



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC CASE NO. 235 OF 2014**

**SELLY J. BUSIENEL.....PLAINTIFF**

**VERSUS**

**RICHARD K. BUSIENEL.....1<sup>ST</sup> DEFENDANT**

**JACKSON K. CHEBET.....2<sup>ND</sup> DEFENDANT**

**RULING**

This ruling is in respect of an application dated 10<sup>th</sup> June 2019 seeking for the following orders:

a) That this honourable court be pleased to issue an order directing the court's Registrar to execute all the requisite survey and transfer documents on behalf of the 1<sup>st</sup> defendant in order to facilitate:

I. The survey, subdivision and excision of fifty (50) acres of land from the lower portion of parcel registered as LR No 6459/5

II. The transfer of fifty (50) acres to the 2<sup>nd</sup> defendant in compliance with the orders issued by the honourable court on 9<sup>th</sup> April 2019.

By a consent of the parties recorded on 9<sup>th</sup> April 2019 and adopted as an order of the court on the same date, the plaintiff and the 1<sup>st</sup> defendant agreed to pay the 2<sup>nd</sup> defendant Kshs.34,340,000/- within (sixty) 60 days. The consent stated that in default of payment of the said Kshs.34,340,000/- within the said period of sixty (60) days, the 1<sup>st</sup> defendant would transfer to the 2<sup>nd</sup> defendant fifty (50) acres of land to be excised from the lower portion of the parcel of land registered as L.R No. 6459/5.

The said sixty (60) days lapsed on 9<sup>th</sup> June 2019 and the 1<sup>st</sup> defendant is yet to pay the 2<sup>nd</sup> defendant the agreed Kshs.34,340,000/-. The 1<sup>st</sup> defendant is therefore in default in as far as payment of Kshs.34,340,000/- to the 2<sup>nd</sup> Defendant is concerned.

Counsel submitted that the only option available to the 2<sup>nd</sup> defendant is for the 1<sup>st</sup> defendant to transfer to him fifty (50) acres of land to be excised from the lower portion of parcel of land registered as L.R No. 6459/5, whose title has since been deposited in this honourable court.

In response to the application, the 1<sup>st</sup> defendant filed a replying affidavit dated 29<sup>th</sup> June 2019 in which he pleads for more time to enable him raise the said Kshs.34,340,000/- so as to be able to pay off the 2<sup>nd</sup> defendant.

The 1<sup>st</sup> defendant further states that his family is not in agreement that he gives out the suit land as the same is their main source of livelihood. He goes further to state at paragraph 9 of his affidavit that he will settle the amount within 30 days from the date of directions of the court.

Counsel urged the court to allow the application as prayed.

**ANALYSIS AND DETERMINATION**

The issues for determination are as to whether the court can vary the terms of a consent and whether the court can extend time for a party to comply with a consent order. From the replying affidavit of the 1<sup>st</sup> defendant, it seems he is seeking that the court gives him time to comply with the terms of the consent order. This is something that the respondent should have taken the initiative to discuss with the applicant to extend time within which to comply with the order. He waited until the applicant filed the application in court for compliance with the order. He further states that the family does not want him to sell the land. This shows bad faith and unwillingness to comply with the order.

It is trite that the court can only vary the terms of a consent order where there are compelling grounds for it to do so. A consent order has the same effect as a contract and can only be set aside on the same grounds that a contract can be set aside. These grounds are where;

- a) There is proof that consent was obtained through fraud or collusion.
- b) The agreement is arrived at in a way that is contrary to the court's policy.
- c) There is failure to disclose or ignorance of material facts.

In **East African Portland Cement Limited —vs- Superior Homes Limited (2014) eKLR**, where the Court of Appeal agreed with a line of decisions where courts have held as follows;

*"a consent order 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. "*

In the same case the Court of Appeal agreed with the decision in **Contractors Ltd -vs- Margaret Oparanya** where the court stated as follows;

*"This court has qualified or conditional discretion when it comes to interfering with consent judgments or orders. Moreover, where the consent order or Judgment is still executory, the court may refuse to enforce it if it would be inequitable to do so. The mode of paying the debt, then is part of the consent Judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. "*

In the English case of **PURCEL V. F. C. TRIGELL LTD, (trading as SOUTHERN WINDOW AND GENERAL CLEANING CO. and Another), [1970] 3 ALL ER671, where Winn, LJ**, opined:

*It seems to me that, if a consent order is to be set aside, it can 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, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract. "*

Further in the case of **The Board of Trustees National Social Security Fund —vs- Michael Mwalo (2015) eKLR**, where the Court of Appeal stated as follows;

*"The position is clearly set out in Setton on Judgments and Orders (7<sup>TH</sup> Edn), Vol. 1pg 124 as follows- "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...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. "*

In the case of **Kenya Commercial Bank Ltd Versus Specialized Engineering Co. Ltd [1982] KIR 485**, it was held that 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 representation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. Justice Harris at page 493 opined:

*"The marking by a court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such an order is not lightly to be set aside or varied save by consent of one or other of the recognized grounds."*

I find that the 1<sup>st</sup> defendant has not proved that there are any vitiating factors which can make the court set aside the consent order, The consent order remains a valid order of the court having been adopted as such and has not been set aside for any reason. In the absence of a substantive application and any reasonable ground as to why the court should exercise its discretion in favour of extending time to enable the 1<sup>st</sup> defendant comply with the consent order, it will be unjust for the court to interfere with the consent order.

I find that the application dated 10<sup>th</sup> June 2019 has merit and is hereby allowed as prayed with costs to the 2<sup>nd</sup> defendant.

**DATED and DELIVERED at ELDORET this 10<sup>TH</sup> DAY OF MARCH, 2020**

**M. A. ODENY**

**JUDGE**

**RULING** read in open court in the presence of Mr. Maina 1<sup>st</sup> Defendant/Respondent, Kipnyekwei for 2<sup>nd</sup> Defendant/Applicant and in the absence of Mr. Omusundi for Plaintiff

