REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 78 OF 2015

FNK.......................PLAINTIFF

VERSUS

JWM...................DEFENDANT

RULING

The application before me is the Notice of Motion dated 5th March 2019 brought under ***Order 51 Rule 1 Order 12 Rule 7 CPR and Section 3 and 3A CPA.*** The Applicant is seeking the following orders:

1. Spent.

2. That this Honourable Court do issue an order of stay against the implementation of the order issued on 22nd November 2018 pending the hearing and determination of this application.

3. That this Honourable Court be pleased to set aside the consent judgment dated 13th February 2017 and the order issued on 10th March 2017 and all consequential orders and thereafter order that the matter be set down for hearing.

4. That the costs of this application be provided for.

The application is premised on grounds shown on the face of the application and the affidavit of FNK. The application is further supported by numerous documents annexed to the supporting affidavit. The Defendant/Respondent filed grounds of opposition dated 13th March 2019.

PLAINTIFF/APPLICANT'S CASE

The applicant in his affidavit argued that he never instructed his previous counsel on record M/S G.O. Ombachi to record the consent dated 13th February 2017 and that the same was procured through fraud and collusion and thus the reason he decided to instruct another advocate. The Applicant further stated that he was married to the Defendant/Respondent and they had problems in their marriage prompting them to part ways in the year 2003 and in 2006, he decided to remarry. He further deponed that should the land be sub-divided as per the consent dated 13th February 2019, then his 2nd family will suffer irreparable loss since they are not provided for and that he has children with the 2nd wife. He argued that his 2nd family live on the suit land and have made various developments thereon. In conclusion, the Applicant stated that the mistake of an advocate should not be visited on a client.

RESPONDENT'S CASE

The Respondent raised five grounds in her grounds of opposition stating that the application is incompetent, incurably defective, bad in law and does not lie. He also stated that the application is frivolous, vexatious and otherwise an abuse of the Court process which should be dismissed with costs. He relied on the following cases:

1. East African Portland Cement Co. Ltd Vs New Limuru Hardware Ltd HCCC No. 1335 of 2001 (NBI)

2. Erik Gakuya Mwathaita Vs Maganjo Joshua Kago ELC Case No. 661 of 2013.

ANALYSIS AND DECISION

I have considered the affidavit evidence and the documents attached to the application. I have also considered the grounds of opposition and the submissions by both parties. The genesis of this application is a consent letter by counsels for both the Plaintiff/Applicant and the

Defendant/Respondent dated 13th February and adopted by this Court on 13th February 2017. The said consent order reads as follows:

> ***"(1) That L.R. No. BARAGWE/GUAMA/xxxx be shared equally amongst the following:***

- ***FNK, KNN, MMN, JWM***

> ***(2) That each person to be issued with his/her own title deed.***
>
> ***(3) That the matter be marked as duly settled.***
>
> ***(4) That each party to bear its own costs".***

The principles for setting aside and/or varying a consent order and/or judgment was considered in the case of ***BROOK BOND LIEBIG (T) LIMITED VS MALLYA (1975) E.A 266*** where ***LAW J.A*** at ***page 269*** stated as follows:

> ***"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 Section on judgments and orders, 7th edition, Volume 1 page 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 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.***
>
> ***No such circumstances have been shown to exist in this case: There is no suggestion of fraud or collusion. All material facts were known to the parties, who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham J, said in the introduction to the passage quoted above from Hirani's case, a Court cannot interfere with a consent judgment except in such circumstances as would be good ground for varying or rescinding a contract between the parties".***

The Applicant in this case has stated that his hitherto lawyer Mr. G.O. Ombachi did not consult him before he entered into the impugned consent judgment. The standard of proof required for setting aside and/or varying a consent order and/or judgment has been put in the same bar as those required in fraud related cases.

In ***Kenya Commercial Bank Ltd Vs Benjoh Amalgamated Limited & another (1998) e K.L.R***, the Court of Appeal cited a page in the ***Supreme Court Practice 1976 (Vol. 2) paragraph 2013 page 620*** stating:

> ***"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 directions; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re-Newen, (1903) ICH. PP 817, 818 Little X Spreadbury, (1910) 2 K B 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 ER Rep 620".***

again in a Uganda case of ***Lenina Kemigisha Mbabazi Star fish Limited Vs Jing Jeng International Trading Ltd (HCT-00.MA.344-2012)*** the Court stated:

> ***"The Court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action".***

From the numerous decisions from this Court and the Superior Courts, it is clear that in an application seeking to set aside a consent judgment, the applicant must justify that the consent was obtained by fraud or collusion or by an agreement contrary to the policy of the Court or that the consent was given without sufficient material facts or in misapprehension or ignorance of such material facts. The Applicant has not alluded any of these facts to justify the setting aside of the consent judgment. There is no suggestion of fraud or collusion disclosed from the affidavit evidence. The reasons given by the Applicant for setting aside the consent judgment is that he married a second wife and were blessed with children who are likely to be disinherited if they are left out in the sharing of the suit property. He stated at paragraph 7 of the supporting affidavit as follows:

> ***"That when my former advocate M/S G.O. Ombachi signed the consent dated 13th February 2017, he never consulted me and I feel that the consent was procured by way of fraud".***

The Applicant in his affidavit stated that his hitherto counsel Mr. G.O. Ombachi did not consult him when he signed the consent judgment and he feels that the consent was procured by fraud. Fraud is a serious matter that is not based on feelings but on cogent evidence which must be particularized. Beside particularizing issues of fraud and/or collusion, an applicant must prove those claims beyond the balance of

probabilities but lower than beyond reasonable doubt required in criminal cases. I am afraid that the Applicant has not only failed to particularize the alleged acts of fraud and/or collusion but has not also proved any such claims. In the case of ***Abdul Rehman Vs Fredrich Delfer & another C.A No. 112 of 1992***, the Court of Appeal was emphatic that the burden of proving fraud especially against an advocate is very heavy and that fraud must be specifically pleaded and proved strictly. I find that the Applicant has not satisfied this Court he deserves the orders being sought.

In the result, the application dated 5th March 2019 is dismissed with costs to the Respondent.

READ and SIGNED in open Court at Kerugoya this 12th July, 2019.

E.C. CHERONO

ELC JUDGE

12TH JULY, 2019

In the presence of:

1. Mr. Ngigi for Respondent

2. Ms Nyangati holding brief for Wambugu Kariuki

3. Okatch – Court clerk present