



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 84 OF 2014(O.S)**

**JEREMIAH MAINA WAMUNGU.....PLAINTIFF/APPLICANT**

**VERSUS**

**LUCY WANGUI KABUU.....DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion application dated 29<sup>th</sup> August 20 the plaintiff acting in person approached the court for orders:

- 1. That pending hearing and determination of this application the court be pleased to issue a stay of execution of the consent orders dated the 15<sup>th</sup> May***
- 2. That the court be pleased to set aside the said consent orders.***

2. In his affidavit in support of the application the applicant deposes that the consent order arrived at without his instructions and that the same will prejudice him if not set aside.

He further deposes that he has filed a separation cause against the Respondent who is his wife and both have resolved all issues save for division of matrimonial properties listed in Paragraph 5 of his affidavit. His complaint principally is that some of the properties held by Family Bank as Custodian were released to the Respondent's Advocates but two of them are missing that is **Nairobi/Umoja/Block14/231 and Nyandarua/Sibilwet/2074.**

He is apprehensive that by virtue of the consent order as recorded, he may lose the properties if held by the Advocates.

In his oral submissions the applicant told the court that he wants properties placed in custody of Family Bank or be deposited with the court pending hearing and determination of the case.

3. It is noted that the applicant represented by his Advocates Githui & Company Advocates when the consent orders were recorded. The Respondent was represented by Judy Thongori & Company Advocates then. However, the applicant filed a notice to act in person on the 29<sup>th</sup> August 2016. Elizabeth Wangari and Company Advocates took over representation of the Respondent from the former advocates by a Notice of change of advocates dated 12<sup>th</sup> July 2016 and filled on the same day.

4. In opposing the application Ms. Mukira relied on the respondents replying affidavit sworn on the 9<sup>th</sup> September 2016.

It is deponed that the terms of the consent order recorded on the 11<sup>th</sup> May 2015 and adopted by the court on the 15<sup>th</sup> May 2015 have been acted upon and executed and therefore there is nothing to stay as the documents and titles to the various properties were released by Family Bank to the Respondents Advocates. To that extent, it is deponed that the application has been overtaken by events.

5. Against the above backdrop, I have considered the consent order. It is dated the 11<sup>th</sup> May 2015 and signed by both Advocates for the parties. It was adopted by the court on the 19<sup>th</sup> June 2015 upon application in the presence of advocates for both parties.

I will not reproduce the consent order here.

The salient features of the same, and subject of the application are that all Title documents deposited in the joint account of the plaintiff and Defendant at Family Bank Limited be released to the firm of Judy Thongori & Company Advocates to hold the same and give copies to the plaintiffs Advocates Githui & Company Advocates. It further stated that all other title documents held by the Surveyor James Mutunga too be released to the firm of Judy Thongori & Company Advocates.

There was a further order restraining either party from desposing any of the suit properties.

6. The above consent order in my respectful view cushioned disposal or interference with the suit properties by both parties pending hearing and determination of the suit.

Ms. Mukira submitted that the consent order is already registered against each of the properties and if set aside, it will have a retrospective effect as the said registrations are in place. Each party ably represented by their Advocates. There are no good reasons to warrant setting aside of the consent order.

For a consent order to be set aside, the applicant must show and prove that there fraud and collusion between the parties, or that the consent is against public policy or the courts policy.

**In Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd (1982) eKLR and cited in Board of Timsales National Social Security Fund vs Michael Mwalo (2015) eKLR, the Honourable Judges of Appeal rendered themselves that :**

*1. A consent order entered into by counsel is binding on all parties the proceedings and cannot be set aside or varied unless it is proved that it was not 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 the agreement.*

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

7. The applicant did not place before the court any evidence of fraud illegality of collusion by the parties. Indeed he failed to prove that he had not given his advocates authority to enter into the consent. The consent as filed protects the suit properties from interference by either plaintiff or the defendant pending determination of the case. The applicant has not persuaded the court he wants the properties released back to Family Bank which is a joint account with the Defendant which if allowed, in my view, would expose them for interference by either party as they are joint co-owners of the said account.

I find no plausible grounds to allow the application. It is dismissed with costs.

**Dated, signed and delivered in open co this 10<sup>th</sup> day of November 2016**

**JANET MULWA**

**JUDGE**