



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 31 OF 2018

LUPE CONTRACTORS CO. LTD.....APPELLANT/RESPONDENT

VERSUS

WILLIAM KARIUKI.....RESPONDENT/APPLICANT

RULING

The matter for determination is the **Notice of Motion** Application dated **1st March 2019**, by the Respondent/Applicant brought under **Section 3A** of the Civil Procedure Act, Cap 21 Laws of Kenya, **Order 26 Rules 1 and 6** of the Civil Procedure Rules seeking for orders that;

1. THAT the Appellant be ordered to deposit the accumulated rent arrears of Kshs.756,000/= plus costs of the Appeal in Court pending the hearing and disposal of the appeal.

2. The Costs of the Application be in the cause.

The Application is premised on the grounds that the Respondent has reason to believe that the Appellant will be unable to pay the Respondent's rent arrears and Appeal costs in the likely event that the Appellant is unsuccessful in his appeal as he has in the recent past expressed his inability to pay the full rent. Further that the Appellant has breached the consent entered in Court with the Respondent on **19th December , 2018** by failing to pay the full rent as greed by the parties. That it is in the interest of justice that the Application is allowed as it will be prejudicial to the Respondent if the Application is not allowed.

In his **Supporting Affidavit**, the Respondent/Applicant averred that the Court made an order directing the Appellant/Respondent to continue paying full rent pending the disposal of the Appeal. However the Appellant has failed to do so as evidenced by **annexture WK**. He further alleged that the Appellant has informed him that he will be unable to pay the full rent due to financial challenges. It contended that he has justified reasons to believe the Appellant will be unable to pay his rent arrears and appeal costs in the likely event that he is unsuccessful in his appeal. He contended that the Appellant should deposit the rent arrears of **Kshs.756,000/=** plus the costs of the Appeal pending the hearing and disposal of the Appeal herein. It was his further contention that the fact that the Appellant has no other known assets means that he risks making major losses and it is in the interest of justice that this application should be allowed.

The Application is opposed and **Peter Leonard Mwangi**, the Managing Director of the Appellant/Respondent filed a **Replying Affidavit** on **26th March 2019**, and averred that the Consent adopted on **19th December 2018**, was only condition on the hearing of the Appeal and the Respondent ought to be barred from attempting to add other conditions since the Orders of **19th December 2018**, have been obeyed. He denied that he is in breach of the **Consent Order**, and contended that he has been obeying the said Order and paying **Kshs.60,000/=** per month as he did before the Appeal and continues to do so and the Application has only been filed with the intention to harass, intimidate and evict him unlawfully. Further that he has been advised by his Advocates, that all parties are bound by the terms of the Consent and therefore the Respondent/Applicant cannot claim to be dissatisfied by an Order whose terms his Advocate agreed to. He also contended that the Application is meant to delay the conclusion of the matter to the detriment of the Appellant being that the Appeal is not based on the arrears but on inhabitable premises which the Respondent has refused and/or neglected to repair.

That the Appellant's case is that the Respondent refunds him **Kshs.500,000/=** since the year **2014**, and repairs the building hence the introduction of the issue of arrears is meant to delay the determination of this Appeal. He urged the Court to dismiss the instant application.

On the **29th of April 2019**, the parties agreed to canvass the Application by way of written submissions. The Respondent through the **Gatuh Nderitu & Co. Advocates**, filed his submissions on the **9th of May 2019**, and submitted that the consent was entered into without enough sufficient facts and it is therefore a ground to vary/set it aside. Reliance was placed on various decided cases and provisions of the law.

The Appellant/Respondent through **Koceyo & Co. Advocates** filed rival submissions on the **20th of May 2019**, and submitted that the Application is being used to add other conditions that are mere afterthoughts despite the fact that the Appellant/Respondent has been

faithfully obeying the consent orders. He relied on various decided cases and further submitted that the Respondent's Application has not met the grounds for varying a Consent Order.

The Court has now carefully read and considered the Application, the **Supporting Affidavit** by the Respondent/Applicant, the **Replying Affidavit**, the annexures thereto and the rival written submissions herein and the Court finds the issue for determination is whether the Respondent/Applicant is entitled to the Orders sought.

The Respondent/Applicant has urged the Court to Order the Appellant to pay the accumulated rent of **Kshs.756,000/=** as the Appellant is in breach of the **Consent Order** requiring him to continue paying the rent as usual. It is important to note that the parties entered into a Consent Order that required the Appellant to continue paying the rent as usual. The Respondent/Applicant has sought to have the Consent disregarded and that the Appellant be ordered to pay the amount as he is in breach of the said Court Order and further that the Appellant has demonstrated that he would be unable to pay him if he loses the suit.

For a Court to set aside any Consent Order, it must be satisfied that either a party has failed to meet its obligations under the said Consent Order or that the **Consent** was marred by fraud, collusion or misrepresentation of facts. See the case of **Kenya Commercial Bank Ltd... Vs... Specialized Engineering Co. Ltd [1982] KLR 485**, where the Court held that:-

"1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side."

Further the Court in **Flora N. Wasike ...Vs... Destimo Wamboko [1988] eKLR**, held that:-

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983."

In **Purcell ...Vs... F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676:**

"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons.."

From the foregoing, it is clear that the Court will only set aside a **Consent Order**, if it is satisfied that there was fraud and collusion and if a party has not fulfilled its part of the Consent Order.

The Respondent/Applicant has alleged that the Appellant/Respondent has failed to pay the rent as required because the rent was not properly indicated in the Order. The Appellant has however denied these allegations and has further produced receipts evidencing that he has been paying the required monthly rent of **Kshs.60,000/=**. This Court must therefore determine the rent payable by the Appellant in order to determine whether there is breach of the said Consent Order. While the Respondent/

Applicant has alleged that the rent payable was **Kshs.108,000/=** that the same had been reduced to **Kshs.99,000/=**. However the Appellant has alleged that the rent was **Kshs.60,000/=**.

This Court notes that the arrears that the Respondent/Applicant alleges he is owed is in contention and therefore that cannot be the rent. Further this Court has seen the tenancy agreement between the parties which indicate that the monthly rent is **Kshs.57,000/=**. The Appellant has produced receipts that evidenced that he has been paying **Kshs.60,000/=** and further receipts evidencing that he has continued to pay the **Kshs.60,000/=**. Without any evidence to controvert the tenancy agreement or evidence reviewing the said rent, this Court finds that the rent payable was **Kshs.60,000/=**.

This Court having held that the rent payable was **Kshs.60,000/=** and further that the Appellant/Respondent having produced evidence to show that he has been paying the rent as agreed, finds that there has been no breach of the **Consent Order**, that was entered by the parties herein. Further the Respondent/Application has not produced any evidence nor has he alleged that his Advocate did not enter into the Consent in place without his instructions nor was there fraud or collusion. See the case of

S M N ...Vs... Z M S & 3 others [2017] eKLR where the Court cited the case of **Lenina Kemigisha Mbabazi Star Fish Ltd (supra)**, and held that:

"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."

This Court finds and holds that there is no reason why the Consent Order herein should be set aside and further finds that there are no rent arrears herein that should be deposited by the Appellant/Respondent.

Further the Court finds that this Appeal has not been determined and the Respondent/Applicant has not satisfied the Court as to why the Appellant/Respondent should deposit the costs. The Respondent's/

Applicant's fear of the unknown cannot be a basis upon which this Court will Order and/or direct the Appellant/Respondent to pay for costs of an Appeal that is yet to be determined and further there is no improper conduct on the part of the Appellant/Respondent herein.

*Having now carefully read and considered the Application , the affidavits and the annexures thereto together with the written submissions of the parties, the Court finds and holds that the Respondent's/Applicant's application dated **1st March 2019** is not merited and consequently, the said application is dismissed entirely with costs to the Appellant/Respondent.*

Let the matter be set down for hearing and the Appeal heard and determined on merit.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th day of November, 2019.

L. GACHERU

JUDGE

8/11/2019

In the presence of

No appearance for Appellant/Respondent

Mr. Gatuhi for Respondent/Applicant

Jackline - Court Assistant

L. GACHERU

JUDGE

8/11/2019