 7.4 million. It was further submitted that the respondent had failed to comply with the consent with the effect that the value of the money was diminishing whereas the value of the subject matter was appreciating. The applicant proffered two authorities to demonstrate the principles for setting aside of consent judgments as:

1. Fraud
2. Collusion
3. Ignorance of sufficient material facts OR
4. Any other general reason which may enable the court to set aside an agreement.

The authorities offered by the applicant are:

1. KCB Ltd Vs Benjoh Amalgamated Ltd & Another, Civil Appeal 276 of 1997.
2. Evan Gachoki Njuki & 2 others Vs Wilson Njuki Karukuma, (2008) e- KLR.

It was submitted that the applicant had demonstrated that the consent had been forced upon him by the respondents and that it had been entered in ignorance of a material fact. That material fact has been specified as the true value of the land in question.

The defendant/respondent submitted that the consent judgment had been drawn by none other than the plaintiff's advocate, was filed on 10th July, 2009 and was made a final judgment on 6th July, 2011. It was submitted that whereas the defendant/respondent had all along been ready and willing to implement the consent judgment, the plaintiff had refused to cooperate. It was submitted that at the time the consent judgment was entered, the value of the property was adequately reflected but the applicant had willingly and maliciously delayed implementation to contrive appreciation of the suit land so that he could unjustifiably extort outrageous sums of money from the respondent.

The Respondent submitted that a consent judgment should be not treated as an ordinary *exparte* judgment. In this case it was entered into with the full willingness of the plaintiff. He submitted that the plaintiff had not demonstrated the existence of the principles spelt out by the court of Appeal in **FLORA N. WASIKE V DESTIMO WAMBOKO 1982-88) KAR 625**, as fraud, mistake or misrepresentation. The respondent also proffered the following other authorities in support of his arguments:

1. **AL JALAL ENTERPRISES LTD VS NIC BANK LIMITED & ANOTHER (2010) EKLR**
2. **PAUL NGOBIA NJOROGE & OTHERS VS KENYA NATIONAL ASSURANCE CO. LD (2013) eKLR.**
3. **ALI SABATIA ALI VS FLORENCE ISAHO BASHIR (2011) eKLR.**

I have examined the averments, authorities and submissions of the parties. I, however, will not attempt to re-invent the wheel. Principles that guide courts in setting aside consent judgments are well established. In **Florence Wasike V. Destimo Wamoka (Op Cit) Hancox, JA**, as he then was, said:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or certain conditions remained to be fulfilled which are not carried out”

This position is pellucidly enunciated in the English Case of **PURCEL V. F. C. TRIGELL LTD, (trading as SOUTHERN WINDOW AND GENERAL CLEANING CO. and Another), [1970] 3 ALL ER671, where Winn, LJ, opined:**

“It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

In Kenya Commercial Bank Ltd Versus Specialized Engineering Co. Ltd [1982] KLR 485, it was held 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 representation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. Justice Harris at page 493 opined:

“The marking by a 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 of one or other of the recognized grounds.”

For a long time, the common law legal system has allowed a consent order or judgment to operate as an estoppel against someone trying to assert a different position from that stipulated in the agreement of the parties. This position is buttressed by the opinion of Lindley L. J in Huddersfield Banking Co. Ltd Vs Henry Lister & Son Ltd (1895) 2 ch. D 273 at page 280 where he said:

“A consent order I agree is an order and as long as it stands it must be treated as such, and so long as it stands it is as good an estoppel as any other order.”

The consent herein was entered into on 3.7.2009 and was made a final judgment on 6.7.2011. It was signed by the advocates representing both parties. The sum of Kshs.2,650,000/= was to be paid to the plaintiff within 10 days from the date of the transfer of Parcel NO.NYAKI/MUNITHU/1068 to the defendant. As the plaintiff has never transferred the said piece of land to the defendant, the defendant cannot be blamed for lack of the fulfillment of the terms of the consent judgment. I note that the valuation report upon which the plaintiff relies in his attempt to establish that the plaintiff was ignorant of a material fact regarding the true value of the subject land is dated 20th May, 2013 about 4 years after the parties signed the Consent Agreement. I do not accept the argument that a party can cause a valuation report to be prepared 4 years after a consent agreement had been signed, and 2 years after it had been converted into a final judgment, to justify the existence of ignorance of a material fact.

A consent judgment is just that: It is a judgment. It cannot be handled perfunctorily. As Justice Harris, J, as he then was, said in Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd (Supra) a consent order or judgment 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 or consent judgment. The plaintiff has not proved the existence of any ingredient or ingredients which would merit the setting aside of the consent judgment. In the circumstances, I dismiss the plaintiff's prayer to review and set aside the consent orders. As a consequence, the alternative prayer to order the defendant to compensate the Plaintiff/ Applicant for the subject land herein at Kshs.7.4 million as per the valuation report dated 20.5.2013 is also dismissed.

I award costs to the defendant.

It is so ordered.

Delivered in Open court this 18th day of March, 2014 in the presence of:

Cc. Daniel

Muthomi for Plaintiff/Applicant

Otieno h/b for D. J. Mbau for Defendant/Respondent

P. M. NJOROGE

JUDGE