



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE NO. 317 OF 1998

RUTH MBENGE MBONDO ::::::::::::::: PLAINTIFF

VERSUS

RICHARD MUEMA MBONDO ::::::::::::::: DEFENDANT

R U L I N G

There is an application filed by the 1st and 2nd defendant dated 14.12.2001 brought by way of chamber summons under order 48 rule 2A order 23 rule 1 and 2 and order 1 rule 21 of the Civil Procedure Rules and section 3 and 3 A of the Civil Procedure Act and all the enabling provisions of the law seeking among others an order that there be a stay of execution of the decree herein pending the hearing and determination of this application, that the consent judgement dated the 11th day of May 2000 and all consequential orders be set aside. The grounds in support of it are set out in the body of the application and affidavit. Counsel for the plaintiffs put in grounds of opposition to that application which contained a preliminary point of law in ground 1 thereof to the effect that the application is bad in law, an abuse of the judicial process of this honourable court and the court will be moved on a preliminary point of law to strike out the defendant application. This ruling is in respect of that preliminary objection. The points in support of the preliminary objection as put by the plaintiffs counsel are that the plot in question plot No.40 Tala market is a deceased person property, that an injunction was sought and obtained to put off hyenas and wolves from the plot (human beings and not animals as wolves and hyenas in their natural form do not own property) that thereafter there were a series of meetings between family members and latter involved lawyers of the parties who came out with a consensus that a consent be recorded in this matter on 11.5.2000 as shown on the record, that the applicants did not move the court in time to complain either by way of judicial review, setting aside or even go on appeal and so they are guilty of laches and since equity does not aid the indolent they should not be indulged, that the application is meant to frustrate and defeat many other subsequent orders entered herein aimed at finalizing the matter amicably. That the consent judgement is proper and it cannot be faulted as it was freely entered into. There is no fraud or mistake pleaded Mr. Kisebu for the 6th defendant concurred with the submission of counsel for the objector and stressed the following points that an advocate is an agent of the client who is the principal and unless the authority is withdrawn whatever the counsel transacts on behalf of the client binds the client, that when the consent was entered into there was no notice from the applicants to the effect that their advocate had no authority to enter into that consent. The applicants have not come to court with clean hands as they are the ones who initiated the process which led to the recording of that consent; they are also not sincere as they have come to court to complain simply because the execution process has been set in motion, they urge the court to find that the consent judgement is legal, regular, valid and it should not be upset.

Mr. Mulekyo for the 5th defendant concurred with the submission of the other two counsels and he supports the preliminary objection because the consent was by a competent court of law and by counsels who had authority from their clients to enter into the same and the resultant decree is a compromise

decree which cannot be challenged at the execution stage, even if there was no counterclaim or liquidated claim the judgement is a compromise judgement as the 5th defendant was ordered to be paid back what had been defrauded from him and he accepted it.

The applicants response to those submissions is that they have reiterated the grounds in the body of the application and the supporting affidavit and state that the authorities cited by the objectors are not relevant, that an agent has authority but it is limited, in this case the advocate should have sought instructions from his clients. That the applicants complied with the consent in part because they had not noticed the mistake, that the clients came to court when they felt aggrieved that they should be allowed to show where the mistake is.

In reply counsel for the objector maintained that the agreements should be honoured, that the case was filed in 1998 and in 1999 they started negotiations to refund what they had obtained, they cannot say they were duped as it came from them and no mistake has been pointed out by them. Principles of law in England are applicable to Kenya if relevant since 1887 through the Judicature Act of Kenya, that the application has just been filed to escape judicial process.

The parties referred this court to legal provisions and authorities. In Halisburys Laws of England Volume 22 page 792 par 1677 it is stated that “a judgement given or an order made by consent may in a fresh action brought for the purpose be set aside on any ground which would invalidate a compromise

Compromises have been set aside on the ground that the

1. Agreement was illegal as against public policy
2. Was obtained by fraud
3. Or misrepresentation
4. Or non disclosure of material fact which there was an obligation to disclose
5. Or by duress
6. Or was concluded under a mutual mistake of fact
7. Ignorance of a material fact
8. Or without authority
9. Or in ratification of a contract incapable of ratification
10. Or it is conditional on some term being carried out or on the assent of the court or other persons being given to the arrangement is not enforceable if the term is not carried out or the assent given effectively.

The case of **Khushaldas and Son Limited versus Weinstein and another 11964) E.A** where it was held inter alia that a decree which embodies matters not relating to the suit or which includes matters which although relating to the suit should not be in the operative part of the decree cannot be challenged in execution proceedings the decree therefore was enforceable. The case of **Harisraj Ranmai Shah versus Westlands General Stores property Ltd. and another (1965) EA 642** where it was held that the appellant had not withdrawn his instruction from the advocate who retained full control over the conduct of the case and had apparent authority to compromise all matter connected with the action accordingly the advocate had the necessary authority to agree to the fixing of the mesne profits as appellants counsel and agent.

2. The consent order made before the Deputy Registrar fixing the amount of the mesne profits was binding and there was no need for the judge to hold or order any further inquiry to be held as to the consent of the mesne profits. The judge correctly ordered mesne profits to be paid in accordance with the consent order.

The case of **Hassan Ali versus City Motor Accessories Ltd. and Others (1972) E.A. 423** where it was held inter alia that the court cannot interfere with a consent judgement except in circumstances which would offer good ground for verifying or rescinding a contract between the parties.

In the case of **Kenya Commercial Bank Ltd. versus Benjoh Amalgamated Ltd. and Muiru Coffee Estate Ltd. Nairobi C.A. 276/97** where it was observed at page 7 of the judgement quoting from the case of **Hirani vs. Kassam (1952) 19 EACA 131** where it was stated “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 claiming under them and cannot be varied and is 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.

At page 8 also quoting from the case of **Flora Wasike versus Destimo Wamboko (1982 – 88) IKAR 625** where it was held that it is now settled law that a consent judgement 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.

I have also had access to look at the plaint briefly and find that it is pleaded in para 5 that plot 40 subject of these proceedings belongs to an estate as per para 6 the plot was confirmed to belong to the house of Lois Mutio deceased jointly in common and equal shares para 7 is crucial and it reads. In utter violation of the grant and confirmation thereof and in utter disregard thereof and in utter disregard of the court order in respect thereof the first, 2nd, 3rd and 4th defendants secretly and behind the backs of the legal administrators of the deceased’s estate and the lawful beneficiaries sold plot No. 40 to the 5th defendant for consideration and made away with the proceeds of the sell and thereby denied the lawful administrators and the said the beneficiaries their lawful entitlement to the said plot No.40 at Tala market” In para 8 it is averred that warning and objection to the alleged sell was given but the defendant went ahead to complete the sell para 9, that the sell agreement was illegal null and void as they contravened the high court order in the grant of representation and confirmation and the illegal sell should be declared null and void.

The reliefs being sought in the plaint were an injunction to restrain the 1st, 2nd, 3rd and 4th defendants from interfering with plot 40 among others, the 5th defendant from forcible entry into the said plot and the 6th defendant from registering the transfer. Finally a declaration that plot No.40 and the buildings thereon belong to the deceaseds estate and is legally vested In the beneficiaries of the house of Lois Mutio Mbondo deceased under the law and by order of the High Court in Case No. 193/97 and that it was illegally transferred to the 5th defendant by the 6th defendant and the illegal sale agreement of plot No. 40 be nullified by cancellation.

The 1st, 2nd, 3rd and 4th defendants filed a joint defence in para 3 averring that plot No. 40 was given to the family of the 1st – 4th defendants and had a right to sell it without consulting other family members, that they sold the plot openly to the 5th defendant as they were entitled to do, that to the exclusion of other family members.

The defence of the 5th defendant para 2 thereof states that he was unaware of the details set out in para 5 and 6 of the plaint save that he was aware that one Richard Muema Mbondo was one of the administrators, that he purchased the same after consultation with members of the family and he is a bonafide purchaser for value. The defence of the 6th defendant is that it did not complete the sale agreement for plot No. 40 and it was not party to the same, that they have not completed the sale as the committee deliberated transfer to the 5th defendant upon application by the 1st defendant but the minutes had not yet been confirmed.

Taking an over all picture of the proceedings herein when assessing the points for and against the preliminary objection adduced herein it is clear that there is no dispute that plot No. 40 Tala market belonged to a deceased person, there is no dispute that a grant had been issued to the administrators and a confirmation order made giving the property to a certain house of the deceased what is gathered from the pleadings is that the sale was carried out by persons other than the administrators and in law that sell was invalid and could not be enforced. The defendant purchased it for value but could not get the transfer effected into his name because of the objection from the family members and more particularly the administrators who were the legal owners of the property then.

Any lawyer acting in the matter having a good grasp of the law relating to sell of deceased's properties and having a clear picture of full facts of the case would do what the lawyers did herein that is recognize the fact that the persons who sold had no authority to sell and no capacity to sell and so that sale is null and void. Secondly recognize that the purchaser even if he had knowledge of locus standi and he has paid for the property he cannot get it in the circumstances of this case and his only recourse in the matter is to get back his money. Having recognized the fact that a refund was inevitable there was no other option but to turn back to those who received the money and ask them to give back the money and retain the plot.

The consent reached by the parties on 11.5.2000 was inevitable. The terms of the consent were that

1. The first to 4th defendants shall remit to the 5th defendant the sum of Ksh. 410,000.00 on or before the 10th August 2000 failure of which the said sum should be paid with interest at court rates.
2. That the first to 4th defendants shall meet the costs of the 5th defendant
3. That the 1st to 4th defendants do pay the costs of the plaintiff and the 6th defendant.

The 1st and 2nd defendants have moved to court to reverse that situation. In prayer 3 of their application dated 14.12.2001 they have simply asked the court to set aside that consent but they have not stated what is to happen to the proceedings after the order is set aside. This is what has been objected to. Their strong point is that there was no liquidated claim in the plaint and no counter claim on the part of the 5th defendant for the refund of money and so the compromise entered into should not have been entered into.

As noted earlier on the parties were not prevented from recording a compromise in the matter as presented by the pleading. It cannot be said that the issues were not clear that they could not be determined, identified and settled. The issue before the court was simple namely that the sale not having enumerated from all the administrators it was unenforceable as the sellers had no locus standi to enter into the sale.

2. The property having been adjudged to be earmarked for certain beneficiaries who have raised objection and it has not been shown that that claim of the beneficiaries is liable to be defeated and cannot be defeated the only solution to that is that they get back their property.
3. When the property is referred back to the beneficiaries it means that those who moved to deprive the beneficiaries of the said property and benefited from that action they have to give back that benefit.
4. The 5th defendant who paid for that which was not there cannot be left remediless if he cannot get the plot he has to get back his money and the person to give back the money are those who received it who are defendant No. 1 to 4.

By asking that situation to be reversed without offering an alternative will mean that the plaintiffs and the 5th defendant will be left remediless while defendant No. 1 to 4 will be left to benefit from their wrong.

I therefore find that the consent was proper in the circumstances and any move to upset it is rightly objected to. The preliminary objection is upheld and the application dated 14.12.2001 be and is hereby ordered to be struck out with costs to the respondents to that application.

Dated, read and delivered at Machakos this day of 2002.

R. NAMBUYE

JUDGE