



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 738 OF 2013

PARAMJIT KAUR alias MANDEEP KAUR.....PLAINTIFF

VERSUS

AVTAR SINGH SURI.....DEFENDANT

RULING

1. This ruling relates to two applications. The first application was filed by Plaintiff on 22/10/2019 seeking to have the police assist her and her surveyors in subdividing the Suit Property being L.R. No. 4275/44 River Side Drive into two portions in accordance with the consent order made before Lady Justice Nyamweya on 4/3/2014. Secondly, the Plaintiff sought to have judgement entered in her favour against the Defendant for Kshs. 9,309,020/= being her share of the rental income from the Suit Property for the period August 2015 to August 2019 as indicated in the rent account which the Defendant produced in the mediation proceedings before the Welfare Committee of the East African Ramgharia Board. In the alternative, the Plaintiff sought to have the Defendant ordered to produce up to date accounts for all the rent he has received from the Suit Property from August 2015 to date so that the court may adjudicate the sum due to the Plaintiff.

2. The application was made on the ground that under the consent recorded before Lady Justice Nyamweya on 4/3/2014, parties agreed to subdivide the Suit Property into two and to obtain separate titles for the Plaintiff and the Defendant. When the Plaintiff sent her surveyors M/s Harunani Associates to subdivide the Suit Property, the Defendant's security officers chased them away. The Plaintiff further contended that the Defendant was in possession of the Suit Property and collected rent. She added that he was required to file a rent account in court under the consent order but has failed to do so.

3. The application was supported by the Plaintiff's affidavit in which she stated that in the consent order the Defendant agreed to pay her share of the rental income from the Suit Property but failed to make any payment. The matter was referred for mediation to the Welfare Committee of the East African Ramgharia Board, Sikh Temple where both the Plaintiff and Defendant were members. She averred that during the mediation proceedings the Defendant produced the rent account for 2014 and 2015 which showed that her share of the average rental income was Kshs. 189,976 per month. She stated that the Defendant only paid Kshs. 3,777,309.70 plus 2,000,000 Indian Rupees towards her share of the rental income from the Suit Property for the period running up to July 2015. She produced a copy of the letter dated 21/7/2014 vide which the Defendant forwarded a cheque for Kshs. 1,018,994.50/= to his then advocate A. I. Onyango and Co. Advocates on account of her rental income for the period running from August 2013 to June 2014. She relied on an agreement dated 5/8/2016 before the East African Ramgharia Welfare Committee in which the Defendant admitted paying her Kshs. 3,777,309.7 in part performance.

4. She averred that based on the monthly rent of Kshs, 189,976/= she was entitled to a further sum of Kshs. 9,309,020/= for the period running from August 2015 to August 2019 as her share of the rental income from the Suit Property. She relied on a valuation report prepared by R.R Oswald Estate Agents who valued the Suit Property and gave its current market value as Kshs. 385,000,000/=. She added that the Defendant had not availed a valuation report but he informed the Welfare Committee that Dayton Valuers Limited gave the value of the Suit Property as Kshs. 135,000,000/=.

5. She stated that the Defendant offered her the sum of Kshs. 67,500,000/= for her half share in the Suit Property including her share of the rental income from July 2015 to date which was not acceptable to her. She counter offered to pay Kshs. 67,500,000/= to the Defendant for his half share of the Suit Property but he refused to accept her offer. She added that the Defendant was collecting rent from the Suit Property.

6. The Defendant filed a replying affidavit in opposition to the Plaintiff's application. He maintained that the consent order the Plaintiff relied on was obtained in fraudulent circumstances. He contended that the Plaintiff had been engaged in fraudulent activities including registering the Suit Property solely in her name and obtaining title to the Suit Property for a renewed term without his involvement despite the fact that he held 50% shares in the Suit Property. He was surprised that the Plaintiff waited many years from when the consent order was issued on 4/3/2014 and even had the case prepared for hearing yet she knew of the existence of the consent order. He contended that if the consent order was genuine it was unbelievable that it took the Plaintiff five years to implement it.

7. He maintained that the negotiations before the Welfare Committee were undertaken on a without prejudice basis and were geared towards settling the matter once and for all but the Plaintiff reneged on the negotiations and the mediation collapsed. The Defendant explained that the monies paid to the Plaintiff both in Kenya and India amounted to Kshs. 19,050,986.05/= which included the partial sale price, full rent

apportionment up to 2016 and partial apportionment for 2017. He maintained that he made these payments to the Plaintiff *ex gratia* in light of the family relations because he had bought 50% share of the Suit Property held by the Plaintiff from her predecessor and added that the negotiations were intended towards paying the Plaintiff a little bit more to enable her execute the necessary transfers. He urged the court to proceed and hear the case and determine the twin issues of rent and specific performance in one final judgement.

8. The Defendant filed the second application dated 17/8/2020 seeking to stay further proceedings in this case and to have the court review, set aside or vary the orders it made on 5/5/2020. He averred that by its ruling made on 5/5/2020 the court inadvertently concluded that the proceedings subsequent to the consent order which was challenged by the Defendant were taken because the Plaintiff never brought to the attention of the court the existence of the consent order of 4/3/2014 which was not the case. Further, that the orders made on 5/5/2020 suggested that the Defendant's counterclaim failed without being heard yet the court allowed the Defendant's application to amend the defence and counterclaim despite opposition by the Plaintiff on 17/10/2019.

9. The Defendant contended that there was a clear error on the face of the record in so far as the order of 5/5/2020 suggested that the matter had been finalised and what was left was for the parties to execute the consent order. The Defendant contended that the facts of the case and the actions by the parties to proceed with the hearing even after the consent order was recorded on 4/3/2014 was sufficient reason to disturb the orders issued on 5/5/2020 and allow the case to proceed for hearing on merit. The Defendant explained that the delay in bringing this application was occasioned by the Covid-19 pandemic which made it difficult to access the court and obtain the orders it seeks to be reviewed.

10. The application was supported by the Defendant's affidavit. He deponed that due to the measures adopted for the containment of further spread of Covid-19 by the court and several offices his advocates only became aware on 7/7/2020 that this court had delivered its ruling on 5/5/2020 in respect of his application dated 25/11/2019 seeking to set aside the consent orders recorded on 4/3/2014. That was when he learnt that his application had been dismissed. He maintained that he did not give instructions to his former advocate Mr. Isaac Onyango to compromise the suit in the way it was presented by the orders recorded on 4/3/2014. He claimed that he was not aware of the existence of those orders until the Plaintiff flaunted them in opposition to his application for amendment for his defence.

11. He averred that there was an obvious error on the record or inadvertent mistake when the court reached the conclusion that the proceedings taken subsequent to the consent order were taken in error. He referred to his application dated 28/2/2019 seeking to amend the defence and the Plaintiff's application dated 15/5/2019 seeking to reinstate the suit. He averred that the consent orders recorded on 4/3/2014 took center stage but the court nevertheless granted him leave to amend his defence and counterclaim.

12. The Defendant contended that parties had taken proceedings in the matter subsequent to the consent order as if it did not exist and that executing the consent order would give an undue advantage to the Plaintiff. He stated that the basis for his counterclaim was that he had become entitled to the Plaintiff's half share of the Suit Property and that since this was contested by the Plaintiff only a hearing on merit would determine the rival arguments. He urged that there were sufficient grounds for the court to vary or set aside the orders of 5/5/2020 to enable the parties contest the case on an equal footing.

13. Virinder Goswami swore the Replying Affidavit in opposition to the Defendant's application dated 17/8/2020. He urged that the application brought by the Defendant was an abuse of the process of court as the Defendant was attempting to review the ruling of this court where it found that the consent recorded before the High Court on 4/3/2014 was properly recorded. He urged that the challenge to that consent order was thoroughly documented before this court and after considering the evidence of Isaac Onyango Advocate and arguments, this court ruled that the consent was properly recorded before Lady Justice Nyamweya on 4/3/2014.

14. He deponed that it was obvious that this court granted the application to amend the defence and counterclaim without being appraised of the orders of 4/3/2014. He added that through the counterclaim the Defendant was seeking to enforce an alleged sale agreement between him and the Plaintiff's predecessor yet there was no enforceable agreement. He contended that there was no dispute regarding ownership of the Suit Property and that both parties were equal owners and the Plaintiff wished to regularise the position in accordance with the consent order which the court held was binding on the parties. He urged that the orders of 5/5/2020 could not be reviewed as the Defendant's application did not meet the conditions for review laid out in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. He averred that the Defendant was attempting to avoid paying the Plaintiff her share of income from the Suit Property.

15. Parties filed submissions in respect of the two applications which the court has considered. The Plaintiff submitted that the Defendant was half owner of the Suit Property and was in charge of the Suit Property and collected rent from it. He submitted that she applied for an extension of the lease over the Suit Property at her sole expense for a term of 50 years from 1/5/2010 in order to preserve the property. She did not ask the Defendant for to make a contribution towards obtaining the new grant because he had been hostile and uncooperative towards her. She maintained that the title over the Suit Property was still registered in their two names.

16. She contended that the Defendant had deprived her of her share of the rental income from the Suit Property from August 2015 to date and urged the court to order that the Defendant should pay her the sum of Kshs. 9,309,020 and that he be caused to produce accounts of rents he received from September 2019 to date. She urged the court to allow her surveyors to conduct a subdivision of the Suit Property and for the OCS Muthangari Police Station to assist her and the surveyors in that exercise. She added that any refusal or obstruction by the Defendant should render him subject to contempt proceedings. She urged the court to alternatively order the Defendant to file full accounts of the rents he received from September 2019 to date and she be at liberty to falsify and surcharge the accounts if need be.

17. The Defendant submitted that the ruling of 5/5/2020 breached life to the consent order of 4/3/2014 totally disregarding his counterclaim. He submitted that the court's duty was to ensure justice was done to all litigants as envisaged by Article 159 (2) of the Constitution. The Defendant maintained that he did not authorise his former advocate to compromise the suit through the impugned consent order. It relied on the decision in **Kuwindu Ruringa Company Limited v Andkuwindu Holdings Limited and 13 others [2019] eKLR** on when the court can draw a conclusion that there was fraud or collusion involved and not uphold a consent order where it is shown that the client was not even aware of the application that gave rise to the consent order.

18. The Defendant urged that the triable issues raised by the parties could not be dispensed with in any other way except by subjecting the suit to trial. According to him, one of these issues was whether the Defendant held a beneficial interest in the Plaintiff's share of the Suit Property and whether an order for specific performance should be made. He pointed out that the consent entitled the Plaintiff to a backdated share of income from the Suit Property and granted authority to separate the Suit Property which would be detrimental to the Defendant when one takes into consideration his counterclaim.

19. The Defendant urged the court to set aside its orders pursuant to Section 80 of the Civil Procedure Act. He relied on the decision in **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** where the court stated that a review may be granted where it is necessary to correct an apparent error or omission on the part of the court which must be self-evident and not require elaborate arguments to be established. The Defendant submitted that the existence of the consent order was brought to the court's attention by the Plaintiff when she challenged the Defendant's application to amend the counterclaim which the court eventually allowed. The Defendant argued that the conclusion reached by the court that the impugned consent order was never brought to its attention was an error curable under Section 80 of the Civil Procedure Act because the court had allowed the Defendant to amend his defence.

20. The Plaintiff filed submissions in response to the Defendant's submissions dated 26/10/2020. She pointed out that the title over the Suit Property was jointly owned with the Defendant. The Plaintiff urged that the Defendant was attempting to reopen the proceedings yet it was a cardinal principle of law that there has to be an end to litigation. She argued that the court was *functus officio* in so far as the prayers sought by the Defendant was concerned. She submitted that following the court's ruling regarding the consent order the proceedings had ended save for the arithmetic of the rent received by the Defendant which is to be paid to the Plaintiff.

21. The Defendant filed submissions in respect of the application dated 18/10/2019 reiterating the averments in his replying affidavit filed in court on 19/12/2019. He stated that the sum demanded by the Plaintiff on account of rent had no basis and added that a portion of the rent was paid to the Plaintiff subsequent to the mediation by the Welfare Committee. The Defendant urged that it was trite law that a party could not introduce evidence in his submissions yet the Plaintiff's submissions had certain documents of evidential value attached to them. He urged the court to dismiss the application.

22. The court will first deal with the application by the Defendant seeking to review, set aside or vary the orders made by this court on 5/5/2020 on the ground that the court inadvertently concluded in the ruling that the proceedings conducted subsequent to the consent order of 4/3/2014 were taken because the Plaintiff did not bring to the attention of the court the existence of the order of 4/3/2014. He urged that this court was aware of the existence of the court order of 4/3/2014 when it allowed the Defendant's application for amendment of the defence on 17/10/2019. The fact that the Plaintiff applied to enforce the consent judgement of 4/3/2014 in 2019 confirms the fact that the court did not consider that consent when it allowed the Defendant's application for amendment of his defence. At the time the court was dealing with the Plaintiff's application for reinstatement of the suit.

23. The ruling this court made on 5/5/2020 clarified that the consent recorded on 4/3/2014 was binding on the parties. The Defendant had challenged the consent order and the court gave its decision after considering the application, the response, the submissions of counsel and the evidence of Isaac Onyango Advocate who the court found had recorded the consent. The Defendant is attempting to re-litigate that issue once more hoping to get a different outcome. The proceedings undertaken after the consent order of 4/3/2014 regarding the preparation of this suit for hearing including the amendment of the defence and counterclaim were taken by mistake and were liable to be reviewed for they amounted to an error on the face of the court record. The court notes that proceedings were undertaken in 2014 after the consent order of 4/3/2014 in partial performance of that consent order.

24. In the ruling of 5/5/2020 this court set out in great detail the proceedings that were taken by the parties after the consent had been recorded on 4/3/2014. The proceedings that took place after 2017 show that neither the Defendant nor the Plaintiff informed the court of the fact that the matter had been compromised by that consent. This is buttressed by the fact that the Plaintiff filed the application dated 18/10/2019 seeking to enforce the consent dated 4/3/2014. This court having declined to set aside the consent dated 4/3/2014, it is not open for the Defendant to revisit arguments regarding the propriety or otherwise of the consent order of 4/3/2014 for this court cannot sit on appeal over its decision. The proceedings that took place in this case after the consent of 4/3/2014 were of no consequence unless they gave effect to the enforcement of the terms of that consent. The Defendant has failed to satisfy the grounds for which the court may review, set aside or vary its orders. The court dismisses the application dated 17/8/2020 with costs to the Plaintiff.

25. Turning to the Plaintiff's application, the court finds that the application is merited for it seeks the enforcement of the consent order of 4/3/2014 which this court already determined was valid. The court grants prayer 1 of the application dated 18/10/2019. Since the issue of accounts of the rent from the Suit Property is contested, the Defendant is to produce up to date accounts of all the rents received from the Suit Property from August 2015 to date, within 30 days of today, to enable the court determine the share of rent payable to the Plaintiff.

26. Each party will meet its costs of the application dated 18/10/2019 since it took the Plaintiff five and a half years to seek to implement the consent order of 4/3/2014.

Delivered virtually at Nairobi this 10th day of December 2020.

K.BOR

JUDGE

In the presence of: -

Mr. A. B. Shah holding brief for Mr. V. Goswami for the Plaintiff

Ms. Caroline Mburu holding brief for Nyawara and Company Advocates for the Defendant

