



**LLA v A-STL (Civil Case 44 of 2017)
[2024] KEHC 13890 (KLR) (Family) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL CASE 44 OF 2017
SN RIECHI, J
OCTOBER 3, 2024**

BETWEEN

LLA APPLICANT

AND

A-STL RESPONDENT

RULING

1. This ruling is in respect of an application dated 9th February 2024 filed by the Respondent/applicant LLA in which he seeks orders:
 1. That pending the hearing and determination of this application interpartes, leave be granted to the firm of M/S Waichungo Martin & Co Advocates to come on record on behalf of LLA. in place of the firm of Kasamani & Co. advocates.
 2. That pending the hearing and determination of this application interpartes there be stay of execution of the consent Judgement entered into on the 7.6.2018 and all the consequential orders arising thereto.
 3. That the consent Judgement entered on 7.6.2018 and decree issued on the 11.9.2019 be set aside.
 4. That costs of this application be provided for.
2. The application is premised on the grounds on face of it and the supporting affidavit of the applicant sworn on even date. The applicant also filed a supplementary affidavit on 12th June 2024.
3. In response the respondent Anne Sophie Trzebinski opposed the application and filed a replying affidavit dated 2nd April 2024.



4. By consent of parties this application was canvassed by way of written submissions.
5. The applicant's case briefly is that the applicant did not execute the settlement agreement dated 12/1/2018 and his signature was forged on the agreement. That the applicant was not present in court on 7.6.2018 and he did not consent to the terms of the consent recorded by the Advocates. The applicant averred that the consent was a collusion of the Advocates and the respondent. The applicant averred that there was no consensus between the parties on the mode of distribution of the matrimonial properties. The applicant averred further that the falsified settlement dated 12.1.2018 was not presented to court at the time of recording the consent and therefore the settlement agreement is null and void and unenforceable by the Land Control Board.
6. The respondent's case is that the instant application is a gross abuse of court process and the application is an attempt to resile an agreement which formed the basis of consent judgement. The respondent stated that the applicant is guilty of laches for disputing an agreement more than 6 years after its conclusion.
7. The respondent stated the settlement agreement leading to the consent was executed following negotiations between the applicant and respondent prior to their separation and divorce.
1. The respondent averred that the applicant's averment that he was not aware of the consent judgment is false for reason that the applicant by application dated 6th April 2023 instituted in ELC JR NO.E006 OF 2023 before ELC court in Nyahururu ,seeking orders of mandamus to compel the respondent therein to issue LCB consent for transfer of L.R.NO.Samburu/Lodokesek/42 as per the consent Judgement. The respondent referred to annexed to the application a copy of the amended Notice of Motion.
8. The respondent stated that in the JR proceedings, the applicant herein filed a PO and replying affidavit. In the replying affidavit filed on 30th May 2023,the applicant stated as follows, on oath;

“That pursuant to Nairobi High Court Martimonial Civil Suit No.44 of 2017 a consent was entered into with the Ex-Parte Applicant want to Comply with piecemeal which is markedly unfair and advantageous to the Ex-Parte Applicant and should not be complied with haphazardly.” The respondent attached a copy of the said affidavit in support.
9. The respondent stated that the court will not interfere with a consent except in circumstances such as would provide a good ground for varying or rescinding a contract. That the applicant has not produced any evidence whatsoever to prove the alleged forgery. The respondent stated if the stay of execution is issued her enjoyment of the rights under the consent judgement will be further delayed and she urged the court to dismiss the application.
10. The applicant filed written submissions dated 12th June 2024 whilst the respondent filed written submissions dated 12th July 2024. I have carefully analyzed and considered the submissions and case law. The parties in their respective submissions reiterated averments in their affidavits and do not need to reproduce the same.
11. From the application, rival affidavits and the submissions the main issues for determination are;
 - i. Whether this court should allow the firm of M/s Waichungo Martin & Co Advocates to come on record on behalf of LLA A. in place of the firm of Kasamani & Co.advocates.
 - ii. Whether this court should grant an order of stay of execution of the consent Judgement entered into on the 7.6.2018 and all the consequential orders arising thereto.



- iii. Whether this court should set aside consent Judgement entered on 7.6.2018 and decree issued on the 11.9.2019.
12. On the first issue the respondent does not oppose the issue and therefore I allow prayer sought therein.
13. On 2nd and 3rd issues the applicant is seeking an order of stay of execution and or setting aside of a consent judgement entered on 7th June 2018 . The consent arose from settlement agreement dated 12th January 2018 which the applicant has argued that he did not sign and his signature was forged. The applicant submitted that he was not present in court on 7.6.2018 and he did not consent to the terms of the consent recorded by the Advocates. The applicant submitted that the consent was a collusion of the Advocates and the respondent. The applicant submitted that there was no consensus between the parties on the mode of distribution of the matrimonial properties. The applicant submitted further the falsified settlement dated 12.1.2018 was not presented to court at the time of recording the consent and therefore the settlement agreement is null and void and unenforceable by the Land Control Board. The applicant also submitted that the Consent Judgement therein was obtained without his knowledge and that he did not execute the settlement agreement dated 12.1.2018 and his signature was forged.
14. The respondent on her part submitted that the consent judgement was issued with knowledge of the applicant. She submitted the parties entered into settlement agreement prior to the divorce. The respondent submitted the application herein is not merited for reasons that the settlement that yielded the consent judgement was executed by applicant in the presence of his Advocate. That the consent was adopted as judgement in presence of his Counsel. That the applicant has not proven fraud or collusion between the respondent and the Applicant's Advocate. That the applicant has not demonstrated the conditions necessary for setting aside a consent judgment. The respondent submitted that the applicant has waited for a period of 6 years since the consent was issued to raise an objection therefore the applicant is guilty of laches and that this application is an abused of court process.
15. The consent subject of this application is the one dated 9th April 2018 in which parties recorded the following consent;
1. That LLA shall transfer his interest in Samburu/Lodokejek/42 to the sole ownership of A-STL .
 2. That LLA shall transfer 50 acres of Samburu/Lodokesek/44 to A-STL to hold in trust for the child Tacha Melet Lemarti and the remainder of the 180 acres of Samburu/Lodokesek/44 shall be solely owned by LLA.
 3. That A-STL will transfer the Tractor, Registration No. KTCB819K (tractor) and Trailer, Registration No. ZE334 to the sole ownership of LLA with A-STL having the liberty to use the same on a license basis.
 4. That the parties shall not make any claims against each other whatsoever or howsoever during their lifetime or claim from or against each other's estate upon the demise of the other.
 5. Every party shall bear its own costs.
 6. That the Registrar High Court of Kenya is authorized to execute any transfer documents in place of either party or any other person holding any title on behalf of either party in the event that the party is unavailable or unwilling to execute the transfer.

Dated and signed at Nairobi this 9th Day of April 2018.

Mwaura & Kigutha Advocates Kasamani & Company Advocates Advocates for the Applicant
Advocates for the Respondent



16. This court proceed to record and adopted the said consent as a consent order on 21st June 2018 in which the court recorded as follows;
1. That Loyaban Lemati shall transfer his interest in Samburu /Lodokeselk /42 to the sole ownership of Anna-Sophie Trzebinski
 2. That LLA shall transfer 50 acres of Lodokesek 44 to Anne Sophie Trzebinski lemarti to hold in trust for the child Tacha Melet Lemarti and the remainder of the 180 acres of samburu/ Lodokesek /44 solely owned by LLA
 3. That Anne-Sophie Trzebinski will transfer the Tractor, registration no. KTCB81xxx (tractot) and Trailor, Registration No. ZE3xx to the sole ownership of LLA with A-STL having the liberty to use the same on a license basis.
 4. That every party shall bear its own costs.
 5. That the Registrar High Court of Kenya is authorized to execute any transfer documents in place of either party or any other person holding any tittle on behalf of either party in the event that the party is unavailable or un willing to execute the transfer.
17. The law on setting aside of a consent order is now settled to the effect that the variation of a consent order can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts. Hancox JA (as he then was) *Flora Wasike v. Destimo Wamboko* (1982 -1988)1 KAR 625, held 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."
18. The Court of Appeal in *Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd* (1982) KLR P. 485 held 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 by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.
19. From the evidence on record the Applicant's Advocate was present in court and the parties recorded a consent in open court. Where an Advocate representing a party appears before a judicial officer, informs the court he acts for the party, enters into a consent with other party which is adopted by the court , a High Court will be reluctant to set aside the consent unless the applicant has proved facts which would vitiate a contract In the present application I do not find that demonstrated.
20. In this application the applicant avers that he never entered into any consent. That the signature in the alleged agreement is a forgery and that on that basis the consent judgement should be set aside.
21. The applicant however admit that he was represented by an advocate. The advocate signed the consent filed in court and which was adopted. Such consent was used in ELC JR Misc E004/2023 in arriving at the determination, no report of alleged forgery was made and or investigated to verify it was forgery and no person has been charged for the same. It is my finding that the allegations have not been proved to vitiate the consent recorded in court.



22. I therefore find no merit in the application to set aside the judgement consent recorded by the parties.
This application dated 9th February 2024 is hereby dismissed with costs.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024.

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S. N. RIECHI

JUDGE

