



**Irungu v Hayer Marquis Limited & 2 others (Environment & Land  
Petition E034 of 2021) [2024] KEELC 4024 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4024 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E034 OF 2021**

**OA ANGOTE, J**

**MAY 2, 2024**

**BETWEEN**

**LUCY IRUNGU ..... PETITIONER**

**AND**

**HAYER MARQUIS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**COUNTY GOVERNMENT OF NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before this Court for determination is the Plaintiffs' Notice of Motion application dated 22<sup>nd</sup> November, 2022 brought pursuant to the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#), and Orders 40 Rule 1, and 51 Rule 1, of the [Civil Procedure Rules, 2010](#) seeking the following reliefs;
  - i. That Pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue an order of injunction to restrain the 1<sup>st</sup> Respondent, its servants, workmen, licensees, agents or any other persons acting on their own behalf or on behalf of the 1<sup>st</sup> Respondent from continuing any further construction happening on LR No 209/9674.
  - ii. That the costs of this Application be granted to the Petitioner/Applicant.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Professor Lucy Irungu, the Petitioner herein. It is her case that she is the registered proprietor of the parcel of land known as LR 209/16014 where she has constructed her dwelling house.
3. According to the Petitioner, the 1<sup>st</sup> Respondent obtained an EIA Licence No NEMA/EIA/PSL/3309 for land parcel 209/9674 and is currently in the process of constructing two blocks of detached



- apartments thereon and that the said construction is contaminating and comprising her residence making it unfit for human habitation, forcing her to seek alternative residence as a tenant.
4. Professor Irungu deponed that as a result of the aforesaid, she instituted the present Petition; that she equally filed a Motion dated 15<sup>th</sup> September, 2021 seeking conservatory orders restraining the 1<sup>st</sup> Respondent from proceeding with any further construction which orders were granted on the 28<sup>th</sup> September, 2021 and issued on 30<sup>th</sup> September, 2021.
  5. According to the deponent, the Motion of 15<sup>th</sup> September, 2021, and orders aforesaid were withdrawn by the consent of her Counsel and the Respondents' Counsel; that the withdrawal was undertaken without her instructions; that when she realized that construction was ongoing, and believing that the orders were still in force, she instructed a new Counsel to file the Motion for contempt dated 21<sup>st</sup> April, 2022 and that it was at this point that she became aware of the consent.
  6. Professor Irungu asserts that the 1<sup>st</sup> Respondent is currently proceeding with the construction on land parcel 209/9674 thus continuing to cause waste on her residence and subjecting her and her family to perpetual health risks; that the construction is causing deterioration of her house making it unsuitable for human habitation and that she stands to be prejudiced if construction is completed while the Motion is pending.
  7. The 1<sup>st</sup> Respondent, through its Finance Manager, Omar Ali, swore a Replying Affidavit on 5<sup>th</sup> August, 2023. He conceded that the 1<sup>st</sup> Respondent has constructed multi-dwelling structures on its Plot No LR No 209/9674 on the strength of an Environmental Impact Assessment (EIA) Licence No NEMA/EIA/PSL/3309 lawfully issued to it by the 2<sup>nd</sup> Respondent on 26<sup>th</sup> June, 2016 and that the Petitioner has at all times been aware of the construction.
  8. Mr Ali deponed that on 30<sup>th</sup> September, 2021, the construction of the 1<sup>st</sup> Respondent's development was temporarily halted by interim ex parte interlocutory orders issued by this Court on 28<sup>th</sup> September, 2021, following a Motion by the Petitioner dated 15<sup>th</sup> September, 2021 and that by the time of the issuance of the interim conservatory orders, the 1<sup>st</sup> Respondents' development was at an advanced stage and the actual construction had been concluded.
  9. According to Mr Ali, as a result thereof, they filed a Motion dated 2<sup>nd</sup> October, 2021 seeking to set aside the ex parte orders and that when their Motion was due for hearing on 12<sup>th</sup> October, 2021, the Petitioner's Advocate then on record, Mr. Ndegwa, informed the Court that the orders could be set aside as the actual construction had been completed and what was being undertaken were internal repairs which had no impact on his client.
  10. He deponed that as a result of the said representation, a consent order was recorded in Court compromising both the Petitioner's Motion of 15<sup>th</sup> September, 2021 and the 1<sup>st</sup> Respondent's Motion of 12<sup>th</sup> October, 2021 and that both applications were marked as withdrawn and the interim orders were accordingly, set aside.
  11. The 1<sup>st</sup> Respondent's Finance Manager deposed that he is aware that the Petitioner's former Advocates had communicated to the 1<sup>st</sup> Respondent expressing the Petitioner's offer that the 1<sup>st</sup> Respondent considers buying her property although no formal communication was made to that effect and that the aforesaid instructions were re-affirmed by the current advocates on record for the Petitioner vide their letter dated 25<sup>th</sup> January, 2022 in which they indicated that they had started negotiations towards an out of Court settlement.
  12. According to the deponent, the above makes it clear that the averment by the Petitioner that her former Advocates had no authority to consent to the setting aside of the conservatory orders has no basis; that



an Advocate has express and ostensible authority to enter into a consent on behalf of his client and that the present Motion which seeks the re-issuance of the same orders that were set aside by consent, formally adopted by the Court and which have not been varied has no basis in fact and in law.

13. It is the 1<sup>st</sup> Respondent's case that the Motion has nonetheless been overtaken by events because they have proceeded and finished the construction which now stands at 95.2% complete with some of the rooms therein being fully furnished and ready for occupation and that further, the Petitioner substantially seeks to challenge the issuance of an EIA Licence to it which challenge must legally, in the first instance, be made before the National Environment Tribunal with this Court having only Appellate jurisdiction.
14. It was averred that the Petitioner has not established a prima facie case; that it is apparent that the Petitioner seeks damages against the 1<sup>st</sup> Respondent and therefore her claim can be adequately compensated by an award of damages and that the balance of convenience herein tilts in favor of allowing the status quo rather than stopping the concluded project by way of an injunction.
15. Both parties filed their respective submissions and authorities which I have considered.

### **Analysis and Determination**

16. Vide the present Motion, the Petitioner seeks injunctive orders restraining the 1<sup>st</sup> Respondent from continuing with construction on LR No 209/9674. In response, the 1<sup>st</sup> Respondent asserts that the Motion is not only unmerited, but fatally defective.
17. The 1<sup>st</sup> Respondent contends that the Motion seeks the re-issuance of orders that were set aside by consent of the parties, which consent was adopted as an order of the Court, and has not been varied.
18. The Court has considered the proceedings. On 15<sup>th</sup> September, 2021, the Petitioner filed a Motion seeking conservatory orders restraining the 1<sup>st</sup> Respondent from proceeding with any further construction. The matter was filed under Certificate of Urgency and the Court issued interim conservatory orders on 28<sup>th</sup> September, 2021 stopping construction until 28<sup>th</sup> October, 2021. Directions were also issued directing the Respondents to file their respective responses.
19. As at 28<sup>th</sup> October, 2021, there were two applications on record, being the Petitioner's Motion of 15<sup>th</sup> September, 2021 and the 1<sup>st</sup> Respondent's Motion of 2<sup>nd</sup> October, 2021 seeking to set aside the orders of 28<sup>th</sup> September, 2021. The Motion of 2<sup>nd</sup> October, 2021 was set down for hearing on 12<sup>th</sup> October, 2021.
20. On 12<sup>th</sup> October, 2021, Counsel for the Petitioner suggested that the applications be compromised and the orders set aside to expedite the hearing of the Motion. He noted that the ongoing constructions may not have any threats on his client's property and it was best to expedite the hearing of the main Petition.
21. This was agreeable and the parties entered into a consent recorded by the Court thus;

“By consent, the Applications dated 15<sup>th</sup> September, 2021 and the 2<sup>nd</sup> October, 2021 are hereby compromised and marked as withdrawn with no orders as to costs. The interim orders issued on the 28<sup>th</sup> September, 2021 are hereby set aside. Parties are to negotiate and settle the matter out of Court. The Petitioner has leave to file the Amended Petition within 7 days and the Respondent has leave to file their reply within 14 days of service.”
22. The Petitioner herein seeks injunctive orders restraining further construction by the 1<sup>st</sup> Respondent pending determination of the Petition. The Motion of 15<sup>th</sup> September, 2021 sought conservatory



orders restraining construction by the 1<sup>st</sup> Respondent until determination of the Petition. It is apparent that the two Motions seek the same relief, being to restrain the construction until final determination of the Petition.

23. The Petitioner asserts that the consent which compromised the Motion of 15<sup>th</sup> September, 2021 was entered into without her instructions. However, it is trite that a consent is contractual in nature and can only be set aside in circumstances which would justify setting aside a contract.
24. The principles upon which a Court may interfere with a consent order or Judgment were outlined by the Court of Appeal in *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR 485 as follows:
  - “ 1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”
25. More recently, the Court of Appeal in *S M N v Z M S & 3 others* [2017] eKLR held as follows:
  - “ 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. It is noted that there has been no attempt to set aside the consent order herein. It remains a valid order of the Court. This being so, the Court is of the view that through the filing of the present Motion, the Petitioner seeks to by-pass the consent which compromised the Motion of 15<sup>th</sup> September, 2021 and re-litigate the issues therein afresh. In the opinion of the Court, this constitutes an abuse of court process.
27. For those reasons, the Court finds the Motion to be unmerited. The Notice of Motion dated 22<sup>nd</sup> November, 2022 is struck out with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2<sup>ND</sup> DAY OF MAY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Masika for 1<sup>st</sup> Respondent

No appearance for Petitioner

Court Assistant – Tracy

