Settim v Linturi (Environment & Land Case 166 of 2009)
[2024] KEELC 3573 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3573 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 166 OF 2009

A NYUKURI, J

APRIL 11, 2024

BETWEEN

JEMIMAH JEPTOO SETTIM ..... PLAINTIFF

AND

HON FRANKLIN MITHIKA LINTURI ..... DEFENDANT

RULING

Introduction

1. Vide an application dated 5th June 2023 and filed on 6th June 2023, the plaintiff/applicant sought the following orders;

    1. Spent

    2. Spent

    3. That the honourable court be pleased to grant orders that the applicant be allowed to give oral evidence in court in support of this instant application.

    4. Spent

    5. The consent letter dated 23rd October 2015 executed between the plaintiff's former advocate and the defendant's advocate and filed in the honourable court on the 12th April 2016 and adopted on the 14th April 2018 as an order of the court be set aside together with all consequences.

    6. That cost of this application be provided for.

2. The application is predicated on grounds on its face and further supported by the affidavit of Jemimah Jeptoo Settim, the plaintiff/applicant herein. She deposed that the defendant failed to pay the plaintiff the balance of the land purchase price, having only paid 10% being Kshs. 4,500,000.00 out of Kshs.

15,593,500/= but somehow managed to transfer the land before completion which necessitated her to file the instant suit to cancel the transfer. She also asserted that she engaged the firm of E. K. Mutua & Co. Advocates to represent her, then the firm became unresponsive around 2017, leading her to engage Samwel Aduda, Advocate, who also later became unresponsive, necessitating her to engage the firm of Omondi Odegi & Co. Advocates.

3. The deponent further stated that she had learnt that the matter had since been concluded and the said firm of Samwel Aduda had not entered appearance despite assuring her. She averred that she discovered that the matter was compromised by a consent dated 23rd October 2015, filed on 12th April 2016 and adopted as an order of the court on 14th April 2016. She maintained that the consent letter was without her knowledge and that she had neither been consulted nor informed about it. According to her, the said consent had some disturbing terms that smacks of corrupt and fraudulent schemes as the terms thereof are appalling and amount to miscarriage of justice. It was her averment that the said consent was fraudulently obtained by collusion since it is not possible for her to donate half of her land without getting value for it. She stated that her advocates took advantage of her naivety in matters of judicial processes. She stated that the consent had not been implemented. She prayed that the file be kept in the strong room as attempts to retrieve a copy from her advocates had been unsuccessful but that she had made the application without delay upon obtaining authority to come on record. She concluded by alleging that she had all along been of the impression that the matter was pending in court and that she had now instructed the firm of Omondi Odegi & Co. Advocates to act for her post judgment and that she would suffer irreparable harm unless the application was allowed. She attached a copy of the plaint; letter dated 3rd June 2022 from her advocate Omondi Odegi Advocates; the consent letter and order; and official searches.

4. The application is opposed. Franklin Mithika Linturi, the respondent herein swore a replying affidavit dated 26th June 2023 and filed on 27th June 2023. He averred that the reasons given as the basis of the prayers sought were frivolous, scandalous and vexatious, especially due to the fact that it is being brought seven years later based on unsubstantiated allegations of fraud.

5. He stated that he was aware that a duly instructed advocate has an implied general authority to compromise and settle a suit and that a client cannot avail himself of any limitation by him unless such limitation was brought to the notice of the other side. He also averred that a consent order has a contractual effect, and can only be set aside on factors that can vitiate a valid contract. It was also his averment that the standard of proof for fraud is higher than the standard applicable in ordinary civil cases and that proceedings which make serious allegations against identifiable persons who are not parties to the suit can be dismissed for non-joinder of necessary and proper parties. The deponent also averred that post-judgement proceedings instituted by a different advocate ought to be preceded with leave of court to effect the change. He relied on several decided cases to support this position.

6. On the substantive application, he deposed that he did not refuse to pay the balance on the purchase price, as the same was payable at the completion of the sale agreement dated 16th January 2009. He maintained that it was the plaintiff who failed to complete the sale of the property by not granting vacant possession and showing the beacons as per clauses 4 and 11 of the sale agreement. It was also his averment that the consent order was filed after lengthy negotiations. He further averred that the plaintiff and the defendant had taken significant steps towards fulfilling the consent order, including incorporating a company known as Marklin Holdings Limited, whose progress has been hindered by other claims over the land and the plaintiff's belligerence.

7. The respondent further averred that the plaintiff had not adduced any evidence to support her weighty accusations of fraud, collusion and corruption against the defendant and their respective advocates.

He also averred that the plaintiff was guilty of latches to the extent that she had brought the application more than a year after the alleged discovery of the material facts and seven years after the adoption of the consent order contrary to the dictates of Order 45 Rule 1 of the Civil Procedure Rules.

8. He concluded by urging the court to find that the application is frivolous, scandalous, vexatious and an abuse of the court process; does not meet the legal threshold for setting aside consent orders; the plaintiff had not adduced enough evidence to support allegations of fraud and that she had delayed for over seven years. He attached the sale agreement and parties' correspondence.

9. Mr. Eric Mutua, S.C of M/S E. K. Mutua & Co. Advocates swore an affidavit dated 4th July 2023 responding to the application. He deposed that he had no objection to another counsel taking over the matter on behalf of the plaintiff but that he wished to set the record straight. He stated that the dispute herein arose because it became difficult to grant vacant possession because the suit property had been invaded by squatters. He averred that following direct negotiations between the parties, the plaintiff had informed him that it had been agreed that the defendant was to fund all the expenses towards eviction of the squatters and that the cost of evicting the squatters would be taken into consideration in respect to the balance of the purchase price, whereof a Memorandum of Understanding was entered into. He averred that it was as a result of the discussion by the parties and subsequent engagements of advocates on record that the consent order was entered into. He also averred that subsequent to the recording of the consent, the plaintiff and the defendant's proxy became shareholders and directors of M/S Marklin Holdings Limited. He annexed copies of the Memorandum of Understanding and registration documents for the parties' company.

10. In a rejoinder, the plaintiff swore a further affidavit dated 3rd July 2023. She averred that her advocates obtained leave to come on record vide this court's order of 18th January 2023. She stated that the defendant was guilty of perjury as the official search provided was not genuine and insisted that the shareholding of Marklin Holding Limited has not changed and remains in the name of Emily Nkirote and the defendant.

11. She further stated that the defendant was guilty of non compliance with the consent order because Marklin Holdings was incorporated a year before the consent, the search shows the land is still in the defendant's name; that the letter of 24th January 2018 tried to vary the consent and that the same shows she was a victim of fraud. She stated that where fraud is pleaded latches do not arise. She attached CR12.

12. In addition, the plaintiff swore a supplementary affidavit dated 6th July 2023 wherein she deposed that the adoption of a consent order by the Deputy Registrar without the input of the trial Judge was an irregularity as the Registrar was only to do the administrative part of signing an extracted pronouncement of the Judge. She also averred that Mr. Eric Mutua S.C had committed acts of perjury by misrepresenting to the court a falsified search and supporting documents. It was her averment that she had never been a director or shareholder of Marklin Holdings Limited and that they had contacted the Registrar of companies who had verified the true shareholding of that company being the defendant and one Emily Nkirote Buantai.

13. The applicant further deposed that several contradictions in the affidavit by Eric Mutua and that the documents exhibited by the respondents demonstrate a further attempt to arm-twist the plaintiff of her rightful gains from the suit property. It was her averment that the depositions by the defendant and Mr. Eric Mutua S.C are so contradicting and one can only conclude a fraudulent scheme.

14. The application was canvassed by way of written submissions. On record are the applicant's submissions dated 23rd November 2023 and filed on even date and the respondent's submissions dated 16th January 2024.

Submissions by the applicant

15. Counsel for the applicant reiterated the reason behind the applicant's prayer to give oral evidence was for the court to appreciate the genuineness of the applicant and her status as a layperson without much understanding of the ways of the court. Counsel outlined the chronology of events as according to the applicant and raised three issues.

16. The first issue was whether the defendant and Mr. Erick Mutua, S.C committed acts of perjury in the proceedings and if the same were a furtherance of fraud and collusion. On this, it was submitted that the defendant's replying affidavit dated 26th June 2023 had deliberate misrepresentations under oath by misrepresenting to the court, falsified documents in the name of CR12 of Marklin Holdings Limited purporting that the applicant was a shareholder of the said company. It was submitted that Mr. Eric Mutua S.C. had equally doubled down on the same falsehoods in the affidavit dated 4th June 2023, whereas the applicant submitted official Government documents showing that the applicant was not a shareholder of the company. Counsel argued that the deposition that the plaintiff and defendant had taken significant steps towards fulfilling the consent including incorporation of a company was false. Counsel maintained that as Mr. Mutua S.C. engaged in the same misrepresentation, the same smacks of collusion.

17. On whether the consent order filed on 12th April 2016 should be set aside, counsel submitted that variation or setting aside of consent judgments can be done. Reliance was placed on several cases including, Brooke Bond Liebig v Mallya 1975 E.A 266 and SMN v ZMS & others [2017] eKLR, Hirani v Kassam (19520 19 EACA 131 and SMN V ZMS & Others [2017] eKLR to submit that grounds for setting aside consent orders include where consent was obtained fraudulently; where there is collusion; if the agreement is contrary to the policy of the court; and if the consent is based on insufficient material, misapprehension or ignorance of material facts.

18. Counsel argued that the applicant had demonstrated fraud as there is no evidence that the firm of E. K. Mutua Advocates had permission from the plaintiff to record the consent, that the terms of the agreement provided by the said advocate are not the same as the terms of the impugned consent and that the consent came two years after the agreement.

19. On the policy of the court, counsel argued that as the terms of the consent are oppressive and punitive, the same cannot serve the interests of justice.

20. It was further submitted that if the consent were to be validated by the court, the same would be vacated for failure of the parties to implement it. Counsel contended that the said consent was not brought to the attention of the applicant and the parties who were aware of the same did not do anything to implement the same. Further reliance was placed on the cases of Flora Wasike vs Destimo Wamboko (1982-1988)1 KAR 625 and Hirani vs Kassam (1952)19 EACA 131.

Submissions by the respondent

21. Counsel for the respondent relied on the decisions in the cases of Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR and Vijay Morjaria v Nansingh Madhusingh & Another [2000] eKLR and submitted that the application had not met the legal threshold for fraud allegations, which ought not be inferred but must be specifically pleaded and proved, which was not the case herein. Counsel argued that the applicant did not dispute selling the land, signing the transfer forms, the defendant's claim that she breached the agreement and the authenticity of correspondence and documents produced by the defendant and her advocate showing negotiations, inter alia.

22. It was further submitted for the respondent that the applicant had failed to specify the clauses of the consent that were allegedly disturbing terms that smack of corrupt and fraudulent schemes. Counsel argued that the allegation of forged CR12 disregarded the concept of perpetual succession meaning that a company remains in eternal existence notwithstanding change of directors, unless it is wound up or deregistered. Counsel maintained that the dates on the CR12 were a clerical error by officers at the company registry and there is no affidavit from the said officers alleging the contrary.

23. Counsel held the view that the application did not meet the legal threshold for setting aside of the consent order, as the applicant had not adduced any evidence to support her claim that the consent order was illegal. Counsel argued that Order 49 Rule 3 of the Civil Procedure Rules empowers the Deputy Registrar of this court to adopt a consent. Citing the case of Kenya Commercial Bank Ltd vs Specialized Engineering Company Ltd Nairobi High Court Civil Case No. 1728 of 1979, counsel held the position that the applicant's advocate had a general implied and ostensible authority to compromise the suit, as there is no evidence that the plaintiff had expressly communicated any limitation of her advocate's general or implied authority to the defendant. Counsel pointed out that a comparison of the terms in the memorandum of Understanding and the consent order yields the conclusion that that their intent is similar and that the terms of the consent were more advantageous to the plaintiff than those in the memorandum of understanding, as the plaintiff was excused from the responsibility of sourcing for a buyer and evicting squatters. Counsel also contended that the application did not warrant the setting aside of a consent order, citing the case of Munyiri vs Ndungunya [1958] eKLR. Further, that the plaintiff did not demonstrate the alleged mistake of her agent; she did not prove that her former advocate acted contrary to her instructions which if that were the case, her recourse would be against her advocate and not the defendant; she has not proved that the defendant knew or ought to have known that her former advocate lacked authority and that she had not proved that the consent was inimical to her interests.

24. On the implementation of the consent order, counsel argued that it had been hindered by proliferation of court cases, hindering eviction of squatters.

25. Regarding non-joinder of necessary parties, it was submitted that there was no justification as to why the applicant failed to join her former advocates in the application to answer allegations of fraud. Counsel cited the case of Trust Bank Limited vs Ajay Shah & 3 Others [2019] eKLR to buttress their submissions. It was also submitted that the applicant was guilty of laches to the extent that she brought the application more than a year after the supposed discovery of the material facts and seven years after the adoption of the consent order and that the excuse given of communication breakdown was frivolous. In that regard, reference was made to the case of Javan Lewa Muye vs Shiva Enterprises Ltd & 3 Others; Mbeyu Mwandaza Mwangoni (Interested Party) [2019] eKLR.

Analysis and determination

26. The court has carefully considered the application, together with affidavits in support thereto; the replying affidavits and parties' rival submissions. Prayer 3 of the application which sought attendance of the applicant was withdrawn on 10th July 2023. The only issue that arise for determination is whether the plaintiff/applicant has met the threshold for setting aside a consent order.

27. It is settled, by many judicial pronouncements that a consent order is a contract and therefore binding on the parties, and cannot be set aside or varied unless it is demonstrated that the consent was obtained by fraud or collusion or by an agreement that is inconsistent with the policy of the court, or that there was misapprehension or ignorance of material facts or for any just cause that would allow a court to set aside a contract.

28. In the case of Hirani v Kassam (1952) 19 EACA 131, the court held as follows;

The compromise agreement was made an order of the court and was thus a consent judgement. It is well settled that a consent judgment can be set aside only in certain circumstances e. g on the grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.

29. In the instant case, the plaintiff alleges that the consent dated 23rd October 2015 was entered into by fraud and collusion between her former advocate and counsel for the defendant. According to her, she was unaware of the consent which was oppressive and meant to deprive her of her property, and that all along knew that the case was pending hearing.

30. Section 107 of the *Evidence Act* places the burden of proof on the person making allegations in question. Therefore, it was upon the applicant to demonstrate fraud and collusion as alleged.

31. Having considered the application and the evidence provided by the parties, it is clear that after this matter was filed, parties engaged in negotiations as demonstrated by the correspondence availed by the defendant. This culminated in the parties signing the Memorandum of Understanding dated 26th September 2014, which fact has not been contested by the applicant. In that Memorandum of Understanding, parties agreed that the plaintiff was to seek for a buyer of the suit property and that upon sale thereof, the defendant was to receive Kshs. 25,000,000/= while the balance thereof would go to the plaintiff. The parties also agreed to withdraw the pending case. Subsequently, the impugned consent dated 23rd October 2016 was entered into, whereof the parties agreed to transfer the suit property into a limited liability company incorporated by the parties and thereafter the property be sold by that company for purposes of sharing the proceeds thereof equally between the parties. However, the costs of obtaining vacant possession of the property are to be borne by the defendant. Further, that the restriction be removed and each party to bear their own costs.

32. Taking into account the fact that the Memorandum of understanding dated 26th September 2014, just like the impugned consent, provided for the sale of the suit property and Kshs. 25,000,000/= to be paid to the defendant while the balance to the plaintiff, the applicant's argument that the impugned consent was oppressive for allowing equal sharing of the proceeds of the sale is untenable and is rejected by this court for three reasons.

33. To begin with, the applicant's allegations that the consent is oppressive for depriving her half of her property, has no basis as the same consent burdens the respondent with obtaining vacant possession thereof, a burden which ordinarily would be borne by her as the land is hers and the defendant is merely a purchaser. In my view, the applicant has not demonstrated how the impugned consent is oppressive as she has not shown that the defendant getting half of the proceeds of sale of the suit property while bearing the cost of obtaining vacant possession thereof, instead of Kshs. 25 Million, without the said cost, is oppressive and to her detriment. Her allegations on that matter are vague.

34. I will hasten to add that even if the consent herein were found to apparently favour one party more than the other, as long as there was a meeting of the minds of the parties and the consent was lawfully entered into, it is not the responsibility of this court to rewrite contracts for parties. Consents are not like independent court decisions to require justification and reasoning. Consents are intricate because they are as a result of negotiations, back and forth discussions, offers and counter offers, consideration and acceptance, among other matters, regarding the interests of parties. Those discussions, negotiations, offers and counter-offers form the basis of the written consent, but most of which may not be included in the written consent. And that is why, as long as there is equality of arms in litigation, if parties agreed to a consent which, on a cursory look, apparently appears to tilt in favour of one party, it is not the

court's business to question that ostensible imbalance, for the obvious reason that the consent is based on matters most of which are not disclosed to the court, and therefore not discernible from the consent itself. In short, what is reduced into a written consent is not necessarily all that there is, concerning such a consent and the parties involved.

35. In the instant case, the applicant has not informed court, what informed the provision in the Memorandum of Understanding for payment of Kshs. 25,000,000/= to the defendant and the balance to herself, and the court appreciates that she is not obligated to make those disclosures. Therefore, she cannot, without clear and cogent evidence, purport to argue that the impugned consent is oppressive and contrary to the terms of the Memorandum of Understanding, when she has neither disclosed the basis of the terms in that Memorandum, nor demonstrated clearly how that basis differ from the basis upon which the new terms in the impugned consent were made. That threshold having not been met, and considering that both the Memorandum and the impugned consent provided for the sale of the suit property and sharing proceeds thereof; and since in my view, the new terms in the impugned consent appear to compensate the applicant on the proceeds sharing ratio by placing the burden of obtaining vacant possession and a purchaser on the defendant, I have no reason to hold that the impugned consent is oppressive.

36. In addition, it is clear from the correspondence shown that advocates on both sides were involved in the parties' negotiations leading to the Memorandum of Understanding, and subsequently to the impugned consent. However, the applicant does not state or demonstrate at what point her advocate had instructions to engage the defence counsel and at what point she withdrew her instructions, as the record shows that several correspondences were exchanged between the two advocates, during the period of negotiations. An advocate is an agent of the client and is deemed to act for a client with instructions, where the retainer is not disputed like in this case. I do not find any truth in the applicant's allegations that her advocate took advantage of her, and acted without instructions. This is because these allegations are very serious and it is rather strange and unsettling that the applicant has not to date deemed it fit to complain against the conduct of her former advocate to the professional body governing the conduct of advocates, when it is her case before this court that due to the fraudulent conduct of her former advocate, she has lost her property by virtue of the consent herein.

37. Moreover, while the applicant has raised several matters, she has not explained to the satisfaction of the court, why it took her seven years to seek to set aside the impugned consent. Blaming her advocates is not excusable in any way as the case belongs to her. It is my view that the application is an abuse the court process, meant to assist the applicant evade her obligations under the consent. If the consent has not been implemented, that cannot be a reason to set it aside. A court does not set aside a judgment merely because it has not been executed. For the above reasons, I find and hold that the applicant has failed to show that the impugned consent was predicated on fraud and collusion. The argument that the Deputy Registrar could not adopt the impugned consent is rejected as provisions of Order 49 Rule 3 of the Civil Procedure Rules allows the Deputy Registrar to adopt a consent.

38. In the premises, I find and hold that the application dated 5th June 2023 lacks merit and the same is hereby dismissed with costs to the respondent.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 11TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Omondi for plaintiff

Mr. Mwangi holding brief for Dr. Muthomi for defendant

Court Assistant – Josephine