



REPUBLIC OF KENYA



**KENYA LAW**  
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**Arinaitwe v Kalsi & 2 others (Environment & Land Case 243 of 2017)  
[2022] KEELC 13651 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13651 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 243 OF 2017  
MD MWANGI, J  
OCTOBER 13, 2022**

**BETWEEN**

**JULIUS ARINAITWE ..... PLAINTIFF**

**AND**

**BALBIR SINGH KALSI ..... 1<sup>ST</sup> DEFENDANT**

**SATWANT SINGH KALSI ..... 2<sup>ND</sup> DEFENDANT**

**HARDEV SINGH KALSI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

(In respect of the Notice of Motion dated March 14, 2022 seeking that the 3<sup>rd</sup> defendant/Applicant be discharged from the obligations under the consent judgement recorded between the parties herein)

**Background**

1. This ruling is in respect of a Notice of Motion dated March 14, 2022 by the 3rd Defendant/Applicant seeking the following orders: -
  - a. Spent
  - b. The Honourable Court be pleased to allow the firm of Messrs Amanya & Co Advocates to come on record for the 3rd Defendant having come after Judgement.
  - c. The Honourable Court be pleased to issue an order discharging the 3rd Defendant/Applicant from the transfer process of all that property known as Flat Number 2 (Ground Floor) erected on part of property known as LR No 1870/IV/82 and from any other obligation of the consent recorded by this Court.
  - d. That in the alternative, this Honourable Court be pleased to issue an order compelling the 1st and 2nd Defendants to abide by the terms of the consent and/or transfer process of all that



property known as Flat Number 2 (Ground Floor) erected on part of property known as LR No 1870/IV/ 82.

- e. That this Honourable Court be pleased to order the 1st and 2nd Defendants to provide a status report of when the transfer to the Plaintiff shall be concluded.
  - f. That costs of this Application be provided for.
2. The application is premised on the grounds on the face of it and supported by the Affidavit of one Hardev Singh Kalsi deponed on the March 14, 2022.
  3. The thrust of the 3<sup>rd</sup> Defendant's application is that parties herein entered into a consent on the 7th December, 2017 whereby, the Defendants agreed to pay the Plaintiff a sum of Kshs 16,500,000/= on the understanding that the Plaintiff was to relinquish his interest or ownership in the property known as Flat Number 2 erected on part of property known as LR No 1870/IV/82. Subsequently however, there was a renegotiation and parties recorded a further consent dated September 6, 2020 that varied the earlier consent. Accordingly, the Defendants agreed to transfer the suit property to the Plaintiff amongst the other conditions agreed upon. In case of default by the Defendants, the Plaintiff was given the liberty to execute against the Defendants to recover the sum of Kshs 16.5 million with interest at commercial rates from July 31, 2018 until payment in full including but not limited to selling the suit property to recover the debt. The 2<sup>nd</sup> consent was adopted as an order of this court on November 18, 2021.
  4. The 3<sup>rd</sup> Defendant's concern is that there has been a delay on the part of his co-defendants/judgement-debtors in complying with the terms of the consent judgement thereby risking execution. The 3<sup>rd</sup> Defendant avers that the Plaintiff is likely to commence execution proceedings against the Defendants yet he (3<sup>rd</sup> Defendant) does not have any proprietorship rights over the suit property. He alleges that he transferred his ownership rights to the 1st and 2nd Defendants who are the current registered owners of the suit property.
  5. The 3<sup>rd</sup> Defendant therefore argues that in as much as he is willing to honour the terms of the consent judgement, he cannot pass legal title or physical ownership to the Plaintiff since he is not an 'owner'. He urges the court to discharge him from the obligations of the consent judgement, to transfer the land to the Plaintiff. He pleads that he risks being held in contempt of the court orders yet he has no role in execution of the judgement.
  6. The application was opposed by the 1st and 2nd Defendants as well as the Plaintiff. The 2nd Defendant, Satwant Singh Kalsi deponed the replying affidavit on the April 26, 2022 on his own behalf and that of the 1st Defendant. The Plaintiff on the other hand filed his Replying Affidavit sworn on the April 14, 2022.

### **1st and 2nd Defendant's Replying Affidavit**

7. The 2nd Defendant avers that he is together with the 1<sup>st</sup> Defendant committed to the terms of the consent judgement. He deposes that they have made good process in complying with the consent judgement by first and foremost paying the sum of Kshs 200,000/= that was one of the other terms of the consent judgement. They have also guaranteed the Plaintiff quiet and peaceful possession of the suit property so far awaiting the transfer to his name.
8. The 2<sup>nd</sup> Defendant explains that the delay in effecting the transfer was due to factors beyond their control. They are waiting for the confirmation of the grant of letters of administration in respect of the Estate of the 1<sup>st</sup> Defendant's late husband, Balbil Singh Kalsi (deceased) - the original 1st Defendant,



to give the 1<sup>st</sup> Defendant the legal capacity to actualize the consent judgement in favour of the Plaintiff in this case. The confirmation of the grant in the estate of Balbil Singh Kalsi (deceased) in Nairobi High Court Succession Cause No 872 of 2017 is expected to be in the month of December, 2022. It only after the confirmation of the grant that the Defendants can deliver the sub-lease to the Plaintiff as stated in the consent. They have attached a Surveyor's status Report.

9. The deponent affirms that though the 3<sup>rd</sup> Defendant may have ceased to be a co-owner of the suit property, at the time of the sale to the Plaintiff he was a co-owner. Further, the 3<sup>rd</sup> Defendant has been a party to the two consents.

### **Plaintiff's Replying Affidavit**

10. The Plaintiff contends that the application by the 3<sup>rd</sup> Defendant is an afterthought, lacks merit and is an abuse of court process intended to obstruct justice and indefinitely delay satisfaction of the Consent judgement in his favour. No sufficient reason has been given by the 3<sup>rd</sup> Defendant to vary or depart from the consent judgement willfully entered into by the parties. He terms the application a delaying tactic calculated to obstruct the course of justice.
11. The Plaintiff further asserts that the issue of the purported change of ownership or alleged transfer of the share of the 3<sup>rd</sup> Defendant in the suit property to his co-defendants has been previously addressed by this court in its earlier rulings. That the 3<sup>rd</sup> Defendant had made two previous attempts to set aside the consent order but for his own reasons withdrawn the applications before they were determined.
12. In any event, the Plaintiff avers that the alleged change of ownership or transfer of shares in the suit property cannot be 'a new and important matter' at all as it was within the 3<sup>rd</sup> Defendants knowledge at the time of recording of the consents of December 7, 2017 and that of the September 6, 2021. The application by the 3<sup>rd</sup> Defendant is therefore devoid of merit and ought to be dismissed with costs.

### **Court's directions**

13. The Court gave directions to the effect that the application be canvassed by way of written Submissions. All parties complied. The 3<sup>rd</sup> Defendant filed his submissions dated the May 23, 2022 whereas the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submissions are dated the June 27, 2021. The Plaintiff filed his submission dated the June 29, 2022. The court has had the opportunity to read the submissions by the parties.

### **3<sup>rd</sup> Defendant's submissions**

14. The 3<sup>rd</sup> Defendant identifies two main issues for determination. The first issue is whether his application has met the threshold for review or varying of the consent order. He submits that at the time the consent dated September 6, 2021 was entered, some material facts were not disclosed to the court. The Defendants' counsel did not disclose that the 3<sup>rd</sup> Defendant ceased owning the suit property and consequently lacked any power or authority to effect any transfer of the said property. He cites the case of *Sofia Mohamed -vs- Rodah Sitienei (1992) eKLR*.
15. The 3<sup>rd</sup> Defendant submits that the consent dated September 6, 2021 was entered without sufficient material facts or misapprehension or ignorance of such facts. That it is unfair and unjust for him to be compelled to transfer the property to the Plaintiff. He therefore prays that he be discharged from effecting the said transfer.
16. The 2<sup>nd</sup> issue for determination as proposed by the Applicant is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants ought to be compelled the transfer of the suit property to the Plaintiff. He submits that they indeed



ought to be compelled to complete the transfer of the suit property as they are the registered owners of the suit property.

### **1st and 2nd Defendants submissions**

17. The 1st and 2nd Defendants submitted that they do not require compulsion by the court to perform their obligations under the consent judgement. They have guaranteed and respected the Plaintiff's peaceful and quiet enjoyment of the suit property as provided at Paragraph 2 of the consent judgement. Regarding compliance with Paragraphs 1 (a) and (b) of the consent, the Defendants are unable to comply, at the moment for the reasons that the initial 1st Defendant passed away and succession proceedings are still on going before the Family Division in Nairobi High Court Succession Cause No 872 of 2017. Therefore, they cannot deliver the sub-lease until the grant is confirmed. They further submit that prayer 5 has to equally await the confirmation of the grant to enable the Surveyor to complete his work so as proceed with the transfer as agreed.
18. As for prayer No 3, the 1st and 2nd Defendants contend that the 3rd Defendant should not be discharged from his obligations under the consent for the reasons that he was a co-owner of the property at the time of sale that resulted in these proceedings. They further assert that the 3rd Defendant has been an active participant in these proceedings all along. The mere fact of relinquishing his interest in the suit property does not free him from his obligations that arose at the point of sale as a co-owner. The application should therefore be dismissed with costs. They also pray that the period within which to deliver the sub-lease be extended to six (6) months, in default paragraph 3 of the consent and the consequences contemplated to apply.

### **Plaintiff's submissions**

19. The Plaintiff submits that the 3rd Defendant's argument that the consent was entered into without sufficient material facts or misapprehension or ignorance of facts is false, devoid of merit and is actually res judicata. He argues that the 3<sup>rd</sup> Defendant has so far filed 3 applications seeking to vary the consent but the court has declined on all the instances. He states that the application is intended to defeat justice and delay satisfaction of the lawful consent decree.
20. The Plaintiff further reiterates the assertions by the 1st and 2nd Defendants that at the time the of sale, the 3rd Defendant was a co-owner in the suit property hence he benefited from the proceeds of sale. It is therefore only fair and just that all the Defendants share on the liabilities arising from their collective default. The 3rd Defendant has been called upon by his co-Defendants to employ his resources to assist in abiding by their collective obligations towards the Plaintiff but the 3rd Defendant is not supportive.
21. He further submits that the 3rd Defendant relinquished his interest back in the year 2011, way before this suit was filed. He participated in the making of the consent judgements in 2017 and 2021. All this time, the Plaintiff submits, the 3rd Defendant never raised the issue of change of ownership. The allegation that the consent was made without sufficient material facts and issue of mistake or misapprehension of facts does not arise at all. He cites the case of *Kenya Commercial Bank Ltd. -vs- Special Engineering Company Limited (1980) eKLR.*

### **Issues for determination**

22. The Court agrees with the submissions of the 3<sup>rd</sup> Defendant/Applicant that the issues for determination in this matter are as follows; -
  - a. Whether the 3rd Defendant's application has met the threshold for reviewing or setting aside a consent order/judgement so as to be discharged from the obligations arising therefrom.



- b. Whether the alternative prayers sought by the 3rd Defendant can be granted in the circumstances of this case.

### **Analysis and Determination**

23. The Court will proceed to consider the issues in the order listed above;

#### **A. Whether the 3rd Defendant's application has met the threshold for reviewing or setting aside a consent order/judgement so as to be discharged from the obligations arising therefrom**

24. The circumstances under which a consent judgement can be set aside were well captured in the case of *Brookbond Liebig (T) Ltd vs Mallya* (1975) EA 266 where the Court of Appeal for East Africa stated as follows: -

' The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani vKassam* (1952) 19 EACA 131 where the following passage from 'Seton' on 'Judgements and orders', 7<sup>th</sup> Edition Vol 1, 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 or those doing 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.'

'As Windham J said in the introduction to the passage quoted above from Hirani's case, a court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.'

25. In its decision in *SMN vs ZMS & 3 Others* [2017] eKLR, the Court of Appeal again stated as follows:

' 17. There is no dearth of authorities on the law governing the setting aside of consent judgments or orders. Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.'

26. The Court of Appeal went on to cite with approval various cases on grounds for setting aside consent judgment and orders such as *Flora N Wasike vs Destimo Wamboko* [1988] eKLR, [Board of Trustees National Social Security Fund -vs- Micheal Mwalo](#) [2015] eKLR amongst other authorities.

27. In this case, the 3rd Defendant contends that he has since relinquished his interest or transferred his ownership rights in the suit property to the 1st and 2nd Defendants hence he should be discharged from the obligations under the consent. He asserts that the consent dated 6th September, 2021 was entered without sufficient material facts or misapprehension or ignorance of such facts. That it is unfair and unjust for him to be compelled to transfer the property to the Plaintiff.

28. The Respondents on the other hand aver that the 3rd Defendant has been an active participant in the proceedings before the court all through. This is despite relinquishing his ownership rights way back in the year 2011 even before the filing of the suit. He shared the proceeds of sale which forms the basis of the consent entered. Although he is currently not registered as an owner in the suit proceeds, his resources are therefore required to facilitate the transfer as agreed upon in the consent.



29. As settled in the above precedents misrepresentation of facts is a ground for setting aside a consent order. Discussing consent orders and misrepresentation, the learned authors of *Chitty on Contracts, 29<sup>th</sup> ed (2004) at paras 6-110, p486* observed citing *Dietz v Lennig Chemicals Ltd.* (1969) 1 AC 170, that –
- ' Where proceedings are compromised by agreement, and the compromise is made the subject of a consent order, the court may set aside the consent order if it is shown to have been based on an agreement induced by misrepresentation.'
30. From the record, the 3rd Defendant has been active and participating in the proceedings before this court from the very onset of this case. He argues that he relinquished his share in the suit property in the year 2011. Further and most importantly, he voluntarily participated in the proceedings including the recording of the consents in this matter. He cannot therefore be discharged from his obligations under the consent judgement.
31. Furthermore, transferring the title to the suit property to the Plaintiff is not the only way that the consent judgement may be satisfied. The parties found it fit to include a default clause that allows the Plaintiff/deed-holder the liberty in case of default to execute against the Defendants for the sum of Kshs 16.5 million with interest at commercial rates.
32. The court's finding is that the 3<sup>rd</sup> Defendant's application does not meet the threshold for the setting aside or variation of the consent order.

**B. Whether the alternative prayers sought by the 3rd Defendant can be granted in the circumstances of this case.**

33. It is evident that the Defendants intended to effect the transfer that is why the 1st and 2nd Defendant paid throw-away costs of Kshs 200, 000/=. They further hired a Surveyor whose Report is annexed to confirm their willingness to comply with the conditions set in the consent.
34. What I gather from the 1st and 2nd Defendants response is that the delay in processing the transfer is as a result of the delay in the succession proceedings pending before the Family Division. It is only upon confirmation of the grant that the transfer may be completed. The 1st and 2nd Defendants further state in their responses that they are willing to comply with the terms of the consents hence do not need any compulsion from the court. I therefore have no basis of granting the alternative prayers Number 4 and 5 of the application.
35. Finally, there is the issue of extension of the period for delivery of the sub-lease from the 90 days agreed upon to six (6) months as sought by the 1st and 2nd Defendants. The consent was agreed upon voluntarily between the parties. This court cannot therefore interfere with the terms agreed by the parties. Only the parties themselves may by mutual agreement vary those terms. I will leave it at that.

**Conclusion**

36. Based on the foregoing, parties hereto are bound by the terms of their consent judgement. Accordingly, the 3rd Defendant's application is dismissed with costs save that the firm of Messrs Amanyana & Co Advocates is allowed to come on record for the 3rd Defendant having come after judgement.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROBİ THIS 13<sup>TH</sup> DAY OF OCTOBER, 2022.**

**M.D. MWANGI**

**JUDGE**



**In the virtual presence of:**

Mr. Muhuyu for the Plaintiff

Mr. Amanyu for the 3<sup>rd</sup> Defendant

N/A for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants.

Court Assistant – Hilda.

**M.D. MWANGI**

**JUDGE**

