



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.102 OF 2015

GARDEN CITY SETTLEMENT LIMITED.....PLAINTIFF

VERSUS

JASHO MWALIMU & 13 OTHERS.....DEFENDANTS

RULING

1. The application before me for determination is the notice of motion dated 10th August, 2020 by the defendants/applicants seeking the following orders:

1. Spent

2. That Casmir Augustus Obiero, Advocate be allowed to come on record for the defendants and the Notice of Change of Advocates dated 10.8.2020 duly filed herein be deemed to be properly on record;

3. That the order of this Honourable Court given in open court on the 4th day of October 2018 and the consent agreement of the 28th day of August, 2018 be set aside;

4. That an order of temporary injunction do issue restraining the plaintiffs/respondents, their agents and/or employees and/or servants and/or assignees from subdividing, constructing and/or in any way interfering and/or dealing with the suit property, being PLOT NO.312/V/MN registered as CR NO.7697/1 pending the hearing and determination of this application;

5. That the matter to proceed for full hearing and be determined on its merit;

6. Any other orders that the court may deem fit to grant

7. That costs of this application be provided for.

2. The application is brought under Section 1, 3 and 3A of the Civil Procedure Act and Order 9 Rule 9 (a), Order 40 Rule 2, Order 42 Rule 7 and Order 51 of the Civil Procedure Rule and all other enabling powers and provisions of the law. The application is supported by the affidavit of Jasho Mwalimu Mkuzi sworn on 10th August 2020 and is premised on the grounds that through material misrepresentation by the defendants' advocates, and absence of express consent of the defendants, an order was made by this court on 4th October, 2018 declaring the plaintiffs to cause excision of 14 acres of the suit property, being PLOT NO.312/V/MN registered as CR NO. 7697/1 for the transfer to the defendants and oversee subdivision, a permanent injunction against the defendants from dealing with the suit property and an order for eviction from the suit property after transfer. That the court adopted and issued the consent order as an order of the court. It is the defendants' contention that the outgoing advocate purportedly acted without instruction and conveniently failed to inform the defendants about the compromised agreement he entered into with the plaintiffs' advocate on 28th August 2018 so as to allow the orders sought to be issued by consent. That the defendants' outgoing advocate took advantage of the defendants' illiteracy and indigence to enter into a consent/compromised agreement in their absence. That since the orders were issued on 4th October, 2018, the defendants' outgoing advocates have never brought to the attention of the defendants having known that they were illiterate and not aware of the orders of this court. That until 15th July, 2020, the defendants have always known that 'the judgment of the case is yet to come from Nairobi.' That the orders covering the suit property interfere with the defendants' quiet use and possession of their land. The defendants aver that they are pursuing a complaint with the Advocates' Complaints Committee for professional negligence and misconduct against the firm of Kenga & Company Advocates. The deponent has annexed a copy of minutes and resolution by the defendants appointing him to be their representative in this matter, a copy of Certificate of Ownership of the suit property, alleged call recording between Mr. Kenga William and the deponent, affidavits of Omar Musa and Samson Fredrick Tevesi, a copy of a summary of a complaint to the Advocates Complaints Commission against

an advocate and copies of the compromise agreement and order of court.

3. The application is opposed by the plaintiff through a replying affidavit by Alfred Boniface Olaba sworn on 4th November, 2020 and grounds of opposition dated 4th November, 2020. It is the plaintiff's contention that there was consensus between the parties in arriving at and entering in the consent order now sought to be set aside. That no particulars of fraud or collusion have been set forth to prove either fraud and/or collusion on the part of the advocates on record representing the parties and that the parties and their advocates consented to compromise in very clear terms and were aware of all material facts and that there could have been no mistake or misunderstanding. That the compromise was not an agreement contrary to the policy of the court and the consent was given sufficient material facts and there exists no reason which could enable the court to set aside an agreement. That generally, advocates act on the full authority and instructions given by their respective principals, i.e. their clients. Mr. Olaba has denied that he and Mr. Kenga worked in cohorts and connived to obtain orders or that the plaintiffs acquired orders herein through misrepresentation, fraud and concealment of material facts as alleged by the applicants. He avers that this case was part-heard and Mr. Fauzi Mirza, one of the plaintiffs gave evidence in their presence, their advocate and all the defendants, including Jasho Mwalimu Mkuzi, the 1st defendant herein. That thereafter negotiations began between the parties directly and when a consensus was arrived at, a common draft compromise document was prepared for the approval of the defendants before a final compromise agreement was signed and endorsed by both Mr. Kenga for the defendants and Mr. Olaba for plaintiffs. That the consent letter was filed in court together with the accompanying documents and that the parties appeared before court including the 1st defendant and the other defendants and the plaintiffs accompanied by their advocates who asked the court to adopt the consent letter as orders of the court which was duly done.

4. I have considered the application, the affidavits on record and submission filed. When this matter came up for hearing of the present application on 29th October, 2020, Mrs. Chengo held brief for Mr. Kenga and informed the court that they had no objection to prayers 2 of the motion in which Casmir Augustus Obiero, Advocate seeks to be allowed to come on record for the defendants in place of Kenga & Company Advocates. Consequently, the Notice of Change of Advocates dated 10th August, 2020 is hereby deemed duly filed and properly on record. What is therefore left for determination by the court is mainly prayer 3 of the motion which seeks to set aside the consent dated 28th August 2018 entered by the parties and adopted as an order of the court on 4th October, 2018.

5. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated and well settled. In the case of **Board of Trustees National Social Security Fund –v Michael Mwalo (2015) eKLR**, the Court of Appeal stated as follows:

“A court of law will not interfere with a consent judgment except in circumstances such as would provide a good grounds for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, collusion or by an agreement contrary to the policy of court.”

6. In the case of **Brooke Bond Liebig (T) Ltd –v- Mallya (1995) EA 266, Law, JA** stated at page 269 in these terms:

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani –v- Kassam (1952) 19 EACA 131, where the following passage from Seton on Judgments and Orders, 7th Edition, Col, 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 on those claiming 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 consent was given without sufficient material facts, or in misrepresentation or in ignorance of material facts, or in general for a reason which would enable the court set aside an agreement.”

7. Similarly, in the case of **Flora Wasike –v- Destino Wamboko (1988) KAR 625, Hancoz, JA** (as he then was) stated:

“It is now 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.”

8. The issue for determination in this application is whether the applicants have met the threshold for setting aside of the consent entered by the parties herein on 4th October, 2018. The record shows that this matter was scheduled for hearing on 14th November 2018. The parties through their advocates then on record filed a consent letter dated 28th August 2018 on 14th September, 2018. Vide a letter dated 26th September, 2018 addressed to the Deputy Registrar, and copied to the defendants advocates, Messrs Kenga & Company Advocates the plaintiff's advocate requested the file to be placed before the court on 4th October, 2018 for mention to adopt the said consent letter dated 28th August 2018 as the judgment of the court. On 27th September, 2018, the Deputy Registrar directed that the matter be placed before the court on 4th October, 2018 for directions. When the matter came up before me on 4th October, 2018, Mr. Olaba Advocate appeared for the plaintiff while Mr. Omuya held brief for Mr. Kenga advocate for the defendants. Mr. Olaba informed the court that the matter was for mention to have it marked as settled in terms of the consent dated 28th September, 2018. Mr. Omuya confirmed that was the position and asked that the consent may be adopted. The court then went ahead and adopted the consent as an order of the court.

9. From the foregoing, it is clear that the parties had been negotiating and had reached an agreement which was reduced into writing and signed by their respective advocates. The consent which was already executed by the advocates for the parties, was adopted as an order of court in the presence of the advocates for the plaintiff and for the defendants. I note that the said consent judgment was entered way back on 4th October, 2018, while the present application was filed on 10th August, 2020 which is a period of more than one year and ten months. It is not clear why the defendants did not bring the application earlier, if indeed they were not party to the consent filed and later adopted as an order of court. Moreover, the matter was scheduled for hearing on 14th November, 2018 before the same was settled in terms of the impugned consent. Although the matter was part-heard, the case had never been heard to conclusion and the defendants had certainly not given their evidence. Therefore their explanation that they were awaiting for judgment from Nairobi does not add up.

10. I find that the defendants have not proved that there was fraud, collusion or misrepresentation. All the material facts were known to the

parties who willingly consented to compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As already stated, a court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for or rescinding a contract between parties. No such circumstances have been shown to exist in this case. Certainly fraud or collusion have not been proved. The upshot is that I find that the notice of motion dated 10th August 2020 has no merit and the same is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY DUE TO COVID-19 PANDEMIC THIS 4TH DAY OF MARCH, 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE