



**Galot v Galot & 2 others (Environment & Land Case 1005 of 2015)  
[2023] KEELC 15884 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15884 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1005 OF 2015**

**AA OMOLLO, J  
MARCH 2, 2023**

**BETWEEN**

**MOHAN GALOT ..... PLAINTIFF**

**AND**

**TARA GALOT ..... 1<sup>ST</sup> DEFENDANT**

**KEVIN GALOT ..... 2<sup>ND</sup> DEFENDANT**

**PAVAN GALOT ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. On 13<sup>th</sup> November 2019, the parties recorded a consent order as follows;
  - i. That accounts be taken of all the rent received from the suit property since the year 2000 up to October 2015 and the Plaintiff's 25% share be established within thirty (30) days.
  - ii. That 25% of all the future rent be paid quarterly to the Plaintiff commencing next due quarter.
  - iii. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to supply the Plaintiff with copies of all the current leases over the Suit premises within seven (7) days.
2. On 24<sup>th</sup> February 2020, the Plaintiff filed a notice of motion dated 19<sup>th</sup> February 2020 seeking for orders that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be cited for contempt and be committed to civil jail for 6 months or such other period as the court may order for defying and being in flagrant and contemptuous breach of the said consent orders.
3. The Plaintiff's motion was supported by an affidavit sworn by Mohan Galot on 19<sup>th</sup> February 2020 outlining the history of the suit he filed against the defendants jointly and severally and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants knowingly and voluntarily entered into the subject consent orders and there is no plausible explanation why they cannot obey the resultant court orders.



4. The 3<sup>rd</sup> Defendant filed a replying affidavit sworn by Pavan Galot on 2<sup>nd</sup> November 2021 stating that in compliance with order 2 and 3 they had forwarded the cheques and current leases however the Respondent's Advocates, Maumo & Company Advocates declined to accept the cheques on the ground that he could not do so in the absence of the accounts in order 1.
5. The Applicants stated that they were having a challenge in complying with order 1 because they could not trace the records of the rent for the period between 2000 to 2019 a period in which the suit property was under the management of the 1<sup>st</sup> Defendant who has since passed. The Applicants further stated that they had consented to provide the records in Order 1 in honest belief that the deceased, 1<sup>st</sup> Defendant, had kept them and that they would trace them but despite their best efforts they have been unable to trace those records.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants also filed a notice of motion application dated 2<sup>nd</sup> November 2021 supported by an affidavit sworn by Pavan Galot on 2<sup>nd</sup> November 2021 seeking for orders that this Honourable court be pleased to vary and or set aside order 1 of the consent order issued by this court on the 13<sup>th</sup> November 2019. That this Honourable Court be pleased to issue such further orders as it shall deem fit and just in the circumstances of this case and that the cost of their application be in the cause.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants stated that they had complied with orders 2 and 3 but are not able to comply with Order 1 since the records of the rent for the period between 2000 to 2019 cannot be traced and the 1<sup>st</sup> Defendant who was in charge of the management of the suit property for that period has since passed on. I have not seen the Plaintiff's response on record.
8. The Defendants filed submissions dated 25<sup>th</sup> August 2022 stating that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who are sons of the 1<sup>st</sup> Defendant were not involved in the management of the suit property during her lifetime. That they have fully complied with orders 2 and 3 of the consent having forwarded as ordered copied of all the leases to the suit and cheques equivalent to the Plaintiff's 25% share of all the rental income derived from the suit property from the first quarter of the year 2020 to date however the Plaintiff rejected the cheques.
9. The Defendants submitted that the consent order has a 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 as was held by Court of Appeal in *Hiraniv v Kassam* (1952) 19EACA 131.
10. The Defendants further submit that at the time of recording the consent, the 2<sup>nd</sup> Defendant sincerely believed that he could trace the records of all the transactions relating to the suit property and the income generated from the records of his deceased mother (the 1<sup>st</sup> Defendant). Therefore, they had entered into the consent with good intentions but they do not have accurate and sufficient material facts regarding the records of between the year 2000 to October 2019, a period of 19 years.
11. The Defendants submitted that this consent can be set aside or varied as it was given without sufficient material facts or misapprehension or ignorance of such facts in general for a reason which would enable the court to put aside an agreement as was held in the case of *Kenya Commercial Bank Ltd vs Specialized Engineering Co. Limited* (1982) KLR 485.
12. The Defendants aver that their failure to comply with Order 1 of the Consent is not willful but has instead been occasioned by factors beyond their control therefore it would militate against equity for the court to enforce an order which the Defendants have demonstrated that they are facing genuine and



unforeseeable challenges in enforcing relying in the case of *Contractors Limited v Margaret Oparanya* [2004] eKLR which held that;

“This court has qualified or unconditional discretion when it comes to interfering with Consent judgement or order. Moreover, where the consent order or judgement is still executory, the court may refuse to enforce it if it would be inequitable to do so.”

13. The Defendant’s application for the review of Order 1 of the consent though unopposed, nonetheless the same should be decided on merit. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have averred that they entered into the said consent order on the belief that they would trace the accounts of all the rent received from the suit property since the year 2000 up to October 2015. However, the situation where they find themselves has made impossible to comply with Order 1 of the said consent.
14. Circumstances under which a consent judgement or order can be varied or set aside were comprehensively discussed by the Court of Appeal in *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* [2015] eKLR as follows;

“What are the circumstances that would lead to a consent order or judgment which has been adopted as an order of the court to be varied or set aside?

The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts...

This Court in the case of *Brooke Bond Liebig v. Mallya* 1975 E.A. 266 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.”

15. The plaintiff’s application seeking contempt orders was the first in time. The Defendants in my opinion brought their current application dated 2<sup>nd</sup> November, 2021 as a defence to the accusations of contempt. There is no dispute that paragraph one of the court order has not been complied with. The explanation offered by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for their non-compliance include the challenge of not being able to trace records of rents paid for the period in question (between the years 2000 – October, 2015). That this was occasioned by the demise of the 1<sup>st</sup> defendant who was tasked with management of the property during that period. A copy of her death certificate was annexed to prove her death.
16. This suit was filed on October, 2015, three years before the demise of the 1<sup>st</sup> defendant. Although the 2<sup>nd</sup> and 3<sup>rd</sup> defendant’s expresses challenge of tracing record for the period in question, this court is left wondering whether the properties were unoccupied before the date of the consent. If the premises were occupied as at 12<sup>th</sup> November, 2019, the Defendants ought to have requested for copies of lease agreement from the existing tenants to determine when they entered the suit premises and how much monthly/yearly and mode of payment to ascertain the income that was being received for some of the years.
17. It is my considered opinion that making a general statement that they are unable to trace the records from 2000 – 2015 is made with unclean hands. This court believes that although it was possible not to trace rents paid for the entire period, the defendants would have laid sufficient background on why they were unable to trace any records from the entire duration. The dishonesty of the Defendants is



displayed for instance, in a letter dated 6<sup>th</sup> July, 2015 annexed to the 3<sup>rd</sup> Defendant's supporting affidavit sworn on 3<sup>rd</sup> November, 2015. The letter states in part thus;

i. Simron Engineering Ltd and other tenants have lawfully entered into a lease agreement with our company Labels and Tags Simply Fashions Ltd. over the property.”

18. The 3<sup>rd</sup> defendant signed off the letter of 6<sup>th</sup> July, 2015 as the Managing Director of Labels & Tags Simply Fashions Ltd. He stated as quoted in the paragraph above that this company (Label & Tags) had signed a lease with tenants over L.R 209/7197, Buture Road Nairobi. Yet in his replying affidavit dated 21<sup>st</sup> November, 2021 and the affidavit in support of their application the 3<sup>rd</sup> defendant deposes that the property was being managed by the 1<sup>st</sup> defendant – deceased without producing or annexing any evidence to support such an averment.
19. In view of the observations highlighted, I find that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not shown sufficient material facts and or ignorance of material facts that would have this court set aside or vary the orders of consent as prayed in their application. Accordingly, I find no merit in the motion dated 2<sup>nd</sup> November, 2021. The same is dismissed with costs.
20. Further, from the documents on record I note that the 3<sup>rd</sup> defendant was aware of the terms of the consent which he has not complied with. There is no evidence that the 2<sup>nd</sup> defendant was directly involved in the management of the suit property over the duration in question. This court concludes that the plaintiff has proved his application dated 19<sup>th</sup> March, 2020 for contempt as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. However, I find the 3<sup>rd</sup> defendant to be the one liable/in breach of paragraph 1 of the consent recorded on 13<sup>th</sup> November, 2019. The 3<sup>rd</sup> defendant is found guilty of breaching order 1 in the consent judgement. A date that shall be set by this court during the delivery of this ruling for the show cause/mitigation before sentencing. The costs of the application awarded to the plaintiff.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MARCH, 2023**

**A. OMOLLO**

**JUDGE**

In the presence of

Maumo for Plaintiff

Omondi h/b for Kenyatta for Defendant

