



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 261 OF 2013

NIZAR HASHAM VIRANI.....PLAINTIFF

VERSUS

SHAMSUDIN GULAMHUSEIN NANJI.....DEFENDANT

RULING

The Defendant filed a Notice of Motion seeking orders that this court orders the Plaintiff to comply with the consent order dated 7th July 2018 by appending his signature on the mutation forms and or any other documents required to enable the issuance of two separate titles of the suit premises known as Land Parcel Kisumu/Kogony/2642 within 7 days, with the title being issued in the name of the Defendant for the area marked A and the second title being issued in the name of the Plaintiff for the area marked B as showing the annexure marked TAT009.

That in default of the above by the Plaintiff, the Deputy Registrar, Kisumu Environment and Land Court be mandated to append signature on behalf of the Plaintiff on the mutation form and any other documents required to enable the issuance of two separate titles of the suit premises known as Land Parcel Kisumu/Kogony/2642 within 7 days, with the title being issued in the name of the Defendant for the area marked A and the second title being issued in the name of the Plaintiff for the area marked B as showing the annexure marked TAT009.

That the court orders that the parties hereto shall be and are hereby directed to append all and any signatures and or do all acts and or anything required to enable the issuance of two separate titles of the suit premises known as Land Parcel Kisumu/Kogony/2642 within 7 days, with the title being issued in the name of the Defendant for the area marked A and the second title being issued in the name of the Plaintiff for the area marked B as showing the annexure marked TAT009.

That in default of the above by the Plaintiff the Deputy Registrar, Kisumu Environment and Land Court be mandated to append all and any signatures and or do all acts and or anything required to enable the issuance of two separate titles of the suit premises known as Land Parcel Kisumu/Kogony/2642 within 7 days, with the title being issued in the name of the Defendant for the area marked A and the second title being issued in the name of the Plaintiff for the area marked B as showing the annexure marked TAT009. That costs of this application be provided for.

Brief Facts

The Plaintiff and Defendant had jointly acquired the suit property in 1983 or thereabouts. The Defendant remained absent from the suit property while the Plaintiff carried out various developments and improvements on the property, even setting up a hotel and jetty on the premises. The Plaintiff sought the Defendant over the years to contribute his share of the development and management expenses. The Plaintiff, upon discovering the Defendant had all along been residing in Canada, filed suit against the Defendant seeking a refund of the expenses incurred on behalf and for the benefit of the Defendant as co-owner, and to sub-divide the property appropriately.

The Court, in its judgment delivered on 24th October 2017, recognised that the Plaintiff had erected a hotel and jetty facility (albeit without the concurrence of the Defendant) and had gone through great lengths and expense in warding off trespassers while the Defendant was away in Canada. The court found that the Plaintiff and Defendant were tenants in common in equal shares of the suit property. The judgment provided three options to the parties to resolve their conflict: either one of the parties purchases the other's half share at market value, with the Plaintiff given first priority; or the parties share the suit property equally and be registered as such; or the parties sell the property and share the proceeds therefore equally.

The parties subsequently chose to file a consent agreement on the 4th of July, consenting to an order being recorded in the following terms:

- 1.The Defendant engage a licensed surveyor or similarly qualified person for the purpose of preparing a proposed sub-division plan of the suit premises into two separate and equitable portions;**
- 2.The Defendant select and communicate in writing a document to be prepared in court as to which of the 2 portions it shall retain and the remaining portion be vested upon the Plaintiff, such selection be final and binding on all parties and to receive**

sanction and enforcement of the court;

3.The two new dispositions be registered by the Registrar of Lands who by order of this court is directed to issue the 2 new titles in the names of the Plaintiff and Defendant as per the details stated in the documents referred to above.

4.Parties herein do not have any other legal claim against each or related third parties

5.Each party be at liberty to apply.

The root of the conflict is the provision of the consent that the Defendant shall have first priority in selecting the portion of the sub-divided property to retain. The Plaintiff's Advocate asserts that he misapprehended the contents of the consent agreement and that he was of the impression that the consent provided that the Defendant would carry out the survey and sub-division of the property and the Plaintiff would get have first priority in selecting his preferred portion. That this was an honest mistake on his part. The Defendant meanwhile extracted a consent order and brought this application to enforce the consent order as signed as filed.

Defendant's Case

The Defendant states that pursuant to the consent agreement, he instructed KOLMANS GEOMATIC CONSULTANTS KENTA LTD (hereinafter Kolmans) to inter alia survey the suit property, subdivide the suit property and obtain the title on behalf of the parties. That the Plaintiff's Advocate was requested to surrender the original title deed for that purpose on 14th August 2018. That the Plaintiff's Advocate was notified that Kolmans would be on the ground for 6 weeks from 14th August 2018 to enable survey and sub-division of the suit property. That the Plaintiff's Advocate was also notified that Kolmans had finalised the subdivision and was again requested to surrender the title deed.

That on 29th October 2018, the Plaintiff's Advocate wrote to the Defendant's Advocate enclosing the title deed and, contrary to the consent order, purported to allocate to the Plaintiff the portion marked A on the surveyor's sketch map which had been earlier forwarded by the Defendant for the Plaintiff's signature.

The Defendant states that he wrote to the Deputy Registrar Kisumu on 1st of November 2018 in compliance with the consent order, forwarding the ground sketch and selecting the part marked A. That the Deputy Registrar acknowledged receipt of the same on 10th December 2018.

That a licensed surveyor from Kolmans wrote to the Defendant's Advocate on 14th January 2019, enclosing the original mutation No. 04415503 which required the signature of the proprietors to enable the issuance of the 2 new titles. That the Defendant's advocate relayed this request to the Plaintiff's advocate via email and requested the Plaintiff's Advocate to share the information with the client for his confirmation so that they may arrange to attend the Plaintiff's Advocates office with the originals for execution by the Plaintiff at a date and time convenient to the Plaintiff.

The Defendant states that the Plaintiff's Advocate instead replied via email, requesting a response to his letter of 29th October 2018. That Defendant's Advocate's response was that the parties had to comply with the consent order. The Plaintiff's Advocate replied insisting that he was not ready to comply with the consent order unless his client was given priority in selecting which parcel title should be issued in his client's name. That unless the court intervenes to enforce the consent order, it would be impossible to finally put the matter to rest.

The Plaintiff's Response

The Plaintiff filed a replying affidavit stating that sometime in late 2017, his Advocate called him to his office and informed him of the court judgment. That he opted for the subdivision of the suit property into two shares. That sometime in 2018, his Advocate had informed him that the Defendant's Advocate had indicated that his client wished to have the property subdivided by a surveyor of his choice, but the Plaintiff was apprehensive that he would get a raw deal but his Advocate assured him that all would be well.

The Plaintiff stated that he lives on the suit property which is partly developed by him whereas the Defendant never invested a penny on the property. That his Advocate had told him that since the Defendant's surveyor would undertake the subdivision, he would chose the part to take and therefore the Plaintiff gave his consent.

The Plaintiff stated that he elected to take side A of the subdivision which comprised his residence, hotel (Kisumu Beach Resort), staff quarters and some kiosks. That these developments were put up by the Plaintiff at his own cost including bank loans. That side B of the subdivision comprised guest rooms and shades. That he was appalled to learn that the Defendant wished to have side A together with all of his developments to his detriment.

The Plaintiff stated that his Advocate informed him that he misapprehended the contents of a proposed consent which had the effect of allowing the Defendant to use his surveyor to undertake the subdivision and at the same time select which side of the subdivision to take. That this was an honest mistake on the Advocate's part which should not be visited on an innocent litigant. That it would be unfair to gift away his lifetime investment to his detriment and subject him to a life of misery and poverty. That it was only reasonable that the Defendant having carried out the survey, the Plaintiff should be allowed to choose his side first, which was obviously Side A of the subdivision.

The Plaintiff's Advocate also swore a replying affidavit echoing the averments of the Plaintiff as above.

Defendant's Submissions

Counsel for the Defendant submitted that it is settled law that a consent by an Advocate is binding upon the client, and that the Plaintiff's assertion that his Advocate made a mistake signing the consent as drawn cannot be accepted by the court. That no evidence that the Advocate acted negative to instructions has been placed before the court. That the consent was drafted on 5th June 2018 and filed over a month later on 4th July 2018. That the same was forwarded to the Plaintiff's Advocate who returned it after only about 7 days for filing in court.

Counsel cited ***Tropical Food Products International Limited v Eastern and Southern African Trade Development Bank (The PTA Bank) [2007] eKLR*** for the proposition that the court can set aside a consent order on the grounds that the parties were under a common and fundamental misapprehension either as to facts or as to their relative and respective rights. Counsel contended that even if the Plaintiff was under misapprehension, it is settled law that the mistake must be common by the parties, and in this case it was not.

Counsel also cited ***Hassanali Holdings v Citizen Cinema Corporation Limited [2005] eKLR*** which held that the mistake should be common to both parties to a pact, indicating that the parties were not acting with the meeting of the minds ie. *ad idem*. Counsel submitted that a party seeking to set aside a consent order has to establish 2 elements: the mistake is common among the parties entering the consent; and the mistake must be mutual.

Counsel asserted that the Defendant did not misapprehend the facts, and further that the Defendant has borne all the costs of surveying, subdividing and transferring the suit property and it was therefore self-evident that it was his intention to give himself priority to select a portion first.

Plaintiff's Submissions

The Plaintiff's Counsel submitted that pursuant to a proposal for subdivision of the property mooted by the Defendant, a consent was forwarded to the Plaintiff's Counsel to execute and, without giving it much thought, the Plaintiff's Counsel informed his client and advised that he would have first priority to choose which part of the portions he would take since the subdivision was carried out by the Defendant. That it later turned out that the defence cunningly provided for the Defendant to have first priority in choosing the portion to take. That as soon as the mistake was realised, there was an arrangement to apply to set aside the consent but Counsel for the Defendant moved with speed to file this application to enforce the consent before the Plaintiff filed his. That the mistake by Counsel should not be visited on an innocent client. That the mistake was honest and hence excusable.

Issues for Determination

1. Circumstances where consent orders can be varied or set aside on the ground of mistake

In ***Flora Wasike v Destima Wamboko [1988] 1 KAR 625***, Hancox JA (as the then was) held:

“It is now settled law that a consent judgement 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. Those, in essence, are the principles which the learned Judge should have applied to determine the application before him.”

The Court of Appeal in ***Tropical Food Products International Limited v Eastern and Southern African Trade Development Bank (The PTA Bank) [2007] eKLR*** was in agreement with the Trial Judge's summary of the grounds upon which a consent order can be varied reviewed or set aside, namely: fraud; mistake; collusion; an agreement being contrary to the policy of the court; absence of sufficient material facts; ignorance of material facts; and any general reason which may enable a court to vary or set aside an agreement. The Court of Appeal then went further to analyse the ground of mistake, holding that “equity will come to the aid of a party pleading mistake without distinguishing, as the common law did, whether it was one of fact or law, or that it was common, mutual or unilateral.” The Court cited with approval Lord Denning in ***Solle v Butcher [1949] 2 All ER 1107***:

“Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground... The court had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained. *Torrance v. Bolton* (19). This branch of equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental, or if one party knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake.”

It follows therefore that a consent order can be varied or set aside on the ground of a unilateral mistake, contrary to the assertions of the Defendant's Counsel in his submissions. The gist of the Plaintiff's averments is that his Advocate's mistake should not be visited upon him and it is only fair and reasonable that he gets first priority in selecting his preferred portion.

Guidance on whether to include the Plaintiff's averments above as an issue for determination in this matter is persuasively provided by the South African Supreme Court of Appeal decision in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634-635***, which has come to be known as the *Plascon-Evans* rule. The Court held that where an Applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the Respondent together with the admitted or undenied facts in the Applicant's founding affidavit which provide the factual basis for determination, unless the dispute is not genuine or the Respondent's allegations are implausible, far-fetched or clearly untenable:

“If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the

applicant is entitled to the final relief which he seeks. . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.”

Even though the Plaintiff has not adduced any affidavit evidence to demonstrate the intent with which his Advocate entered into the consent agreement, from the totality of the evidence adduced herein, it is apparent that the Plaintiff’s assertion that his Advocate made an honest mistake is credible. In his letter to the Defendant’s Advocate dated 29th October 2018, the Plaintiff’s Advocate enclosed the original title deed and informed the Defendant’s Advocate that his client had selected the portion of the proposed sub-division marked A, apparently proceeding on the assumption that the Plaintiff had the first priority to select. The Plaintiff’s Advocate letter to the Defendant’s Advocate dated 29th January 2019 seeking a response to his first letter further reinforces the credibility of his claim that his apprehension of the consent was that his client was to select his preferred portion first. That this was a unilateral mistake on his part.

The question that will then follow is whether the Advocate’s unilateral mistake is a sufficient ground to vary or set aside the consent order.

2. Whether the Defendant’s Advocate’s mistake is sufficient ground to vary or set aside the consent order

Varying the order would essentially mean rectifying the contract between the parties. The elements that should be present in order to allow for rectification of a contract on the ground of a unilateral mistake are set out in ***Thomas Bates & Son v Wyndham’s (Lingerie) Ltd [1981] 1 All ER 1077*** at 1086 as per Buckley L.J.:

“...it must be shown: first, that one party A erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A; thirdly, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely, that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A’s intention on the ground that the mistake was not, at the time of execution of the document, a common mistake.”

Regarding the question of knowledge of the mistake by the other party *Chitty on Contracts 32nd Ed.* at Section 3-070 elaborates as follows:

“On current authority it appears that the knowledge must be actual knowledge. It is not enough that the party against whom rectification is sought may have suspected that a mistake had been made; but if a party wilfully shuts its eyes to the obvious, or wilfully and recklessly fails to make such inquiries as an honest and reasonable man would make, that will count as actual knowledge.”

Where the other party did not have positive knowledge of the claimant’s mistake, or did not know what the claimant intended, and the contract result in an unconscionable bargain, it ought to be rescinded or set aside on equitable terms. In ***Commission for the New Towns v Cooper (GB) Ltd [1995] 2 All ER 929*** at 946, Stuart-Smith L.J. held:

“where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B’s attention from discovering the mistake ..., and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted. A’s conduct is unconscionable and he cannot insist on performance in accordance to the strict letter of the contract; that is sufficient for rescission.”

Upon receiving the Plaintiff’s Advocate’s letter of 29th October 2018 which implied the Plaintiff and his Advocate seemed to have misapprehended the import of the consent agreement, the reaction of the Defendant’s Advocate was to immediately write to the Kisumu ELC Deputy Registrar seeking to extract the Consent Order. It is only after the Consent Order was extracted on 10th December 2018 that the Defendant’s Advocate wrote to the Plaintiff’s Advocate via email on 16th January 2019. The Defendant’s Advocate email did not address the issue of the Plaintiff’s Advocate apparent misapprehension of the consent but instead forwarded a scanned copy of the mutation form and sought to fix a date for the signing of the same. It was only until the Plaintiff’s Advocate sought a response to his letter of 29th October 2018 that the Plaintiff’s Advocate addressed the issue.

Granted, the Defendant’s Advocate silence in this manner cannot automatically be regarded as misrepresentation, more so in light of the dearth of evidence on the side of the Plaintiff. However, the effect of the chain of events as discerned from the facts is that the consent agreement has resulted in an unconscionable bargain. As the consent order stands, the Defendant is at liberty to select the portion of the sub-divided property comprising of the Plaintiff’s residence, hotel and other facilities that the Plaintiff has developed with his own efforts and resources. It is apparent that the intentions of the parties were not aligned at the time of entering into the consent agreement, which is therefore ripe for rescission.

The upshot of the above is that the Defendant’s application is hereby dismissed and the consent order set aside; and that the Plaintiff is ordered to compensate the Defendant for the costs of survey and sub-division carried out by Kolmans.

DATED AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

Mr. Indimuli holding brief for Taib for Defendant.

No appearance for Plaintiff.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE