



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 115 OF 2010

ISMAEL SHEMAKA.....PLAINTIFF

VERSUS

1. RAFFAELA POCHINTESTA.....1ST DEFENDANT

2. SARAF VENTURES LIMITED.....2ND DEFENDANT

RULING

1. By this Notice of Motion dated 11th February 2019, Ismael Shemaka (the Plaintiff) urges this Court to review the Consent Order dated 30th September 2015 in its entirety and to order that Kilifi/Jimba/1334 be sold and the proceeds thereof be used to offset the unpaid balance of the decretal amount.

2. The application which is supported by an affidavit sworn by the Plaintiff is based on the grounds that:-

a) The parties herein agreed to record a consent to the effect that Kilifi/Jimba/684 one of the two suit properties herein be sold and the proceeds be used to offset the amounts claimed by the Plaintiff;

b) It was also a term of the consent order that the proceeds of the said Kilifi/Jimba/684 shall be held in a joint interest earning account between the Plaintiff and the Defendants Advocates pending the taxation of costs or agreement on costs in this matter and the other matters pending in other Courts between the Plaintiff and the Defendants;

c) That the total amount claimed by the Plaintiff was settled at Kshs 70,224,000/- and the proceeds of the sale of the said Kilifi/Jimba/684 being the sum of Kshs 5,000,000/- were not sufficient to set off the decretal amount owing to the Plaintiff; and

d) That the interest of justice demands that the decree holder be allowed to dispose off Kilifi/Jimba 1334, the remaining suit property to enable him realize the unpaid decretal amount.

3. The application is opposed. By Grounds of Opposition dated and filed herein on 8th May 2019, Raffaella Ponchintesta (the 1st Defendant) objects to the application on the grounds:-

1. That the prayers/orders sought by the Application are not tenable as the same have since been overtaken by events.

2. That the Order of the Court was entered by consent of the parties herein, and the suit was marked as settled in terms of the consent.

3. That the 2nd Defendant herein adhered to the Order of this Honourable Court as to the terms of the consent.

4. That from the reason(s) given) on the face of the application, the Applicant had adequate opportunity to ascertain the value of the property Kilifi/Jimba/684 before agreeing to record a consent.

5. That the Applicant has sat on his laurels since September 2015 and has filed this suit as an afterthought.

6. That in the premises the said application is superfluous and overtaken by events.

7. That in the interest of justice the said application should be dismissed with costs.

4. I have perused and considered the application by the Plaintiff and the Grounds filed in Opposition thereto. I have similarly perused and considered the submissions and authorities filed by Mr. Kilonzo Advocate for the Plaintiff. I was unable to find any submissions filed by Mr. Gicharu Advocate for the Defendants.

5. This suit was instituted by the Applicant herein way back on 30th September 2010. By his Plaint dated the same day, the Plaintiff sought Judgment against the two Defendants for:-

a) An order that the 2nd Defendants title to Plot No. Kilifi/Jimba/684 and Kilifi/Jimba/1334 be attached by way of a warrant of attachment and be sold by the Plaintiff to recover a sum of Euros 88,000 or its equivalent of Kshs 8.8 Million;

b) Alternatively Judgment be entered against the 1st and 2nd Defendants jointly and severally for Euros 88,000/- or (its) equivalent worth of Kshs 8.8 Million and interest thereon at Court rates;

c) Alternatively an order be directed against the 1st and 2nd Defendant to convey by way of a valid conveyance to the Plaintiff of all the proprietary interests and titles of the 2nd Defendant in Plot Nos. Kilifi/Jimba/684 and Kilifi/Jimba/1334 and such conveyance be deemed as sufficient settlement of the Plaintiff's claim against the Defendants and in failing to make such a conveyance, the Deputy Registrar of this Honourable Court be mandated to execute all necessary conveyance instruments and processes to effectively vest titles to Plot Nos. Kilifi/Jimba/684 and Kilifi/Jimba/1334 in favour of the Plaintiff; and

d) Costs of this suit and interest thereon at Court rates.

6. Those prayers arose from the Plaintiffs contention that Raffaella Pochintesta (the 1st Defendant) had in the first half of the year 2010 borrowed the said Euros 88,000/- from himself to enable her finalise some strategic investment ventures which she was then undertaking. According to the Plaintiff they had agreed with the 1st Defendant that she would refund the said sum of money as soon as she received some money from some Italian Banks or soon after selling the alleged investment ventures.

7. The Plaintiff avers that the 1st Defendant who is a director of Saraf Ventures Ltd defaulted in their agreement and that when he confronted her, she executed an agreement on 12th May 2010 in which she agreed to repay the money on or before 13th June 2010 and in default, the Plaintiff would be at liberty to assume possession of title to the properties known as Kilifi/Jimba/684 worth about Kshs 6.8 Million and Kilifi/Jimba/1334 valued at Kshs 2 Million. The agreement further provided that the 1st Defendant shall as a director execute transfers of the said properties belonging to the 2nd Defendant in favour of the Plaintiff.

8. By this suit, the Plaintiff accused the 1st Defendant of failing to repay the money and or to transfer the properties as agreed.

9. But in their Statement of Defence and Counterclaim dated 8th October 2010, the Defendants denied borrowing the said sum of money or guaranteeing the same. While admitting the two properties belonged to the 2nd Defendant, the Defendants denied the values attributed to the properties asserting that the same were of a much higher value than that suggested by the Plaintiff.

10. On their part, the Defendants accused the Plaintiff of exerting pressure upon the 1st Defendant to pay a sum of 69,000 Euros allegedly incurred by her late husband Alessandro Martinelli, and of seizing the titles to the two properties as collateral for the loans.

11. By way of their Counterclaim, the Defendants sought orders as against the Plaintiff as follows:-

a) A declaration that the proper party to prove, sue and pursue for the debt allegedly incurred by the said Alessandro Martinelli (deceased) is a duly appointed Administrator of his estate;

b) An order directed at the Plaintiff requiring him to refund the sum of Euros 69,000(approximately Kshs 6,900,000/-) paid to him by the 1st Defendant;

c) A declaration that the alleged agreement dated 12th May 2010 did not and cannot defeat the 2nd Defendant's proprietary rights in favour of the Plaintiff.

d) An order requiring the Plaintiff to immediately reconstitute the Title Deeds (for) the Parcels of Land known as and described as Kilifi/Jimba/1334 and Kilifi/Jimba/684 to the 2nd Defendant; and

e) Costs and interest.

12. The matter proceeded to trial commencing 7th May 2015. However after the Plaintiff closed his case and one witness had testified for the Defence, the parties recorded a consent Judgment as follows on 30th September 2015:-

1. That the Plaintiff to surrender title deed of Kilifi/Jimba/684 to be retained by the parties Advocates on record therein to offset the amounts claimed by the Plaintiff in this suit.

2. That the proceeds of sale of Kilifi/Jimba/684 shall be held in a joint interest earning account between the Plaintiff and the Defendants' Advocates pending the taxation of costs or agreement on costs in this matter and other matters pending in other Courts between the Plaintiff and the Defendants.

3. That the sums claimed by the Plaintiff in this suit shall be paid from the proceeds of the sale of Kilifi/Jimba/684;

4. That the Plaintiff shall release to the Defendants the original title of Kilifi/Jimba/1334 as soon as this consent is entered into;

5. That the Plaintiff shall withdraw all suits against the Defendant including Criminal Case No. 903/2010 against the 1st Defendant relating to obtaining money by false pretences and issuing of bouncing cheques the subject of this suit; and

6. That this suit be marked as settled in terms of the consent.

13. For some reason, however, the parties do not appear to have treated the matter as settled. From the record, by a letter dated 3rd March 2016, some six months after the consent, the Plaintiff's Advocates sought for a mention before the Judge. When the parties subsequently appeared before the Honourable Justice Angote on 18th April 2016, Mr. Gicharu Learned Counsel for the Defendants is shown on the record stating that the parties needed time to deal with the issue of compliance. The matter would thereafter be mentioned and adjourned several times until the present application was filed on 11th February 2019.

14. According to the Plaintiff, Plot No. 684 has since been sold by the Defendants but it only fetched a sum of Kshs 5 Million yet the parties have agreed after the consent that the total sum due to the Plaintiff is Kshs 70,224,000/-. In the premises he now urges this Court to review the consent Judgment and order that Plot No. 1334 also be sold and the proceeds thereof used to offset the unpaid balance of the decretal amount.

15. While it was not clear to me how and in which forum the sums due to the Plaintiff had been agreed to be an aggregate of Kshs 70,224,000/- as stated, it was apparent that the consent order had not resolved the issues between the parties. According to the Defendants the Plaintiff had sat on his laurels since September 2015 when the consent was recorded and they accused him of inter alia filing the present application as an afterthought.

16. In *Brook Bond Liebig Ltd –vs- Mallya (1975) EA 266*, the Court of Appeal observed 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.”

17. Similarly in *Flora Wasike –vs- Destimo Wamboka (1988)1 KAR 625*, 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...”

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 knowledge of the material by legally competent persons.”

18. From the record herein, it was evident that this dispute largely remains unresolved. While Clause 3 of the consent stated that the sums claimed by the Plaintiff were to be paid from the proceeds of the Sale of Plot No. 684, the Defendants have not denied that the sale said to have been done by themselves only yielded a sum of Kshs 5 Million. Similarly, Clause 2 of the Consent Order provided that the proceeds would be held in a joint interest earning account pending taxation of costs or agreement of the costs on this and other matters pending in other Courts between the two parties.

19. As it were, Order 25 Rule 5 of the Civil Procedure Rules provides as follows:

“(1) Where it is proved to the satisfaction of the Court, and the Court after hearing the parties directs, 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 any 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.

(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.

20. Arising from the foregoing it would appear to me that the Consent Order was still executory. It is the Applicant's contention that he was of the mistaken view when he entered into the consent that the proceeds from plot No. 684 would be enough to offset the amount he was claiming from the Defendants. Clearly that was not the case and I think it would be inequitable in the circumstances herein to enforce the consent as it is.

21. In the premises, I am satisfied that there is merit in the Plaintiff's application dated 11th February 2019. The same is allowed with no order as to costs.

Dated, signed and delivered at Malindi this 17th day of June, 2020.

J.O. OLOLA

JUDGE