



**Maina v Mbuthii; Kimiti (Interested Party) (Environment & Land Case 8 of 2013) [2020] KEELC 3120 (KLR) (13 March 2020) (Ruling)**

*Margeline Wambui Maina v Leonard Maina Mbuthii; Stephen Kabuthi Kimiti(Interested Party) [2020] eKLR*

Neutral citation: [2020] KEELC 3120 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 8 OF 2013**

**EC CHERONO, J  
MARCH 13, 2020**

**BETWEEN**

**MARGELINE WAMBUI MAINA ..... PLAINTIFF**

**AND**

**LEONARD MAINA MBUTHII ..... DEFENDANT**

**AND**

**STEPHEN KABUTHI KIMITI ..... INTERESTED PARTY**

**RULING**

1. The application before me is the Notice of Motion dated 23<sup>rd</sup> July 2018 brought under Section 1A and B CPA, Order 9 Rule 9 (a), Order 36 Rule 2 and 10 CPR and all enabling provisions of law. The applicant is seeking the following orders:
  1. Spent.
  2. That the consent order herein dated 14<sup>th</sup> May 2018 and all consequential orders be reviewed and set aside.
  3. That the plaintiff be granted leave to be heard and defend himself by giving evidence herein.
  4. Costs be in the cause.
2. The application is premised on grounds shown on the face of the said application and a supporting affidavit sworn by the applicant Leonard Maina Mbuthii. According to the applicant, they entered into a consent with the plaintiff and the interested party on 14<sup>th</sup> May 2018. The nature of the said consent was that the interested party was to get a half acre ½ out of land parcel No. Kiine/Kibingoti/



Nguguine/3369 in which he was the registered owner. The defendant/applicant deponed that the interested party was not entitled to the said half acre  $\frac{1}{2}$  because he was not purchasing the same but he paid the sum of Ksh. 505,200/= to a shylock firm on his behalf so that he (defendant) could be released the original title deed for the said land. The applicant stated that since the suit land is a family land and they depend on it for their livelihood, he sat down with his family later where they agreed to refund the interested party the said amount in accordance with Clause 7 (a) and 7 (ii) of the agreement dated 14<sup>th</sup> November 2011. The applicant further deponed that him and his family are willing to refund the said sum in two monthly instalments as he entered into the said consent without consulting his family first and after he informed them of what he had done, his family came up with the idea of refunding the said amount since they have nowhere to stay and settle.

3. The applicant in his supplementary affidavit sworn on 16<sup>th</sup> October 2019 deponed that the consent order dated 14<sup>th</sup> May 2018 was entered in error and under misrepresentation and mistake. He stated that the interested party has only paid him Ksh. 505,000/= and that the value of half acre ( $\frac{1}{2}$ ) in his area is Ksh. 800,000/=. He further stated that there is a shortfall of Ksh. 300,000/= that was not captured in the consent order which was done hurriedly. The applicant also stated that he will transfer the land equivalent to half acre ( $\frac{1}{2}$ ) to the interested party upon him paying the full purchase price of Ksh. 800,000/= equivalent to the value of half acre ( $\frac{1}{2}$ ) hence the same should be reviewed and added a clause that the interested party will receive the land upon payment of Ksh. 300,000/= to him.
4. The application is opposed with a replying affidavit sworn by the interested party Stephen Kabuthi Kimiti on 25<sup>th</sup> October 2019. On his part, the interested party deponed that the application is an afterthought, it's an abuse of the due process of the Court and without merit. He stated that on 14<sup>th</sup> May 2018, the matter had come up for hearing before Hon. Justice S.N. Mukunya who asked the parties whether there was a possibility of amicably settling the issues involving the interested party and every party was agreeable. He deponed that the Court directed the parties to look for a suitable place to hold the meeting and they agreed to meet outside the Court room. He stated that there were several issues raised by the plaintiff concerning the defendant who was said to be selling family properties without notice to other family members. He said that the plaintiff and the defendant could not agree on how to share family properties remaining but it was agreed that the interested party gets half ( $\frac{1}{2}$ ) acre out of land parcel No. Kiine/Kibingoti/Nguguine/3369. He felt that that was less than what he could have gotten but for the sake of an amicable settlement, he compromised and agreed to take the half ( $\frac{1}{2}$ ) acre. The interested party further deponed that they then went back to Court and recorded the consent. Due to pressure of work as there was a hearing in session, the Court directed that they do a handwritten consent order to be signed by all parties involved. He deponed that the consent was drawn and every person went through the consent order which was found to be agreeable and that all the terms agreed upon had been captured. They all freely and voluntarily signed the consent order which was later adopted and became an order of the Court. The interested party further deponed that the issues being raised by the defendant/applicant in the supplementary affidavit that the land he was to get is a family land and that the family sat down and agreed to refund back his money is not supported by the plaintiff who has not filed any affidavit to corroborate the same. He therefore believes that this application is an afterthought and not an agreement of the family members as alleged.

### **1<sup>st</sup> Defendant/applicant's Submissions**

5. The 1<sup>st</sup> defendant submitted that the consent order dated 14/5/2018 was entered in error and under misrepresentation and mistake. He relied in the following authorities:
  1. Flora N. Wasike Vs Destimo Wamboko C.A. No. 81 of 1984 (Kisumu) reported in (1988) e K.L.R.



2. Setton on judgments and orders (7<sup>th</sup> Edition), Vol. 1 Pg 124.
3. Brook Bond Liebig Ltd Vs Mallya (1975) E.A 266.
4. Birket Vs Arcon Business Machines Ltd (1999) 2 All E.R. 429.
5. Makula international Ltd Vs His Eminence Cardinal Nsubuga & Another (1982) HCB II, the Uganda Court of Appeal.
6. The applicant further submitted that the omission in the consent constituted “any other sufficient reason” on the basis of which review could be justified.
7. The applicant further relied on the following:
  6. National Bank of Kenya Vs Ndungu Njau (Civil Appeal No. 211 of 1996 (UR)).

### **Interested Party’s Submissions**

8. The interested party submitted that the defendant is the registered owner of L.R. Kiine/Kibingoti/ Nguguine/3369 and on 14<sup>th</sup> May 2018, there was a consent order that was recorded by all the parties to the effect that the interested party/applicant would get ½ acre out of L.R. No. Kiine/Kibingoti/ Nguguine/3369. He stated that once the said order was signed on 23<sup>rd</sup> May 2018, the interested party requested the applicant to sign the necessary documents for sub-division so as to create two (2) portions one of which would be transferred to the interested party as per the consent order. However, the defendant/applicant refused to sign the said documents stating that he had changed his mind alleging that the land was worth more than what the interested party had paid him. The interested party stated that on the day the consent was entered, the defendant was present and never at any point objected to the said consent being entered into. He cited the following cases:
  1. Juma Musa Ali Vs Biasha Omar Seif (2018) e K.L.R.
  2. Brooke Bond Liebig (T) Ltd Vs Mallya (1995) E.A. 266.
  3. Flora Wasike Vs Destimo Wamboko (1988) K.A.R 625.

### **Analysis And Decision**

9. I have considered the affidavit evidence and the annexures together with the submissions by counsels for the defendant and the interested party. The issue under dispute in this application is a consent order entered into between the parties on 14<sup>th</sup> May 2018. The circumstance under which the said consent was entered into has been explained by the interested party under paragraph 5 and 6 of his replying affidavit sworn on 25<sup>th</sup> October 2019 where he deponed as follows:

“5. That on 14<sup>th</sup> May 2018, the matter had come up for hearing before Honourable Justice S.N. Mukunya who asked the parties whether there was a possibility of amicably settling the issues involving the interested party and every party was agreeable.

6. That the Court directed that the parties look for a suitable place to hold the meeting, and we met outside Environment and Land Court room. There were several issues raised by the plaintiff concerning the defendant, as the defendant was said to be selling family properties without notice to any family member. The plaintiff and the defendant could not agree on how to share the family properties remaining, but it was agreed that I get ½ acre out of land



parcel Number Kiine/Kibingoti/Nguguine/3369. I felt the area was less than what I would have demanded but for an amicable out of Court settlement, I compromised and agreed to take the ½ acre”.

9. Those averments given on oath were not controverted by the defendant. In paragraph 9 of his supplementary affidavit sworn on 16<sup>th</sup> October 2019, the defendant stated as follows:

“9. That I will transfer the land equivalent to ½ acre to the interested party upon him pay the full purchase price of Ksh. 800,000/= equivalent to the value of ½ acre hence the same should be reviewed and added a clause that the interested party will receive the land upon payment of Ksh. 300,000/= to me”.

10. My reading of the applicant/defendant’s supporting affidavit particularly the supplementary affidavit sworn on 16<sup>th</sup> October 2019 is that the defendant’s complaint is on the adequacy of the consideration. The defendant is complaining that the current value of half an acre of land in the area is worth Ksh. 800,000/= and not Ksh. 505,000/= which the interested party paid him. This Court did not have the benefit of the evidence how the parties entered into the agreement for the sale of the half acre land. It is not therefore the duty of this Honourable Court to rewrite agreements for parties but to enforce contractual obligation by the parties. The defendant/applicant has not alluded to any acts unconscionable or undue influence while he entered into the sale agreement with the interested party or any other vitiating circumstance that would call for the setting aside the impugned sale agreement or consent order. The doctrine of undue influence has not been alluded to by the defendant to warrant this Court interfere with the sale agreement.

11. Lord Nicholls in the case of Royal Bank of Scotland Vs Etridge (No. 2) A.C. 773 succinctly set out the essence of the doctrine of undue influence as follows:

“The law will investigate the manner in which the intention to enter into the transaction was secured; how the intention was procured; in the often repealed words of Lord Eldon L.C, from as long ago as 1807 (Hugvein Vs Basely (1807) 14 Ves Jun 273 at 300, (1803 – 13) All E.R. Rep 1 at 13). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or “undue” influence, and hence unacceptable whenever the consent thus procured ought not fairly to be treated as the expression of a person’s free will”.

12. I agree with the position of the law as espoused in the above decision. The other issue arising from the pleadings for my consideration in this application is whether the consent order should be reviewed so that the interested party pays an additional sum of Ksh. 300,000/= to the defendant to make a total of Ksh. 800,000/= which is the current value of half ½ an acre in the area? The place of consideration in a contract was discussed in the case of Namusisi And Others Vs Ntaabazi (2006) 1 E.A 247 where it was held by Tse Kooko, JSC as follows:

“Consideration and performance mean two different things. Consideration is crucial at the time the contract is formed and its sufficiency is really not the business of the Courts ..... under the English Law of Contract which is the applicable law in Uganda, consideration is important and consideration is an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable ..... Thus the doctrine of consideration implies or means reciprocity .... The Courts will not inquire into the sufficiency or adequacy of the consideration as long as there



is some consideration ..... A peppercorn does not cease to be good consideration if it is established that the promise does not like peppercorn and will throw it away”.

13. Again in the case of Mohamed Badrundin M. Dhanji Vs Lulu & Co. (1960) E.A 541, Crawshaw, J. held that:

“A promise or unequivocal acceptance of liability, intended to be binding, intended to be acted upon, and in fact acted on, is binding. Thus a creditor is not allowed to enforce a debt which he has deliberately agreed to waive if the debtor has carried on business or in some other way changed his position in relation to the waiver ..... Unilateral promises have long been enforced so long as the act of forbearance is done on the faith of the promise and at the request of the promissory, express or implied. The act done is then in itself sufficient consideration for the promise, even though it arises ex post facto”.

14. The defendant in this case admitted having been paid the agreed consideration of Ksh. 505,000/= for half acre land which the interested party paid in full. He cannot now be heard saying that the consideration is insufficient or inadequate. The sufficiency or adequacy of a contract is not the business of the Court. In my view the applicant has not given evidence of fraud, collusion when entering into the agreement contrary to the policy of this Honourable Court or any sufficient material facts or reasons which would enable the Court set aside an agreement to warrant the setting aside the consent order entered on 14<sup>th</sup> May 2018. That was the holding by Law J.A. in the case of Brooke Bond Liebig (t) Ltd Vs Mallya (1995) E.A 226:

“The circumstances in which a consent judgment may be interfered with were considered by this Court in Hirani Vs Kassam (1952) 19 E.A.C.A 131, where the following passage from seton on judgments and orders, 7<sup>th</sup> edition, Vol. I.P. 124 was approved:

“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 ..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court ..... or if consent was given without sufficient material facts, or in misrepresentation or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement”.

15. I entirely agree with the decision of the learned Judge in the above decision. In the final analysis, I find no merit in the Notice of Motion dated 24<sup>th</sup> July 2018. Suffice to add that the authorities cited by counsel for the applicant are distinguishable and inapplicable in this case. Consequently, I hereby dismiss the said application with costs to the interested party.

**READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 13<sup>TH</sup> DAY OF MARCH, 2020.**

**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

In the presence of:

Mr. Asiimwe holding brief for Maina Kagio

Ndegwa holding brief for Wangechi Munene

Ms Maina holding brief for Ann Thungu



Mbogo, Court clerk

