



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 126 OF 2005

SIEGFRIED MICHAEL HOFESTETTER.....PLAINTIFF

-VERSUS-

RANGATIRA LIMITED.....DEFENDANT

RULING

1. The Application for consideration is the Notice of Motion dated 12th July 2019 and stated to be brought under Section 1A, and 1B of the Civil Procedure Act and Article 159(2) of the Constitution. In the Application, the plaintiff/Applicant seeks orders that the matter be set down for formal proof to determine the ratio of sharing of the amount realized from the sale of PLOT NO. MN/I/1890 and that pending the hearing and determination of the formal proof, the Defendant by itself, its servants, agents, or otherwise be restrained from selling, charging, subdividing, transferring or in any other manner interfering with the title to PLOT NO. MN/I/1890.

2. The Application is based on the following grounds:

a. This court issued by consent of the parties an order on 4th December, 2018 which determined the process of a quick disposal of this suit. What remained however, was the ratio of sharing the amounts realized from the sale.

b. To fully execute the order of 4th December, 2018 required the full participation of the parties. In this regard the Defendant has totally declined to cooperate making it impossible to fully implement the order of this court issued by consent of parties on 4th December 2018.

c. Court orders are not issued in vain.

d. The court has an obligation to determine this suit within the provisions of the constitution and the Civil Procedure Act. To do so parties need further directions.

e. The Applicant is suspicious that the actions/inactions of the respondent may lead to complications in finalizing this suit should the Defendant act adversely to the current status. Prudence calls for a restraining order.

f. Should the respondent deal adversely against the title the plaintiff will suffer irreparable loss and damage.

g. There are justifiable reasons for grant of the orders sought.

3. The Application is supported by the affidavit of Nagib Mohamed Shamsan sworn on 12th July 2019 in which it is deposed that the Defendant had been urged to cooperate for purposes of moving this matter forward but there has been no response from the Defendant. That investigation on the mother title which is held by G. Odull and Advocates confirmed that a caveat placed by the plaintiff was removed without following due process. That this illegal action was done by the Defendant to enable it sell apartments it developed on an adjacent subdivisions and that several sale agreements have been done. The plaintiff avers that he is apprehensive that once they enter the final stretch of handling the formal proof, the Defendant may proceed to sale, subdivide, charge, lease or even dispose the suit property since it holds the mother title. That if this happens, they will lose the substance of this suit and the plaintiff will suffer irreparable loss and damage. It is deposed that the Defendant may not be having any other property in Kenya and therefore the plaintiff is exposed.

4. In opposing the Application, the Defendant filed grounds of opposition on the following grounds:

1. The court has ordered that the property herein be sold and proceeds divided between parties in a ratio to be determined by the parties. The Application herein is thus pre-mature because

i. The property has not been sold.

ii. The parties have not disagreed on how to divide the proceeds thereof.

iii. The court cannot determine the ratio of sharing the proceeds unless the property has been sold and proceeds received in a joint account of the plaintiff and Defendant's advocates.

2. The Application is self-defeating as an injunction to stop the sale of the property will ultimately work against the consent filed by the parties to sell the property and divide the proceeds.

3. The Application is an abuse of the court process as the Plaintiff, who has consented to the sale of property is now seeking to injunct the same sale he has consented to.

4. The Application ought to be held in abeyance until such time that the property is sold, proceeds received and the parties have disagreed on the ratio of sharing the proceeds.

5. I have considered the Application and the submissions filed. The only issue for determination is whether the orders sought should be granted. It is not in dispute that on 30.10.2018 the parties herein entered into a consent allowing the parties to sell a portion of the property MN/I/1890 and the proceeds thereof to be held in a joint account of the plaintiff and Defendant's advocates and thereafter the parties were to divide the proceed in a ratio to be agreed by the parties. It is common ground that the property has not been sold. The plaintiff now wants the court to set down the matter for formal proof to determine the ratio of sharing the proceeds from the proposed sale. Further, the plaintiff seeks an order restraining the Defendant from selling, charging, subdividing, transferring or in any other manner interfering with the title to PLOT NO. MN/I/1890. It is not in dispute that the consent entered into by the parties on 30/10/2018 and which was adopted as an order of the court on 4th December 2018 is still in force and has not been set aside. Clause 2 of the consent clearly stipulated that the parties herein were to agree on the ratio of sharing of the proceeds from the sale. Now the plaintiff wants the court to decide the ratio of sharing the said proceeds. In my humble view, the Application by the plaintiff is tantamount to applying to setting aside the consent or sections of the consent entered into by the parties and for the court to make a decision instead of the parties themselves as agreed in the consent.

6. In the case of **Board of Trustees National Social Security Fund –v- Michael Mwalo (2015)eKLR**, the Court of Appeal stated that: *“a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court.”*

7. In the case of **Brooke Bond Liebig (T) Limited –v- Mallya (1995)EA 266**, Law, JA stated at page 269 in these terms: *“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani –v- Kassam (1952) 19 EACA 131, where the following passages from Seton on Judgments and Orders, 7th Edition, Vol. 1 P.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 the consent was given without sufficient material facts, or in misrepresentation or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. ”*

8. In the case of **Flora Wasike –v- Destio Wamboko (1988) 1KAR 625** Hanxox, JA (as he then was) stated: *“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 contract aside or if certain conditions remain to be fulfilled, which are not carried out. ”*

9. In this case, there is no dispute that the property has not been sold pursuant to the consent order. From the Application, the Applicant has not alleged that there has been disagreement or dispute on how to share proceeds. Further, the Applicant has not alleged that there was misrepresentation, mistake or coercion and there is no suggestion of fraud or collusion. In my considered view, the Application is premature. I am in agreement with the Defendant's submission that the ratio of sharing the proceeds can only be canvassed once the property has been sold as per the consent order. And even then, the court can only intervene where the parties have failed to agree. It is only then that the jurisdiction of the court can be invoked to determine the ratio of sharing the proceeds from the sale between the parties.

10. In the Application the Applicant also seeks an order restraining the Defendant from inter alia selling the property. In the consent entered herein, the parties mutually agreed to sell the property and share the proceeds. I find it superfluous that the Applicant now wants the court to stop the sale. In this regard, I am in agreement with the Defendant's submissions that the Application is self-defeating as an injunction to stop the sale of the property will ultimately work against the consent entered into by the parties, which was to sell property and divide the proceeds.

11. In the result, I find the Application as devoid of merit and the same is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Hassan holding brief for Mutugi for Plaintiff

Gathu for Njeru for Defendant

Yumna Court Assistant

C.K. YANO

JUDGE