



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 362 OF 2017**

**CHINA WU YI COMPANY LIMITED.....PLAINTIFF**

**=VERSUS=**

**BELGO HOLDINGS LIMITED.....DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 16<sup>th</sup> November 2020 brought under order 51 rule 1 and 3, order 9 rule 9, order 50 rule 6, order 22 rule 22 and order 12 rule 11 of the Civil Procedure Rules, section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Article 49 of the Constitution of the Republic of Kenya and all other enabling provisions of the law.

2. It seeks orders:-

**1. Spent.**

**2. Spent.**

**3. Spent.**

**4. That this honourable court be pleased to set aside the said consent orders recorded herein on 16<sup>th</sup> June, 2017 and 22<sup>nd</sup> June 2017 and all consequential order arising therefrom.**

**5. That this honourable court be pleased to stay any other proceedings in this matter pending the intended appeal against the judgment that was delivered on 30<sup>th</sup> January, 2020 by honourable justice Loise Komingoi in ELC NO. 545 of 2012 Belgo Holdings Ltd vs Kenya Urban Roads Authority & Another.**

**6. That the costs of this application be provided for.**

3. The grounds are on the face of the application and are (a) – (e).

**(a) The said consent orders that were recorded herein on 16<sup>th</sup> June 2017 and 22<sup>nd</sup> June, 2017 were recorded without the knowledge, consent authority or instructions of the plaintiff/applicant.**

**(b) The said consent orders were premised on the outcome of another case in ELC No. 545 of 2012 Belgo Holdings Ltd vs Kenya Urban Roads Authority & Another wherein the subject parcel of land are the same subject matter in this particular case.**

**(c) The defendants in the said ELC No 545 of 2012 have already filed a Notice of Appeal against the said judgment.**

**(d) The defendant/respondent herein is threatening to execute the said consent orders, an eventuality which is likely to render the said intended appeal nugatory.**

**(e) In the interest of justice it is reasonable to order a stay of execution of the said consent order of 27<sup>th</sup> June, 2017 pending further orders of this honourable court when the same comes up for a mention on 11<sup>th</sup> February 2021.**

4. The application is supported by the affidavit of Lui Quing Hua Project Manager of the Red Hill Project, Waiyaki Way along Peponi Road

Westlands sworn on the 16<sup>th</sup> November 2020.

5. The application is opposed. There are grounds of opposition filed by the defendant dated 24<sup>th</sup> November 2020.

6. On the 10<sup>th</sup> December 2020, the court with the consent of parties directed that the Notice of Motion dated 16<sup>th</sup> November 2020 be canvassed by way of written submissions.

7. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the grounds of opposition, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.

8. Before I consider the merit of this application I would like to consider the issue of whether M/s C. M. Ngugi Rebiro & Co. Advocates are properly on record for the plaintiff/applicant. Order 9 rule 9 of the Civil Procedure Rules, 2010 provides that:-

***“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—***

***(a) upon an application with notice to all the parties; or***

***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.***

9. I have gone through the court record. By a consent dated 12<sup>th</sup> November 2020 and filed in court on 13<sup>th</sup> November 2020 it is agreed by consent:-

***“That the firm of M/S C. M. Ngugi Rebiro & Co. Advocates be allowed to come on record for the plaintiff in place of Wambugu & Mwaniki Advocates.”***

10. It is clear from the above that the firm of M/S C. M. Ngugi Rebiro & Co. Advocates are properly on record for the plaintiff/applicant.

11. The gist of this application is in paragraph 5 of the supporting affidavit of Lui Quing Hua. He states:-

***“That as far as the plaintiff/applicant is concerned the said consent orders were recorded by its former advocates without any knowledge, authority, instructions and/or concurrence of the plaintiff/applicant.***

In paragraph 6, he states:-

***“That further I wish to categorically state that at no one time did the plaintiff/applicant and the defendant/respondent ever discussed and agreed on the purported additional rent of Kshs.607,500/- per month from 1<sup>st</sup> March 2017, yet the relationship of the parties herein is contractual in nature between a landlord and a tenant and the said plaintiff's/applicant's former advocate had not been authorized and/or mandated to negotiate such terms on its behalf thus rendering the said consent orders fraudulent.”***

12. I have gone through the court record. The matter commenced before Honourable K. Bor J on 5<sup>th</sup> June 2017. On the 16<sup>th</sup> June 2017, in the presence of Mr. Esmael holding brief for Mr. Ochieng, Oduol for the defendant and Mr. Wambugu for the plaintiff the following consent was recorded:-

***“By consent of the parties:-***

***1. Subject to the issue of additional rent being agreed:-***

***(i) An order as per prayer No. 2 of Belgo's application dated 12<sup>th</sup> April 2017 in ELC 263/17 is granted until further orders of the court.***

***(ii) China Wu Yi will be allowed by Belgo to enter into the portions of the land measuring 1094 square metres as identified in the report of Belgo's surveyor dated 2<sup>nd</sup> May 2017 for the purpose of:-***

***(a) Erecting a foundation for the link road.***

***(b) Erecting an inter section on Peponi road junction with a link road***

***(c) For temporary diversion of traffic on peponi road.***

***(iii) Upon completion of construction works, China Wu Yi will restore the land on its original condition.***

(iv) *Belgo to withdraw notice of termination of tenancy dated 24<sup>th</sup> March 2017 given to China Wu.*

(v) *Costs in the cause.*

(vi) *Mention on 22<sup>nd</sup> July 2017”.*

The said consent was signed by both counsel and adopted as the order of the court.

13. On the 22<sup>nd</sup> June 2017, a further consent was recorded in the presence of Mr. Wambugu for the plaintiff and Mr. Ochieng Oduol for the defendant.

*“ By consent of the parties;-*

*1. Rent payable for additional area will be Kshs607,500/- per month from 1<sup>st</sup> March 2017.*

*2. This rent will only be payable by the plaintiff to the defendant if the ELC Court holds in ELC 545/2012 that Belgo Holdings Limited is the owner of the entire land and that the road corridor has not been acquired by the government.*

*3. If the rent becomes payable, the plaintiff will pay interest on the accrued rent at 14% p.a.*

*4. The suit is marked as settled. Each party will bear its own costs”.*

It is signed by both counsel and the consent is adopted as the order of the court.

These are the orders which the plaintiff/applicant seeks to set aside.

14. The grounds upon which a consent order can be set aside are now well settled. In the case of **Flora N. Wasike vs Destimo Wamboko [1988] eKLR**, the Court of Appeal held that:-

*“It is now well 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, see the decision of the court in J. M. Mwakio vs Kenya Commercial Bank Ltd Civil Appeal No 28 of 1982 and 69 of 1983. In Parcell vs FC Trigell Ltd [1970] 2ALL ER 671, Wim LJ said at 576:*

*“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 matter is by legal 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.”.*

This position was restated in the case of **Board of Trustees, National Social Security Fund vs Michael Mwala [2015] eKLR.**

15. It is the plaintiff's/applicant's contention that its former advocate entered into the consent herein without its knowledge, authority, instructions and/or concurrence.

It is not in dispute that the plaintiff's/applicant's former advocates M/S Wambugu & Muriuki Advocates were properly seized of this matter. They had full instructions. No material has been placed before this court by the plaintiff/applicant to suggest that the said advocates did not have instructions to enter into the said consent. In the case of **Hansraj Shah vs Westlands General Stores 642** where an advocate had agreed to the quantum of mesne profits, the Court of Appeal held at page 642 G:

*“The appellant had not withdrawn his instructions from the advocate who retained full control over the conduct of the case and had apparent authority to compromise all matters connected with the action; accordingly, the advocate had the necessary authority to agree to the fixing of the mesne profits as appellant's counsel and agent”.*

16. I have gone through the court record and find that the same deponent Lui Qing Hua in his affidavit sworn on 26<sup>th</sup> July 2018 and filed on 30<sup>th</sup> July 2018 acknowledged full knowledge of the consent orders and concurrence of the plaintiff to the final consent order recorded on 22<sup>nd</sup> June 2017.

17. In the case of **Diamond Trust Bank vs Ply and Panels [2004] 1EA 31**, the Court of Appeal held thus:-

*“A consent judgment may only be set aside on the grounds of fraud or collusion, mistake or misrepresentation. An advocate had ostensible authority to reach a compromise on behalf of a client (Brooke Bond Liebig (T) Ltd vs Mallya [1975] EA 266, Wasike vs Wamboko (1982-88) 1KAR 266 and Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd and another [1997] LLR 640 (CAK) followed.*

*The respondents' application for setting aside the consent judgment was made merely to try to avoid their obligations under the*

***judgment as it was made after inordinate delay only two days before expiry of time. Further, the respondents' advocates had ostensible authority to reach a compromise on their behalf and the advocates never complained that they had been cheated or misled."***

I agree with the counsel for the defendant's submissions that the consent order of 22<sup>nd</sup> June 2017 is very clear as for when the agreed additional rent is payable.

**18.** Judgment in ELC 545 OF 2012 was delivered on 30<sup>th</sup> January 2020. This application is not to stay execution of that judgment pending appeal. I find that the orders of stay cannot issue. The plaintiff/applicant herein is not appealing against the decision in ELC 545 of 2012. It is not a party to that case.

**19.** I have gone through the supporting affidavit of Lui Quing Hua, sworn on the 16<sup>th</sup> November 2020 and find that no particulars of fraud have been given.

**20.** In conclusion, I find no merit in this application and the same is dismissed with costs to the defendant/respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18<sup>TH</sup> DAY OF MARCH 2021.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Byamukama for Mr. Ngugi for the Plaintiff

Mr. Esmail for the Defendant

Phyllis - Court Assistant