



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 145 OF 2017

STEPHEN KIMITEI ARAP SANG.....PLAINTIFF

VS

DOMINIC KIPROTICH.....1ST DEFENDANT

JONAS K. METTO.....2ND DEFENDANT

GLADYS CHELAGAT.....3RD DEFENDANT

EDWIN CHEBET.....4TH DEFENDANT

EMMANUEL KOLIL.....5TH DEFENDANT

HEZEKIA KIPTOO.....6TH DEFENDANT

DANIEL OKONG'O.....7TH DEFENDANT

DAVID LETTING.....8TH DEFENDANT

RODAH TOO.....9TH DEFENDANT

RULING

This ruling is in respect of an application dated 11th December 2019 by the 8th and 9th defendants seeking for the following orders:

- a) Spent
- b) Pending the hearing inter partes and determination of the application there be an order suspending the delivery of the ruling scheduled for 17th December 2019.
- c) The proceedings of 6th November 2019 be set aside.
- d) The 8th and 9th defendants be accorded a hearing on the application dated 30th September 2019.
- e) The time within which the consent judgment is settled be extended by six (6) months
- f) Costs of the application.

The plaintiff herein filed a Complaint dated 30th March 2017 seeking for the following reliefs against the defendants:

- a) A declaration that Stephen Kimitei Arap Sang is the legitimate owner of Eldoret Municipality/ Block 15/ 1829.
- b) An eviction order to issue against the defendants, their agents and/or servants from entering, occupying, selling, transferring,

encumbering, wasting and or otherwise interfering with the plaintiff's quiet possession use and/ or enjoyment of the suit land to the detriment of the plaintiff's right as the proprietor of the same.

c) A permanent injunction restraining the defendants, their agents and/or servants from interfering with or in any other way dealing with the suit property to the detriment of the plaintiff as the proprietor of the same.

d) Costs and interest of the suit.

The plaintiff filed the plaint together with an application whereby the respondents entered appearance and filed a replying affidavit sworn on 5th June 2017 by Edwin Kipkorir Chebet, the 4th defendant, in opposition to the plaintiff's application.

Before the application was heard, the parties entered into a consent which compromised the application together with the whole suit on 5th December 2017 on the following terms:

“By consent of the parties herein, the application and the entire suit be compromised in the following terms;

1. The plaintiff be declared the lawful owner of the land parcel known as Eldoret Municipality Block 15/1829 and thus entitled to possession thereof.

2. In lieu of an order of eviction of the defendants, the defendants are hereby allowed to acquire the plaintiff's interest over the suit land by way of monetary compensation of Kshs. 3 million to be paid as follows; -

a). Kshs. 300,000 has been paid today.

b). The balance of Kshs. 2.7 million be paid in instalments of Kshs. 225,000 and the 1st instalment being done on 5/12/2017 and thereafter on the 5th day of every subsequent month.

c). In default of any 2 consecutive instalments the plaintiff be at liberty to evict the defendants and thereafter refund the money so paid less Kshs. 300,000

d) Costs of the suit to the plaintiff. The same to be agreed by the parties.

e) On completion of the above amount (Kshs. 300,000) the plaintiff to avail completion documents.

Subsequently, on 5th September 2019, the plaintiff filed another application dated 3rd September 2019 seeking for orders that this court be pleased to issue orders of eviction against the defendants in execution of this court's consent decree recorded on 5th December 2017.

That application was opposed by the respondents who filed a replying affidavit sworn on 7th October 2019 by the 4th defendant who stated that the delay in repaying the balance was due to tough economic times.

8TH & 9TH DEFENDANT/ APPLICANTS' CASE

The application is supported by the sworn affidavit of the **David Kimeli Letting** and **Rodah Too** the **8th** and **9th** defendants respectively.

The grounds upon which the application is made are contained in that affidavit. The defendants depone that they had instructed the late E C Rotich Advocates to represent them in the matter; that since the said advocate died, they have not instructed another advocate to act for them; that they were surprised to learn from that the 4th defendant and the plaintiff had filed an application and the same was heard on 6th November 2019 and that they were represented by Kigen, Ngetich and Co. Advocates whom they had not instructed.

The 8th and 9th defendants further stated that the 4th defendant informed them that the other defendants did not settle the decretal sum. That the plaintiff filed an application for eviction which was heard without them and urged the court to allow the application.

The defendants stated that they are keen on completing the payments and are still keen on making payments to the last sum if given more time. Further that the applicant will not suffer any prejudice since he is not in possession of the suit property and that the defendants have put permanent structures on the suit parcel which they shall loose if they are evicted,

The defendant also stated that the applicant has not made any undertaking to refund the purchase price so far paid if the orders sought were to be granted.

PLAINTIFF/RESPONDENT'S CASE

The plaintiff opposed the application vide a replying affidavit sworn on 20th January 2020. It was the plaintiff's evidence that the parties tried an out of court settlement and later recorded a consent on 5th December 2017 where Advocate Timothy Ngetich who was counsel in the firm of E C Rotich & Co Advocates represented the defendants.

That the plaintiff had had filed an application dated 3rd September 2019 seeking for the eviction of the defendants and Mr. Ngetich received the application on behalf of the defendant and argued the application.

It was the plaintiff's submission that the defendants served the plaintiff's counsel with a notice of change of advocates together with a response dated 7th October 2019 and when the matter came up for hearing Advocate Ngetich was in court defending the application on behalf of the defendants; that the notice of change and response to the said application was conducted under the instructions of the 4th defendant who was granted authority to act for all the defendants on record.

Counsel for the plaintiff submitted that the 8th and 9th defendants were afforded the right to be heard and it is not disputed that vide the authority to act filed in court together with their replying affidavit on the 5th June 2017, they instructed the 4th defendant to act on their behalf and to sign all the requisite court documents including pleading and to act in any other role concerning this case.

Further that it is through this authority that the 4th defendant instructed Mr. Ng'etich who was their counsel in conduct of this matter and previously in the firm of E.C. Rotich to file a notice of change to his current firm at M/S Kigen, Ng'etich & Company Advocates, and swore the affidavit on the 7th October 2019 opposing the plaintiff's application dated 30/9/2019 where the plaintiff sought to enforce the terms of the consent decree.

Mr Tororei submitted that pursuant to Order 9 Rule 1 of the Civil Procedure Rules, the firm of M/S Kigen, Ng'etich & Company Advocates being the defendants' recognized agent had the authority to participate in the hearing of the plaintiff's application dated 30/9/2019 on the 6th of November 2019.

On the issue whether the consent order can be set aside or varied counsel relied on the Court of Appeal case of East **African Portland Cement Company Limited v Superior Homes Limited [20171 eKLR]** where it was held that:

"While this court has discretion to extend time under the provisions of section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules if good reason is shown, the court must interrogate whether these provisions are applicable to court orders where the time for doing an act is set not by the court, but by the parties themselves in a consent order. I find in this respect that the foregoing findings as to the setting aside of a consent order by way of review must also apply to any terms as to time in a consent order. This is because there are well established grounds as to when a consent order can be reviewed, which of necessity also apply to time limits agreed to by the parties in a consent order.... It is the finding of this court that it has no discretion to extend time set in a consent order, and that for the Plaintiff to be able to set aside or the terms of their consent order and decree as to time, it must show a good ground.

Counsel further cited the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [20151 eKLR]** where the Court of Appeal appreciated the following decisions when adjudicating over the issue of whether or not consent orders can be varied: Hancox JA (as he then was) in the case of **Flora Wasike v. Destimo Wamboko (1982 -1988) 1 KAR 625**, said in his judgment at page 626 -

"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." See the decision of this Court in J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983,

Mr Tororei submitted that the 8th & 9th defendants have failed to demonstrate good grounds to warrant the varying of the consent decree as sought and also failed to demonstrate that the consent decree was obtained fraudulently or that there was an element of collusion.

Counsel therefore urged the court to dismiss the application with costs as the 8th and 9th defendants were afforded the chance to be heard which right they exercised through their advocate.

ANALYSIS AND DETERMINATION

The gist of the application is for enlargement of time within which to comply with the consent order as deponed by David Kimeli Leting and Rodah Too. The same is couched in language that faults the consent order and at the same time stating that they wish to negotiate for time within which to comply with the consent order.

I have considered the application and submissions by counsel and come to the conclusion that the defendants were properly represented by their counsel Mr. Ngetich and that the 8th and 9th defendants had given authority to the 4th defendant to act and sign all requisite documents on their behalf vide the authority filed in court on 6th June 2017 marked as "ECK1"

The applicants have not demonstrated that the consent order was obtained fraudulently or with collusion which would enable the court to set it aside or vary. In the case of **Brooke Bond Liebig v. Mallya 1975 E.A. 266** it was held: -

"A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement."

Further in the case of **Hirani v. Kassam (1952), 19EACA 131**, the Court with approval quoted the following passage from Seton on judgments and Orders, 7th edition, Vol. 1 p. 124 as follows:

"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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. '

The defendants have not met the threshold for setting aside or varying the consent orders that was entered into by both parties and signed by the advocates on record. This application is one that is an afterthought to buy time to comply with the consent order.

The parties had opened the doors for mutual settlement of the claim which was on track until the defendants defaulted. They should have used the same avenue to seek for more time to settle the claim and not come to court that they were not aware of the consent order.

I find that the application lacks merit and is therefore dismissed with costs to the plaintiff. In the interest of justice, I order that the defendants do pay the unpaid balance within 45 days' failure to which eviction orders to issue and the plaintiff to refund the amount already paid within 60 days.

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF MARCH, 2021

M. A. ODENY

JUDGE