



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. 143 OF 2013 (FORMERLY HCC. 21 OF 2007)

SIMON EMONGER ENANGEI PLAINTIFF

=VERSUS=

SUMPROSE OKALO MADEGWA DEFENDANT

R U L I N G.

The Plaintiff **SIMON EMONGOR ENAGAI**, filed the application dated 19.11.2014 praying for the following orders:

- “ 1. That this honorable court do revokes and or cancels the consent order dated 13th October, 2011, made between my counsel and Respondent’s Counsel which was made without my knowledge and consultation.
2. That costs be in the cause.”

The Plaintiff set out three grounds in support of his application which are;

- “ i) That I was not consulted whatsoever when the stated consent of 13.10.2011 was entered.
- ii) That my counsel on record at that time was compromised to enter the same since he was offered some of this plots.
- iii) That I have never entered into an agreement to sell land parcel No. North /Teso/Kocholia/1223.”

The application is also supported by the Plaintiff’s affidavit sworn on 19th November, 2013 in which he among others depones as follows;

1. That he was represented by M/S. Kassim Sifuna & Associate Advocates in this suit.
2. That he had not entered into a sale agreement to sell his land North Teso/Kocholia/1223 and that the advocate entered into the consent order of 13th October, 2011 without his instructions.
3. That M/S. Elungata & co. Advocates who were his counsel at the time were compromised by Respondent who he later discovered was related to the counsel.
4. That the Respondent is likely to get the title deeds to land parcels North Teso/Kocholia/1424, 1425 and 1800 without his consent.

The Defendant filed grounds of opposition dated 27th November, 2013 through M/S. Bogonko, Otanga & co. Advocates setting out three grounds as follows;

“ 1. That he said application is frivolous, vexatious and scandalous .

2. That the application is an abuse of court process in view of another application dated 26th July, 2012 which is still pending.

3. That the application is misconceived and without merit and that the same is spurious as the applicant was at all times represented by able counsel and was present at the time the order was made and is bound by the said order.”

The Defendant also filed a replying affidavit sworn on 20th March, 2014 and filed through his new advocates, M/S. Bulimo & co. Advocates in which she among others depones;

1. That the lawyers on record had proper instructions when the consent impugned was entered.

2. That she did not offer any plot to the Plaintiff counsel as alleged and was not aware that the counsel had been compromised.

3. That indeed she had sale agreement with the Plaintiff under which she bought the suit land which she has taken possession and had title deed issued to her names on 25th January, 2000. The copies of the title deeds are annexed to the affidavit.

HISTORY OF THE SUIT.

The Plaintiff filed this suit through plaint dated 19th January, 2007 through M/S. Etyang Oroni & co. Advocates praying for permanent injunction and cancellation of titles obtained by Defendant from Land parcel North Teso/Kocholia/1223.

In the paragraphs 3 to 5 of the said plaint, the Plaintiff averred that;

“ 3. The Plaintiff entered into a land sale agreement with the Defendant to purchase a portion of land parcel No. North Teso/Kocholia/1223 of which the purchase price was paid.

4. The Defendant has moved without the knowledge of the Plaintiff and obtained title to the detriment of the Plaintiff hence this action.

5. The Defendant has further moved to demarcate the Plaintiff’s land without consent.”

M/S. Bogonko, Otanga & co. Advocates entered appearance and filed defence for the Defendant dated 7th August, 2007 terming the suit bad in law and time barred. The Defendant further avers that land parcel North Teso/Kocholia/1223 was closed on 17th July, 1994 upon being subdivided by Plaintiff into seven portions. That the portions she occupied were bought from Plaintiff and were transferred to her names by the Plaintiff following the due process.

The Plaintiff, through his counsel filed an amended plaint dated 11th December, 2007 with the following prayers;

“A (i) That this honourable (court) do order cancellation of title to land parcel North Teso/Kocholia/1425 in the names of Defendant and it reverts back to the Plaintiff.

B (i) Cancellation of title to land parcel No. North Teso/Kocholia/1800 and an order for resurvey and thereafter transferring 1 ½ acres purchased to the Defendant and the extra 1 ½ acres to revert back to the Plaintiff.”

C Costs of this suit.”

Plaintiff also filed an application dated 11th December, 2007 seeking for an injunction against Defendant which was on 14th December, 2007 fixed for hearing on 4th March, 2008. No further action was taken on that application.

Defendant filed an application dated 30th July, 2008 seeking for a temporary injunction against Plaintiff and interim orders were granted on 1st December, 2008.

M/S. Ipapu P. Jackah filed notice of change of advocate dated 25th September, 2008 and came on record for Plaintiff in place of M/S. Etyang Oroni & co advocates . He also filed an application dated 25th March, 2010 for leave to amend the plaint as the amended plaint filed earlier was without leave. That application was filed to regularize the position as directed by the court on 2nd March, 2010. A consent order dated 14th April, 2010, and signed by both counsel, was filed allowing the application dated 25th March, 2010.

The Plaintiff, through M/S. Ipapu P. Jackah & co. Advocates, filed the amended plaint dated 12.12.2010 which contains the following prayers;

- “ a. A permanent injunction restraining the defendant from interfering with land parcel No. North Teso/Kocholia/1223.
 - b. That this honorable court does order cancellation of these title which were fraudulently obtained from N. Teso/Kocholia/1223.
1. North Teso/Kocholia/1223
 2. North Teso/Kocholia/1420, 1421,1422, 1423,1424, 1425.”

The Defendant then filed a defence to the amended plaint and counter claim dated 4th January, 2011 though her advocates praying for an injunction against Plaintiff from interfering with the seven suit properties listed and costs.

M/S. Ipapu P. Jackah & co. advocates filed a notice ceasing to act for the Plaintiff dated 3rd January, 2011 and filed on 18th January, 2011.

11. On 3rd February, 2011, M/S. Kassim Sifuna & Associates Advocates filed a notice of appointment to act for Plaintiff in place of M/S. Ipapu P. Jackah & co. Advocates dated 24th January, 2011.

The counsel for the Plaintiff and Defendant filed list of documents dated 10th October, 2011 and 3rd June, 2011 respectively.

On 13th October, 2011, the consent order which effectively compromised the entire suit was recorded by the court in the presence of Mr. Kassim for the Plaintiff and Mr. Bagonko for the Defendant. Both counsel appended their signature next to their names at the coram space of the court file on that date.

That on 31st July, 2012, the Plaintiff filed a notice to act in person dated 26th July, 2012 and an application of the temporary injunction against Defendant, claiming the parcels awarded to Defendant by the court order of 13th October, 2011 did not exist on the ground, among other reasons.

The Defendant filed a replying affidavit to the application through her advocates stating that the consent of 13.10.2011 was entered into in the presence of both parties and their advocates and pursuant to negotiations carried outside the court between the parties and their advocates.

M/S. Elungata & co. Advocates wrote a letter to the Deputy Registrar dated 24th April, 2013 seeking for

copies of the documents in the court file and the request was declined as they were not on record for any of the parties.

On 13th November, 2013, the Plaintiff filed another notice to act in person and the application subject matter of this ruling.

M/S. Ashioya & co. Advocates then filed two notices of appointment of advocate for the Plaintiff dated 2nd December, 2013 and 18th February, 2014.

M/S. Obura- Obwatinya & co. Advocates filed notice of change of advocate dated 6th March, 2014 coming on record for the Plaintiff in place of M/S. Ashioya & co. Advocates.

M/S. Bulimo & co. Advocates filed notice of change of advocate dated 10th March, 2014 for the Defendant to the application dated 19th November, 2013.

During the hearing of the application dated 19th November, 2013 on the 8th April, 2014, Mr. Obwatinya and Mr. Wamalwa appeared for the Plaintiff and Defendant respectively and made oral submissions on behalf of their clients. I have carefully considered the submissions by counsel, grounds set out on the application, grounds of opposition, supporting and replying affidavits. I have also perused the entire court record including the hand written notes and the documents filed and come to the following findings.;

That both parties had claims against each other which were set out in the amended plaint and amended defence and counterclaim dated 14th December, 2010 and 4th January, 2011 respectively.

That the Plaintiff claim against Defendant was primarily that titles created after subdivision of his land parcel North Teso/Kocholia/1223 being North Teso/Kocholia/1800, 1420, 1425 and registered in the names of Defendant be cancelled and Defendant be permanently restrained from interfering with the land.

The Defendant claim against Plaintiff was that his case be dismissed and judgment entered in her favour restraining Plaintiff from interfering with her land parcels North Teso/Kocholia/1420 to 1425 and 1800.

That when the matter came up before court on 13th October, 2011, the consent which Plaintiff now seeks to impugn was entered into by the respective counsel then on record for the parties in this suit. One Mr. Kassim signed the day's entry against his name for the Plaintiff. The firm of M/S. Kassim Sifuna & Associates Advocates had come on record for Plaintiff through the notice of appointment of advocate dated 24th January, 2011 and filed on 3rd February, 2011. That firm of advocates remained on record for Plaintiff all through the time of entry of the consent judgment. The consent of 13th October, 2011 effectively compromised the whole suit and any party wishing to change an advocate or to act in person needed to comply with order 9 Rule 9 of the Civil Procedure Rule to obtain the consent of the parties or a Court Order to that effect.

That when the Plaintiff filed the notice to act in person dated 26th July, 2012 on 31st July, 2012 and the application of the same date which is still pending, he had not, and to date has not, complied with Order 9 rule 9 of the Civil Procedure Rules. No steps have been taken to prosecute the application dated 26th July, 2012 and filed on 31st July, 2012. In view of the application dated 19th November, 2013 by the same party, the court takes the position that the Plaintiff has technically abandoned the application and the same is accordingly struck out.

That this case having been compromised or settled in terms of the consent order of 13th October, 2011, an appeal was not an option. The provisions of section 67 (2) of Civil Procedure Act addresses this matter in the following terms;

‘67 (1).....

(2) **No appeal shall lie from a decree passed by the court with the consent of the parties.’**

A party who wishes to challenge or impugn a consent order has one of the options as one applying for a review or setting aside the consent order under Order 45 of the Civil Procedure Rules. For such a party to be successful, the party must establish the existence of either fraud, collusion, ignorance of sufficient materials or any other reason that may enable the court to set aside an agreement or contract. This position has been clearly dealt with in many cases by various superior courts and the following six cases are but examples;

- a. **Kahagi Ndirangu –vs- Kenya Power and Lighting company Ltd (2014)eKLR.**
- b. **Evans Gachoki Njuki & 2 others –vs- Wilson Njuki Kirukuma (2008)eKLR.**
- c. **Kenya Commercial Bank –vs- Specialized Engineering co. Ltd 1982 KLR 485.**
- d. **Florence Wasike –vs- Destimo Wamboko 1982 - 88 KAR 625.**
- e. **Purcell –vs- F.C. Tigal Ltd (1970) 3 All ER. 671.**
- f. **Kenya Commercial Bank Ltd., -vs- Benjoh Amalgamated Ltd & Another C.A. No. 276 of 1997.**

That the disposition of the Defendant in her undated replying affidavit filed on 9th August, 2012 responding to the Plaintiff’s application dated 26th July, 2012, that both parties were present and negotiated outside the court before entering the consent of 13th October, 2011 has not been rebutted. The Plaintiff claim that he had not given his consent or instructions to his advocate to enter the consent of 13th October, 2011 remains a mere allegation. The Defendant, and for that matter, the court may not be expected to know the extent of the instructions Plaintiff had given his advocate. It is however not disputed that Mr. Kassim was as of 13th October, 2011 on record for the Plaintiff. In the case of **Kenya Commercial Bank Limited –vs- Benjoh Amalgamated & Another** quoted above, the Court of Appeal stated;

‘ The extent of authority of a solicitor to compromise is set out in a passage in the Supreme court Practice 1976 (Vol. 2) paragraph 2013 page 620 as follows;

‘Authority of solicitor - a solicitor has a general authority to compromise on behalf of his client if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power. (Re Newen, [1903] 1 Ch pp 817, 818; Little -vs- spreadbury, [1910] 2 KB 658) No Limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice – see Welsh –vs- Roe [1918 – (9) All E.R 620.’

The court went ahead to refer to the case of **Brooke Bond liebigh (T) Limited -vs- Mallya [1975] E.A 266** at page 269 where Law J.A restated the law applicable in consent order as follows;

‘ The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani –vs- Kassim (1952)* 19 EACA 131, where the following passage from Seton on Judgment and Orders, 7th Edition, Vol. 1 P. 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 themand 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 misapprehended or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.’

In this case, all the material facts were known to the parties and their counsel as they had exchanged the documents. Among the documents filed by advocates but wrongly headed , ‘Plaintiff’s list of

documents,” dated 3rd June, 2011 were copy of mutation form for North Teso/Kocholia/1223 under which the land was subdivided to parcels 1419 – 1425 in 1994 by the Plaintiff. There is also the copy of mutation form of North Teso/Kocholia/1419 showing it was subdivided to parcel 1799 and 1800 by the Defendant in 1997. There are also copies of the title deeds for North Teso/Kocholia/1800, 1420 to 1425 all in the names of Defendant. The consent of 13th October, 2011 had the effect of conferring ownership of North Teso/Kocholia/1425 to the Plaintiff from the Defendant and the Defendant do not seem to have any objections to that. The claim by Plaintiff that he had not given his counsel instructions to compromise the suit in the terms of 13th October, 2011 cannot therefore hold water without the Plaintiff establishing that he had specifically restricted his counsel from compromising the case in the terms of the said consent and that the Defendant had knowledge of the Limitation. This could have been by availing a written document setting out the nature of the instructions he had given his advocate. Such a document should clearly show his counsel did not have instructions to enter into the consent of the nature of that of 13th October, 2011 and further Plaintiff would have to establish that Defendant were aware of the limit of the instructions to his counsel. As no such limit of instructions on the Plaintiff’s counsel was established, then the counsel had the authority to compromise the suit as he did in the consent of 13th October, 2011 on behalf of his client.

That M/S. Elungata & co. advocates who Plaintiff depones in paragraph 8 of his supporting affidavit sworn on 19th November, 2013 was compromised by the Defendant and that he was a relative of the Defendant was never on record for any of the parties in this suit. The only thing the firm of M/S. Elungata & co. Advocates did in this suit is to do the letter dated 24.5.2013 seeking for copies of documents in this file which request was rightly declined by the Deputy Registrar. The letter was in any case being done about one year and seven months after the consent order of 13th October, 2011 was entered.

The Court of Appeal in the case cited above said a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between parties. The court went on and referred to the case of *Flora Wasike –vs- Destimo Wamboko (1988) 1 KAR 625 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 it contain conditions remaining to be fulfilled which are not carried out”.

The Plaintiff in this case has not in his application dated 19th November, 2011 indicated what has not been done or effected of the consent order of 13th October, 2011 that can make this court set aside or review the consent order. I also see nothing that can be attributed to the Defendant that can make this court be moved to review or set aside the consent order, leave alone to revoke or cancel it.

The Plaintiff filed the application dated 19th November, 2013 over two years from the date the consent order of 13th October, 2011 was entered and has not offered an explanation.

For reasons shown above, I find no merit in the application dated 19th November, 2013 and the application is dismissed with costs to the Defendant.

It is so ordered.

S.M. KIBUNJA

JUDGE.

DATED AND DELIVERED IN OPEN COURT ON 13th DAY OF MAY, 2014.

IN THE PRESENCE OF;

JUDGE.