



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 738 OF 2013

PARAMJIT KAUR ALIAS MANDEEP KAUR.....PLAINTIFF

VERSUS

AVTAR SINGH SURI.....DEFENDANT

RULING

1. This suit revolves around the ownership of land reference number 4275/44 situated in Nairobi (“the Suit Property”). The Defendant filed the application dated 25/11/2019 seeking to set aside, vary or review the order of the court given on 4/3/2014 recorded by consent of the parties so that the matter can be heard on its merits. The application was made on the grounds that the Defendant was not party to and did not give instructions for the consent of 4/3/2014 to be recorded and adopted by the court. Further, that Isaac Onyango Advocate who represented the Defendant at the time had confirmed that he did not record any orders in court on 4/3/2014 hence the consent order was obtained through fraud.

2. The application was supported by the affidavits of the Defendant and Isaac Onyango both of which were sworn on 25/11/2019. The Defendant deponed that it only came to his knowledge that an order had been made for the subdivision of the Suit Property on 4/3/2014 when he saw the Plaintiff’s application dated 15/5/2019. He got hold of his former advocate, Mr. Isaac Onyango who confirmed to him that he neither consented to such orders nor did he attend court on that day and that the order was a fraud. The Defendant questioned why this suit was subsequently fixed for hearing if indeed the consent was recorded on 4/3/2014 as the Plaintiff contended. He added that the case had been under mediation by their temple for many years and the Plaintiff had never raised the issue of the consent said to have been recorded on 4/3/2014. Further, that the Plaintiff had fraudulently dealt with the Suit Property by obtaining the renewal of the lease without involving him as a co-owner. He urged the court to determine this application first before the Plaintiff’s application dated 18/10/2019 which sought to enforce the impugned consent.

3. Mr. Isaac Onyango deponed that he represented the Defendant up to 9/3/2016 when the Defendant appointed his current advocates. He averred that he received the Defendant’s letter sometime in October 2019 indicating that a consent had been recorded in court on 4/3/2014 directing the subdivision of the Suit Property and separation of the titles. He verified from his skeleton file that he did not have instructions from the Defendant to enter into the consent and was not a party to it. He stated that the only issue that had been agreed upon was the rent up to 2015.

4. Mr. Onyango averred that he had looked at the handwritten notes of Lady Justice Nyamweya of 4/3/2014 when the consent is said to have been recorded and was certain that he did not appear before the Judge on that day and the misrepresentation made that he signed the consent was fraudulent and his signature was forged. He urged the court to set aside the consent and welcomed investigations into the circumstances under which the consent was recorded in court.

5. Mr. Virinder Goswami swore the affidavit filed on 14/1/2020 in opposition to the Defendant’s application. He adverted to Mr. Onyango’s letter dated 3/3/2014 to the Plaintiff’s former advocates, Omulele and Company Advocates which confirmed that there had been a meeting between Mr. Omulele and Mr. Onyango at which the consent to be recorded when the matter came up on 4/3/2014 was discussed. The letter, which was copied to the Defendant, proposed to have the order to deposit the rent in court varied so that the money could be paid to the Plaintiff; to have both parties’ commission audits of the accounts; and have the Suit Property be separated into respective titles for each party.

6. Mr. Goswami attached the typed proceedings showing that Mr. Onyango appeared before Nyamweya J. on diverse dates including 8/10/2013, 29/11/2013, 3/4/2014 and 14/7/2014. He stated that Mr. Onyango addressed the court on 14/7/2014 on the filing of the audit report. He added that the Defendant did forward two cheques for Kshs. 1,018,994.50 being the Plaintiff’s share of the rent from August 2013 in compliance with the consent order that he now seeks to challenge.

7. Mr. A.B. Shah Advocate who appeared together with Mr. Goswami for the Plaintiff made an application on 22/1/2020 to photocopy the proceedings of 4/3/2014 and to have Mr. Isaac Onyango Advocate cross examined at the court’s next hearing. Mr. Nyawara who appeared for the Defendant also applied to have their own handwriting expert lift copies of the proceedings for the examination of the signatures. The court granted the parties leave to lift copies of the proceedings for purposes of getting handwriting experts to examine the disputed

signatures.

8. Mr. Goswami filed a supplementary affidavit on 30/1/2020 vide which he produced the report of Antipas Nyanjwa, the Document Examiner who examined the disputed signature of Mr. Isaac Onyango and compared it with the signatures Mr. Onyango admitted were his.
9. Mr. Isaac Onyango swore the supplementary affidavit filed in court on 18/2/2020 that produced the examination report prepared by CI Daniel George Marwa of the Directorate of Criminal Investigations on behalf of the Defendant.
10. Mr. Isaac Onyango Advocate attended court on 18/2/2020 and was cross examined by Mr. A.B. Shah Advocate. Mr. Onyango confirmed that he had appeared before Nyamweya J. and that the Judge taught him at the University of Nairobi. He confirmed that he signed the letter dated 14/2/2014 addressed to Omulele and Company Advocates. Mr. Onyango stated that eventually the contents of that letter dated 3/3/2014 to Omulele and Company Advocates were not agreed upon. He confirmed that he appeared before Nyamweya J. on 8/10/2013, 29/11/2013 and 3/4/2014 but denied that he appeared before the Judge on 4/3/2014. He added that parties had only agreed on the issue of rent. He stated that his office sent somebody to attend court and hold his brief on 4/3/2014 with instructions to record a consent on rent only.
11. Mr. Onyango conceded that he signed the consent on 3/4/2014 as well as the proceedings of 14/7/2014. He conceded that he signed the letter dated 2/12/2014 attached to the report of Antipas Nyanjwa. On re-examination by Mr. Nyawara, he stated that he was never served with the order extracted from the proceedings of 4/3/2014. He maintained that before the Defendant withdrew instructions from him, he only appeared before Nyamweya J. when the discussions over rent were going on but not on the issue of the separation of the Suit Property.
12. Parties filed submissions which the court has considered. The Defendant submitted that the expert opinion of Mr. Marwa indicated that the signature on the consent and the specimen signatures of Mr. Onyango were different and concluded that the writer indicated on the handwritten consent may or may not have been Mr. Onyango.
13. The Defendant relied on the case of **Brooke Bond Lie Big v Mallya [1975] EA 266** that gives the grounds for setting aside a consent as fraud or collusion; public policy or such other reason that would enable the court set aside or rescind a contract. He also relied on **Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd [1982] KLR 485** where it was held that a consent order entered by consent is binding on all parties and can only be set aside when it is proved that it was obtained by fraud or collusion, or by an agreement that is contrary to the policy of the court or where it was given without sufficient material facts or in misapprehension or ignorance of the facts or other sufficient reasons for which a court may set aside an agreement.
14. The Defendant contested the findings of Mr. Nyanjwa urging that he was not called to give evidence on how he arrived at his opinion as an expert. He also relied on the finding in **Susan Mumbi v Kefala Grebedhin** which was quoted in **Sanganyi Tea Factory v James Ayiera Magari [2016] eKLR** that in civil cases, whoever alleges has to prove and the court will not presume adverse evidence. The Defendant surmised that a lot has happened in the suit since the disputed orders were made on 4/3/2014 without the parties invoking the consent orders and that the purpose of those orders had been overtaken by events hence they should be set aside.
15. The Plaintiff submitted that the consent of 4/3/2014 settled most of the issues in dispute between the parties and that it followed three applications dated 24/6/2013, 18/2/2014 and 12/8/2013. The Plaintiff's application dated 24/6/2013 sought an injunction to restrain the Defendant from collecting rent and for him to remit to the Plaintiff the accumulated rents; an order for subdivision of the Suit Property and to nullify the tenancy agreements entered into without the Plaintiff's consent. The Defendant's application dated 12/8/2013 sought to stay the orders of Nyamweya J made on 6/8/2013 for the rent to be deposited in court. In the third application dated 18/2/2014, the Plaintiff sought to institute contempt proceedings against the Defendant for not depositing the rent in court.
16. The Plaintiff submitted that the consent followed negotiations between the parties which culminated in the terms contained in the letter dated 3/3/2014, item 3 of which touched on the subdivision of the property. She contended that the Defendant risked being in contempt of court orders if the consent was not recorded. She faulted Mr. Isaac Onyango for not giving the name of the person who he claimed held his brief when the matter came up before Nyamweya J. on 3/3/2014. The Plaintiff pointed out that Mr. Onyango admitted attending court and signing the consent on 3/4/2014 vide which it was agreed that an audit of the income from the suit premises would be undertaken independently, and emphasised that this was item 3 of the impugned consent order.
17. The Plaintiff added that what Mr. Onyango told Judge Nyamweya on 14/7/2014 fortified what was agreed between the parties and dated back to the consent of 4/3/2014. She urged that the High Court is a court of record and what is recorded stands unless it can be shown that the Judge was wrong. She relied on the definition of a court record in Black's Law Dictionary, 9th Edition as a court that is required to keep a record of its proceedings; and that the court's records are presumed accurate and cannot be collaterally impeached.
18. The Plaintiff pointed out that the unsigned report prepared by C.I George Marwa produced by the Defendant stated that the signature in question might have been Mr. Onyango's while the report of Antipas Nyanjwa concluded that the disputed signature was indeed Mr. Onyango's.
19. What the court needs to determine in this application is whether or not to set aside the consent orders made on 4/3/2014 following the consent recorded by the parties before Nyamweya J. This will depend on the court's finding as to whether or not Mr. Isaac Onyango Advocate appeared before Nyamweya J and recorded the consent dated 4/3/2014.
20. It is helpful to run through the relevant parts of the proceedings and what transpired in this suit before determining the issue in dispute. The lease over the Suit Property was for 99 years from 1911. The Defendant owned half share in the Suit Property and Mohinder Singh Suri owned the other half. The Defendant claimed that he entered into an agreement with Mohinder Singh Suri on 28/1/2004 to purchase his share in the Suit Property for Kshs. 15,500,000/= out of which they agreed to set off Kshs. 2,250,000/= against a debt which the Defendant claimed Mohinder owed him. Unfortunately Mohinder died on 11/3/2004 before the sale was concluded.

21. The Defendant claimed that he took possession of Mohinder's share and that he had had possession of the Suit Property until when this suit was filed. Mohinder bequeathed his half share in the Suit Property to his son Gurmeet Singh Suri. The Defendant claimed he paid Kshs. 3,350,000/= towards the purchase price in July 2008. Sadly, Gurmeet died on 14/7/2008. The Plaintiff, who is Gurmeet Singh Suri's widow, filed this suit in 2013 claiming his half share in the Suit Property together with the rent proceeds. The Defendant filed a counterclaim in October 2019 seeking a declaration that he is the registered owner of half the Suit Property and the equitable owner of the other half. He sought specific performance for the Plaintiff to execute a transfer of her half share in the Suit Property to the Defendant.

22. The Plaintiff was represented by Omulele and Company Advocates until 28/7/2014 when Sobhag H. Shah and V. Goswami Advocates came on record. The Defendant was represented by A. I. Onyango advocates until 9/3/2016 when Nyawara and Company Advocates took over conduct of the suit. The lease expired and it would seem the Plaintiff solely applied for extension of the lease without involving the Defendant. A new title was issued on 25/7/2012 in the names of the Defendant and Gian Singh Suri with Gurmeet Singh Suri for 50 years from 1/5/2010. An Assent was registered on 16/10/2018 vesting Gurmeet Singh Suri's share in the land to the Plaintiff as Executrix of his estate.

23. During cross examination, Mr. Onyango Advocate conceded that he authored the letter dated 3/3/2014. However, he maintained that the contents of that letter were not agreed upon.

24. It is useful to reproduce the letter of 3/3/2014 which A.I. Onyango Advocates wrote to Omulele and Co. Advocates on a without prejudice basis. The letter read as follows:

“RE: HC ELC NO. 738 OF 2013-PARMJIT KAUR V AVTAR SINGH SURI

We refer to the above, to your letter dated 7th February 2014 and to the meeting between your Mr. Omulele and the undersigned on the 1st March 2014.

We further refer to your *Ex parte* Application for Leave to commence contempt of Court proceedings against ours that is set for the 4th March 2014.

Upon discussions, it was tentatively on a *without prejudice basis* agreed that rather than depositing the monies in Court as ordered, we vary that Order so that:-

1. Those monies (your Client's Share) are paid directly to yours back dated with effect from August 2013 less taxes paid upon that income to the Government;
2. That both yours and ours to commission separate audit/account so that each respective back dated share is known for the period that yours was not paid (and which period is to be agreed upon) and then an offer be given on repayments (less taxes paid to the Government); and
3. That the property be separated into respective titles for each party.

Upon number 3 aforesaid, the issue of either party buy out may then be contemplated, discussed and if agreed upon settled upon terms to be agreed upon.

We hope that the above captures our discussion and may be recorded in Court.

Yours Faithfully,

For: - A I Onyango & Co.

Isaac Onyango

C.c. - Client”

24. The court notes that a consent was recorded in court on 14/7/2014 for payment to the Plaintiff of half share of the rent from the Suit Property from 6/8/2013 until 5/8/2014 less the sum of Kshs. 288,239/= already paid. In default the Plaintiff was to collect rent from 6/8/2014 to 5/8/2015 and the yearly rent increments were to be taken into account and reconciled by the parties.

25. The Defendant filed the application dated 13/10/2014 seeking to have the tenants in the Suit Property directed to pay rent to him and that he pay half portion of the rent to the Plaintiff. The Plaintiff filed a replying affidavit together with grounds in opposition to the Defendant's application. Omulele and Company Advocates filed a bill of costs against the Plaintiff on 26/11/2014. Upon inquiry from Sobhag H. Shah and V. Goswami Advocates, this firm denied in the letter of 8/8/2014 that it had filed any bill of costs in the matter. There is a certified copy of the order made on 4/3/2014 in the file which shows that it was issued on 18/3/2014.

26. The Plaintiff filed the application dated 11/6/2015 seeking to have the Defendant committed to prison and his properties sequestered for his failure to pay the Plaintiff half share of the rent from the Suit Property as ordered by the court on 21/7/2014. The Plaintiff applied in person on 7/9/2015 for proceedings in the case. The proceedings were typed and placed in the court file. There is no indication as to whether she ever collected the typed proceedings. The Defendant filed his replying affidavit in opposition to the application dated 11/6/2015 and denied being in contempt of the court order while explaining that he had paid Kshs. 288,239/= being part of the rent to Omulele and

Company Advocates and Kshs. 1,018,994.50 to Ouya Imbukwa Thomas Advocate based on the letter the Plaintiff wrote on 24/6/2013 that Ouya Imbukwa Thomas Advocate of Omulele and Co. Advocates would handle the case on her behalf. A consent was recorded in court on 8/9/2015 by the advocates for both parties to have the application dated 11/6/2015 marked as stood over generally.

27. When the Defendant's advocates invited the Plaintiff's advocates to fix a date for pretrial conference on 11/7/2017, Mr. V. Goswami indicated on the letter that the matter was before the East African Ramgharia Board Welfare Committee for mediation and that parties had agreed to have the suit stood over. This was followed up with a letter dated 27/7/2017. The East African Ramgharia Board wrote to court on 21/3/2019 to confirm that the parties were engaged in mediation while intimating that the matter was taking long to conclude because the Plaintiff who is a widow with a child to support resided in India. The Board expressed its optimism that the matter would soon be settled. The Board filed its report in court on 24/9/2019.

28. The matter came up in court on 11/6/2018 when Mr. Nyawara informed the court that parties were negotiating and that there was mediation by the Hindu Ramgharia Welfare Committee of the Sikh Temple and that the parties required three months for the mediation. Parties informed the court on 23/10/2018 that no consent had been reached and the court fixed the matter for hearing on 24/1/2019. The hearing could not proceed on 24/1/2019 since the Defendant's advocate had not served the Plaintiff. The hearing was put off to 1/4/2019. The court dismissed the suit for want of prosecution on 1/4/2019 when the parties indicated that they were not ready for the hearing.

29. The Defendant filed an application to amend his defence on 6/3/2019. The Plaintiff applied to reinstate the suit on 15/5/2019. Each opposed the other's application and the court directed parties to file written submissions. The matter came up on 22/5/2019 for the hearing of two applications. Mr. Nyawara sought time to obtain his client's instructions and the case was adjourned to 3/6/2019 when the parties agreed to file written submissions on the Plaintiff's application to reinstate the suit and the Defendant's application to amend his defence and counterclaim. The two applications were argued on 25/9/2019 and the ruling delivered on 17/10/2019. The court reinstated the suit and directed that the Defendant was to file and serve his amended defence within 7 days.

30. When this suit came up on 22/1/2020 the Defendant's advocate informed the court that his application dated 25/11/2019 seeking to set aside the consent order of 4/3/2014 and have the suit heard on merit was still pending. The Plaintiff's Advocate stated that her application dated 18/10/2019 which sought to enforce the consent order made on 4/3/2014 had not been heard. She further ought to have judgement entered against the Defendant for Kshs. 9,309,020/= being her share of the rent from the Suit Property from August 2015 to August 2019 or that the Defendant produce an account of all the rents he received from the Suit Property so that the court can adjudicate the amounts due to the Plaintiff.

31. Looking at the court record, it shows that Mr. Onyango appeared before Nyamweya J. on 4/3/2014 for the Defendant while Mr. Imbukwa appeared for the Plaintiff. According to the record, Mr. Onyango informed the court that they wished to record a consent that would compromise the Plaintiff's notice of motion dated 24/6/2013, the Defendant's notice of motion dated 12/8/2013 and the Plaintiff's motion dated 18/2/2014.

32. From the court record, Mr. Onyango dictated the terms of the consent to the court as follows:

1. *"The parties have agreed that the Plaintiff's share of income from the suit premises be paid directly to her and be backdated with effect from August 2013 less the taxes if any paid upon the income to the Government.*
2. *Both the Plaintiff and the Defendant to commission separate audit of accounts so that these respective backdated shares are known for the period that the Plaintiff has not been paid. This period to be agreed upon by both the Plaintiff and the Defendant.*
3. *Upon the audits being undertaken the Defendant shall make an offer on how the amounts due to the Plaintiff will be paid less any taxes paid to the Government.*
4. *The suit property to be separated into separate titles for each party- the Plaintiff and Defendant respectively.*
5. *Upon default any party be at liberty to apply."*

The consent was signed by Imbukwa Ouya Thomas for the Plaintiff and Isaac Onyango for the Defendant.

Both advocates inserted their own names, signed and dated the court record. The consent was adopted and the court directed that the case would be mentioned on 3/4/2014 for further directions.

33. On 3/4/2014 Mr. Omulele appeared for the Plaintiff before Nyamweya J while Mr. Onyango appeared for the Defendant. Mr. Omulele stated that they had only received Kshs. 280,000/= as the Plaintiff's share of income as opposed to the expected sum of Kshs. 1.5 million. He proceeded to record a consent with Mr. Onyango's concurrence for independent audits to be undertaken. Both Mr. Omulele and Mr. Onyango inserted their names, date and signed the consent which was adopted by the court. Mr. Onyango admitted signing this consent.

34. The matter came up before Nyamweya J on 7/5/2014, 26/5/2014 and 14/7/2014. Mr. Onyango informed the court on 14/7/2014 that he had not filed the audit report and another consent was recorded with Mr. Imbukwa in similar fashion. When the matter came up on 6/8/2014 Mr. Onyango informed Nyamweya J that Mr. Shah had just come on record for the Plaintiff and needed time to go through the record. He added that they had agreed to take another mention date for a complete settlement. The court directed that the matter would be mentioned on 5/11/2014 for purposes of recording a settlement.

35. Did Mr. Isaac Onyango record the impugned consent before Nyamweya J. on 4/3/2014? Mr. Onyango stated that he sent an advocate to hold his brief in court on 4/3/2014. He did not give the name of that advocate or call him to give evidence. Mr. Onyango and Mr. Ouya

Thomas Imbukwa signed the consent which basically replicated the contents of Mr. Onyango's letter of 3/3/2014 to Omulele and Company Advocates, which Mr. Onyango admitted that he authored. Mr. Onyango did not call Mr. Ouya Thomas Imbukwa to confirm that he did not appear before Nyamweya J on 4/3/2014 when the disputed consent was recorded. Had another advocate appeared on behalf of Mr. Onyango, then he or she would have recorded and signed the consent in their own name and not that of the advocate whose brief they were holding. In any event Mr. Imbukwa as an officer of the court who knew Mr. Onyango well would have pointed out to Nyamweya J. when he signed the consent that the consent could not bear Mr. Onyango's name since he was not in court.

36. The report prepared by the Defendant's handwriting expert although unsigned, indicated that the signature on the consent of 4/3/2014 could have been Mr. Onyango's signature. The proceedings that took place before Nyamweya J on 3/4/2014 and 14/7/2014 when Mr. Onyango and Mr. Imbukwa attended court basically gave effect to the consent recorded before Nyamweya J on 4/3/2014 on the payment of half share of the rent from the Suit Property to the Plaintiff.

37. The court is persuaded that Mr. Isaac Onyango advocate did appear before Nyamweya J on 4/3/2014. The contents of his letter to Omulele and Company Advocates of 3/3/2014 are in essence the terms of the consent he recorded in court on 4/3/2014. The consent was implemented in the months that followed with Mr. Onyango's participation in the subsequent proceedings where he recorded other consents in court.

38. The court is convinced that Mr. Isaac Onyango attended court and recorded the consent before Nyamweya J on 4/3/2014. The Defendant has failed to prove that the consent recorded in court on 4/3/2014 was obtained through fraud, or collusion, or by an agreement contrary to the policy of the court or that it was given without sufficient material facts or in misapprehension or ignorance of the facts or other sufficient reasons for which a court may set aside an agreement.

39. The consent recorded in court on 4/3/2014 is binding on both the Plaintiff and the Defendant. Further proceedings were taken in this case as if the consent were never recorded because the Plaintiff failed to bring to the attention of the court the existence of the consent and the fact that the consent recorded in court on 4/3/2014 had substantially settled the issues in dispute and what was left was for parties to execute the court order.

40. The court declines to grant the orders sought in the application dated 25/11/2019. Each party will bear its costs of the application.

Dated and delivered at Nairobi this 5th day of May 2020

K.BOR

JUDGE

In the presence of:-

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff and the Defendant