



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 135 OF 2018

ASSET & CARGO LTD.....PLAINTIFF

-VS-

HOUSING FINANCE KENYA LTD

MUGANDA WASULWA.....DEFENDANTS

RULING

1. The application before me for determination is the Notice of Motion dated 17th April 2019 and the Notice of Motion dated 25th April 2019 by the Plaintiff and the Notice of Motion dated 17th March 2019 by the defendants. The plaintiff is primarily seeking orders to review, vary or set aside the consent judgment entered herein on 31st January 2019 and the consequent decree, and to be allowed to pay and liquidate the agreed sum of Kshs.25, 120, 582. 00 by monthly installments. In the alternative, the plaintiff seeks to set aside the decree herein and for time to be enlarged to enable the plaintiff liquidate the said sum of Kshs.25,120, 582.00 as agreed by the parties or as will be directed by the court.
2. The plaintiff's case is that it was not consulted before the consent judgment was executed and filed. That the consent had not been fully agreed between the parties and that the plaintiff had requested for a period of 180 days upon which the sum agreed upon was to be paid not 90 days as set out in the consent letter dated 28th January, 2019. The plaintiff states that it duly instructed its advocates not to enter into any agreement before the issue of time had been agreed upon but the advocate went against that directive. The plaintiff therefore wants the consent judgment vacated in order for a proper arrangement to be recorded in court as proposed. The plaintiff avers that it cannot raise the whole decretal amount in one lumpsum and proposes to settle it by making a deposit of Kshs.3,500, 000.00 on or before 30th June 2019 and to pay the balance by monthly installments of Kshs. 3,603, 430.30 with effect from 30th July 2019 and every 30th day of the succeeding months till payment in full.
3. In opposing the plaintiff's applications, the defendants filed the Notice of Motion date 17th May, 2019 seeking to discharge and/or set aside the ex-parte orders issued on 25th May 2019. It is the defendant's contention that the court was already *functus officio* and further that the plaintiff's applications are in contravention of the provisions of Order 9 Rules 9 and 10 of the Civil Procedure Rules. The Defendants, further aver that the suit is res judicata in view of a previous suit to wit, Mombasa ELC Cause No. 93 of 2017 which was dismissed by this court. The ruling in that suit has been exhibited.
4. The 1st defendant also filed a Notice of Preliminary Objection dated 6th September 2019 on the grounds that the pleadings drawn and filed by Messrs Bosire & Partners Advocates are incompetent, fatally defective and bad in law for offending the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules.
5. The applications were canvassed by way of written submissions which were also highlighted by the advocates for the parties.
6. I have considered the applications and the submissions made. I will first deal with the preliminary objection raised by counsel for the defendants.
7. Learned counsel for the defendants submitted that since judgment in the matter had already been entered, then the new counsel is bound by the provisions of Order 9 rule 9 of the Civil Procedure Rules which is couched in mandatory terms. That failure to comply with the provisions of Order 9 rule 9, the pleadings filed herein by Messrs. Bosire & Partners Advocates are incompetent and fatally defective.
8. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

a) Upon an application with notice to all the parties; or

b) Upon a consent filed between the outgoing Advocate or party intending to act in person as the case may be.”

9. Order 9 rule 10 provides:

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

10. In this particular case judgment was entered by consent of the parties on 31st January 2019. The plaintiff’s advocate on record was Messrs Jackson Muchiri & Company Advocates. On 18th April 2019, the firm of Messrs Bosire & Partners Advocates filed the Notice of Motion dated 17th April 2019 seeking leave to be heard during the court recess under the Vacation Rules. Prayer (c) of that application sought for leave for the firm of Bosire and Partners Advocates to come on record in place of Jackson Muchiri and Company Advocates. A consent dated 17th April 2019 signed by M/s Jackson Muchiri & Company Advocates and Bosire & Partners Advocates marked “JOB 1” was annexed to the application. On 18th April 2019, the firm of M/s Bosire & Partners Advocates filed a notice of change of advocate to act for the plaintiff in place of Ms. Jackson Muchiri And Associates Advocates. From the foregoing, it is clear therefore that the firm of M/s Bosire & Partners Advocates followed the procedure provided under Order 9 rules 9 and 10 of the Civil Procedure Rules. It is therefore my finding that the firm of M/s Bosire & Partners Advocates are properly on record for the plaintiff and that the pleadings filed by them, including the applications herein are properly on record and are not incompetent or fatally defective as submitted by the defendants. Therefore the 1st defendant’s notice of preliminary objection dated 6th September, 2019 is overruled.

11. The other issue to consider is whether the consent judgment entered herein should be set aside and reviewed and the plaintiff allowed to pay the decretal amount by monthly installments as sought. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated and well settled. In the case of Board of Trustees National Social Security Fund –v- Michael Mwalo (2015) eKLR, the Court of Appeal stated:

“A court of law will not interfere with a consent judgment 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 judgment, it must be shown that it was obtained by fraud, collusion or by an agreement contrary to the policy of court.”

12. In the case of **Brooke Bond Liebig (T) Ltd –v- Maliya (1995) EA 266**, Law JA stated the law at p. 269 in these terms:

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hiran –v- Kassam (1952) 19 EACA 131, where the following passage from Seton on Judgments and orders, 7th Edition, Vol. 1P.124 was approved. 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 consent was given without sufficient material facts, or in misrepresentation or ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

13. Similarly, in the case of **Flora Wasike –v – Destimore Wamboko (1988) KAR** 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 condition remain to be fulfilled, which are not carried out.”

14. The issue for determination in the present case is whether the plaintiff has met the threshold for setting aside of the consent judgment entered by the parties herein on 31st January, 2018. The record shows that there were negotiations going on between the parties to settle the suit. Indeed when the matter came up before court on 31st January 2019, the court was informed that the parties had reached a settlement and had filed a consent dated 28th January, 2019 and filed on 30th January 2019. The Court was asked to adopt the said consent as an order of the court and the court did adopt that consent as an Order of the court and the matter was marked as settled in terms of that consent. The consent filed had been signed by the advocates for both the plaintiff and for the defendants and did not mention or allude to any conditions that remain to be fulfilled. There was no indication that the consent was subject to the conditions now alleged by the plaintiff in the application. Indeed, the plaintiff is attempting to introduce new terms in the form of payment of the decretal amount by installments and not in the manner earlier agreed by the parties. I note that all the parties were represented by their advocates then on record who after deliberations executed and filed the consent in court and requested the court to adopt the same as an order of the court, and the court duly adopted the same.

15. I find that the applicant has not proved that there was misrepresentation, mistake or coercion. There is no suggestion of fraud or collusion. Indeed there is no indication that the letters annexed to the plaintiff’s application herein allegedly requesting for 180 days were ever received by M/s Jackson Muchiri & Associates Advocates. These letters may as well have been written by the plaintiff to suit the present applications.

16. As already stated, a court cannot interfere with consent judgment except in such circumstances as would afford a good ground for varying or rescinding a contract between parties. No such circumstances have been shown in this case. Accordingly, I find that the plaintiff’s

applications have no merit and the same are hereby dismissed with costs to the defendants.

DATED, SIGNED and DELIVERED at MOMBASA this 7TH day of July 2020.

In the presence

Yumna Hassan Court Assistant