REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 151 OF 2008

EUNICE WANJIRU GATHITHI (the legal

representative of the estate of the

late FREDRICK GATHITHI KABUE).....PLAINTIFF

VERSUS

CANNON ASSURANCE KENYA LIMITED.....DEFENDANT

R U L I N G

1. Before Court is a Motion on Notice dated 19/06/2020 by the plaintiff. It was brought under ***Articles 10, 25, 40 and 159 of the Constitution, Sections 4 & 19(4) of the Limitation of Actions Act, Sections 1A & 1B, 3A, 26 and 63 of the Civil Procedure Act, Order 20 Rules 1, 3 & 4, Order 21 Rule 17 and Order 25 Rules 2 & 5 of the Civil Procedure Rules.***

2. In the Motion, the plaintiff sought orders that the consent dated 26/10/2015, marking the suit as settled, be set aside and parties do forthwith enter into a settlement on just terms. It also sought that the judgment dated 15/6/2015 at paragraph 85 be varied, in the court's equitable and inherent jurisdiction, with an order that the redemption amount due from the plaintiff be based on the sum of Kshs. 5 million with simple interest at the rate of 22% per annum from 24/4/1992 for a period of six years.

3. The application was based on the grounds set out in the body of the Motion and the supporting affidavit of **Eunice Wanjiru Gathithi** sworn on 19/6/2020.

4. The applicant contended that the defendant acted inequitably by applying compound interest to the amount guaranteed thereby rewriting the terms of the contract which only provided for simple interest as set out in the Letter of Offer dated 6/3/1991.

5. That the judgment of 15/6/2015 caused a grave injustice as no proper redemption amount was ascertained. That the wrongful application of compound interest led the debt of Kshs. 5 million to escalate to over 2 billion in that, interest was applied on monthly rests instead of annual basis leading to an unlawful debt escalation of about Kshs. 680 million.

6. That the plaintiff did not involve her advocate nor forward the Settlement Agreement ("the said agreement") to her advocate. That her advocate only became aware of the Settlement Agreement dated 9/10/2015 and the Agreement for purchase of 1 acre of land on 17/5/2020 via email.

7. That at the time the consent was adopted on 26/10/2015, the plaintiff had not shown her advocate the said agreement as she was afraid the defendant may decline to sign should the advocate insist on the application of proper interest.

8. She further contended that the consent should be set aside as the defendant never provided the just and accurate redemption amount and that it had wrongly included costs in the settlement while the Court had ordered each party to bear own costs because the guarantor may have been defrauded.

9. That on account of real fear of loss of the entire charged land based on wrong accounts, this amounted to mistake, undue influence and coercion that is sufficient to set aside the consent and enter into a lawful compromise in accordance with ***Order 25 Rule 5.*** That, in any event, the defendant had caused delay in completing the agreement dated 9/10/2015 for purchase of 1 acre.

10. The respondent opposed the application vide replying affidavits of **Vishy Talwar** and **Martha Mutoro** sworn on 17/07/2020, respectively. They averred that the suit was settled in 2015 by the consent of the parties. That the offer to settle the suit came from the

Plaintiff's advocate, and on 9/11/2015, the advocates for the parties appeared in court and confirmed the consent as an order of the court.

11. That the plaintiff's advocate did not raise any objection nor did he assert that he had not seen the terms of the said agreement. That the plaintiff was therefore seeking to re-litigate a matter that had been procedurally and lawfully marked as settled. That it has always been the interest of the defendant to have the subdivision of the property finalized and receive three acres so that it can close its books on the debt.

12. Tracing the many cases that the defendant had faced from the deceased before this suit, it was contended that the defendant had been kept in litigation for over 25 years and it was time that the litigation be brought to a close. The defendant therefore prayed that the application be dismissed with costs.

13. I have considered the depositions of the respective parties. I have also considered the submissions dated 28/7/2020 and 3/8/2020, respectively. I have also considered the entire record. The sole issue for determination is whether the consent dated 26/10/2015 should be set aside and consequently the judgment be varied.

14. In **S M N vs Z M S & 3 Others [2017] Eklr,** the Court of Appeal stated: -

> ***"There is a dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us. Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties".***

15. In **Flora N. Wasike vs Destimo Wamboko [1988] Eklr,** it was stated: -

> ***"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: see the decision of this Court in J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983."***

16. Elsewhere in **Purcell vs F C Trigell Ltd [1970] 2 All ER 671,** Winn LJ stated 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. ...".***

17. In **Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR**, the Court of Appeal held: -

> ***"A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court."***

18. Finally, in **Setton on Judgments and Orders (7th Edn), Vol.1 pg 124,** it was observed that: -

> ***"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... it cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."***

19. From the foregoing, it is clear that, it incumbent upon a party who seeks to set aside a consent judgment or order to prove to the satisfaction of the court that, such consent was obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or without sufficient material facts or by mistake. This is the burden then that the plaintiff had in the matter before Court.

20. The plaintiff's case was that the consent should be set aside as the defendant wrongly applied compound interest that led the debt of Kshs. 5 million to escalate to over 2 billion. That the interest was wrongly applied on monthly rests instead of annually. That she signed the settlement agreement without consulting her advocate.

21. In the application, the plaintiff did not charge the defendant for any fraud or collusion. Neither did she allege that the consent was against the public policy of the court. This is so because the plaintiff consciously entered into the said agreement with knowledge of all material facts.

22. She stated that she wanted to save the entire land from being auctioned as a result of the debt. There was no evidence to show that there were any representations by the defendant on which the plaintiff relied on to enter into the contest. It must have been out of her estimation of the nature of her case vis a vis the possible outcome that led her to enter into the said agreement. This is so because, it is common ground that she opened discussions for settlement after the defendant's witness had been cross examined on the defendants' accounts.

23. The plaintiff was, at all times during the pendency of this suit, represented by Counsel. However, out of her own volition, she decided to sidestep her advocate and negotiate a settlement with the defendant. Can the negotiation be said not to have been at arms length? I don't think so. The plaintiff made a conscious choice of leaving her advocate out of the negotiation. She cannot turn around now and impeach an arrangement consciously entered into and already acted on by both the defendant and the Court.

24. She contended that the judgment of 15/6/2015 should be varied in the court's equitable and inherent jurisdiction with an order that the

redemption amount due from her be based on the sum of Kshs. 5 million with simple interest at the rate of 22% per annum from 24/4/1992 for a period of six years.

25. She stated in **paragraph 14 (f)** of her affidavit thus: -

> ***"The judge made an erroneous assumption in paragraph 84 and 85 by relying on the Defendant's advocate letter which had not produced any statements as regards the guarantor's liability…"***

26. In the judgment of 15/6/2015, the Court ordered that the sum due from the plaintiff was Kshs. 63,972,105/= as at 31/8/2004. That this was to be the foundation upon which further calculations on interest would be anchored. A detailed statement of account was ordered to be supplied within 10 days for consideration before the court could make final orders.

27. Pursuant thereto, the defendant filed a statement of account vide a letter dated 25/6/2015, reflecting the plaintiff's debt at Kshs. 679,391,461/=. The computation was contested by the plaintiff's advocate whereby the Court directed that the defendant's witness be cross-examined on it. The cross-examination was undertaken on 14/7/2015 and the matter adjourned for final orders on 13/10/2015.

28. In the meantime, the plaintiff approached the defendant on 7/7/2015 and agreed to surrender 3 acres of land in settlement of the matter. The record shows that, on 29/7/2015, well before final orders were made, the plaintiff's advocate wrote to the defendant's advocates as follow: -

> ***"after due consultation and instructions, our clients have carefully considered the matter and would like to settle by surrendering the three acres of land in full and final settlement of the matter".***

29. On 23/9/2015, the plaintiff informed the Court that the parties had arrived at a settlement. On 13/10/2015, the plaintiff's advocate requested for time to look at the Settlement Agreement. The parties then filed the consent on 28/10/2015 and on 9/11/2015, the advocates for the parties appeared and confirmed the consent as an order of the court.

30. From the foregoing, it is clear that the consent was entered into after due consideration of the judgment that had been entered, the cross-examination of the defendant's witness who fully disclosed how the interest had been applied. The consent was entered into to avoid the Court making its final orders after the aforesaid cross-examination. The plaintiff must have weighed her case vis a vis that of the defendant before negotiating the settlement.

31. Contrary to the contention that the settlement agreement was entered into without legal advice, the Court did give the plaintiff's advocate time to consider its terms before it was finally adopted by the Court in the presence of all advocates for the parties.

32. In view of the foregoing, this Court holds that the plaintiff's attempt to ran away from her obligations under the Settlement Agreement is not in good faith. It is an afterthought to attempt to vary the judgment and propose new terms. There was no mistake either in the judgment or in the settlement agreement.

33. The plaintiff invoked the equitable and inherent jurisdiction of this court under ***section 3(A) of the Civil Procedure Acts.*** It is not in dispute Court retains residual power. In **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004,** the court stated: -

> ***"It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."***

34. In **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasized that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.

35. In the present case, the Court has found no special circumstance which would necessitate the exercise of its inherent jurisdiction to right an injustice. The plaintiff has not been at a disadvantage and has at all times had the benefit of legal counsel.

36. There were allegations of unconscionable bargain. This was not demonstrated. The parties were dealing with each other at arm's length. There was no danger of sale of the property at the time the plaintiff decided to approach the defendant for settlement. The plaintiff must have reflected on the merits of her case before approaching the defendant with the settlement proposal which the defendant agreed to.

37. If everytime a party in a litigation reflects on a deal he has willingly entered into, which has already been acted upon by another, and thinks that it was not as good as he would have wished and the party is allowed to change that position, as the plaintiff wishes to do here, there may never be an end to litigation. Many are the times parties would, long after finalizing a deal, reflect and find that they could have gotten a better deal. There should never be room for such parties to renege on such deals.

38. In the circumstances of this case, I find that the application has been made as an afterthought. Accordingly, I find no merit in the application dated 19/6/2020 and I dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2021.

A. MABEYA, FCI Arb

JUDGE