



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 106 OF 2013

KITALE INDUSTRIES.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

THE COUNTY GOVERNMENT OF TRANS-NZOIA.....2ND DEFENDANT

RULING

1. The application dated 1/11/2019 and filed in court on the same date has been brought by the plaintiff/applicant seeking the following orders:

(1) That the order made by the court on the 19/7/2018 marking the plaintiff's/applicant's case as withdrawn be reviewed and set aside and the plaintiff's suit be reinstated and heard on merit.

(2) That the applicant, do pay the costs of the application.

2. The application is brought under Article 50 and 159 of the Constitution, Sections 1A (1), 3, 3A, 63(c) of the Civil Procedure Act, Order 45 (1) (b) and 51(1) of the Civil Procedure Rules.

3. The grounds for the application are that with effect from 4/11/2010 the plaintiff became the registered owner of the land comprised in Title No. Kitale Municipality Block 4/114; that the plaintiff sued for trespass to the said property by officers in the Ministry of Transport and Infrastructure and the Department of Kenya Rural Roads Authority; that the parties engaged in an attempted out of court settlement and the court was advised of the same; that mistakenly believing that the out of court negotiations were to be successful and conclude the dispute, the applicant gave instructions to its then advocates to withdraw the suit in order to facilitate the ongoing negotiations; that however the negotiations finally failed and yet the plaintiff's grievances have not been resolved and there is need to have the court resolve the whole dispute, rather than only hear the counterclaim of the 1st defendant/respondent and that the withdrawal of the plaintiff's claim is extremely prejudicial to the plaintiff since the determination of the 1st defendant's counterclaim alone will still leave the plaintiff without redress to its claims, yet the two claims are quite intertwined.

4. The application is supported by the affidavit of Mohamed Mbarak, a Director of the plaintiff's company, sworn on 1/11/2019. In that affidavit the plaintiff avers that he understood the withdrawal of the suit to mean the "shelving of its hearing" as the out of court negotiations continued; that its erstwhile advocate did not inform it of what transpired in court on 19/7/2018 when the matter was marked as withdrawn. The plaintiff avers that upon engaging a new advocate he alerted him of the withdrawal of the suit and he explained to it the legal implication thereof hence this application. The deponent maintains that the filing of another suit after the counterclaim is heard and determined will defeat the court's overriding of objectives. On those grounds, he posits that a review and setting aside of the withdrawal order is appropriate.

5. The 1st defendant filed grounds of opposition dated 11/11/2019. In those grounds the following matters are raised

(i) That the withdrawal of the suit was voluntary and with both the instructions of the plaintiff and the consent of the other parties;

(ii) That the requirements for setting aside a consent order have not been met;

(iii) That the application has been brought after inordinate delay.

(iv) That there were no negotiations being undertaken and the time of the withdrawal of the suit;

(v) That there is no existing suit upon which the application can be predicated;

(vi) That the firm of Ms. Kiarie & Co. Advocates is improperly on record and have no right of audience and hence the documents filed by them ought to be expunged;

(vii) That the application is vexatious, scandalous and an abuse of the process.

6. Not to be left behind in these proceedings, the 1st defendant through Sifuna & Sifuna Advocates filed grounds of opposition dated 5/2/2020 and raised the following matters:

(i) That the application neither meets the legal threshold for setting aside a consent nor the legal threshold for review;

(ii) That the application seeks to set aside a consent order by the back door through review;

(iii) That the application has been made after an unreasonable and inordinate delay of almost two years;

(iv) That the plaintiff should instead of pursuing reinstatement of the suit follow up on the actualization of the out of court settlement with the 2nd defendant.

7. On 12/11/2010 this court ordered the parties to file submissions in respect of the application. The plaintiff filed his submissions on 2/12/2019. The 1st defendant filed its submissions on 14/1/2020 while the 2nd defendant filed no submissions.

8. I have considered the application and the response including the filed submissions.

Determination

Issues for determination.

9. The issues for Determination in this application are as follows:-

(a) Did the withdrawal order of 19/7/2018 amount to a consent order and if so has the plaintiff met the legal threshold for the setting aside of a consent order?

(b) If the withdrawal order did amount to a consent order, are the provisions of Order 45 rule 1 applicable to this application?

(c) What orders should issue?

10. The issues are discussed as herein below.

(a) Did the withdrawal order of 19/7/2018 amount to a consent order and if so has the plaintiff met the legal threshold for the setting aside of a consent order.

11. A scrutiny of the proceedings of 19/7/2018 shows that Mr. Karani appeared for the plaintiff, Mr. Kuria for the 1st defendant and Prof Sifuna for the 2nd defendant, and the court for the day in the instant suit went as follows:

“Mr Karani: The plaintiff and the defendants are engaged in negotiations. I pray that the matter be marked as withdrawn.

Mr Kuria: No objection. We seek the hearing of the counterclaim.

Prof Sifuna: No objection. The counterclaim may be marked as withdrawn. No orders as to costs.

Court: the plaintiff's claim is marked as withdrawn. The parties to appear before court on 26/7/2018 to record a possible consent on the counterclaim of the 1st defendant. The counterclaim of the 2nd defendant is hereby marked as withdrawn.”

12. Does what is reflected on the record as above amount to a consent of all the parties?

13. In my view determination of that issue revolves around whether the consent of the other parties was necessary for the said withdrawal. And for that confirmation the provisions of Order 25 of the Civil Procedure Rules, which governs withdrawal of suits, have to be scrutinized.

14. Order 25 provides as follows:

ORDER 25 – WITHDRAWAL, DISCONTINUANCE AND ADJUSTMENT OF SUITS

1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such

discontinuance or withdrawal shall not be a defence to any subsequent action.

2. (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.

(3) The provisions of this rule and rule 1 shall apply to counterclaims.

15. This suit had been set down for hearing. Order 25(2) approves of a withdrawal of suit after a hearing date has been fixed only if there is a written consent filed, signed by all the parties. This sort of termination of suit is to be contradistinguished from a withdrawal before a hearing date has been taken, in which latter case to effect a withdrawal all a plaintiff requires is to file and serve a notice on all parties in accordance with Order 25 (1).

16. There is no doubt that the suit had been fixed for hearing before the withdrawal and ordinarily the provisions of order 25(2) sub rule (1) should be applicable.

17. However, the convoluted nature in this matter arises from the fact that no formal consent was filed by the parties yet the suit was marked as withdrawn in open court. The only relevant issue is whether the plaintiffs were entitled to a written consent withdrawing the suit and in my view they were. That no written consent was filed by the parties does not detract from the fact that Order 25(2) sub rule (1) applied in the circumstances of that withdrawal. I am well supported in this observation because there appears to have been no intimation of a withdrawal in the proceedings preceding 19/7/2019; consequently the defendants appear to have been taken by surprise by the developments of 19/7/2018 but nevertheless conceded to the withdrawal as seen in the proceedings. A consent remains a consent whether reduced into writing by the parties before being adopted by the court, and where the circumstances required expedition as in the proceedings of 19/7/2018 the principle that "equity deems as done that which ought to have been done", must apply. The consent of the other parties to the withdrawal on 19/7/2018 is therefore deemed to be as effective as a formal, written consent would have been. The finding of this court is that there was a consent.

18. Now that the court finds that it was a consent under Order 25 rule 2(1) the second issue is whether the legal threshold for the setting aside of the consent order has been attained.

19. Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action.

20. A consent can not be casually set aside by a court of law. In the case of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR the Court stated as follows:

"It is now 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 vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.*"

21. Certain conditions for setting aside a consent must therefore be met before that is done. In the case of *James Muchori Maina vs. Kenya Power & Lighting Company Ltd* [2005] eKLR the court, approving of the *Flora Wasike* decision (supra), observed as hereunder:

"Consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of *Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd. – Nairobi Civil Appeal No. 276 of 1997*, wherein the Court of Appeal applied the reasoning in the case of *Flora Wasike –vs- Destimo Wamboke (1988) 1 KAR 625 at page 626* where Hancox JA (as he then was) stated-

"It is now 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". That consent was binding on the parties, and can only be set aside as enunciated above by the Court of Appeal. That consent still being intact on record cannot be challenged in this appeal."

22. A further insight into the conditions under which a court would set aside a consent order is given in *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* [1982] KLR 485, where it was held 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."

23. In a recent Court Of Appeal decision, *S M N v Z M S & 3 others* [2017] eKLR the court observed as follows:

21. Finally in the Ugandan case of Lenina Kemigisha Mbabazi Star Fish Ltd (supra) the Court stated:

“The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”

24. Now this court is tasked to examine whether the conditions under which a consent order may be set aside apply to this case.

These are

a.fraud or collusion;

b.an agreement contrary to the policy of the court; or

c.that consent was given without sufficient material facts or in misapprehension or ignorance of such facts.

25. No fraud or collusion is alleged.

26. It is also clear that it is not alleged in the application that the consent entered into is contrary to the policy of the court; it is the normal thing to enter into consents that compromise entire suits where parties deem it necessary.

27. However in this case the deponent of the supporting affidavit who is a director of the plaintiff alleges that he understood the withdrawal of the suit to mean shelving its hearing as the out of court negotiations continued and that the plaintiff's erstwhile advocate did not inform him of what transpired in court on 19/7/2018 when the matter was marked as withdrawn. I must regard as unhelpful the allegation that the plaintiff was not informed of what transpired in court on 19/7/2018, it being a negative and also being a fact that has not been proved by the plaintiff by way of any empirical evidence.

28. However the question remains: other than the allegation of lack of information regarding the happenings of 19/7/2018, do the rest of the allegations perfectly fit within the category of “lack of sufficient material facts” or “misapprehension or ignorance of such facts?” to enable this court set aside the consent order?

29. First, it must be presumed that in an ideal situation, proper communication went on between the plaintiff and its counsel. However, only two letters are exhibited in the supporting affidavit.

30. The first letter is dated 12/7/2018. It is from the plaintiff to Ngigi Mbugua & Co. Advocates who were its advocates at the time in this matter. It states as follows:-

“The above matter refers

Kindly apply for withdrawal of the above suit when it comes up for hearing on 19/7/2018 as we are making efforts to pursue an out of court settlement.

Yours faithfully,

Kitale Industries Limited.

31.The second letter is dated 30/4/19 and it was addressed to the plaintiff by the plaintiff's erstwhile advocate and it reads in part as follows:

“We refer to the above subject and your instructions to try and engage the parties to this cause for a possible settlement. We engaged the State Law Office as the legal advisers to all government departments both informally and in this court. We can now confirm to you that the County Government of Trans Nzoia did withdraw its counterclaim with no orders as to costs.

The National Land Commission through its regional representative a Mr. Choge was very responsive to your request to settle the counterclaim away from court. They have suggested that a plot be identified, purchased and their offices be set up for the various departments that are currently housed on the suit land. They request that an official officer (sic) in the above terms be made to the Attorney General immediately.

The Attorney General together with the National Land Commission undertook to engage the stakeholders to prepare them and build a consensus on the relocation. We are required to back to court on 25/6/2019 to report on the progress of actualizing settlement.

Kindly confirm that we can proceed to release the offer letter.

Yours faithfully.

32. As seen from the paucity of evidence attached to the affidavit, no communication between advocates and client is revealed for the purpose of enabling this court decipher whether there was lack of proper communication that led to the plaintiff's director's acceptance of the solution of withdrawal of the suit by way of a consent.

33. A company is not the same as a natural person when it comes to the manner of doing things. Whereas the deponent of the supporting affidavit would have the court believe that legal advice to withdraw the suit was orally given to it in early July 2018, at paragraph 10 where that allegation is made, the deponent does not reveal the identity of the associate or the partner who gave him oral advice to that effect. I consider that to be a deviation from the normal practice where legal advice giving rise to such drastic consequence, and would be expected to be in writing, especially as it relates to a company having perpetual succession and not a natural human person.

34. Also in this court's view, the failure to mention the withdrawal of the suit in the letter dated 30/4/19 from the plaintiff's counsel is not sufficient proof that counsel had not informed the client that the suit was already withdrawn; in any event though such an allegation if proved may have added to the weight of the application in so far as delay was concerned, it would be of very little probative value in the setting aside of the consent order that terminated the plaintiff's suit.

35. In my view the plaintiff has not established that there was "lack of sufficient material facts" or "misapprehension or ignorance of material facts" so as to successfully persuade this court to set aside the consent order entered into by the parties on 19/7/2018.

36. Consequently I find that the application dated 1/11/2019 has no merit and the same is hereby dismissed with costs to the defendants.

It is so ordered.

37. Dated, signed and delivered at Nairobi via Teleconference on this 14th day of May, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE.

Ruling read in the presence of:

Mr Kiarie for the Applicant.

N/A for the Respondents.

Hon

Mercyline

Lubia,

DR.

MWANGI NJORGE

JUDGE, ELC, KITALE.

14/5/2020.