REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT NYAHURURU

ELC NO 142 OF 2017

(FORMERLY NAKURU ELC NO 6 OF 2014)

JOEL NJEMA WARUIRU.....1st PLAINTIFF/RESPONDENT

NANCY WAMBUI NJEMA.....2nd PLAINTIFF/RESPONDENT

VERSUS

ROBERT KIBUNJA.....DEFENDANT/APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated 14th December 2018 brought under *Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act as well as Article 159 of the Constitution* where the Applicant seeks:

i. That the Consent judgment recorded on the 18th July 2018 be and is hereby set aside and the matter be set down for hearing.

ii. That in the alternative and without prejudice to prayer (1) above the court do hereby rectify the consent by inserting the words **'per month'** immediately after the **'20%'** in order to reflect the true intention of parties and cure a patent error on the face of the consent.

iii. That the cost of this application be in cause.

2. The said application is premised on the grounds on the face of it as well as the sworn affidavit of Robert Kibunja Mwangi sworn on the 14th December 2018.

Background

3. The Plaintiff /Respondents in this matter filed this suit on the 17th September 2012 wherein they sought for declaratory orders to the effect that the transfer of land parcel No. Nyandarua/Ol Kalout West/563 was fraudulent null and void to which the title deed in the name of the Defendant/Applicant herein be cancelled and the register rectified to reflect their names as co-owners.

4. The Respondent/Applicant in reply to the claim and vide his amended defence and counter-claim denied the said claim reiterating that land parcel No. Nyandarua/Ol Kalout West/563 was lawful and his title was indefeasible. That further in the alternative the 1st Plaintiff be ordered to pay the loan advances to him of Ksh 30,000/= together with interest at the rate of 43% per month from the 8th November 2007 to the date of judgment.

5. On the 21st September 2016, during the pre-trial stage, Counsel for the plaintiff sought for and adjournment so that they could negotiate on a refund by the Defendant herein, which adjournment was granted.

6. Parties' however failed to reach a settlement after having sought for an adjournment on several consecutive dates that the matter had been set down for mention to confirm whether they had reached a settlement.

7. On the 20th September 2017 the court was informed that the parties having failed to reach a settlement, that the matter be listed for hearing in the meantime counsel for the Defendant sought to amend his defence and put in a counterclaim, an application which was allowed.

8. On the 18th July 2018 when the matter was set for hearing, the court was informed by counsel for the Defendant that although they were ready to proceed for hearing, yet the parties were willing to settle the matter. The court gave them 30 minutes to decide on the way forward

wherein at the lapse of the said time Counsel informed the court that they had a consent to record to wit;

> *'By consent, judgment be entered in favour of the Defendant against the Plaintiffs for ksh 30,000/= with interest at the rate of 20% payable from 8th October 2007 to date.*
>
> *The cumulative sum be paid by the Plaintiffs to the Defendant within 90 days from the date hereof and upon full payment, the title deed registered as Nyandarya/Olkalou West/563 be re-transferred to the Plaintiff's jointly. In default of payments, execution to issue.'*

9. The said consent was subsequently adopted as the court order on the 29th July 2018.

10. After adoption of the consent order, counsel for the Plaintiffs herein filed an application dated the 25th September 2018 objecting to the manner in which Counsel for the Defendant had extracted the decree.

11. The matter was heard exparte wherein the court in its ruling delivered on the 1st October 2018 found that the procedure under Order 21 Rule 8 of the Civil Procedure Rule was not followed to the effect that the Defendant/Respondent herein extracted a decree that did not conform to the terms of the consent entered into by the parties on the 18th July 2018 thus the same did not reflect the terms of the order of the court. The court thus set aside the said decree and directed the Deputy Registrar to extract a proper decree.

12. Following this order, when the matter came up or mention on the 29th November 2018, the court was informed by counsel for the Defendant that the consent recorded by parties on the 18th July 2018 had been done so by mistake thus misleading the court on the percentage of the interest whereby they sought for the same to be set aside.

13. The court directed the Defendant to file a formal application to set aside the consent judgment. That the said application was to be disposed of through viva voice on the 18th December 2018.

14. The Applicant/Defendant filed his application on the 14th December 2018 wherein the Respondent/Plaintiffs filed their replying affidavit on the 15th January 2019.

15. On the 30th January 2019 when the same up for hearing inter parties, her was no appearance by counsel for the Plaintiff/Respondent despite the hearing date having been taken by consent.

Applicant/Defendant's case;

16. The Applicant/Defendant hence proceeded with submission on their application to the effect that the application under certificate of urgency, dated 25th September 2018 sought to challenge the validity of the consent judgment entered into by the parties on the 18th July 2018 thereby seeking orders that the same be set aside to allow the matter be heard to conclusion.

17. The Grounds upon which the said application was based is that there was an apparent error on the consent recorded in court which error made the consent unenforceable for being ambiguous.

18. That the consent did not specify how the interest was to be applied whether it was annually or monthly. That it had just stated 20% following which parties came up with different interpretations.

19. That the Defendant had gone ahead to extract a decree in terms he believed were that terms of the consent which was at all times around the interest specified in the pleadings that is monthly interest.

20. That the Plaintiff/Respondents on the other hand had come up with their own interpretation which according to their replying affidavit dated the 10th January 2019 the interest was either to be applied annually or at the court rate or alternatively under the Banking Act which clearly showed that there was no meeting of the mind.

21. That when parties were given time by the court to negotiate, they had negotiated in terms of the pleadings however when recording the consent, it escaped Counsel's attention that the interest specified was not stated as to how it was to apply. This was clear misappropriation of the material facts.

22. Having stated earlier that the Plaintiff/Respondents had filed their replying affidavit to the application on the 15th January 2019 and despite their absence in court on the date scheduled for hearing of the application, I shall never the less proceed to consider the said replying affidavit.

Respondent/Plaintiff's case

23. The Respondent's replying affidavit of the 10th January 2019 in opposition of the application and while maintaining that the consent judgment was good in law thus was a proper determination of the suit in finality was to the effect that soon after the consent of 18th July 2018, was entered, the Plaintiff/Respondent had deposited a bankers cheque for Ksh 96,000/= after computation of interest wherein counsel for the Applicant rejected it and returned to his advocate.

24. That the Applicant has been demanding for payment of the amount together with usurious interest rates which the Respondent's counsel has rejected. That the Respondent had been willing to pay an interest rate of 14% which is the court rate.

25. That pursuant to the provision of Section 26 of the Civil Procedure Act, interest rates is charged per annum and nit per month. That what the Applicant was addressing was rates charged by shylocks.

26. That in reference to the consent reordered in court, parties had agreed on the interest rate of 20% per annum and that negotiations were as per the provisions of Section 26 of the Civil Procedure Act.

27. That the Consent recorded in court was a binding contract as against the parties and it was not the business of the court to renegotiate the same or assist the Applicant to get out of what he considered to ebb a bad bargain. The issue of ambiguity in this case did not arise.

28. That interest was either charged at commercial rates or at court rate which was 14% per annum. Where interest was charged on commercial rates, the rate was 4% above the base lending rates. The Applicant did not justify himself how he came up with the interest rate of 20% per annum. The Respondent prayed for the dismissal of the Application.

Determination.

29. I have considered the Application herein as well as the replying affidavit and the oral submission by Counsel for the applicant herein.

30. I note that the present application has been brought under the provisions of Order 51 of the Civil Procedure Rules and under Section 3A of the Civil Procedure Act, provisions which do not give this Court jurisdiction to grant the prayers sought.

31. Whereas the provisions of Order 50 of the Civil Procedure Rules stipulate provisions on how to approach the Court, Section 3A of the Civil Procedure Act stipulates the inherent powers of the court and does not help the Defendant's case either. The Defendant ought to have applied for review or through a separate suit but not to approach the court under the said provisions.

32. In the case of **Mumias Out growers Company (1998) Ltd –vs- Mumias Sugar Company Ltd NRB HCCC No. 414 of 2008** the court held that when considering an application to set aside and/or vary a consent decree, that:

> *"The applicant has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed.*

33. Bosire J (as he then was) in the case of **Muchiri –vs- Attorney General & 3 others (1991) KLR 516** *stated at page 530 that:-*

> *"Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice."*

34. Also in **Halburys Laws of England 5th edition Vol. II, 2009 paragraph 15, it was observed that:-**

> *"… a claim should be dealt with in accordance with the rules of the court and not by exercising the court's inherent jurisdiction……..and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary. Where it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexations or oppression to do justice between the parties and to secure a fair trial between them."*

35. From the foregoing, it is quite clear that once a consent order or judgment has been entered into by the parties, the procedure available to challenge or set aside or vary the same is by way of an application for review or by a different suit.

36. That notwithstanding, the matter for determination in the circumstance is whether the present consent order which has been adopted as an order of the court can be varied or set aside.

37. In the case of **Brooke Bond Liebig (T) Limited vs Mallya (1975) E.A. 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 **Hirani vs Kassam (1952), 19 EACA 131,** where the following passage from Seton on Judgment and order, 7th edition, Vol. 1 page 125 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.'*

38. The Court of Appeal in the decision in **Munyiri –vs- Ndungunya (1985) KLR 370 held as follows:**

> *….. will exercise its jurisdiction to review, vary or set aside a consent order if it is shown that such an order has been obtained by fraud or collusion, by agreement contrary to the policy of the Court, or the consent was given without sufficient material fact, or misapprehension or ignorance of material facts or for a reason which would enable a court to set aside an agreement or by the*

consent of the parties themselves.

39. In the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR** the court of Appeal held that:

> *The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.*

40. I find in present case, no such circumstances have been shown to exist. There is no suggestion of fraud or collusion in the consent entered into by the parties herein. Indeed all material facts were known to the parties, who consented to the compromise in terms as clear and unequivocal as to leave no room for any possibility of mistake or misapprehension.

41. Section 26 of the Civil procedure Act stipulates as follows:

> *Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.*
>
> *(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.*

42. In this instance, it is apparent while there was good intention by the parties, there was failure to tie up the loose ends of the contractual arrangement between them. **Section 26 (1)** of the *Civil Procedure Act* herein above captioned gives this Court a complete discretion to order interest to be paid at such rate as it deems reasonable.

43. In my view therefore, I direct that the interest rate of 20% agreed upon by parties, be paid **per annum** to give effect to the consent to read as follows:

> *'By consent, judgment be entered in favour of the Defendant against the Plaintiffs for Ksh 30,000/= with interest at the rate of 20%* **per annum** *payable from 8th October 2007 to date.*
>
> *The cumulative sum be paid by the Plaintiffs to the Defendant within 90 days from the date hereof and upon full payment, the title deed registered as Nyandarya/Olkalou West/563 be re-transferred to the Plaintiff's jointly. In default of payments, execution to issue.'*

44. Further orders are that the Deputy Registrar to extract the said decree 7 days upon the delivery of this ruling. This matter is hereby marked as finalized.

45. The Application dated 14th December 2018 is herein dismissed with costs to the Respondents.

Dated and delivered at Nyahururu this 26th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE