



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 46 OF 2015

PROTUS HAMISI WAMBADA.....PLAINTIFF/RESPONDENT

ELIZABETH SHIJEYI SHAVA.....DEFENDANT/RESPONDENT

AND

ELDORET HOSPITAL.....INTERESTED PARTY/APPLICANT

RULING

This ruling is in respect of an application dated 19th December 2019 by the interested party applicant seeking for the following orders:

- a) Spent
- b) The consent order dated 20th November 2017 executed between the Plaintiff and the defendant and filed in court on 21st November 2017 and adopted as an order of the court be set aside together with all consequential orders.
- c) The Chief Magistrates Civil Suit No. 150 of 2019 be transferred to this court for hearing and disposal.
- d) The suit be set down for hearing and disposal on merit upon consolidation with CMCC No. 150 of 2019.
- e) Costs.

Counsel agreed to canvas the application vide written submissions which were dully filed

APPLICANT'S CASE

Counsel for the applicant submitted that the consent order was obtained fraudulently by misleading the court. That the plaintiff's advocate took advantage of the advocate holding brief for the applicant who did not have knowledge of the material facts of the case and did not participate in the proceedings.

Counsel further submitted that the consent was a collusion between the plaintiff and the defendant to defeat the applicant's ownership rights over parcel No. KAPSERET/KAPARET BLOCK 10(LAMAYWET)/11. The consent was recorded in the absence of the applicant's advocate and on a date when the case had been fixed for mention to confirm compliance with order 11 of the rules.

Mr. Kamau counsel for the applicant submitted that there were no negotiations regarding any settlement and neither the applicant nor its advocate was aware of the existence of the said consent. Further that the defendant having sold the suit land to the applicant, had no right to execute the consent. The defendant was also not present in court and that the order was obtained fraudulently with the sole intention of depriving the applicant legal rights over the suit parcel.

The Applicant filed a further affidavit and written submissions on 25th February 2020 where he deponed that on 17th September 2019 his secretary received a court order with summons to enter appearance in Civil Magistrate's E&L case No. 150 of 2019. He was out of town and instructed her to forward them to the advocates on record. On returning to his office from his trip he was surprised to see that the court papers indicated that the suit parcel had purportedly by consent between the plaintiff and the defendant been handed over to the plaintiff. On contacting the advocates on record he said he was not party to the consent and was not aware of its existence as the same was executed by the Plaintiff and the Defendant in his absence and to date the consent has not been served on him.

Counsel submitted that by a letter dated 27th September 2017 addressed to the interested party they had informed the interested party that the suit had been fixed for mention on 21st November 2017 to confirm compliance with the rules which happens to be the date the consent was recorded.

Mr. Kamau Counsel for the interested party stated that at no time had he be instructed to record such a consent as this would go contrary to the purpose of making the application to be enjoined in the first place.

It was counsel's submission that at the time the consent was recorded, the applicant had already received all compliance documents from the defendants' advocates and was no longer interested in the suit as its rights were now fully protected as per the annexures filed with the application

Counsel further submitted that at the time the consent was recorded, parcel No. KAPSARET/KAPSARET BLOCK 10(LAMAYWET)/11 had ceased to exist on 16th October 2015 and the said order was devoid of material facts and cannot be used to obtain orders against the interested party or the current registered proprietor. He referred to a copy of the green card marked as EH13. That the consent was an agreement to dispose of land which ought to have been in writing and signed by all parties as required by Section 3(3) of Cap 23 therefore the consent is illegal and the court cannot aid an illegality.

Counsel cited cases on setting aside of consent judgments like the case of **Samson Munikah practicing as Munikah & Company Advocates vs Wedube Estates Limited Nairobi Civil Appeal No. 126 of 2005** where the court stated that:

*“This appeal raises the vexed question: (of) what are the circumstances in which a consent judgment may be set aside? In **BROKE BOND LIEBIG (T) Ltd V MALLYA (1975) E.A. 266** the then court of appeal for East Africa set out the circumstances in which a judgment freely entered into by parties to a dispute in court would be set aside:-*

*“The circumstances in which a consent judgment may be interfered with were considered by this court in **Hirani V Kassar (1952)19 EACA 131** where the following passage from **Section on judgments and orders, 7th Edition vol. 1, P. 124** was approved:*

“Prima Facie, any order made in the presence and with the consent of the 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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement”.

For his part Ag. Vice President Mustafa had this to say:

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.

In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all material facts and there could have been no mistake or misunderstanding.

The above decision was quoted with approval in **Miliman ELC No. 364 of 2011 Shakhhalaga Khwa Jirongo & Sololo Outlets Limited V. National Social Security Fund**

Counsel submitted that Mr. Okara counsel for the plaintiff did not mention the fact of the suit land being transferred to or being registered in the name the plaintiff because this would have very easily alerted the advocate holding brief. Counsel submitted that this was fraudulent as the advocate holding brief was not aware of what was being recorded.

Mr Kamau also listed the following issues to prove errors on the face of record that Miss Kibichy did not participate, there is nothing to show that the court consulted Miss. Kibichy on the consent and knew the contents of the consent, and finally that Mr. Okara did not show the consent to Miss. Kibichy.

Counsel further submitted that the nature of the consent was that of compromising the suit which is covered by Order 25 Rule 5 which provides as follows:

“Where it is proved to the satisfaction of the court, and the court after hearing the parties direct~~s~~, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or part of the subject matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith”.

This order stipulates that where parties wish to compromise a suit there must be the following:

- a) The compromise must be proved.
- b) The court must be satisfied.

- c) There must be a hearing of all parties concerned.
- d) The compromise agreement must be lawful.
- e) There must be a specific order by the court that the agreement be recorded.

Counsel submitted that it is the interested party's case that all the above elements are lacking from the record and this presents manifest errors and omissions on the face of the record. It is the interested party's submission that any compromise must be in writing and signed by all parties concerned.

Mr Kamau further submitted that the consent executed between the Plaintiff and the Defendant on 20th November, 2017 and filed in court on 21st November, 2017 was an agreement to dispose of an interest in land and that that the agreement is subject to the provisions of the Contract Act Cap 23. Counsel cited the case of **Leo Investment Limited V. Estuarine Estate Limited ELC Civil Suit No. 2067 of 2007** where the court said:

".....The resultant scenario is that there was no contract executed by both parties as required under section 3(3) of the law of contract Act. The key issue which then arises out of this scenario is the question as to whether or not the Plaintiff's suit is statute barred under the provision of section 3(3) of the law of contract Act....."The court then went on:-

Counsel therefore urged the court to set aside the consent judgment recorded on 20th November 2017.

On the issue of transfer of **E&L CMCC No. 150 of 2019** counsel submitted that the same should be transferred to enable the court hear and determine the matter. Counsel further cited the ruling of the court in **Protus Hamisi Wambanda v Elizabeth Shijeyi Shava [2017] eKLR** where the court had this to say:

"Would it be tenable for the applicant to file a separate suit against the defendant over the same subject matter? My answer to this would be that such a route would increase costs for the parties and make an unfair demand on the court's time and other resources which can be put to better use to serve other litigants. The other worst case scenario would be where similar disputes over the same subject matter have different outcomes which can embarrass the courts".

Counsel also cited the case of Hanzhou **Agrochemicals Industries Ltd Vs. Panda Flowers Ltd (2012) e KLR** where the court addressed the conditions to be considered in determining whether or not to grant an order transferring a suit, thus:

"In my view which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witness, balance of convenience questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends on the facts and the circumstances of a particular case".

Counsel therefore urged the court to transfer **ELDORET E&L CMCC No. 150 of 2019** to this court for conclusion.

DEFENDANT/RESPONDENT'S CASE

Counsel for the defendant filed submissions and supported the application seeking to set aside the consent order as the defendant was not present in court on the date the consent order was made. It was further counsel's submission that the defendant could not have been part of the same as the record of the days speaks for itself.

She cited the case of **Flora N Wasike v Destimo Wamboko (1982-1988) 1 KAR 625** wherein **Hancox J A** quoted a section from **Judgments and Orders (7th edition) volume 1 page 124** which was quoted in **HIRAN VS KASSAM (1952) 19 EACA 131**, 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 ... 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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."

The defendant denies that she was part if any collusion to obtain the consent order and states that the Plaintiff's advocate committed acts of forgery as regards her signature and therefore there are overwhelming reasons for the court to set aside the consent order.

Counsel submitted that the consent was obtained without the defendant's knowledge. The court record shows that the plaintiff and the defendant had agreed and it was important for the defendant to be in court to confirm the terms of the negotiations.

It was counsel's submission that on the day the consent was entered, the matter had been listed for mention for compliance with order 11. The defendant further stated that her signature was forged and is in the process of referring the matter to the criminal investigative agencies. Counsel urged the court to set aside the consent order.

PLAINTIFF/RESPONDENT'S CASE

Counsel for the plaintiff opposed the application and submitted that an application for review can only succeed if it can be shown that there has been discovery of new and important matters which after due diligence was not within the applicant's knowledge or could not be produced at the time the order was made or if it was shown that there was some apparent error on the face of the record or if there exists some other sufficient reason provided the application is made without unreasonable delay.

Counsel submitted that the order was made on 21st November 2017 yet the application for review came on 19th December 2019, more than 2 years after the order was made with no reasons being advanced for the delay. He relied on the case of **John Agina v Abdulwanad Sharif Aiwi, Civil Appeal No. 83 of 1992** and submitted that the delay was inordinate.

Mr. Okara submitted that the applicant has not shown that he took any steps to find out the position of this matter from its advocates. It is not in every case that a mistake committed by an advocate would be a ground for setting aside. He cited the case of **Flora N Wasike v Destimo Wamboko (1982-1988) 1 KAR 625** and submitted that a consent has a contractual effect and can only be set aside on such grounds as would obtain in a contract.

Counsel submitted further that an order put in place by consent of counsel is binding on all parties and cannot be varied unless it is shown to have been obtained by collusion, fraud, misapprehension of facts, material facts or if the agreement is contrary to the policy of the court and that no such circumstances obtain here.

Counsel relied on the case of **Koinange & 13 others (1986) KLR 3** where the court stated that the cardinal precept of the law of evidence is that he who alleges must prove. He also cited the case of **Ratilal Goordhanbhai Patel v Lalji Makanji (1957) EA 314 and Ulmila Mahindra Shah v Barclays Bank International (1979) KLR** where the court stated that the standard of proof is beyond the usual standard of balance of probabilities in civil cases but below proof beyond reasonable doubt.

Counsel also cited the case of **Yusuf Abdi Adan & Another v Hussein Ahmed Farah & 3 others, Civil Case No. 100 of 2016 (Nairobi)** and stated that the applicant having transferred the suit property to Trans County Developers Limited has lost interest in the suit and thus lost status as an interested party and urged the court to dismiss the case with costs.

ANALYSIS AND DETERMINATION

The issues for determination is as to whether the applicant has met the threshold for reviewing or setting aside a consent judgment and whether the **ELDORET E&L CMCC 150 of 2019** should be transferred to this court for hearing.

This is a case where the applicant herein was enjoined as an interested party upon application to the court. The court gave a ruling on 29th March 2017 whereby the applicant was allowed to file a response to the suit if any within 14 days.

On 20th November 2017 a consent order between the plaintiff and the defendant was recorded and adopted as an order of the court which is the subject matter of this application.

In the Court of Appeal in the case of *Brooke Bond Liebig Ltd V Mallya* [1975] EA 266 at 269 Law Ag P said:

"A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

In **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd** [1982] KLR 485, Harris J correctly held inter alia, that –

1. *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 misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.*

2. *A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.*

In **Hirani V. Kassam** [1952] 19 EACA 131 the Court of Appeal held;

*"It is now well 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 v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd** [1970] 3 All ER 671, Winn LJ said 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 the 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."

From the court record, which the court has perused, it indicates that Counsel for the plaintiff Mr. Okara had indicated to the court that the plaintiff and the defendant had agreed and they were in the process of filing a consent withdrawing the suit which he urged the court to adopt as an order of the court. He also stated that the suit property measuring 0.9 acres should be transferred to the plaintiff.

The record further states that the defendant was not present when the consent was recorded though there is a written consent letter purportedly signed by Buluma & Co. Advocates and the defendant ELIZABETH SHIJEYI SHAVA who has disowned the signature as a forgery. It is also on record that Ms. Kibichy was on record holding brief for Mr. Kamau for the interested party and did not object to the recording of the consent.

Counsel for the applicant stated that counsel holding brief was misled in recording the consent. This cannot be true as counsel was in court and had the opportunity to object or ask the court to put aside the matter for further instructions from the instructing counsel. The issue of counsel casually taking up matters in court without proper and adequate instructions has cost litigants their cases. When a counsel agrees to hold brief then he/she should be given full instructions to be able to be useful to the client and the court. Not taking up a brief and abandoning half way that the instructions were limited to applying for an adjournment. What if the adjournment is not allowed, do you abandon the case or proceed with it? This is what is happening in most of our courts which should be stemmed.

In this case counsel for the interested party had given instructions to Ms. Chesio who later handed over the brief to Ms Kibichy who was in court but did not object to the consent being recorded to withdraw the case. This cannot be categorized as mistake of counsel but negligence of counsel. What was the use of holding brief and not taking the interest of the client in the case?

This case will only benefit from the fact that the defendant was not in court when the consent was recorded and the fact that she claimed that she did not visit the offices of Buluma & Co Advocates and therefore did not sign the consent that was filed in court. I will give her the benefit of doubt. The court is not buying the assertion of the interested party's counsel that counsel that held brief was misled. This is a preposterous proposition which does not hold water.

The defendant having disowned that consent, it follows that the same was not obtained lawfully or legally which has to be interrogated further. The suit could therefore not be compromised without the participation of the parties concerned. In the Supreme Court of India case of **Gurpreet Singh V. Chatur Bhuj Goel (1988) AIR 400** the court held that :

“Under Rule 3 as it now stands when a claim in a suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them.....”

The omission to obtain a written agreement from the parties makes this matter suitable for setting aside the consent that did not meet the threshold of a contract. In the case of **MUNYIRI vs NDUNGUYA[1985] eKLR** Platt Ag JA held as follows:-

“However, we may observe that as there appears to be a good deal of argument about contents of some consent judgment and orders, it would be wise to obtain the signatures of the advocates, or the parties if they are present. In this way, it will then be clear that the terms were known and agreed to, at the time the consent order or judgment was entered into, and may help to avoid later recanting by the parties themselves, which is also a well- recognized feature of life, despite instructions earlier given to their advocates...”

Nyarangi JA stated that:

The advocates should have in this case appended their signatures to the judgment or registered their disapproval of the judgment as soon it was delivered. The judge should, as a precaution have full made a and careful note of what each advocate said to him which culminated in the consent judgment.

On the issue as to whether **ELDORET E&L CMCC 150 of 2019** should be transferred to this court for hearing Section 18 of the Civil Procedure Act provides;

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

The plaint in the lower court case is annexed to the application and on perusal of the same reveals that the suit land in this matter forms the subject matter in the case sought to be transferred. In the case of **Hanzhou Agrochemicals Industries Ltd. V Panda Flowers Lt. (2012) eKLR** the court held that:

“In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and maintaining the witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.

I find that in order for the issues to be effectually determined once and for all it would be prudent to transfer **ELDORET E&L CMCC 150 of 2019** to this court and be consolidated with this file for hearing and determination.

Finally there is one issue on the delay of filing this application. Counsel has not told the court why there was a delay of 2 years in bringing this application. Even though the court has granted the orders as prayed, the applicant must pay costs of this application to the plaintiff.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF MAY, 2020

M. A. ODENY

JUDGE