REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 5 of 2008

BERYL OTIENO.....APPLICANT

VERSUS

SAMWEL SONTO MUYAA.....RESPONDENT

RULING

The applicant, Dorcas Beryl Otieno brought this suit against the respondent Sonto Muyaa claiming a refund of the purchase price in the sum of Kshs.4,900,000/= plus interest and costs.

Subsequently by a letter dated 16th July, 2008 on the letter head of the firm of Kimondo Mubea and Company Advocates, counsel for both parties communicated to the Deputy Registrar, High Court at Nakuru of their consensus to comprise the suit and the terms of that consensus.

Upon receipt of the letter on 1st August, 2008, the following consent was recorded:

> " BY CONSENT
> This suit be marked as settled on the
> following terms:-
>
> a) The Defendant do Transfer 24 acres of land out of title No.Kajiado/Kaputiei North/4795
>
> b) The Defendant to apply for consent to sub-divide the title No.KAJIADO/KAPUTIEI NORTH/4795 and for the sale of 24 acres therefrom to the plaintiff within sixty (60) days from the date of this consent and thereafter execute a transfer in favour of the plaintiff
>
> c) In default of the defendant procuring the aforesaid consent and to execute the transfer in favour of the plaintiff, the deputy registrar of this Honourable court to execute the said documents at the costs of the defendant including the subdivision costs.
>
> d) The plaintiff to forthwith pay to the defendant the balance of the purchase price of Kshs.840,000/= and upon receipt of the same, the defendant to forthwith give vacant possession of the aforesaid 24 acres out of the suit premises to the plaintiff with liberty to the plaintiff to commence and/or undertake any development of her choice.
>
> e) Each party shall bear its own costs."

That consent was signed by Kwengu and Company Advocates for the applicant and Kimondo Mubea and Company Advocates for the respondent.

Nearly one year after the recording of the above consent judgment, the applicant filed a motion on notice dated 16th July, 2009 to which this ruling relates for orders:

> "1) THAT this Honourable court be pleased
> to review the consent judgment dated 16th
>
> July, 2008.

2) THAT in the alternative this Honourable Court be pleased to set aside the consent order and decree issued on 13th November, 2008.

3)……"

The application is premised on the grounds that:

i) the applicant has discovered a new and important matter
ii) there was misrepresentation of material facts
iii) the respondent acted in bad faith
iv) there was fraud

The respondent has opposed the application and denied the foregoing allegations of misrepresentation and bad faith. He has also stated that the instant application is incompetent and bad in law.

I have considered these arguments as well as the authorities cited by each side. The dispute here can be summarized thus:

The respondent is the registered proprietor of parcel of land Nos. KAJIADO/KAPUTIEI NORTH/4795 situated in Olturoto area and KAJIADO/KAPUTIEI NORTH/5521 and 5522 in Kisaju Township. The applicant contends that although she paid for 24 acres to be excised from the former parcel (No.4795) to which the consent judgment relates, that was not the parcel the applicant intended to purchase. The applicant intended to purchase the latter Nos.5521 and 5522 which suited her need to set up an environmental institute in view of the location of the land on the highway to Namanga. Parcel No.4795 is located 25 km away from Kisaju Township and is not suitable.

The application before me now seeks the review of the consent order on account of the alleged confusion on the parcel of land the transaction relates.

It is 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. See **Flora N. Wasike** Vs. **Destimo Wamboko** (1982-88) 1KAR 625. A contract will be set aside on the grounds of misrepresentation, fraud, mistake or collusion. The applicant appears to rely on the grounds of fraud, misrepresentation and mistake. The applicant seeks review on account of discovery of a new and important matter or evidence. The new and important matter discovered by the applicant is the fact that on visiting the land, the subject of the consent judgment, the applicant found it was not the one she had intended to buy.

Order 44 rules 1(1)(b) provides that:

"(1) Any person considering himself aggrieved-

a) ……

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

(Emphasis supplied)

I reiterate that the application is premised on the ground *"discovery of a new and important matter."*

As the applicant negotiated, made payments and even entered a consent, she believed she was buying the two parcels (Nos.5521 and 5522) at Kisaju Township. But after the signing, filing and adoption of the consent, the applicant moved to the land in question in order to fence it. She was, in her words, shocked to find third parties on the land claiming also to have purchased it. It is at this stage that she discovered that she had either been mistaken as to the actual parcel of land or the defendant had defrauded her.

I have set out the provisions of **Order 44 rule (1)(b)** aforesaid and emphasized that for one to rely on the ground of discovery of a

new and important matter or evidence, one must demonstrate that that discovery was after the exercise of due diligence at the time the judgment was entered. Secondly, the application for review must be brought without unreasonable delay. In paragraph 10 of his supporting affidavit, the applicant had deposed that she trusted the respondent and the only thing she did was to conduct an official search from which she satisfied herself that the parcels of land she was purchasing belonged to the respondent. That she did not obtain the necessary area map to ascertain the actual location of the land.

The respondent in paragraph 15 of his affidavit in reply is categorical that the land he showed to the applicant and which she agreed to buy is located at Olturoto area and not Kisaju Township. There is no supplementary affidavit to rebut that averment.

In a nutshell, the applicant set out to purchase land for a specific project i.e., to set up an environmental centre for environmental research and studies. A suitable piece would border Kitengela-Isinya main Highway. The land would be 24 acres. She was to pay for that parcel of land Kshs.5,040,000/= which she eventually paid. It is as baffling as it is incredible that a person of the applicant's background (from the annexed Business Plan) – a doctor with a wealth of experience in environment, training and management, represented by counsel would wait until she has committed herself beyond recall to ascertain whether the land she was purchasing existed and where it was located. If that be the case, then the applicant failed to conduct due diligence and cannot blame it on the respondent. A mistake that would vitiate a contract is a mistake that is mutual and common to the parties to the contract.

Finally, it has taken the applicant nearly one year to bring this application after she *"discovered"* that she was buying a wrong property. This delay was highly inordinate and one would be justified in concluding that it was infact an afterthought. See **Michael Mubea Kamau** Vs. **Robert Wanjiku Muchina & Another**, Civil Appeal No.305 of 2002.

Before I conclude, I need only to point out three matters;

i) The applicant's alternative prayer in this application lacks merit in view of what I have stated above.

ii) While this suit was pending, the applicant brought a similar suit in Nakuru HCCC No.198 of 2009 against the defendant in respect of the same subject matter and seeking more or less the same relief. That is clearly an abuse of the process of this court. I say no more.

iii) It is strange that although the basis of this dispute is an agreement for the sale of land, neither the applicant nor the respondent has annexed a copy of the sale agreement.

For the reasons stated earlier, this application fails and is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nakuru this 15th day of July, 2010.

W. OUKO
JUDGE