



**Njigoru v Liquidator Kenya National Assurance Limited & 2 others
(Civil Suit 6 of 2017) [2024] KEHC 3443 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL SUIT 6 OF 2017
LM NJUGUNA, J
APRIL 11, 2024**

BETWEEN

KUDGETA WAMUGO NJIGORU PLAINTIFF

AND

**THE LIQUIDATOR KENYA NATIONAL ASSURANCE LIMITED 1ST
DEFENDANT**

KENYA COMMERCIAL BANK LIMITED 2ND DEFENDANT

FREDRICK MUKUA NJIGORU 3RD DEFENDANT

RULING

1. For determination are 2 applications dated 02nd November 2023 and 16th January 2024. In the former, the 1st and 2nd defendants/applicants are seeking the following orders:
 1. Spent;
 2. That this honourable court be pleased to issue orders to remove the caution placed on 23rd March 2011 by the 3rd defendant/respondent/applicant against plot no. Embu Township 330;
 3. That this honourable court be pleased to issue orders restraining the 3rd defendant by himself or his servants and/or agents from interfering with the sale of the suit property herein;
 4. That in the event that the 3rd defendant/respondent/applicant declines to comply, the Executive Officer/ Deputy Registrar be authorised to sign all documents necessary to expedite the removal of caution, discharge of charge and transfer of the property; and
 5. That costs of the application be borne by the 3rd defendant/respondent/applicant.
2. The 1st and 2nd defendants/applicants deposed that on 11th May 2022, they entered into a consent with the plaintiff/respondent for payment of a sum of Kshs.16,300,000/= and throw away costs



of Kshs.500,000/= within 6 months. The consent was adopted as the order of the court. The 3rd defendant/respondent/applicant being a third party, did not appeal against the said order. It is the 1st and 2nd defendants/applicants' case that the plaintiff/respondent got a buyer for plot no. Embu Township 330 ("suit property") who offered Kshs.90,000,000/= as the purchase price but the 3rd defendant/respondent/applicant wrote a letter to the buyer, claiming ownership of the property. That the buyer got cold-feet and reduced their offer to Kshs.55,000,000/=. That the parties have executed the relevant documents to enable the purchase but the 3rd defendant/respondent/applicant placed a caution on the property and so the transaction cannot be completed. That the 3rd defendant/respondent/applicant is only a co-executor of the property and ought to transfer the plaintiff/respondent's portion to her but he refuses to do so and the issue is pending in Embu High Court Succession Cause No. 280 of 2007.

3. This application was opposed through the 3rd defendant/respondent/applicant's replying affidavit wherein he deposed that the suit property was registered in both their names at the behest of the plaintiff/respondent and that he has every right to participate in the sale transaction. That he has since participated in developing the said property thus adding to its value. That the 1st and 2nd defendants/applicants and the plaintiffs went behind his back and entered into an agreement, prompting him to place a caution on the property since he is a co-owner and has a stake in the property. That he did not know of the consent order of 11th May 2022 until he perused the court file. That a similar application was filed in Embu High Court Succession Cause No. 280 of 2007 between similar parties where the court held that the matter should be determined in the ELC and nothing has changed since. That he filed an originating summons at ELC No. 9 of 2023 seeking similar orders as the ones sought herein and the same is still pending. He urged the court to dismiss this application.
4. Through the application dated 16th January 2024, the 3rd defendant/respondent/applicant seeks the following orders:
 1. Spent;
 2. That this honourable court be pleased to temporarily issue an order to set aside a verbal consent order recorded in court on 11th May 2022 between the plaintiff/respondent and the 1st and 2nd defendants/applicants, pending hearing and determination of this application;
 3. That upon granting order 2 above, the court be pleased to issue an order to set aside the consent order verbally recorded in court on 11th May 2022 pending hearing and determination of the ELC Originating Summons No. 9 of 2023;
 4. That the costs of this application be in the cause.
 5. The application dated 16th January 2024 is premised on the grounds on its face and in the supporting affidavit thereof. It is the 3rd defendant/respondent/applicant's case that the consent order of 11th May 2022 was entered without his knowledge and there will be no consent if one party is excluded. That if the consent order is not set aside, he will suffer irreparable damage as he is a joint owner of the suit property with the plaintiff/respondent. That through the application dated 02nd November 2023, the 1st and 2nd defendants/applicants stated that the 3rd defendant/respondent/applicant did not participate in the consent. That the property was valued at Kshs.90,000,000/= but the plaintiff/respondent is willing to accept an offer of Kshs.55,000,000/=. That in the pendency of the ELC suit, this court should grant the orders prayed for and await a lasting solution from the ELC.



6. The 1st and 2nd defendants/applicants opposed the application dated 16th January 2024 through grounds of opposition stating that the application is frivolous and vexatious and does not disclose a prima facie case. That it is an abuse of the court process and should be dismissed.
7. In support of both applications, the applicant filed an affidavit dated 22nd January 2024 wherein she deposed that the consent entered on 11th May 2022 was reached after intense negotiations to reduce the loan amount from Kshs.212,000,000/= to Kshs.16,300,000/= . That it is the 3rd defendant/respondent/applicant who had procured the said loans from the 2nd defendant/applicant between the years 1992-1994.
8. That she was bequeathed the suit property through the estate of the late Njigoru Muya Katheri who died testate but the property is registered to herself and the 3rd defendant/respondent/applicant as executors and the 3rd defendant/respondent/applicant was supposed to transfer it to her as the beneficiary. That the 3rd defendant/respondent/applicant was only enjoined in the testate succession to help in administering the estate and not to be a joint owner of the estate. That injunctive orders has been granted in another suit but the 3rd defendant/respondent/applicant withdrew the suit thus the orders lapsed and the plaintiff/respondent was forced to file the suit herein.
9. She deposed that the 3rd defendant/respondent/applicant took the loans in a bid to waste the most profitable asset in the estate of the deceased and the issue with the creditors was resolved in this suit through the consent. That even though the 3rd defendant/respondent/applicant was drawing an income from the suit property, it took the judgment of the Court of Appeal dated 13th June 2013 to return control of the suit property back to the plaintiff/respondent. That since the Court of Appeal decision, she has been haggling with the creditors in and out of court until the consent was recorded. That she has filed a notice of appeal and intends to appeal against the decision of this court in Embu High Court Succession Cause No. 280 of 2007.
10. The 3rd defendant/respondent/applicant filed a supplementary affidavit in support of his position in both applications stating that the consent of 11th May 2022 was not a judgment per se as it only laid down conditions for future action. That it is irregular and does not meet the requirements of a consent as the same was entered in the exclusion of the 3rd defendant/respondent/applicant who is a key party to the proceedings. That he has never abandoned the suit and he had a right to participate in the consent, which right he was denied.
11. The court directed that both applications be canvassed by way of written submissions and all the parties complied save for the plaintiff/respondent.
12. Regarding the application dated 16th January 2024, the 3rd defendant/respondent/applicant submitted that the consent entered on 11th May 2022 possesses a serious error as it excludes a party to the proceedings and so it is not a valid consent amongst consenting parties. He relied on the case of *Wema Foundation Trust Company Limited v County Government of Nairobi City & another* [2022] eKLR where the court rendered null and void, a consent that was entered in the absence of a party to the suit. Further reliance was placed on the case of *Gurpeet Singh v. Chatur Bhuj Goel* (1988) AIR 400. He argued that the court must pay attention to his reservations regarding the consent and set it aside. On the application dated 02nd November 2023, the 3rd defendant/respondent/applicant submitted that when the plaintiff/respondent approached this court for similar orders in Embu High Court Succession Cause No. 280 of 2007, the same were denied as the court found itself lacking jurisdiction and referred the parties to the ELC. That he has already filed a suit before the ELC as guided by this court and the same



is sub judice, therefore this court cannot determine the application. That the orders sought through the application are also before the ELC through the Originating Summons dated 23rd March 2023, including an order for lifting the caution. He urged the court to dismiss this application.

13. Regarding both applications, the 1st and 2nd defendants/applicants submitted that the caution has subsisted on the property since 2011 without good reason and the same is hindering them from progressing the pending transaction. That the 3rd defendant/respondent/applicant has changed his advocates without the leave of court contrary to Order 9 Rule 9 of the *Civil Procedure Rules*. For this argument, reliance was placed on the cases of S.K. Tarwadi v. Veronica Muehlmann (2019) eKLR and Lalji Bhinji Shangani Builders & Contractors v. City Council of Nairobi (2012) eKLR.
14. That the 3rd defendant/respondent/applicant filed a notice of withdrawal of suit on 17th October 2017 and thereafter neglected to participate in the case but whatever the case, the consent order is not prejudicial to him. That the consent order can only be varied if it can be proved that there were vitiating factors at the time of making the consent. That there are no vitiating factors in sight of this consent and so the same should not be set aside. They relied on the cases of Brooke Bond Liebig v. Mallya (1975) EA 266 and Kenya Commercial Bank v. Specialized Engineering Co. Ltd (1982) KLR P. 485.
15. The issues for determination are as follows:
 1. Whether the orders sought through the application dated 02nd November 2023 can be granted; and
 2. Whether the consent order issued on 11th May 2022 should be set aside pending hearing and determination of ELC Originating Summons No. 9 of 2023.
16. The application dated 02nd November 2023 seeks orders to compel the 3rd defendant/respondent/applicant to remove the caution on the suit property, to execute the transaction documents and to restrain him from interfering with the sale of the suit property. Through Embu High Court Succession Cause No. 280 of 2007, the plaintiff/respondent herein sought these same orders among others through summons dated 26th October 2023. In its ruling delivered on 29th November 2023, this court considered the application on its merits and dismissed the same for want of jurisdiction. The court noted that the matter belongs to the ELC and subjected itself to the decision of the ELC at such time as the same shall come.
17. The 3rd defendant/respondent/applicant has filed ELC Originating Summons No. 9 of 2023. The same is pending hearing and determination at the said court. At this point, there are several reasons why the orders sought through the application dated 02nd November 2023 cannot be granted. For me, the most outstanding reason is that the same is res judicata, having been determined on merit by this court. Section 7 of the *Civil Procedure Act* provides for res judicata as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



18. Similarly, in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), it was held that:

“For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

19. As to whether the consent order issued on 11th May 2022 should be set aside, it is the 3rd defendant/respondent/applicant’s argument that he was denied a chance to participate in the consent and so the same should be set aside as this is a vitiating factor. In the case of *Hirani V. Kassam (1952) 19 EACA 131* where the Court of Appeal held;

“It is now well 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: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983*. In *Purcell v F.C. Trigell Ltd [1970] 3 All ER 671*, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.””

20. Further, in the case of *KCB Limited v Specialized Engineering Co. Ltd (1982) KLR* the court held:

“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 in misapprehension or ignorance of suit facts in general for a reason which would enable the court to set aside an agreement.”

21. It is clear that the 3rd defendant/respondent/applicant has been a party to the suit since its inception at the different courts and/or divisions. There is a long-standing conflict between the 3rd defendant/respondent/applicant and the plaintiff/respondent on both succession and commercial issues. The issue of ownership of the subject land which was raised in the succession cause is the subject of ELC and this court already pronounced itself as much while the impugned consent arises from the commercial issues rightly before this court.

22. As I determine this issue, I do take note that in the conflict between the 3rd defendant/respondent/applicant and the plaintiff/respondent there is a very thin line between this court’s jurisdiction and the



ELC jurisdiction because the issues introduce the issue of ownership of the land. I say this because it may appear possible for a joint owner of the suit land to enter into a consent on behalf of the other co-owner, but I cannot say this because I risk saying it without the relevant jurisdiction.

23. The competing interests between the 3rd defendant/respondent/applicant and the plaintiff/respondent in light of the consent are commercial in nature. Any other issue arising between the co-owners of the suit property between them as proprietors can be placed before the ELC for purposes of determination of ownership.
24. The 3rd defendant/respondent/applicant has not given sufficient reasons to warrant setting aside of the consent. The cause of action that triggered the consent is commercial in nature and was rightly brought before this court, hence the consent. In any event, the 3rd defendant/respondent/applicant does not suffer any prejudice since the restructured debt was affecting both him and the plaintiff/respondent. In addition to the fact that there are no vitiating factors to warrant setting aside of the consent, there is no legal basis for the same given that the consent favours the 3rd defendant/respondent/applicant from a commercial point of view and he does not stand to suffer any prejudice if the consent is not set aside.
25. In the end, I find that both the applications lack merit. The application dated 02nd November 2023 is hereby struck out and the application dated 16th January 2024 is hereby dismissed. Each Party to bear its own costs of the applications.
26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

.....for the Plaintiff/Respondent

.....for the 1st Defendant/Applicant

.....for the 2nd Defendant/Applicant

.....for the 3rd Defendant/Respondent/Applicant

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