



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC PETITION NO. E005 OF 2021

CATHERINE NYAGA.....1<sup>ST</sup> PETITIONER/APPLICANT

JAMES M KARIUKI..... 2<sup>ND</sup> PETITIONER/APPLICANT

JOHN MACHARIA ..... 3<sup>RD</sup> PETITIONER/APPLICANT

NGANGA KARIUKI .....4<sup>TH</sup> PETITIONER/APPLICANT

JAMES N KUNGU.....5<sup>TH</sup> PETITIONER/APPLICANT

PETER KINYANJUI.....6<sup>TH</sup> PETITIONER/APPLICANT

MICHAEL G KIBATHI..... 7<sup>TH</sup> PETITIONER/APPLICANT

BEATRICE MUNGAI ..... 8<sup>TH</sup> PETITIONER/APPLICANT

RUIRU KANGANGI ESTATE

WELFARE ASSOCIATION.....9<sup>TH</sup> PETITIONER/APPLICANT

VS

COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT

RULING

1. There are two orders under challenge in this application dated the 25/8/2021 filed by the Respondent seeking the following orders;

**a. Spent**

**b. That the Court be pleased to set aside the orders issued on the 8/7/2021 and 23/6/2021.**

**c. Costs be provided for.**

2. The application is premised on the grounds annexed and the supporting affidavit of Mary W. Kamau sworn on the 25/8/2021. She averred that she is the Chief Executive Committee Member (CECM) for Education Gender, Culture and Social Service of the Applicant.

3. It is her averment that on the 23/6/2021 the parties entered into a consent allowing a temporary injunction restraining the Applicant from evicting and causing to vacate the 1<sup>st</sup> – 8<sup>th</sup> Petitioners from their houses situate in Kangangi Estate within Ruiru County. That the premises, developed in 1974 houses the Applicants employees on a Landlord – tenant agreement. That the Applicant has earmarked the entire estate for the development of a rescue centre for gender based violence survivors. She deponed that the Applicant has secured donor funding to aid the rehabilitation of the said estate. That the Applicant risks losing the donor aid unless the designated houses are vacated and made available for rehabilitation by the 30/9/2021. That public interest outweighs private interests and in the light of the circumstances of the case urged the Court to grant the orders to enable the Applicant protect the rights of the vulnerable women and children in need of housing.

4. The application is opposed by the Respondents. Vide a RA sworn by the Catherine Nyaga on the 17/9/2021 she informed the Court that she is aware of the consent order arrived by the parties maintaining status quo with respect to the application dated the 7/6/2021. With respect

to the Applicants grounds supporting the said application the deponent stated that the same is an afterthought on the following grounds that; no evidence of the alleged donor has been given hence no likelihood of withdrawal or risk of losing the alleged donor aid; no evidence of the alleged implementation schedule that demands the estate is vacated by the 30/9/2021; no request for approval of a donor and the use of donor funding for purposes of setting up a rehabilitation centre has been tabled.

5. That the reasons being adverted for the review of the Courts orders aforesaid are new having been omitted by the Applicant in its response to the substantive petition and as such the Applicant has failed to satisfy the threshold for review of the said orders. There is no evidence that the said donor and donor funds were not within the knowledge of the Applicant nor could not be produced at the time when the orders were made on the 23/6/2021.

6. Further that the Applicant has not demonstrated that the consent orders were obtained through fraud, misrepresentation collusion, by an agreement contrary to policy or that the consent was given without sufficient material facts or in misapprehension or ignorance of such facts.

7. Interalia, that the Respondent stands to be prejudiced if the orders are set aside as setting aside the orders means the Respondents will be evicted and the substratum of suit shall be defeated before the suit is heard and determined. If the orders are set aside, the Petitioners will be evicted thus being condemned unheard.

8. With respect to public interest, the Petitioners argue that they too have rights to equal protection and benefit of the law by dint of Art 40 (1) and 43 (1) (b) of the Constitution. That the Petitioners have been maintaining the houses and dutifully paid rent having occupied the premises for over 40 years. That the Petitioners have a legitimate expectation of being accorded priority and preference over the disposal of the units as assured by the Applicant and its predecessor. In addition, the Applicant contends that no public participation was carried out for the conversion of the housing units into a rescue center. Finally, that the application should be dismissed.

9. Parties elected to canvass the application by way of written submissions. By the time of writing this ruling only the Applicant had filed. The Respondent failed to do so despite directions of the Court taken on the 6/10/2021.

10. As to whether the orders issued on the 23/6/2021 should be set aside, the Applicant submitted that the Court has the power under order 45 rule 1 (b) of the Civil Procedure Rules to set aside the orders. That when the orders were made the Applicant was not aware of the donor funding aid for the rehabilitation of the suit premises which aid was only available within limited timeframe.

11. The Applicant further submitted that a consent order may be set aside if the following conditions are met; if the consent is given without sufficient material facts; or for a reason which would enable the Court set aside an agreement; fraud or collusion, an agreement contrary to public policy; if consent was given without sufficient material facts; misapprehension or ignorance of such facts.

12. The Applicant relied on the cases of **Flora N Wasike Vs Destimo Wamboko 1 KAR 625**; **Hiran vs Kassam (1952) EACA 131**; **Kenya Commercial Bank Ltd Vs Specialized Engineering Co Ltd (1982) KLR 485** cited in **Protus Hamisis Wambada & Anor vs Eldoret Hospital (2020) eKLR** where the Court held interalia that;-

**“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 or where the consent was given without sufficient material facts or in misapprehension or ignorance of the facts in general for the reason which would enable the Court to set aside an agreement.”**

13. As to whether the orders of the 8/6/2021 should be set aside, the Applicant states that the Court is empowered under Order 51 rule 15 of the CPR to set aside exparte. That the Petitioners are people of means capable of paying rent and therefore do not stand to be prejudiced and that their interests if any outweigh public interest which in this case is the protection of vulnerable women and children in need of shelter.

14. The key issue for determination is whether the orders made by the Court on the 23/6/2021 should be set aside.

15. Before delving into the matter, I would like to address the orders dated the 8 /6/2021. These orders granted interim interlocutory injunction for 14 days which orders expired by the 22/6/2021. There is therefore nothing for the Court to review with respect to orders that lapsed by affluxion of time. The orders are now spent.

16. The Applicant's case is that it has received donor aid that requires to be deployed by the 30/9/2021 for the development and rehabilitation of the 8 houses occupied by the Petitioners and therefore the need to discharge the status quo orders made by the Court on 23/5/2021 to avail the houses for rehabilitation for the gender based victims. That if the orders are not discharged or set aside the donor funds shall be lost. That at the time of making the orders the Applicant had no knowledge of this fact. The gist of its application therefore is that at the time of the consent order it did not have sufficient material facts relating the donor and the donor aid and the schedule of implementing the rehabilitation.

17. The Respondents have denied the application and termed it an afterthought and urged the Court to uphold the orders so that the substratum of the suit is maintained pending the hearing and determination of the suit.

18. A brief background of this matter is apt. This suit was filed by the Petitioners on the 8/6/2021 seeking interalia a declaration that their rights as tenants in the premises have been violated; general damages for breach of their constitutional rights to property, housing and other disclosed rights, orders quashing the notices to vacate the premises and orders of mandamus compelling the Applicant to issue the Petitioners with tenancy agreements.

19. Simultaneously with filing the said Petition, the Petitioners filed a notice of motion of even date seeking interalia temporary injunction

against the Applicant pending the hearing and determination of the Petition.

20. It is evident from the proceedings on record that on the same day the Court allowed prayer No 2 of the said Notice of motion for a period of 14 days. This prayer restrained the Applicant from evicting the Petitioners from the houses pending the hearing and determination of the notice of motion.

21. The Court directed the application be heard on the 23/6/2021.

22. Come the 23/6/2021 the parties recorded a consent in the following terms;

a. **“THAT the Notice of Motion Application dated 7<sup>th</sup> June 2021, is compromised with an order of Status Quo and the Status Quo is that the Petitioners continue living on the Suit Property until the Petition is heard and determined.**

b. **THAT the Respondent to file and serve the Responses to the main Petition within a period of fourteen (14) days from the date hereof.**

c. **THAT the Petitioners have leave of fourteen (14) days after service to file a Further Affidavit if need be.**

d. **THAT mention on 6<sup>th</sup> October 2021, to take directions on how to proceed with the Main Petition”.**

23. It is trite that Section 80 of the Civil Procedure Act gives this Court power to review its orders as follows;

**“Any person who considers himself aggrieved—  
(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or  
(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”**

24. Order 45 of the Civil Procedure Rules sets out the rules which govern the review process by the Court. They are expressed as follows;

**“(1) Any person considering himself aggrieved-**

**(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the Court which passed the decree or made the order without unreasonable delay.”**

25. A review may be granted where an Applicant has met the threshold set out in para 24 above.

26. It is trite that setting aside of consent orders will be done if the application meets the grounds similar to those present in a vitiated contract. In the case of Brooke **Bond Liebig vs Mallya (1975) EA 266** where Mustafa Ag. VP stated thus;

**“The compromise agreement was made an order of the Court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a Court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”**

27. In the case of **Flora N. Wasike vs Destimo Wamboko [1988] eKLR Hancox JA** cited **Setton on Judgments and orders (7<sup>th</sup> edition) vol 1 page 124**, and reiterated that;

**“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 a Court set aside an agreement.”**

28. A consent judgment may be set aside if it is proved that the same was vitiated by fraud, collusion, misrepresentation, an agreement contrary to policy or if the consent was made without sufficient material facts.

29. This application is anchored on the affidavit of Mary Kamau, who stated that the Applicant has earmarked the houses for rehabilitation to house gender violence victims and that donor funding has been found to aid the rehabilitation. In addition, that the donors have set a strict implementation schedule requiring the houses to have been vacated and made available by the 30/9/2021 failure to which the funds will be

withdrawn. That public interests outweigh private interests and urged the Court to set aside the orders.

30. From the record there is no evidence adduced by the Applicant to show that indeed a donor was involved in the project, evidence of approval of donor funds and even the strict schedule of implementation. Neither has it been demonstrated that the information with respect to the financial aid and the donor was not within the knowledge of the Applicant when the orders were made.

31. With respect to the issue whether public interest outweighs private interest the Court is constrained from delving into it at the preliminary stage. This is a weighty issue that parties ought to lead evidence.

32. From the totality of the evidence on record it is the Courts view that there are no cogent reasons advanced to warrant the setting aside of the orders issued on the 23/6/2021. There is no evidence to demonstrate that the consent suffers from any fraud, coercion misrepresentation, is contrary to policy or such other grounds that would vitiate a contract. It is also not lost on the Court that if the orders are set aside at this stage it amounts the short circuiting of the hearing of the Petition thus ejecting the Petitioners unheard from the temple of justice. Let the parties have their day in Court.

33. Having now considered the application, the response and the written submissions and all the material placed before me I have come to the conclusion that the application is unmerited.

34. It is dismissed with costs in favour of the Petitioners/Respondents.

35. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2021 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

M/s Wakhisi for 1<sup>st</sup> – 9<sup>th</sup> Petitioners

Ms. Cheserek for the Respondent

Ms. Phyllis Mwangi – Court Assistant