



Mantel Limited v Randolph M Tindika t/a Tindika & Company Advocates (Environment & Land Case 200 of 2020) [2022] KEELC 3775 (KLR) (28 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 200 OF 2020
NA MATHEKA, J
JUNE 28, 2022**

BETWEEN

MANTEL LIMITED PLAINTIFF

AND

**RANDOLPH M TINDIKA T/A TINDIKA & COMPANY
ADVOCATES DEFENDANT**

RULING

1. The application is dated March 3, 2022 and is brought under section 1A, IB and 3A of the [Civil Procedure Act](#), order 22 rule 22 and order 50 rule 6 of the [Civil Procedure Rules](#) seeking the following orders;
 1. That this application be certified as urgent and service of the same be dispensed with at the first instance.
 2. That this honourable court be pleased to order stay of execution and/or enforcement of the consent orders recorded on January 24, 2022 pending the hearing of this application *inter-partes* and further pending the hearing and determination of this application and the status quo with regard to the suit property, to wit, title number: Mombasa/Block XXVI/144 be maintained pending the hearing of this application *inter-partes* and further pending the hearing and determination of this application.
 3. That this honourable court be pleased to extend the time within which the parties herein ought to have fulfilled their respective obligations with regard to the consent orders recorded on January 24, 2022.
 4. That costs of this application be provided for.



2. It is based on the grounds that on January 24, 2022, the parties recorded a consent by the terms of which the plaintiff agreed to sell the suit property to the defendant at an agreed amount. That the defendant was to pay the deposit of the purchase price within 30 days and the parties were also to sign a definite agreement for sale within the said period. That the defendant was unable to pay the deposit due to the fact that the funds he intended to use for the said purpose has been subjected to a third party process, which the defendant has no control over and thus has been delayed due to a reason beyond the defendant's control. That the plaintiff has also not availed the proposed agreement for sale to the defendant and thus the parties have not executed the definitive agreement for sale as agreed and within the time thereof. However, the plaintiff has now threatened to execute the consent orders herein, notwithstanding the foregoing. That it is in the best interest of both parties herein and/or in the interest of the justice the time within which the parties were to fulfil their respective obligations be extended. That the defendant would be prejudiced if the orders herein prayed for are not granted and will to suffer prejudice, loss and damage.
3. The respondent stated that the plaintiff is the registered owner and entitled to possession of the property known as land reference Number Mombasa/Block XXVI/144 situated off Kaunda Street within Kizingo Area of Mombasa County, which is fully developed. A copy of the certificate of title for the property is produced and shown as an exhibit marked "SL 1" at page 4 to 7. That defendant/applicant who is an advocate is in occupation of the suit property having occupied the same as a tenant on November 1, 2016. The property is used as an office. That by a letter dated November 22, 2021, the defendant made an offer to the plaintiff to purchase the suit property for the sum of kshs 48,000,000/= on certain terms as were set out in the said letter. A copy of the applicant's letter dated November 22, 2021 is annexed. That by a letter dated December 8, 2021 (letter of offer), the plaintiff accepted the applicant's offer and the terms thereof which are set out in the said letter of offer, *inter alia* that applicant was to pay a deposit of kshs 4,800,000/= being 10% of the purchase price to the plaintiff's advocates upon execution of the aforesaid letter of offer. The offer was valid for 7 days from the date of receipt of the same. That the applicant accepted the terms of the said letter of offer dated December 8, 2021 by signing and returning the same to the plaintiff on December 14, 2021. A copy of the letter of offer dated December 8, 2021 is produced and marked "SL 3". That the applicant was required to pay the deposit of the purchase price within seven (7) days from December 14, 2021 but he failed to do so. Upon his request made vide a letter dated December 20, 2021, the plaintiff extended the time for payment of the deposit by a further 14 days. This was communicated to the applicant in an email dated December 23, 2021. However, the applicant did not pay the said deposit as required. That by a letter dated January 11, 2022, the applicant sought a further extension of the time to pay the agreed deposit and once again, the plaintiff agreed to extend the time for payment of the deposit on terms which were agreed upon by the parties and which the parties agreed to record as a consent in this matter. Copies of the applicant's letters dated December 20, 2021, January 11, 2022 and the email dated December 23, 2021 are produced marked "SL 4". That on January 24, 2022 when this matter came up for hearing, the parties herein recorded a consent order evidencing their mutual agreement which is clear and unambiguous. That in accordance with the order recorded on January 24, 2022, the applicant was required to pay 10% deposit on or before February 23, 2022 and in the event he failed to do so, the order provides that he will vacate and hand over vacant possession of the suit premises to the plaintiff by February 24, 2022. A copy of the order recorded on January 24, 2022 is produced marked "SL 5". That the applicant failed to pay the agreed deposit within the time stipulated but in breach of the said consent order, he has unreasonably refused to vacate and hand over vacant possession of the suit property to the plaintiff without any reasonable justification. The defendant continues in such defiance which should not be condoned by this honourable court. That the plaintiff sent the applicant a letter dated February 28, 2022 requesting him to vacate and hand over vacant possession of



the suit property by March 1, 2022, purely out of courtesy and in consideration that the applicant is an advocate and an officer of this honourable court. The applicant has unreasonably refused to vacate. Instead, he has approached this court seeking orders to vary the consent. A copy of the letter dated February 28, 2022 is produced and marked "SL 6". That there is no justification for the defendant/applicants continued occupation of the suit property which is not yielding any return for the plaintiff due to his failure to abide by the court order, which this honourable court should not condone. They therefore pray that the application be dismissed with costs and the applicant be ordered to vacate from the suit property forthwith.

4. This court has considered the application and submissions therein. The defendant/applicant submitted that on January 24, 2022, the parties recorded a consent by the terms of which the plaintiff agreed to sell the suit property to the defendant at an agreed amount. That the defendant was to pay the deposit of the purchase price within 30 days and the parties were also to sign a definite agreement for sale within the said period. That the defendant was unable to pay the deposit due to the fact that the funds he intended to use for the said purpose has been subjected to a third party process, which the defendant has no control over and thus has been delayed due to a reason beyond the defendant's control. That the plaintiff has also not availed the proposed agreement for sale to the defendant. That he does not wish to vary or set aside the consent recorded but seeks extension of time for the parties to comply. I find that extension of time is indeed a variation of the consent. In the case of *Hirani vs Kassam* (1952) 19 EACA 131, at 134, the court stated as follows:

5. The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in [Setton on Judgments and Orders](#) (7th Edn), Vol 1, p 124, as follows:

“*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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

6. In the case of *Brooke Bond Liebig Ltd vs Mallya* (1975) EA 266, the court stated that:

"a consent order 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."

7. And in the case of [Flora Wasike vs Destimo Wamboka](#) (1988) 1 KAR 625 the court stated that;

8. 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 if certain conditions remain to be fulfilled, which are not carried out.... In *Purcell vs FC Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really 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.”



9. In the case of *Contractors Ltd vs Margaret Oparanya* (2004) eKLR, stating thus:

"This court has qualified or conditional discretion when it comes to interfering with consent judgments or orders. Moreover, where the consent order or judgment is still executory, the court may refuse to enforce it if it would be inequitable to do so. The mode of paying the debt, then is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

10. The defendant in this case seeks extension of time and for the plaintiff to provide the sale agreement. On enlargement of time, order 50 rule 6 of the Civil Procedure Rules provides as follows:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

11. In the case of *Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd* (1982) KLR 485 the court held that;

The making by the 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 or on one or either of the recognized grounds."

12. I find that the law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include fraud, collusion, illegality, mistake, and agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Based on the facts as presented and bearing in mind that the Civil Procedure Rules under order 50 gives this court the discretion to enlarge time to undertake an event, I find that in this instance case there has not been demonstration of fraud, collusion, or any other reason to enable the court review, vary or set aside the said consent order. I find that the application dated March 3, 2022 is unmerited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JUNE 2022.

N A MATHEKA

JUDGE

