REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Suit 61 of 2006

JAPHET NOTI CHARO .....PLAINTIFF

VERSUS

JOSEPH KIVUMO CHARO SHUTU

KIRIMO FONDO SHUTU

FRANCIS K. SHUTU

HARRISON CHARO SHUTU.....DEFENDANTS

R U L I N G

By a Notice of Motion dated 6-3-09, made under Order LXIV Rule 1 and Order L Rule 1 Civil Procedure Rules, section 62(d) and 3A Civil Procedure Act the applicant seeks that the consent order entered on 14-4-08 in respect of the application dated 14-3-08 be reviewed and set aside for renegotiation and/or the said application be heard and determined on merit. It is based on grounds that:

(1) The consent was entered in terms some of which were not consented or agreed upon.

(2) There was no meeting of minds in particular between applicant and his then advocates, in conduct of the matter.

(3) The applicant only come to understand the terms in the current form after contempt proceedings were commenced.

(4) The consent order is likely to result in grave injustice to the applicant and occasion irreparable loss to him.

(5) It is only fair that the said consent order be reviewed to accord parties an opportunity to renegotiate and determine the application on merit.

(6) There is sufficient cause shown to justify review of the consent and the parties will not be prejudiced by that order.

the application is supported by the affidavit sworn by Japheth Noti Charo in which he depones that he had given strict instructions to his advocates to oppose the application as the orders sought, if granted would have the effect of stopping him from the use enjoyment and

development of his property (which is the suit property plot No. C).

He explains that when the matter was called out in court, his advocate Mr. Otara called him aside and informed him that there was need to maintain the status quo. – which he understood to mean that the applicants who had trespassed on his property would be allowed to stay until such time as the suit would be concluded.

He also understood it to mean that he would not be hampered from carrying on with development and generally enjoying the use of his property, and that the consent was a compromise seeking to balance his interest and those of the defendants.

It then turned out that the consent actually recorded, gave the defendants the freedom to enjoy his property while denying him any such right and recently the respondents had electricity connected to the premises which they had illegally put on the suit property. Applicant states that he did not understand nor contemplate that he would be required to stop developing his own property whose title is indefeasible on account of a claim by trespassers.

He later learnt from his advocates upon service of the notice to institute contempt proceedings against him, that the consent order required him to stop development of any nature and says had he known that was the nature of the consent, then he would not have agreed to it.

It is his contention that, the consent was premised on a mistake and it is only fair that it be reviewed. The application is opposed, and respondent in the replying affidavit sworn by Francis K. Fondo who depones that the applicant consulted with his then advocate, Mr. Otara who explained to him in detail, the importance and consequences of the consent, whereupon, the applicant agreed to the same, save that his house which was then under construction would not be affected by the consent.

Further that the consent orders were made after negotiations had taken place for about 30 minutes on 14-4-08 and both parties agreed, together with their respective advocates who were present during the negotiations and in fact it is the plaintiff who came up with the idea that respondents should file an undertaking as to damages, in return for the consent and that the consent should indicate that he would not put up any further structures except for the one house, then under construction and the applicant can't claim mistake.

Further, that the application is bad in law, as the order sought to be reviewed has not been annexed to the application and that it even offends Order L Rule 15(2) Civil Procedure Rules and should be struck out with costs.

The respondents view the application as simply an attempt by applicant to thwart the filing of contempt proceedings against him and enable him to finish constructing houses or petrol pump, being structures that are being constructed against court orders.

Respondents also argue that the applicant is coming to court with unclean hands.

In arguing the application, Mr. Angima for the applicant submitted that the order sought to be reviewed has actually been annexed to the affidavit and referred to in paragraph 21 of the supporting affidavit. He pointed out that the substantive suit filed by the applicant had sought injunctive orders on account of trespass by the respondent on the ust premises belonging to the applicant. On the other hand, the respondents filed a defence claiming equal distribution and sharing of the suit premises and of relevance is that, they did not seek any injunctive orders. He explained that the injunction was being sought by the respondent specifically to restrain applicant from construction of a house on plot No. B, which application was opposed, as the house was already complete and the application has been overtaken by events. He submits that applicant did not have any compelling reasons to make the kind of concessions that appear in the consent and that applicant had in fact given instructions to his counsel to oppose the

application he further explains that what Mr. Otara told applicant was that the consent was for the maintenance of status quo, and the status quo as it then stood was that respondents who had forcibly entered onto the plaintiffs property were still in occupation of that part of the property which applicant was entitled to. The applicant therefore understood that he was being asked to accommodate the respondents and allow them to stay in the interim period pending determination of the suit.

Mr. Angima further points out that the property in question is commercial in nature (not agricultural) yet the 2nd term of that order (which the applicant contests) is that he can cultivate, it is his contention that there were no such discussions and the terms slotted into the consent were contrary to the spirit of the intended consent. He states that the terms were not decided to the point of being unconscionable.

Mr. Angima argues that consent is a compromise, and is about balancing interests of parties, yet considering the prevailing situation here, the applicant gets nothing and the respondent gets away with everything; and that could not have been the intention of the applicant and that there may have been a communication breakdown between applicant and his advocate and so the consent entered into was a mistake.

Mr. Kenga for the respondent submitted that by the time the application came up for hearing, there was only one structure under construction and it was not supposed to be affected by the consent order. He urged the court to note that it was the applicant's counsel Mr. Otara who came up with the consent. He contests the assertion that as a result of the consent, applicant is left with nothing, pointing out that there is an undertaking filed in return for the consent.

He is insistent that both parties consulted together with their advocates and that has not been disputed. It is his contention that Mr. Otara should at least have sworn an affidavit to say he made a mistake.

Mr. Kenga urged the court to look at the pleadings, application and annextures and consider that applicant obtained title after many applications on behalf of respondent, to the Commissioner of Lands and the parties are members of that family, they were born there and the issue of trespass does not arise and that is why applicant consented. He argues that its not about Title that cannot be defeated, rather its about facts which were available.

Mr. Kenga argues that consent orders are not appealable because they were not created by the court. His position is that the consent order was in respect of the application dated 14-2-08 and that has already been compromised and section 7 A of the Civil Procedure act relating to Res Judicata comes into play, and there is nothing to review. Mr. Kenga submits that a review can only be made where there is discovery of new evidence or issues that were not in the aggrieved party's knowledge at that time, error/mistake by court or for sufficient reason and that the mistake must be on the part of the court not counsel, Mr. Kenga wonders what prejudice applicant will suffer if the consent is not reviewed, pointing out that the undertaking for damages cushions applicant and that it is applicant who is now setting up cottages which may actually destroy the subject matter.

Mr. Angima's response is tht the replying affidavit does not address the issues raised by the applicant and that the court has unfettered discretion under section 3A and b 3(e) to make orders necessary for the ends of justice and prevent abuse of the court process.

Mr. Angima argues that a consent order can be brought to court for review, only that the standard required is higher. He submits that if counsel's position is if that the structure which was the original cause of the application filed on 114-2-08, was no more an issue of the consent, then what was the reason for the consent? He denies that the matter is Res Judicata.

The consent order in issue is annexed to the applicant's supporting affidavit and reads:

"***it is hereby ordered by consent as follows:-***

1. That status quo obtaining on the suit premises being plot no. BC and D, all of Malindi municipality be maintained pending hearing of the suit.

However, the plaintiff do continue cultivating the portions of land comprising the suit premises but not to put any further permanent structures on the said parcels, pending hearing and determination

2. That by further consent the defendants be and hereby undertake to pay compensation for damages in terms of the undertaking filed herein in the event the defendants counterclaim is dismissed and the plaintiff's suit is allowed by the court. The said undertaking to be filed within seven (7) days.

Under the provisions of Order XLIV Rule 1 (b), the order to be reviewed is pegged on discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the aggrieved party or could not have been produced by him at the time when the decree was paid or order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. I have really agonized over whether the orders sought should have been for review or for setting aside. When can a consent order be reviewed or set aside?

The case of **Flora Wasika V Destinio Wamboka Civil Appeal No. 81 of 1988, reported in (1988)KLR at pg 429** laid down the issues to be taken into consideration when setting aside a consent judgment – which principles I think, can be used to guide this court in considering review of the consent order to the effect that:

(1) A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting side a contract, or if certain conditions remain to be fulfilled which are not carried out.

The position is amplified by the test set out in Setton on Judgments and Orders (7th Edition), Vol 1 pg 124 as follows:

"***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…cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court…, or if the consent was given without material facts, or in general, for a reason which would enable the court to set aside an agreement"***

Clearly then what I must consider is whether the applicant has demonstrated existence of fraud, mistake or misrepresentation exiting at the time that the consent order or whether the consent was given without sufficient material facts.

Were the terms and consequences of the consent, adequately explained to the appellant?

Certainly the consent was entered into with the participation of the applicant's former counsel who has not sworn any affidavit to say he mistook or misunderstood or misrepresented the terms and consequences of the consent to the applicant – instead applicant decided to engage service of another counsel. The order required the status quo to be maintained – what was the prevailing status quo? From the application leading to the consent, it was that the court do issue injunction against the plaintiff restraining him and his servants from further construction – that was catered for in the consent, but he could carry on with cultivation.

So the status quo was that plaintiff was on the land, respondents were also on the land (according to the plaint) but it is the applicant's activities which were to stop – there cannot have

been a second or hidden meaning to those orders. And for clarity, the defendants (now respondents) were to undertake to pay compensation for damages in the event that the plaintiff's suit succeeded and counterclaim dismissed.

Now applicant turns round to say he thought the orders were to restrict the respondents- if that was so, then what was the purpose of making the undertaking?...There is nothing to suggest fraud or misrepresentation or mistake – his counsel even took him aside to consult. At least Mr. Otara (former Counsel) could have sworn an affidavit to support applicant, he did not. Has there been some new and important matter which applicant could not have discovered even with great diligence at the time of entering the consent? There is nothing new, the presence of the respondents on the suit property and their activities were matters well within the knowledge of the applicant and so this does not satisfy the requirement envisaged when consideration applicants from review.

The upshot is that there is no merit in the application whatsoever with costs to respondents.

Delivered and dated this **7th** day of **July 2009** at Malindi.

H. A. OMONDI

JUDGE