



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT & LAND COURTS

ELC NO. 245 OF 2011

NYOIKE NJENGA HINGA.....PLAINTIFF/RESPONDENT

=VERSUS=

HON. JOHN MUTUTHO.....1ST DEFENDANT /APPLICANT

RULING

The matter coming for Ruling is the Defendant/Applicant's Notice of Motion dated *6th October 2016*, brought under *Section 95 of the Civil Procedure Act, Order 40 Rule 1, Order 45 Rule 1 and Order 50 Rule 6 of the Civil Procedure Act* and other enabling provisions of the Law.

The applicant has sought for these orders:-

- 1. That an interim Injunction be issued restraining the Plaintiff and his agents ,servants or anybody claiming right through the Plaintiff from entering ,building, evicting alienating ,selling ,transferring ,charging ,licensing or otherwise dealing with the Land Parcel No. 1/598, pending the hearing and determination of this application.*
- 2. That this honourable Court be pleased to review and vary the Consent Judgement of 11th November 2014, and extend the time for the Defendant to vacate LR No. 1/598 from 30th November 2016 to 30th November 2017.*
- 3. That costs of the application be provided for.*

The application is premised on the grounds stated on the face of the application and on the affidavit of *Hon. John Njega Mututho*. Among the grounds in support of the application are that:-

- a. That consent was entered into on the 11th of November 2014 ,granting the Defendant two years in the premises.*
- b. The essence of the consent was that the Defendant had spent a colossal sum on improving the property and purchase of the equipments thus the need to recoup the investment.*
- c. The investment in the suit property was not possible due to lack of the Change of User of which the Defendant undertook to obtain.*
- d. The Change of User took more time what was expected hence the Defendant could not*

proceed with the construction and or renovation of the suit property.

e. The Construction is yet to be completed hence the need for extension of time to give the applicant chance to complete the renovations.

f. The delays in completing the renovations were unforeseeable hence the intention of the consent awarding two years was not achieved.

g. The Defendants has not recouped his expenditure on the renovations and construction from the business currently going on.

h. It is in the interest of justice that the time be extended.

i. This court has power to vary the consent order and extend the time for a limited period of one year.

In his Supporting Affidavit, the Defendant/Applicant reiterated the averments made on the grounds in support of the application and urged the court to review and vary the consent judgement entered on **11th November 2014**.

The application is opposed and Plaintiff/Respondent filed his grounds of opposition on **12th October 2016**, and stated as follows;-

- 1. That the application is frivolous, vexatious and an abuse of the Court process.**
- 2. That the application is misconceived and bad in law.**
- 3. That the application is devoid of merit and ought to be disallowed.**
- 4. That the Orders sought are untenable and incapable of being granted.**
- 5. That this Court lacks jurisdiction to grant the Orders sought.**

The application was canvassed by way of written submissions as directed by the court on **24th October 2016**. The Law Firm of **Karanu Kanai & Co. Advocates** for the Defendant/Applicant filed the written submissions on **8th November 2016**, and relied on **Section 95** of the **Civil Procedure Act** which provides;-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”.

The applicant also relied on various decided cases;- **Benjoh Amalgamated Ltd another Vs Kenya Commercial Bank (2014) eKLR** where the court held’-

“It is our finding that this Court not being the final court has residual jurisdiction to review its decision to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice”.

“This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice”

They also relied on the case of **Kenya Commercial Bank Ltd Vs Specialized Engineering Co.Ltd (1982) :-**

“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 or such facts in general for a reason which would enable the court to set aside an agreement”.

The Law Firm of ***Munga Kibanga & Co. Advocates*** for the Plaintiff/Respondent filed their written submissions on ***17th November 2016*** and urged the Court to dismiss the Instant Notice of Motion. They relied on various decided cases among them;- **National Bank of Kenya Ltd Vs Ndungu Njau ,Civil Appeal No. 2011 of 1996** where the court held that;-

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a Statute or other provision of law cannot be a ground for review”.

Further they relied on the case of **Board of Trustees National Social Security Fund Vs Micheal Mwalo ,Civil Appeal No. 293 of 2014** where the Court of Appeal held that ;-

“ The judgement arose from consent of the parties to the suit. The law pertaining to setting a side of consent judgement or consent orders has been clearly stated. A court of law will not interfere with a consent judgement except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a Consent Order or a Consent Judgement, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of Court”.

This Court has carefully considered the Instant Notice of Motion and the Court record in totality. The Court has also considered the relevant provisions of law, the written submissions, and the cited authorities. From the Court record, it is evident that the Plaintiff filed this suit in the year 2008. There are several amendments to the pleadings herein. It is also evident that the matter was fixed for hearing several times but adjourned for one reason or another. The matter finally took off on ***24th March 2014*** wherein, the plaintiff herein gave his evidence and he thereafter closed his case.

Thereafter the matter was set for Defence hearing on ***15th May 2014*** but was adjourned because the Defendant had changed his advocate. It was fixed for Defence hearing on ***9th June 2014*** but once again adjourned because ***Mr. Kithi Advocate*** for the Defendant needed to go through the draft statement of Defence and seek further instructions. The Defence hearing was again fixed for hearing on ***22nd July 2014***, wherein the same was adjourned because ***Mr Kithi*** for the Defendant was unavailable. The Defence was granted last adjournment and matter was set down for hearing on ***7th October 2014***.

On ***7th October 2014*** , the Court was informed that the Defendant had made an offer to the Plaintiff which was capable of disposing off the suit . The Court did allow the parties to attempt an out of court settlement and the matter was set to be mentioned on ***11th November 2014***, for purposes of recording a settlement. Indeed on ***11th November 2014*** ,the parties did record a Consent which disposed off the entire suit. The Consent entered by the parties is as follows;-

BY CONSENT.

i. The Defendant to leave, vacate and give vacant possession of the premises known as LR No.1/598 Nairobi to the Plaintiff within two years from the date of this consent and not later than 30th November 2016 .

ii. In default, of clause No.1 above, the Plaintiff be at liberty to execute.

iii. The Defendant be at liberty to obtain change of user of the premises at his cost.

iv. Each party to bear its own costs.

With signing of the above consent by the Advocates for the parties, the suit was compromised and the consent was entered as recorded and it thus became the judgement of the court.

It is this Consent that the Defendant now wishes to have it varied or reviewed. The Defendant has averred that the improvements that the Defendant was to undertake are still ongoing but had temporarily stopped due to the necessity to have approvals from the City Council of Nairobi. Further that the real intention of the consent was to enable the Defendant complete the renovations and recoup his expenses for the renovations. It was submitted that the spirit of the consent was not achieved due to the period taken to acquire the change of user and renovations.

On the part of the Plaintiff, it was submitted that the consent judgement entered had a contractual effect and could only be set aside on grounds which would justify setting aside a contract. Further that at the time of the entering the consent, all material facts were known to the parties who consented to compromise the suit freely in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension.

The principles for review of a consent or setting aside of the same were laid down in the case of **Flora Wasike Vs Wamboko(1988) KLR 429**, where it was held that;-

“ It is well settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain unfulfilled which are not carried out .If consent is to be set aside, it can only be set aside on grounds which would justify setting aside a contract entered into with the knowledge of material matters by legally competent persons (See also K J M Mwakio Vs Kenya Commercial Bank Civil Appeal No. 28 of 1982)”.

Further courts have severally held that they cannot interfere with a consent order except in circumstances that would afford a good ground for varying or rescinding a contract between the parties. See the case of **Brook bond Liebig Ltd Vs Mallya (1975) EA 266 and Hiran V Kassam (1952)19 EACA 131**. For avoidance of doubts the grounds that would necessitate setting aside of consent judgement are ;-

1. Fraud

2. Mistake

3. Misapprehension

4. Collusion

5. An agreement contrary to public policy

6. Absence of material facts.

7. Ignorance of material facts

8. Any general reason which may enable a court to set aside an agreement.

The main reasons advanced by the Defendant/Applicant herein is that it took such a long time for him to obtain charge of use from the county government of Nairobi and thus he has not finished the renovations and has not recouped his expenses .

The Court has gone through the court record and noted that the Defence and Counter Claim filed by the Defendant had brought out the issues of renovations and change of use. The issue of renovations has been an going issue since the *year 2008*. On the *consent order* entered on *11th November 2014*, the issue of renovations and change of use was not a condition for compliance of the consent judgement entered by the parties herein.

It was clearly stated that the Defendant may apply for change of user at his expense. That was discretion but not a condition for the fulfilment of the consent judgement. The Court has considered the annexures to the Affidavit in support of the application. The Defendant was carrying out renovations of the building as late as *July 2016*, whereas he knew that he was supposed to vacate the building by *30th November 2016*. The Court finds that the Defendant was aware that he was supposed to vacate the suit premises as at *30th November 2016*, and there was no need of him to go on and carry massive renovations of the building as later as *July 2016*. He had no obligations to renovate the building for the Plaintiff.

The Defendant has alleged that at the time of recording the consent, the building was in dire need of repairs and renovations. However, that did not form part of the consent judgement and the plaintiff cannot be tied to a preference of the Defendant herein. The applicant has not established that any of the conditions for setting aside an agreement exists herein to warrant this Court review the consent judgement entered on *11th November 2014*.

This is a matter already settled and only awaiting compliance of the consent judgement. The Defendant cannot ask the court to injunct the Plaintiff on an already compromised matter. If Defendant herein has any claim against the Plaintiff, he should file another suit but not to re-open a suit that has already been compromised.

The Order sought by the Defendant/applicant are discretionally and the said discretion must be exercised judiciously. As provided by *Section 3A* of the *Civil Procedure Act*, the Court is enjoined to make orders that are necessary for end of justice to be met and to prevent abuse of the court process. The Court finds that the necessary orders herein to ensure that justice is met is to disallow the Defendant/Applicant Notice of Motion for review of the Consent Judgement entered on *11th November 2014* as the Courts would ordinarily not interfere with Consent order or judgement except in the circumstances that would afford a good ground for varying or rescinding a contract between parties and the court finds that no such circumstances exist herein. Further the court finds that the Defendant/Applicant is the one who chose to repair and renovate the suit premises which was not a condition for the fulfilment of the Consent judgement. The Defendant was only at liberty to apply for change of use but not to repair the suit premises. Allowing the review herein would be tantamount to abuse of the court process which *Section 3A* of the *Civil Procedure Act* seeks to prevent.

For the above reasons, the Court finds that the Defendant/Applicant's Notice of Motion dated *6th October 2016*, is not merited. The upshot thereof is that the said application is dismissed entirely with costs to the Plaintiff/Respondent herein.

It is so ordered.

Dated, Signed and Delivered this *2nd of December, 2016*

L.GACHERU

JUDGE

In the presence of ;-

Mr Mogire holding brief for Mr Kibanga for Plaintiff/Respondent

Mrs Karanu for Defendant/Applicant

Vincent : Court Clerk

Court: Ruling read in open Court in the presence of the above stated advocates.

M/s Karanu . The Plaintiff went ahead and filed an eviction application at the lower court. They got the eviction orders and on Friday, they evicted the Defendant and demolished the suit property. This is despite that we were before the Court.

The Plaintiff was not truthful to the court. As an officer of the Court, one needs to be truthful. We got the ***status quo*** order ***on 2nd December 2016*** but the time we got there the place was already demolished. We will take the Ruling.

Mr Mogire: There were no orders from the court seeking to stop eviction. There is no contempt. There was no status quo by ***1st December 2016***. Defendant was to vacate by consent. They ought to have been evicted by ***30th November 2016***. It was two days late. We are not in contempt. I brought to the attention of the court on Friday that Plaintiff had taken possession of the suit premises.

Court :The Defendant/Applicant to file the relevant application for contempt.

L.GACHERU

JUDGE