



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 89 OF 2019

SAMUEL NJOGU KAMOTHO & 43 OTHERS..... PLAINTIFFS

VERSUS

KENYA AFRICAN NATIONAL UNION (KANU).....DEFENDANT

RULING

1. The plaintiffs herein filed this suit on 31st July 2019 through the law firm of Robert Ndubi & Company Advocates. Alongside the plaint, they also filed Notice of Motion dated 30th July 2019 through which they sought an injunction to restrain the defendants, their agents and servants from entering into any sale agreement in respect of the suit property Naivasha Municipality Block 5/386 without a resolution and concurrence of the members of the defendant particularly the plaintiffs pending hearing and determination of the suit. The plaintiffs had claimed that they are members of the defendant with valid leases with the defendant in respect of the suit property and that the proposed sale of the suit property had been arrived at without members' blessings. Upon considering the application, this court found no merit in and dismissed with costs to the defendant vide a ruling delivered on 30th April 2020.

2. Subsequently, the defendant filed Notice of Motion dated 17th June 2020 seeking eviction of the plaintiffs from the suit property on the basis that it entered into a sale agreement dated 26th August 2019 pursuant to which it sold the suit property and further pursuant to which it was required to give vacant possession to the purchaser on 25th August 2020. The defendant contended failure to give vacant possession would amount to breach of the agreement and would occasion it loss of a significant amount of money. Still represented by the law firm of Robert Ndubi & Company Advocates, the plaintiffs successfully resisted the application leading to its dismissal through a ruling delivered on 17th December 2020. The application largely failed on the ground that the sale agreement was entered into in violation of an interim injunction that specifically restrained the defendant from entering into any agreement for the sale of the suit property. Additionally, the court found that eviction being akin to mandatory injunction ought to await the final hearing and determination of the suit.

3. Immediately the ruling was delivered, parties recorded an oral consent in the following terms:

1. *The plaintiffs to vacate and give vacant possession of the suit property Naivasha Municipality Block 5/386 on or before 30th March 2021.*
2. *In default of order No. 1 above, eviction orders to issue.*
3. *Each party to bear own costs of the suit.*

4. The terms of the consent were dictated to the court by Mr Ndubi. Upon confirmation by counsel for the defendant, the consent was adopted and the matter was marked settled on those terms.

5. Come 1st April 2021, the plaintiffs switched advocates and instructed the firm of P.K. Njuguna & Company Advocates. They also filed Notice of Motion dated 31st March 2021, which is the subject of this ruling. The plaintiffs seek the following orders:

1. *[Spent]*
2. *THAT the consent orders made on the 17th of December 2020 and issued on 21st December 2020 providing that the plaintiffs do vacate the suit property Naivasha/ Municipality Block 5/386 on or before 30th March 2020 and in default eviction orders to issue be set aside, varied, vacated and or reviewed.*
3. *[Spent]*

4. THAT plaintiffs/applicants herein be granted leave to amend plaint.

5. THAT the costs hereof be in the cause.

6. The application is supported by an affidavit sworn by Samuel Njogu Kamotho. He deposed that Messrs. Robert Ndubi & Company Advocates did not consult or involve the plaintiffs in the process of recording the consent and that they only came to learn of the orders on 25th March 2021 when they found copies of the order dropped around the premises. He added that if they are evicted, then they will suffer irreparable loss and damage especially in this time of the pandemic. That they are ready to pool resources so as to buy the suit property in about three years and in the meantime to pay rent.

7. The defendant responded to the application through grounds of opposition in which it *inter alia* took the position that the firm of Robert Ndubi & Company Advocates has been the plaintiffs' recognized advocates with full instructions to act for them pursuant to an Authority to Act signed by the plaintiffs and filed on 31st July 2019, that court does not supervise in whatever manner an advocate obtains instructions from his clients, that the application does not meet the requirements for review, that the orders sought are a waste of the court's time as setting aside has nothing to achieve in the long run since the plaintiffs cannot bar the defendant from selling its property to a third party, that the plea that the plaintiffs need approximately three years to enable them raise funds to purchase the suit property cannot be a ground for setting aside the consent order since the court has no power to negotiate on behalf of the defendant or even compel the defendant to sell the property to the plaintiffs and that the application is frivolous, vexatious, scandalous and an abuse of the court's process.

8. The application was canvassed through oral submissions. The applicants submitted that the consent orders have the effect of evicting them from business where they have been operating and were made without their being consulted. That consensus was not achieved in the matter prior to recording the consent and that their counsel exceeded his authority. They placed reliance on the cases of **Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others [2019] eKLR** and **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others Election Petition Appeal No. 1 of 2017 (Nyeri) [2018] eKLR**. They submitted further that under the rules of natural justice a party who wishes to be heard should not be locked out. That the country was undergoing a pandemic and they will have a lot of suffering if they are evicted thus making the consent contrary to public policy. They prayed that they be given a chance to buy the land and urged the court to allow the application.

9. The defendant on its part relied on its grounds of opposition and the case of **M & E. Consulting Engineers Limited v Lake Basin Development Authority & another [2015] eKLR**. It submitted that the applicants had not shown that there was any collusion and added that the applicants' previous advocates had authority to file the case and to proceed with it. That further, the applicants have also not shown that the consent was contrary to the policy of the court. It argued that the application does not meet the threshold for setting aside as no evidence had been adduced to show that Mr. Ndubi did not have instructions and that setting aside will not achieve anything. That Mr. Ndubi's actions should be treated the same way as those of Mr. Njuguna who had instructions to file the present application and did not need to file anything else to prove that he had instructions. That this court cannot compel the defendant to sell to the plaintiff. The defendant therefore urged the court to dismiss the application.

10. I have considered the application, the affidavit, the grounds of opposition, the submissions and the authorities cited. The grounds upon which a consent order can be set aside are well settled. In the Court of Appeal case of **Flora N. Wasike v Destimo Wamboko [1988] eKLR**, Hancox JA 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...

11. In the case of **Hirani v. Kassam (1952) 19 EACA 131** as cited in the case of **Flora N. Wasike v Destimo Wamboko** (supra), the Court of Appeal for East Africa quoted an extract from **Setton on Judgments and Orders (7th edn), 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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.

12. The position adopted in **Flora N. Wasike v Destimo Wamboko** (supra) has been restated severally by the Court of Appeal including in **Njagi Wanjeru & Company Advocates v Nairobi City County [2019] eKLR**.

13. The plaintiffs' contention is that their former advocate entered into the consent without consultation, that consensus was not achieved in the matter prior to recording the consent and that their counsel exceeded his authority. That cannot be a valid ground for setting aside a consent order. As correctly pointed out by counsel for the defendant, the plaintiffs validly filed this suit and took all steps in the matter through Messrs. Robert Ndubi & Company Advocates. The record shows that Mr Ndubi personally attended court and recorded the consent. In doing so, he had authority and bound the plaintiffs the same way he did when he drafted and filed the plaint as well as all subsequent pleadings. The allegation that Mr Ndubi exceeded his instructions is made in his absence and without any affidavit from him confirming such allegations.

14. The plaintiffs' arguments as to hardship that will allegedly be caused by eviction and their claim that they intend to purchase the suit property are really neither here nor there. They must face the consequences of a contract freely entered into. I do not see any sense in which the consent can be said to be against public policy. Equally, their suggestion that they intend to amend the plaint is not of any help. One cannot amend the plaint in a concluded case. Besides, they have not exhibited any draft amended plaint and the suggestion that they intend to amend seems to be an afterthought.

15. The plaintiffs have not established any collusion, misrepresentation or any reason which would warrant setting aside the contract

comprised in the consent.

16. I find no merit in Notice of Motion dated 31st March 2021. The application is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF MAY 2021.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiffs/applicants

Mr Oruenjo for the defendant/respondent

Court Assistants: B. Jelimo & J. Lotkomoi