



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 139 OF 2014

CONSTANT ODIDO ORABI.....PLAINTIFF

VERSUS

WILFRED OKUKU MUBADI.....DEFENDANT

R U L I N G

1. The defendant/applicant brought this application premised on the provisions of Section 3A of the Civil Procedure Act seeking for the following orders;

a) That the Consent dated 17th February 2020 be revoked.

b) That costs of this application be provided for.

2. The application was supported by the annexed affidavit of WILFRED OKUKU MUBADI and on the following grounds that;

i) It was entered into without the applicant having legal representation.

ii) The notice to act in person was not voluntarily signed.

iii) The Consent was entered into without spousal consent.

3. The plaintiff/respondent opposed the application by filing their grounds of opposition on 6th November 2020 impleading that:

i) That the application is subjudice as there exists a similar application on record dated 14.8.2020 that is yet to be heard and determined.

ii) That the application herein is malicious and an afterthought.

iii) That the application is untenable, frivolous, a clear abuse of the court process and the law and mischievous given that the Kshs.80,000/= received by the defendant/applicant at the time of signing the consent dated 17.2.2020 is yet to be refunded.

iv) That the application is without merit and ought to be dismissed with costs.

4. The plaintiff/respondent also filed a document referenced "further affidavit" on 11th May 2021 where he deposed that on or about February 2020, his son Godfrey Odido informed him that he had a meeting with the defendant/applicant in which they reached an agreement to settle the claim herein out of court. She stated that she agreed with her son that they buy out the defendant/applicant so that he relinquishes his title and ownership of the suit land BUKHAYO/MATAYOS/2890 for a consideration of Kshs. 360,000/= within 6 months and that as a sign of commitment to that agreement the defendant/applicant was paid Kshs. 80,000/=. The payment was done in the presence of two witnesses. The defendant/applicant and her son knew each other as the son had a suit against the defendant being BUSIA CMCC No. 250 of 2013 which was withdrawn and costs paid.

5. The Respondent annexed a copy of the receipt issued for the costs stating that the defendant could not be mistaken as the figures were different, being for Kshs. 80,000/= and the other for Kshs.97,000/=. He added that the defendant/applicant had at that time willingly signed a notice to act in person a copy annexed to her affidavit as COO2. She further deposed that the application was filed after undue delay. She

maintained that the applicant has not proved that the consent was procured in circumstances where there was fraud, coercion or misrepresentation. The applicant added that the defendant/applicant has not refunded the Kshs.80,000/= and she prayed that this application be dismissed with costs.

6. The plaintiff/respondent filed her submissions on 11th May 2021 submitting that the application is mischievous and devoid of merit and it does not meet the threshold set down by authorities that deal with the issue of setting aside consent between parties. She further submitted that the application is an afterthought and should be dismissed and relied on the decision in **KUWINDA RURINJA CO. LTD V. KUWINDA HOLDINGS LTD & 13 OTHERS (2019) eKLR** where the Court of Appeal dismissed the appeal because the appellant had failed to demonstrate grounds for setting aside a consent judgement. The Court of Appeal in the *Kuwinda* case made reference to several decisions inter alia, **Flora N. Wasike vs Destimo Wamboko (1988) eKLR** where the trial court held thus, “*It is now settled law that a consent judgement or order has a contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remained to be fulfilled which are not carried out*”.

7. The defendant/applicant filed his brief submissions on 2nd August 2021, submitting that he was called to the respondent’s counsel office without the knowledge or consent of his counsel. He submitted that the documents he signed were unknown to him and they deliberately shoved away his counsel in order to protect the interests of the respondent. He further submitted that he has partly refunded amounts received that day as a show of good faith and that the respondent shall be at liberty to demand for the balance through execution process.

8. It is the principle of the law that a consent judgement can be set aside if it proved that the consent was obtained by coercion, misrepresentation and or fraud. This has been re-stated in the case of **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485**, Harris J correctly held inter alia, that –

1. *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 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.*

2. *A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.*

9. The court is called to evaluate whether or not the consent entered into by the parties and dated the 17th February 2020 ought to be set aside. The applicant in seeking to set aside the consent has listed two grounds; first that the consent was executed without the participation of his advocate, and secondly that he is illiterate and the consent was never fully explained to him. He also stated that the Notice of Intention to Act in Person was not signed voluntarily and spousal consent was not sought. The Applicant does not explain in his supporting affidavit the person who prepared and filed the notice to act in Person. If he indeed filed the notice to act in person, then there was no basis to have his counsel participate in a transaction taking place after the advocates’ services had been terminated.

10. The Applicant impleads that he thought he was being paid for costs in a previous suit between him and the Respondent’s son. This is evidence that the Applicant has engaged in signing documents to court. He was short of disclosing to the court how he knew that the money being paid was for costs and why he chose to receive the costs directly and not through his advocates on record in the previous suit. This gives the impression that the applicant is a dishonest person. The dishonesty is demonstrated further when in his submissions he states that the respondent can execute for the balance of the Kenya shillings eighty thousand paid to him. If his intention was not to receive money for the suit parcel, why should he find it difficult to voluntarily release all the funds?

11. Secondly, if the applicant is pleading that he was coerced to sign the consent dated 17th February 2020 as he was not allowed to seek legal advice from his advocate then he had a burden to prove the coercion. In the case of **Benson Omwenga Anjere vs Kivati Nduto & Anor [2013] eKLR** the Court considered what constitutes coercion, duress and undue influence as follows;

Coercion is defined by Black Law Dictionary as, “**Compulsion, constraint, compelling by force or arms or threat.**”

Duress is defined by Black Law Dictionary as;

“**Any unlawful threat or coercion used by a person to a manner she or he otherwise would not (or would) [it is] subjecting a person to improper pressure which overcomes his will and coerces him to comply with a demand which he would not yield if acting as free agent.**”

Undue Influence is described in Black’s Law Dictionary;

“**persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts instead subject to the will or purposes of the dominating party.**”

12. A perusal of the impugned consent, the same was witnessed by several people. The respondent deposed that the Applicant had come to Mr Ashioya’s office accompanied by Patrick Benson Mwato and Linus Wandera Ojiambo. The two named persons also signed the impugned agreement and the Applicant did not include anything signed by them to corroborate his averment that he did not know what he was signing or that he was coerced into the transaction. The Applicant has not elaborated on what provisions of the law required that his spouse also be present while he signing the impugned consent that is sought to be set aside.

13. The respondent has submitted that the documents which the applicant signed are in good English and hence he cannot allege that he lacks the capacity to comprehend and sign the documents written in English. The respondents further submitted that the consent was clear and the applicant had two witnesses with him when he signed it. Although it may appear that the applicant was at a disadvantaged position and he might have signed the contract without all the facts being explained, the Applicant has not proved beyond a balance of probabilities the fraud misrepresentation on the part of the Respondent that should warrant the setting aside of the consent.

14. In light of the foregoing, I find that the Applicant has not proved any of the principles for setting aside a consent judgement or order. The application dated 19th October 2020 is without merit and dismissed with costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 14TH DAY OF OCTOBER 2021.

A. OMOLLO

JUDGE