



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL SUIT NO. 83 OF 2011

HIDDEN TREASURE INVESTMENT LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ALI MSELEM SULEIMAN.....DEFENDANT/RESPONDENT

RULING

1. By its Notice of Motion application dated 5th February 2018, Hidden Treasure Investments Ltd (the Plaintiff/Applicant) prays for an order that it be allowed to settle the balance due and owing to the Defendant/Respondent in the sum of Kshs 3.8 Million in reasonable installments of Kshs 100,000/- each succeeding month until completion in full.

2. The application which is supported by two affidavits sworn by the Plaintiff's director Jebel Munene is based on the grounds inter alia, that:-

a) The Plaintiff owed the Defendant Kshs 4,000,000/- as per the consent order dated 6th October 2011 but has since paid a sum of Kshs 500,000/-;

b) Due to unprecedented circumstances and the prevailing harsh economic times, the Plaintiff is unable to make good his part of the bargain by paying a lump sum and is willing to settle the amount in installments of Kshs 100,000/-;

c) The Defendant has unlawfully leased out a substantial part of the Plaintiff's property and is solely earning profits at the Plaintiff's expense while at the same time waiting to be compensated for putting up a building on the Plaintiff's property;

d) The Defendant wants to derail the settlement of the matter herein so that he can accrue income from the rent he unlawfully collects while at the same time the Plaintiff is losing his user rights. The Plaintiff forwarded a cheque for Kshs 100,000/- but the Defendant returned the same without a reasonable explanation;

e) The Defendant is taking advantage of the lack of a 'default clause' in the consent order respecting the right to apply in case of breach of the terms of the consent; and

f) The Plaintiff is willing to settle the matter as soon as possible and that inability should not be contrived as unwillingness to meet such terms.

3. In response to the said application, Ali Mselem Suleiman (the Defendant) has filed a Replying and Further Affidavit which he avers that the consent order was vacated on 6th December 2015 and despite knowledge of the same, the Plaintiff went ahead and purported to make a payment of Kshs 100,000/-.

4. The Defendant further avers that pursuant to the consent executed on 6th September 2011, the Plaintiff was required to liquidate the sum of Kshs 4,000,000/- within a period of six months from the date of execution of the consent but the Plaintiff has reneged on the same.

5. The Defendant avers that he shall claim loss of user of the said premises as the Plaintiff failed to abide by the terms of the consent.

6. I have perused and considered the application and the response before me. I have equally considered the Written Submissions filed herein by the Learned Advocates for the parties.

7. The Plaintiff had filed this suit on 30th June 2011 seeking a declaration that it is the lawful owner of Plot No. 4260 Malindi and a finding

that the Defendant is a trespasser on the said property and hence an order of eviction against the Defendant.

8. By a Statement of Defence filed on 26th July 2011, the Defendant denied the Plaintiff's claim asserting instead that he had the authority of the previous owner of the land to construct a structure thereon.

9. Subsequently by a consent dated 6/10/11 but filed herein on 6th September 2011, the parties agreed to have the matter marked as settled on condition that the Plaintiff would pay unto the Defendant a sum of Kshs 4,000,000/- within six months of the date thereof as compensation for the structure and/or developments that the Defendant had on the suit property.

10. As it turned out, the Plaintiff has to-date only paid to the Defendant a sum of Kshs 500,000/- leaving an unpaid balance of Kshs 3,500,000/-. By the application before me, it now urges the Court to allow it to settle the balance due and owing by installments in the sum of Kshs 100,000/- each succeeding month until payment in full.

11. As it were, the sum to be paid and the period within which it was to be paid was arrived at as a result of the consent of the parties. A variation of the period for settlement of the balance will therefore in my view amount to a variation of the consent as agreed by the parties and is tantamount to the Court changing the terms of the contract entered into by the parties.

12. It is trite law that any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings and cannot be varied or discharged unless the same was obtained by fraud or collusion, or by an agreement contrary to the policy of the Court. (*See Hirani –vs- Kassan (1952) 19 EA*).

13. In the circumstances herein, I did not find any sufficient grounds to warrant a variation of the consent and to grant the orders sought herein.

14. The application dated 5th February 2018 is in my view devoid of merit. The same is dismissed with costs to the Defendant/Respondent.

Dated, signed and delivered at Malindi this 30th day of January, 2020.

J.O. OLOLA

JUDGE