



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CASE NO. 48 OF 2017

NDOVU ESTATE LIMITED..... PLAINTIFF

VERSUS

SITABO OLE KUDATE.....1ST DEFENDANT

KAUSHAL KUMAR MAHEND RABHAI.....2ND DEFENDANT

RULING

A. INTRODUCTION

1. By Notice of Motion dated 29th June, 2020, the Applicant sought for the following orders: -

a) Spent.

b) That the Honourable court be pleased to set aside orders made on 17th October, 2017 marking this matter as settled and allow it to proceed to full hearing.

c) That the Defendants' application dated 23rd June, 2016 be listed for hearing and or be dealt with as may be ordered by the Honourable Court.

d) That costs of this application be provided for.

2. The application is based on the grounds thereof and the Supporting Affidavit sworn and dated 29.06.2020. The applicant avers that the parties herein recorded a Consent Judgment which was recorded in the sister file Narok ELC No. 234 of 2017 and adopted as the judgment in both files. That pursuant to the said Consent Judgment, the matter herein in respect to land parcel No. Cis Mara/ Ololunga/ 13864, was marked settled.

3. It is the Applicant's contention that the said Consent laid out various terms and obligations to be met by either parties to the said. However, the Plaintiff is yet to pay any amounts to the defendant as agreed and as contained in the said Consent but has continued to occupy the defendants land parcel to date without payment. The defendant/ applicant is therefore concerned that should the said orders marking the suit as settled not be vacated, then he stands to lose his land to the plaintiffs.

4. The application was not opposed. Despite the Plaintiff/ Respondent being served with the said Application dated 29.06.2020 and an Affidavit of Service filed to that effect they failed to respond to the claims made by the Applicants.

5. I have read and considered the Application and the various annexures thereto and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

6. The issue for determination which arise therefrom is: -

a) Whether the Consent Order dated 12/10/2017 can be set aside.

I. Whether the Consent Order dated can be set aside.

7. The principles of setting aside and/ or varying a Consent Order or Judgment are now well settled. An Applicant seeking to have a consent order or judgment set aside or varied must satisfy the court that there was fraud, misrepresentation, collusion or such other grounds that are contrary to the law.

8. The Court of Appeal Judges in **East African Portland Cement Company Limited v Superior Homes Limited [2017] eKLR** while grappling with the same issue and quoted with approval the case of The **Brooke Bond Liebig Ltd vs Mallya [1975] EA 266** where the Court stated that:

"a consent order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

9. Equally, the Court of Appeal in **Flora Wasike vs Destimo Wamboka (1988) 1 KAR 625** while addressing the issue on the setting aside of consent judgment stated as follows:

"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.... In Purcell vs F C Trigell Ltd [1970] 2 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 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."

See also ***Hirani V Kassan (1952)19 EACA 131.***

10. This court has taken the liberty to call for the sister file being Narok ELC No. 234 of 2017 (Formerly Nakuru HCCC No. 58 of 2011) to peruse the consent judgment recorded on 12th October 2017 and the terms thereon. The said consent order was also adopted in the present case and is what is before me today for determination.

11. I fully adopt the reason in the above mentioned case laws and add that the Consent Judgment dated 12th October, 2017 was anchored on the basis that the Plaintiff/Respondent would pay a certain amount of money (whether it is the same as in the previous case of KShs. 1,550,000/=) within 30 days of recording the said consent. The Defendant/ Applicant on the other hand would thereafter transfer the land parcel no. Cis Mara/ Ololunga/ 13864 upon receipt of the said amount.

12. Despite being served with the present Application, the Plaintiff/Respondent elected not to respond to the claims raised by the Applicant, which as a result stand uncontroverted and unchallenged.

13. It is noteworthy that the attitude taken by the Plaintiff/ Respondent of refusal to comply with his obligation as per the Consent judgment by paying the agreed amount within the stated timelines says little about fair play and candour. The consent was recorded on 12.10.2017 and it was incumbent upon the plaintiff to pay the said amounts; that has not been the case and the plaintiff/ respondent continues to occupy the Applicants land without pay to date.

14. In the upshot, I find that the Application dated 29.06.2020 is merited and I accordingly set aside the consent judgment dated 12/10/2017 and order that the suit herein be set down for hearing. It is so ordered.

DATED, SIGNED and DELIVERED virtually at **MIGORI** on 27th day of **OCTOBER, 2021.**

MOHAMMED KULLOW

JUDGE

Ruling delivered in the presence of:-