



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 102 OF 2006**

JOSEPH OGUNA ODERO ..... PLAINTIFF

VERSUS

MARY ACHIENG HOSEA ..... DEFENDANT

**RULING**

1. The plaintiff brought this suit against the defendant on 27<sup>th</sup> July 2006 seeking; a declaration that the plaintiff is the lawful and registered proprietor of all that parcel of land known as **LR No. Suna East/Wasweta I/3966** (hereinafter referred to as “**the suit property**”), the eviction of the defendant from the suit property, a permanent injunction to restrain the defendant from residing in, collecting rent from, interfering with, trespassing and/or dealing with the suit property in any manner whatsoever and an order that the defendant do remit and/or refund to the plaintiff rent accrued from the suit property from 15<sup>th</sup> July 2003 in the sum of kshs. 504,000/= together with mesne profits. In his plaint dated 27<sup>th</sup> July 2006, the plaintiff averred that he purchased the suit property at a public auction at kshs. 1,300,000/= on 15<sup>th</sup> July 2003. The said public auction was conducted by Co-operative bank of Kenya Ltd. which, had a charge over the suit property and which carried out the said auction in exercise of its statutory power of sale to recover the monies then due and owing to it by the defendant’s deceased husband one, Washington Hosea Songa. The suit property was charged to Co-operative Bank by the said **Washington Hosea Songa** (hereinafter referred to as “**the deceased**”) to secure a loan that had been advanced to him by Co-operative Bank of Kenya Ltd (hereinafter referred to as “**the bank**”).
2. The plaintiff averred that after successful bid at the said auction, the suit property was transferred to him on 20<sup>th</sup> July 2004 and he was issued with a title deed for the same. The plaintiff averred that at the time when the suit property was put up for sale by the bank, the 1<sup>st</sup> defendant who is the widow of the deceased and three (3) tenants were in occupation of the buildings on the suit property which comprises of the main house, two (2) twin family houses and a temporary structure. The plaintiff averred that the defendant has continued with her occupation of the suit property and the said tenants have also continued to pay rent for the premises under their occupation to the defendant without any lawful basis. The plaintiff averred that the suit property having been sold and transferred to the plaintiff, the defendant has no right known in law in the suit property that would justify her continued occupation and collection of rent from the tenants on suit property.
3. The defendant entered appearance and filed her statement of defence on 14<sup>th</sup> August 2006. In her statement of defence, the defendant admitted that she is the widow of the deceased and that the deceased who was the registered proprietor of the suit property had charged the suit property to the bank to secure a loan. The defendant denied however that the suit property is developed or

that it was sold by public auction to the plaintiff in the manner pleaded in the plaint. The defendant contended that if at all the suit property was sold to the plaintiff by the bank then, that sale was fraudulent and illegal and could not confer upon the plaintiff a lawful title. The defendant accused the bank of secretly arranging and selling the suit property after the death of the deceased without any notice to the deceased's personal representatives and without first issuing the requisite statutory notice. The defendant denied further that she is in occupation of the suit property and contended that she is occupying **LR No. Suna East/Wasweta I/8032**. The defendant claimed that the suit property is not developed and that she has not been collecting any rent there from as claimed by the plaintiff or at all. The defendant urged the court to strike out and/or dismiss the plaintiff's suit with costs.

4. When the plaintiff's suit came up for hearing before Makhandia J. on 21<sup>st</sup> October 2010, the parties recorded a consent compromising the suit on the following terms;

**“(i) The defendant shall pay back to the plaintiff the sum of kshs. 1,300,000/= only with interest thereon at 14% per annum from 15<sup>th</sup> July 2003 until 20<sup>th</sup> January 2011. It is expected that the defendant shall pay the amount on or before 20<sup>th</sup> January 2011.**

**(ii) The defendant too shall pay to the plaintiff the sum of kshs. 14,000/= only per month being monthly rent payable in respect of the premises on LR No. Suna East/Wasweta I/3966 w.e.f 15<sup>TH</sup> July 2003 to 20<sup>th</sup> January 2011. The said amount shall attract interest at the rate of 14% per annum as well.**

**(iii) In default of any payment aforesaid, the plaintiff shall be at liberty to forcefully evict the defendant from the suit premises, that is LR No. Suna East/Wasweta I/3966 without any further notice. This notwithstanding ,the defendant shall still be required to pay the rents in line with limb 2 of the order herein.”**

5. Soon after this consent judgment was recorded, the original court file disappeared from the court registry. The same has not been traced to date. On application by the plaintiff the court on 21<sup>st</sup> July 2011 ordered the construction of a skeleton file. That is the file in which these proceedings are being undertaken. On 10<sup>th</sup> January 2014, the defendant filed an application by way of Notice of Motion dated 6<sup>th</sup> January 2014 seeking among others the following orders;

- i. That the court be pleased to set aside the consent entered into between the plaintiff's advocates and the defendant's advocates herein on 21<sup>st</sup> October 2010.
- ii. That subsequent to the court granting prayer I above the defendant be granted leave to defend the suit.
- iii. That the defendant be granted leave to amend her statement of defence.

This is the application which, is the subject of this ruling. The defendant's application was brought on the grounds that; the consent recorded on 21<sup>st</sup> October 2010 was entered into without the authority or consent of the defendant, there was a misrepresentation to the defendant as to the effect of the said consent, the plaintiff would not suffer any prejudice if the application is allowed which cannot be compensated for in costs and that the defendant has a strong defence to the suit herein. The application was supported by the affidavit of the defendant sworn on 6<sup>th</sup> January 2014. In her affidavit, the defendant stated that; towards the month of June, 2010, she started ailing from meningitis, tuberculosis and anemia. In the meantime, this suit was listed for hearing on 21<sup>st</sup> October, 2010 by her then advocate on record Mr. K'owino. Before she attended court for the hearing, she was advised to accede to whatever her said advocate, Mr. K'owino would tell her regarding the case. As a result of this advise, she attended court for the hearing on 21<sup>st</sup> October 2010 and sat at the back of the court room. When this matter was called out, she confirmed that she was present. Thereafter, Mr. K'owino told her that he would inform her of the next hearing

date. When she realized that no further communication was forthcoming from her said advocate, she decided to withdraw instructions from him.

6. Following that decision, she filed a notice to act in person in January, 2011 after which she fell seriously ill and was admitted in hospital in March 2011. Due to her illness, she was not able to follow up on the case until sometimes in November, 2013 when she perused the court file and noted that there was a draft consent in the file. The said consent was entered into without her approval. Even after compromising the case, her said former advocate, Mr. K'owino continued sending her notices to the effect that the case was coming up for hearing. On learning of this development, she lodged a complainant against her said former advocate with the Advocates Complaints Commission for his gross misconduct in handling her case. The suit property is her only abode where she resides with her children and as such if the consent judgment is not set aside and she is allowed to defend the suit, she will suffer irreparable harm. The defendant contended that it is inconceivable that she would agree to pay to the plaintiff the amounts indicated in the consent judgment at the pain of being evicted in default while she is challenging the sale of the suit property to the plaintiff. The defendant contended further that she has a strong defence against the plaintiff's claim and a counter-claim against the bank which she should be given an opportunity to put forward.
7. The defendant's application was opposed by the plaintiff through grounds of opposition dated 17<sup>th</sup> January 2014 and a replying affidavit sworn by the plaintiff on the same date. The plaintiff has termed the defendant's application as misconceived, bad in law and an abuse of the process of the court. In his affidavit, the plaintiff has contended that the defendant had brought two (2) previous applications to amend her defence and introduce a counter-claim which applications were dismissed. The first application was dismissed by Musinga J. (as he then was) on 22<sup>nd</sup> June 2010 and the second one, by Makhandia J. (as he then was) on 21<sup>st</sup> October 2010 when this suit came up for hearing. The plaintiff has contended that after Makhandia J. had dismissed the defendant's application to amend the defence as aforesaid, he directed that the matter do proceed to hearing consequent to which the plaintiff was sworn. However, before the plaintiff could start giving evidence, the defendant stood up and personally informed the court that it was her desire to have the matter amicably settled out of court.
8. The judge (Makhandia J.) in view of this development gave the parties and their advocates time to discuss the matter and come back with a consent. The parties and their advocates then went outside the court room and after deliberations they arrived at a consent that was approved by both parties. The parties and their advocates thereafter came back and dictated to the court the terms of the settlement that they had arrived at. The settlement that was recorded by the court in the form of a consent judgment was endorsed by the advocates for the parties and the parties themselves, the defendant inclusive. That settlement gave rise to the consent judgment/order/decree that the defendant is now seeking to set aside. The plaintiff has contended that the idea of having the matter settled out of court came from the defendant herself and not from her advocate. The plaintiff has contended that in the circumstances, it is not true that the consent sought to be set aside was entered into without the defendant's knowledge. The plaintiff has contended further that the defendant has been aware of the terms of the consent aforesaid since it was recorded on 21<sup>st</sup> October 2010 and chose not to apply to set the same aside until after the lapse of over 3 years an attitude which can only be termed as lethargic.
9. On the defendant's application to amend the defence, the plaintiff has contended that the application is *res judicata* similar applications have been made by the defendant previously, considered by the court and dismissed. The plaintiff has contended that the defendant is not deserving of the exercise of this court's discretion. With leave of the court, the defendant filed a supplementary affidavit in which she denied most of the averments contained in the plaintiff's replying affidavit. The defendant denied that she had made previous applications for leave to amend the defence which were dismissed and that she asked the court to give her the opportunity to try to settle this matter amicably out of court. The defendant reiterated that the terms of the consent and its effect were never explained to her and that she did not approve of the same. The defendant also reiterated the fact that the conduct of her previous advocate Mr. K'owino smacks of fraud and deceit.
10. On 29<sup>th</sup> January 2014, the advocates for the parties agreed to argue the defendant's application by

way of written submissions. The plaintiff's advocates filed their submissions on 24<sup>th</sup> February 2014 while the defendant's advocates did so on 11<sup>th</sup> March 2014. I have considered the defendant's application together with the two affidavits filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the plaintiff in opposition to the application. Finally, I have considered written submissions filed by the parties' respective advocates and the authorities cited therein. The defendant has sought two (2) main reliefs in the application before me namely, the setting aside of the consent order made herein on 21<sup>st</sup> October 2010 and leave to amend the defence to plead counter-claim. The defendant's second prayer is dependent on the first one because if the court declines to set aside the said consent order, it would not be necessary to consider the application for leave to amend the defence. I would therefore deal with the prayer for the setting aside of the consent order first. In the case of, **Wasike –vs- Wamboko (1988) KLR 429** that was cited by both parties, it was held that;

**“A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.”**

In the case of, **Brook e Bond Liebig (T) Ltd –vs- Mallya [1975] E. A 266** that was cited by the plaintiff, it was stated that;

**“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani –vs- Kassam [1952] 19 E. A.C.A 131, where the following passage from, Seton on Judgments and orders, 7<sup>th</sup> Edn. Vol. I, p 124 was approved:**

**“prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.”**

**No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension.”**

Applying the foregoing principles to this case, the question that I need to answer is whether the defendant has established valid grounds that would justify the setting aside of the consent judgment/order entered herein on 21<sup>st</sup> October 2010. Has the defendant established that there was fraud or collusion or mistake or misapprehension or ignorance of material facts or any other reason that would justify the setting aside of an agreement in relation to the consent judgment/order that was entered by the court herein on 21<sup>st</sup> October 2010?

11. It is not in dispute that the defendant was present in court with her advocate when the consent judgment was entered herein on 21<sup>st</sup> October 2010. It is also not in dispute that, the defendant's said advocate consented to the said judgment. The defendant's contention is that her advocate entered into the said consent judgment without her instruction or approval and that although she was in court when the consent judgment was entered, she did not follow the proceedings because she had been sick and had been advised “to accede” to whatever her advocate was to tell her on that day. The burden was upon the defendant to prove that the consent judgment herein was entered without her knowledge or approval. I am of the view that the defendant has failed to discharge this burden. The defendant has not placed any material before the court from which the court can conclude that the said consent judgment was entered without the defendant's knowledge or approval.

12. The defendant has cited her sickness and the fact that her previous advocate had continued to notify her that this case was fixed for hearing even after it had been compromised as aforesaid as grounds to show that she had not approved of the consent. There is no evidence before me that the defendant was sick prior to 22<sup>nd</sup> March 2011 when she was admitted for eight (8) days at St. Joseph's Mission Hospital – Migori. There is no basis therefore upon which it can be safely concluded that as at 21<sup>st</sup> October 2010, the defendant's physical and mental faculties were so impaired by illness such that she could neither give instructions to her advocate nor follow the court proceedings. On the issue of the letter dated 28<sup>th</sup> October 2013 that was written to the defendant by her advocate Mr. K'owino notifying her that this suit was fixed for hearing on 16<sup>th</sup> December 2013, I am of the view that nothing turns out from the same. This case actually came up for mention on 16<sup>th</sup> December 2013 for directions and from the affidavit of service sworn by one, David Okumu Ojill on 11<sup>th</sup> December 2013, the firm of M/s K'owino & Company Advocates were served with a notice for the said mention.
13. I therefore see nothing untoward in Mr. K'owino having notified the defendant that the matter was coming up the defendant having notified him that she was acting in person. In fact on that day, Mr. Wambugu advocate currently appearing for the defendant appeared in court for the defendant and the court gave appropriate directions. Mr. Wambugu's appearance I believe was pursuant to the said notice which Mr. K'owino had sent to the defendant otherwise Mr. Wambugu would not have known that the matter was coming up on that day. The defendant has also failed to show that the consent herein was entered into by Mr. K'owino fraudulently. As admitted by the defendant's advocates in their submissions, fraud is a serious allegation more so against an advocate who is an officer of this court. The standard of proof of fraud is slightly higher than balance of probabilities. The defendant has contended that the fact that the defendant's said former advocate has not responded to the allegations made herein against him by the defendant is an admission of fraud. I am unable to agree with the defendant in this reasoning. First, there is no evidence that the defendant's previous advocates were served with the defendant's present application and secondly, the burden of proof of Mr. K'owino's guilt was upon the defendant. For the foregoing reasons, I am unable to infer any misconduct or fraudulent dealing on the part of Mr. K'owino on account of his alleged non response to the allegations leveled against him in the application herein.
14. In the circumstances, I am not satisfied that the defendant has given any valid ground that would justify the setting aside of the consent judgment entered herein on 21<sup>st</sup> October 2010. The defendant having failed in her bid to have the said judgment set aside, it is not necessary for me to consider the second limb of her application that sought leave to amend her defence. I would wish to state however that even if I had set aside the consent judgment of 21<sup>st</sup> October 2010, I would not have allowed the defendant's application for leave to amend the defence. The plaintiff has placed before the court two (2) previous applications dated 3<sup>rd</sup> September 2007 and 19<sup>th</sup> October 2007 respectively in which the defendant had sought leave to amend her defence to bring a counter-claim against the plaintiff herein and Co-operative Bank of Kenya Ltd ("the bank"). The plaintiff has contended that the two applications were dismissed by the court. The current application for amendment by the defendant is seeking similar relief. The defendant has not explained the fate of the two earlier applications save only to state that none of her applications to amend the defence had been dismissed. I wonder why the defendant would file a third application for amendment of the defence if the first two applications are still pending. The only conclusion that can be made is that the earlier applications were unsuccessful. If this court presided over by Musinga J. and Makhandia J (as they were) had declined to grant to the defendant leave to amend the defence to introduce a counter-claim against the plaintiff and the bank, the issue as rightly pointed out by the plaintiff's advocate is *res judicata* and cannot be re-opened for consideration by this court. For that reason, I would have dismissed the defendant's prayer for leave to amend the defence.
15. In conclusion, I find no merit in the defendant's application dated 6<sup>th</sup> January 2014. The same is dismissed with costs to the plaintiff. In the interest of justice, I hereby grant to the defendant sixty (60) days within which to vacate the suit property in default of which the plaintiff shall be at liberty to proceed with her forceful eviction in terms of paragraph (iii) of the decree issued herein on 16<sup>th</sup> December 2013.

**Delivered, signed and dated at KISII this 31<sup>ST</sup> of October, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Oguttu-Mboya for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**