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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO. 65 OF 2013

PHILLIP ACHIKI NDUBI.....1ST PLAINTIFF

ELIJAH MONDA NYANCHOKA.....2ND PLAINTIFF

VERSUS

DR. ANIL TAYLOR.....DEFENDANT

RULING

1. What is before me is the 1st plaintiff's application brought by way of Notice of Motion dated 6th May, 2013 under order 39 and Order 40 rules 1,2,3 and 11 of the Civil Procedure Rules. The application seeks the following orders:-

a. **That “the consent entered between the plaintiff/applicant and the defendant/respondent has been disobeyed and the court be pleased to order the property of the respondent to be**

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attached for such disobedience and an injunction do issue to restrain the respondent for breach of contract”.

b. **That the consent order be set aside.**

c. **That “the costs for the cause be to the respondent”.**

2. The application was brought on the grounds set out in the body thereof and in the affidavit of the 1st plaintiff sworn on 6th May, 2013. The plaintiffs brought this suit against the defendant on 19th February 2013 claiming that the defendant had wrongfully evicted them the parcel of land known as L.R.NO. West Kitutu/Bomatara/669 on which they were running a secondary school known as Hill Secondary School. The plaintiffs claimed that in the process of the said unlawful eviction, the defendant carried away the school equipment such as chairs, beds, laboratory apparatus and mattresses. The plaintiffs sought an order for the return of the said equipment, damages for breach of contract and mesne profits.

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3. The defendant entered appearance but did not file a defence. Sometimes on 18th March, 2013 the 1st plaintiff and the defendant entered into a consent on the following terms:-
 - i. **The defendant to pay to the 1st plaintiff a sum of kshs. 80,000/-.**
 - ii. **The 1st plaintiff to discontinue this suit.**
 - iii. **The 1st plaintiff to take away his property in the school namely, 2 tables, 1 chair and any other property that belonged to him.**
4. The said consent was reduced into writing, executed by the 1st plaintiff and the defendant and filed in court on 18th March, 2013. It was however not endorsed by the court. It is this consent that is the subject of the present application. The 1st plaintiff claims that the defendant has breached the terms of the said consent by breaking into the 1st plaintiff's office at the school and taking away the properties which the 1st plaintiff was entitled under the consent to take. The defendant has also denied the 1st plaintiff entry into the school premises for the

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purposes of realizing the terms of the consent. It is on account of the foregoing that the 1st plaintiff has moved the court for the orders sought herein. The 1st plaintiff's application was opposed by the defendant. Through grounds of opposition dated 4th June, 2013, the defendant contended that the 1st plaintiff's application has been brought under the wrong provisions of the law and that the same is frivolous, vexatious and amounts to an abuse of the process of the court. The defendant contended further that the 1st plaintiff's application has no basis or merit at all.

5. When the application came up for hearing on 17th June, 2013 the 1st plaintiff submitted that under the consent aforesaid the 1st plaintiff was supposed to be paid kshs.80,000.00 and was also to be given access to the school to collect his properties which were set out in the said consent. He submitted that although he was paid kshs.80,000.00 in full by the defendant,

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the defendant did not allow him to collect his properties. In response to the 1st plaintiff's submissions, the defendant's advocate submitted that the orders sought are not available to the 1st plaintiff because the 1st plaintiff's application has been brought under the wrong provisions of the law. Counsel submitted further that the application is seeking inconsistent reliefs in that, on one hand the 1st plaintiff is seeking the enforcement of the consent order while on the other hand he is seeking to set aside the said consent. The defendant's advocate submitted further that the 1st plaintiff has not given any good reason as to why the consent entered into by the parties herein should be set aside. The defendant's advocate submitted further that no valid grounds have been advanced to justify the attachment of the defendant's assets. Counsel submitted that what the 1st plaintiff was entitled to under the consent were his goods. In the circumstances, there is no basis

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for the court to attach the defendant's properties. Counsel submitted that if the 1st plaintiff felt that the consent they entered into with the defendant has been breached; the 1st plaintiff's recourse is to apply for execution. Counsel submitted that as far as the defendant is concerned, he had complied with the terms of the consent. In his response to the defendant's advocate's submissions, the 1st plaintiff submitted that he would not be able to apply for the execution of the consent order because the consent had no default clause. He termed the issues raised by the defendant's advocate as mere technicalities which should not stand on his way to justice.

6. I have considered the 1st plaintiff's application together with the affidavit in support thereof. I have also considered the submission by the 1st plaintiff. Equally, I have considered the grounds of opposition filed by the defendant together with the defendant's advocate's submission in opposition to the 1st

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plaintiff's application. This is my view of the matter. The 1st plaintiff has sought three (3) substantive reliefs which belong to distinct areas of law. The 1st plaintiff has sought the attachment of the goods of the defendant on the ground that the defendant has disobeyed the consent order. This relief falls in the area of contempt of court. The 1st plaintiff has also sought an injunction to restrain the defendant from breaching the terms of the consent. This falls in the area of injunction. The last relief seeks the setting aside of the consent order. This falls in the area of setting aside of orders and judgments. The issues that arise for determination in this application are as follows:-

- i. **Whether the 1st plaintiff is entitled to an order for the attachment of the defendant's properties;**
- ii. **Whether the 1st plaintiff is entitled to an injunction to restrain the defendant from breaching the terms of the consent.**

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- iii. **Whether the 1st plaintiff has shown good cause to warrant the setting aside of the consent entered into herein with the defendant.**

7. The 1st issue;

Consent is an agreement. As an agreement, one cannot import into a consent what has not been provided for therein. The consent between the 1st plaintiff and the defendant did not provide for the attachment of the defendant's goods in the event of default. In fact, it did not have a default clause. In the circumstances I see no basis at all on which the 1st plaintiff can seek the attachment of the defendant's properties under the said consent. Assuming that the 1st plaintiff was moving the court to convict the defendant for contempt of court and to proceed to attach his properties on account of that contempt, again, the 1st plaintiff has not laid a basis for that conviction and attachment. For the court to convict the defendant for contempt, the 1st plaintiff was under a duty to show that the

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court did issue an order requiring the defendant to do or to refrain from doing certain acts and that the defendant with the knowledge of that order disobeyed the same. The consent between the 1st plaintiff and the defendant although filed in court was not endorsed by the court as an order of the court. No order was therefore extracted therefrom which can be enforced through contempt of court proceedings. In any event, the consent provided that the defendant was to pay to the 1st plaintiff a sum of kshs.80,000.00 and that the 1st plaintiff was to discontinue the suit and also collect his properties from the school. The 1st plaintiff admitted that the defendant paid him kshs.80,000.00 that was provided for under the consent. In my view, this was the only thing that the defendant was obliged to do under the consent. The other terms of the consent were to be complied with by the 1st plaintiff. The consent letter did not provide that the defendant was hand

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over the 1st plaintiff's properties to him or that the defendant would give him access to take delivery. It follows from the foregoing that even if the consent had been endorsed by the court and became an order of the court, it is doubtful if the defendant would have been held to have disobeyed the same.

8. The 2nd Issue:-

The court has power to restrain a breach of contract by an order of injunction. See order 40 rule 2 of the Civil Procedure Rules, 2010. Such order can however be granted only on a substantive suit. The order sought herein by the 1st plaintiff to restrain the defendant from breaching the terms of the consent entered herein between the 1st plaintiff and the defendant cannot therefore issue. Even if such order could be issued by the court, I do not think that this court would have done so. This is because, as I have explained above, I am not satisfied that the defendant has breached the terms of the consent that

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he entered into with the 1st plaintiff.

9. The 3rd issue:-

In the case of, **Flora Wasike Vs. Destimo Wamboko (1982-1988) 1 KLR 625**, the Court of Appeal held that a consent judgment can only be set aside on the same grounds as would justify the setting aside of contract such as fraud, mistake or misrepresentation. I am in agreement with the submissions by the advocate for the defendant that the 1st plaintiff did not give valid grounds on the basis of which the consent entered herein with the defendant could be set aside. The 1st plaintiff did not show that the said consent was entered into through fraud, mistake or misrepresentation. The mere fact that the consent has been breached does not in law call for the setting aside of the consent. Due to the foregoing, I am not satisfied that valid reasons have been put forward to justify the setting aside of the consent herein.

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10. Conclusion:-

From the totality of the foregoing, it is clear that the 1st plaintiff's application must fail. The Notice of Motion application dated 6th May, 2013 is dismissed with no order as to costs.

Dated, signed and delivered at Kisii this 7th day of October, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Plaintiff present in person.

No appearance for the defendant

Mobisa Court clerk.

S. OKONG'O,

JUDGE.

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