



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 233 of 2009

MARY WAMBUI MIGADDE.....PLAINTIFF

VERSUS

ECOBANK LIMITED 1ST DEFENDANT

EQUATOR 2000 LIMITED

(Under Receivership).....2ND DEFENDANT

P.V.R. RAO3RD DEFENDANT

K.V.S.K. SASTRY.....4TH DEFENDANT

RULING

1. By way of restating a brief background of this matter, on 3rd April 2009, the Plaintiff filed this suit against the Defendants simultaneously with an application seeking for an order of injunction restraining the 1st Defendant from selling by public auction or dealing with a property known L.R. Kisumu Municipality/Block 4/157 and No. 4/116 until the determination of the suit.

2. An interim order of injunction was granted on 8th April 2004, on condition that the Applicant was to pay the Auctioneer's charges. On 8th September 2009, the parties recorded the following consent order:-

- “(i) That the outstanding liability due from the 2nd Defendant and Plaintiff respectively to the 1st Defendant be settled at the sum of Kshs.36,000,000/=.**
- (ii) That the Plaintiff's Advocates forthwith remit a sum of Kshs.3,600,000/= being 10% deposit to the 1st Defendant's Advocates and which payment should be remitted in any event not later than Three (3) days from the filing date of the duly executed consent order.**
- (iii) That the balance of the settlement sum being Kshs.32,400,000/= shall be remitted by the Plaintiff's Advocates to the 1st Defendant's Advocates within Forty Five (45) days from the date of filing of the duly executed consent order.**
- (iv) That the Plaintiff shall pay the 1st Defendant's costs arising from the suit on an Advocate/Client scale in the sum of Kshs.550,000/= V.A.T inclusive and which payment shall be made by the Plaintiff's Advocates to the 1st Defendant's within Forty Five (45) days from the date of filing of the duly executed consent order.**
- (v) That upon receipt of the duly filed consent order, the 1st Defendant will release the original title and discharge documents to L.R. No. 209/12369 Nairobi directly to the Purchaser's Advocates. M/s Wainaina Ileri & Co. Advocates, in exchange of a suitable professional undertaking from the Purchaser's Advocates for the payment of the balance of the settlement amount (being Kshs.32,400,000/=) within Forty Five (45) days of filing the consent order.**
- (vi) That the Plaintiff will settle the Auctioneers charges to be agreed upon and/or taxed and which payments shall be made within Forty Five (45) days from the date of agreement and/or taxation.**

- (vii) That in default of payment of the balance of the settlement sum within Forty Five (45) days from the date of filing of the consent order the terms of the consent order shall abide and the original documents and discharge of charge will be forthwith returned by the Purchaser's Advocates to the 1st Defendant in similar condition to that in which they were at the time of release.
- (viii) That in default of compliance of any of the consent terms hereinabove the agreement to settle at Kshs.36,000,000/= on the above terms shall stand withdrawn by the 1st Defendant and the 1st Defendant will be at liberty to forthwith exercise its statutory power of sale over the suit properties.
- (ix) That the Plaintiff's application dated 3rd April, 2009 and the suit herein be and is hereby settled on the above terms."

3. That consent order essentially settled the application and the suit, however, on 27th November 2009; the Applicant filed the present Notice of Motion in which she is seeking for the following principal orders:

- "1. That pending hearing and determination of this Application *inters partes* this Honorable Court be pleased to reinstate the interim orders granted on 8th April 2009 in the following terms inter alia:**

An order be and is hereby issued restraining the 1st Defendant from selling by public auction, advertising, transferring, charging, taking possession, disposing off or otherwise howsoever from exercising proprietary rights over the suit premises and L.R No. Kisumu Municipality/Block 4/157 and L.R. No. Kisumu Municipality/Block 4/116 pending *interpartes* hearing.

- 2. That this Honourable Court be pleased to set aside/vacate and/or vary the consent order dated 2nd September 2009 filed in court on 8th September 2009 and adopted as an order of the court on 1st October 2009.**

- 3. That in the alternative the 1st Defendant be compelled to refund to the Plaintiff a sum of Kshs.3,600,000 being 10% deposit of the settlement sum."**

4. The facts in support of this motion are as stipulated in the body thereto, and the supporting affidavit of the Plaintiff sworn on 27th November 2009. Briefly summarized, the Plaintiff admits that she entered into a consent order with the 1st Defendant which was adopted by the court on 1st October 2009. The settlement of the suit was to depend on the sale of the 2nd Defendant's parcel of land known L.R. No. 209/12369 Nairobi to Galana Oil Kenya Limited which company was represented by Wainaina Ileri & Co. Advocates in the sale transaction.

5. According to Clause 5 of the consent order, the 1st Defendant was supposed to release the original title and discharge of charge over L.R No. 209/12369 Nairobi to the Purchaser's Advocate in exchange of a suitable undertaking that the Purchaser's Advocate would pay the balance of the purchase price that is Kshs.32,400,000/= within Forty Five (45) days of the filing of the consent.

6. It is alleged that the 1st Defendant refused to forward the title documents and the discharge of charge despite having been informed that there was a cash buyer. Thus the Plaintiff applies to this court to set aside the consent order and to reinstate the matter for hearing, and the interim order of injunction which was in operation be reinstated until the matter is heard.

7. Counsel for the Applicant argued that there is ambiguity in the consent which was arrived at in utmost good faith. The 2nd Defendant was not a party to the consent but he took responsibility to pay the loan. The Plaintiff who was the principal in the consent did not have money of her own. It is the 2nd Defendant who was selling the property and the debt was agreed at Kshs.36 million. Counsel for the Plaintiff forwarded the cheque of Kshs.3.6 million as part of the agreement but the balance was to be paid within Forty Five (45) days by **Wainaina Ileri & Co. Advocates** who were acting for the Purchasers.

8. Counsel for the plaintiff submitted that it was wrong for the 1st Defendant to insist that they should honor the

professional undertaking and by insisting to demand the firm of Gichuki King'ara & Co. Advocates should provide the professional undertaking instead of Wainaina Ireri & Co. Advocates to whom they were supposed to release the documents in exchange of the professional undertaking.

9. It is apparent that the parties are dissatisfied with the consent order more so, counsel for the Plaintiff who forwarded Kshs.3.6 million as part of the consent. It is further submitted that the Plaintiff only guaranteed only one loan account but she is now being asked to settle the entire outstanding loan.

10. On 27th October 2009, the Auctioneers were instructed to auction the property before the 1st Defendant could enforce the professional undertaking. The 1st Defendant has appointed a receiver manager in respect of the property in Nairobi. Counsel was of the view that the consent order is unenforceable and made reference to the decision by the Court of Appeal in **Flora Wasike v Destimo Wamboko Civil Appeal No 81 of 84; (1982-88) 1 KAR 625.** In that decision the Court of Appeal set out the conditions upon which consent order can be set aside. Thus this order was said to be invalid and void *ab initio* because the 1st Defendant frustrated the effectual implementation of the consent.

11. This application was supported by the 2nd Defendant, counsel submitted that the 2nd Defendant was not a party to the consent order yet the 2nd Defendant was the principal borrower, and the registered proprietor of the suit premises which was offered as security, and was supposed to be sold by private treaty. It was therefore necessary to include the 2nd Defendant in the consent order. Moreover the 1st Defendant is the one who frustrated the consent by refusing to hand over the documents to Wainaina Ireri & Co. Advocates, the Advocate for the Purchasers.

12. This application was opposed, counsel for the 1st Defendant relied on the replying affidavit sworn by Wilfred Oroka on 28th November 2009. It is contended that the consent order is binding between the Plaintiff and the 1st Defendant. The fact that the consent order did not involve the 2nd Defendant is not a ground for setting aside a consent order. This was held in the case of **Karani & 47 others vs Kijana & 2 others (1987) KLR 557** where the Court of Appeal expressed itself thus:-

“1. The few appellants who had given their advocate the instructions to enter into the consent judgment had ostensible authority on behalf of the others and the advocate therefore had the authority to enter into the consent judgment for all the appellants.

2. The consent order was valid and there was nothing which could justify the setting aside of the consent judgment.”

13. It was further argued that a consent order cannot be set aside by the Plaintiff who filed the suit against the Defendants and chose to enter consent with the 1st defendant. If the 2nd Defendant is aggrieved by the consent, they have not even applied to set it aside. The consent is not ambiguous including Clause 5, as it was the duty of counsel for the Plaintiff who had instructions to sign the consent and who was corresponding with the 1st Defendant's Advocates to ensure that a professional undertaking was furnished to counsel for the 1st Defendant to enable them release the title document.

14. The 1st Defendant was not privy to the contract of sale with third parties and that is why they are asking the firm of Gichuki King'ara who were privy to the negotiation and who had forwarded the 10% per cent deposit to furnish them with the professional undertaking. The consent was properly signed by the parties and the Plaintiff has not been able to show that the consent was entered into by way of fraud, collusion or undue influence the prerequisites for setting aside a contract.

15. The 2nd Defendant has no locus standi to support this application to set aside the consent by way of a supporting affidavit. The application for injunction was settled by the consent order which also marked the suit settled. Therefore this application is res judicata because the application and the suit were both compromised; there is no substratum upon which the current application can stand on. The Applicant is meant to file a fresh suit to support the allegations of fraud and ambiguity.

16. The above is the summary of the salient issues brought out in the pleadings and rival submissions. The long and

short of the issues raised in this application, is whether the consent order recorded should be set aside. Secondly whether the terms of the consent are ambiguous, and illegal for failure to include the 2nd Defendant whose property was being sold.

17. Both parties relied on some leading authorities by the Court of Appeal that give guiding principles on the circumstances under which consent order or judgment can be set aside. The Court of Appeal in the case of **Wasike vs. Wamboko (1988) KLR** reiterated same principles in the decision in **J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983**. and cited with approval the same principles In **Purcell v F C 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.”

18. Going by the above principles, the consent order herein is to be treated as a contract. The Plaintiff who is a party to the contract instituted this suit against several Defendants but chose to enter into a compromise with the 1st Defendant. The Plaintiff undertook to do certain things as per the consent order. Indeed there are no allegations that the Plaintiff lacked capacity to enter into the consent or there was undue influence. It is also not denied that the Plaintiff instructed her Advocates to sign the consent. It is noteworthy that 10% of the sum agreed as the settlement figure was paid by the Plaintiff's Advocates to the 1st defendant as part of the settlement.

19. What is alleged is that the 1st Defendant frustrated the part of the consent in particular Clause 5, by failing to release discharge of charge to the firm of Wainaina Ireri & Co. Advocates. On the part of the 1st Defendant, it is contended that the discharge of charge was supposed to be released in exchange of a suitable professional undertaking, that the balance of the settlement amount, that is Kshs.32,400,000/= will be paid within Forty Five (45) days.

20. That professional undertaking was not forthcoming therefore the documents of title could not be released. Who was responsible for giving professional undertaking? It is stated that M/s Wainaina Ireri & Co. Advocates were to give it, however the prime mover was the Plaintiff who wanted the matter settled. The plaintiff should have ensured that the firm of Wainaina Ireri & Co. Advocates were in a position to give the requisite professional undertaking and that they actually gave the professional undertaking so that this matter which she had filed against the 1st Defendant could be settled according to the consent order.

21. It was eloquently argued by the counsel for the 2nd Defendant that the consent order is a nullity because it affected the 2nd Defendant who was not a party to the consent. The Court of Appeal in the case **Karani & 47 others [supra]** while dealing with a similar set of facts where a consent judgment was entered by some parties in the suit held that some of the parties who gave instructions to their advocates to enter into the consent order had ostensible authority to act for the other parties.

22. The Plaintiff is the one who instituted this suit and she is the one who intended to bring it to an end and compromised it through the consent. It is up to the Plaintiff to find ways and means of meeting the obligations in the consent. What is of interest is that the 2nd Defendant did not make any application on his part to set aside the consent or review it. It is the Plaintiff who is a party to the consent who has made the present application.

23. I find no justifiable reasons for setting aside the consent order as between the plaintiff and the 1st defendant. Before I end this ruling, I noted this is really not an application for review as provided for under Section 80 of the **Civil Procedure Act or Rule 44 of the Civil Procedure Rules**. This is an application brought under **Section 3 and 3A of the Civil Procedure Act**. Apart from lacking in merit, this application is also bad in law for failure to invoke the correct jurisdiction of the court; the application is seeking for an injunctive relief which was the same order sought in the application that was compromised. It also

seeks for setting aside under the inherent powers of the court. The procedure is well set out in the Court of Appeal decisions; it is by way of review or a fresh suit.

24. Accordingly the application is dismissed for lacking in merit and for being bad in law with costs to the 1st Defendant.

RULING READ AND SIGNED ON **16th December 2009** AT NAIROBI.

M.K. KOOME
JUDGE