



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT**

**AT KERICHO**

**ELC CASE NO. 61 OF 2014**

**STANLEY KORIR.....PLAINTIFF**

**VERSUS**

**WALTER KIPYEGON CHERUIYOT.....DEFENDANT**

**RULING.**

**Introduction**

1. The Plaintiff/Applicant moved the court by way of a Notice of Motion dated 5<sup>th</sup> December, 2017 brought under Order 45 Rule 2 of the Civil Procedure Rules seeking to review the court's Ruling dated 14<sup>th</sup> July, 2017 on the ground that there is an error apparent on the face of the record.
2. The application is based on the grounds stated in the Notice of Motion and the Plaintiff/Applicant's supporting affidavit.
3. The background of the case is that the Plaintiff entered into a sale agreement with the defendant dated 3<sup>rd</sup> March, 2014 for the sale of land parcel number KERICHO/SILIBWET/264 measuring 0.32 acres at an agreed price of Kshs. 600,000. The defendant paid a deposit of Kshs. 300,000 upon signing the agreement and it was agreed that the balance would be paid by 3 installments of Kshs. 100,000 in May, July and September 2014.
4. It is the Plaintiff's case that he fulfilled his part of the agreement but the defendant has refused to hand over vacant possession of the suit land and effect transfer of the title to the plaintiff.
5. The defendant filed a Defence in which he denies that the plaintiff has honoured his part of the agreement and states that the plaintiff only paid Kshs. 300,000 upon signing of the agreement and promised to pay the balance of Kshs. 300,000 by 3 installments of Kshs. 100,000 by September 2014 but failed to do so. The defendant further states that in May 2014, the plaintiff took advantage of the defendant's wife's illiteracy and made her sign that she had been paid Kshs. 170,000 whereas the plaintiff had only paid Kshs. 70,000.
6. The case was set down for hearing on 22nd November, 2016 when both parties and their advocates attended. The plaintiff's advocate Mr. Orina then informed the court that they had a consent to record. The court recorded a consent dictated by the advocate in the following terms:

*“By consent of the parties, this suit be compromised on the following terms:*

1. *That the plaintiff do pay to the defendant a sum of Kshs. 100,000 within the next seven days being the balance of eh purchase price.*
2. *That the defendant do execute transfer documents in favour of the plaintiff of 0.2 acres comprised in L.R number KERICHO/SILIBWET/264 which should be done within seven days from today.*
3. *That the sum of Kshs. 130,000 which is held by the firm of M/S J.K Koech & Company Advocates be released to the defendant immediately.*
4. *That each party to bear his own costs.*
5. *That upon the terms being complied with, the case be marked as settled.”*

7. According to the court record, the defendant's advocate, Mr. Kirui confirmed the terms of the consent and both advocates signed against their names.

8. The court then adopted the consent as the judgment of the court and marked the suit as settled.

9. The Defendant subsequently filed an application dated 3<sup>rd</sup> February, 2017 seeking to set aside the consent order on the grounds *inter alia* that his former advocate did not explain to him the terms of the consent and that he was no longer interested in selling the suit property to the Plaintiff as bad blood had developed between the family of the defendant and that of the plaintiff. The application was opposed by the Plaintiff.

10. The parties agreed to canvass the application by way of written submissions and both parties' advocates filed their submissions after which the court delivered its Ruling on the 14<sup>th</sup> July, 2017. In the said Ruling the court held that the Defendant had not satisfied the conditions for setting aside a consent order and dismissed the application. The court ordered the Plaintiff to satisfy the terms of the consent order within 7 days failing which the Defendant would be at liberty to seek an appropriate remedy.

11. The Plaintiff subsequently filed an application dated 18<sup>th</sup> August, 2017 in which he sought orders to enforce the consent order by seeking orders for Defendant to execute the transfer documents in respect of the suit property failing which the Deputy Registrar of the Court should be allowed to execute the same. In the supporting affidavit to the said application, the Plaintiff stated that he had complied with the terms of the consent order and it is the Defendant who had not yet complied with his part.

12. The Defendant opposed the application on the grounds that he had appealed against the Ruling dated 14<sup>th</sup> July, 2017. He further stated that the Plaintiff had not complied with the terms of the consent order and if he had, he had not attached evidence of payment of the balance of the purchase price. In his further affidavit sworn on the 19<sup>th</sup> October, 2017 the Plaintiff for the first time attached a copy of a receipt for Kshs. 100,000 dated 25<sup>th</sup> November, 2016 ostensibly issued by the firm of J.K KIRUI & Co Advocates as the balance of the purchase price for the sale agreement between the Plaintiff and the Defendant.

13. Before the said application was fixed for hearing, the Plaintiff filed the instant application and fixed it for hearing before the earlier application.

14. This Ruling is therefore in respect of the application for review. In his application the Plaintiff seeks to review this court's Ruling dated 14<sup>th</sup> July 2017 for the following reason:

*“That the Honourable court in its judgment (sic) dated 14<sup>th</sup> July 2017 dismissed the Defendant/Respondent's application dated 3<sup>rd</sup> February 2017 but instead of directing the Defendant to satisfy the terms of the consent order, the court erroneously stated that it was the Plaintiff who was to satisfy the terms of the consent”*

15. The Plaintiff in her supporting affidavit sworn on the 5<sup>th</sup> December, 2017 avers that he has in fact satisfied the terms of the consent order, a fact which was only casually mentioned in the Replying Affidavit to the application to set aside the consent order without any tangible evidence. It is no wonder that the court in its Ruling of 14<sup>th</sup> July, 2017 ordered the Plaintiff to satisfy the terms of the consent order. And even after this apparent error, the Plaintiff did not deem it fit to have it corrected at the earliest possible instance before attempting to execute the said order. It is only after the Defendant pointed out the lack of evidence of payment that the Plaintiff attached the receipt of payment.

#### **Analysis and Determination**

16. I have carefully evaluated the application, affidavits, annexures and the proceedings herein as well as counsels' submissions. The timing of this application coming as it does after the Defendant has filed an appeal against the Court's Ruling dated 14<sup>th</sup> July, 2017 puts me in a bind. Any attempt to alter my Ruling at this juncture would certainly prejudice the Defendant/Respondent's pending appeal and might be viewed as an attempt to circumvent the appeal. Without weighing in on the veracity of the receipt, or the merits of the application it is my considered view that I must act with restraint and decline to grant the orders sought.

17. For the foregoing reasons, the application is disallowed.

18. I make no order as to costs.

**Dated, signed and delivered this 16<sup>th</sup> day of February, 2018.**

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**J.M ONYANGO**

**JUDGE**

#### **In the presence of:**

1. Defendant/Respondent present in person

2. No appearance for the Plaintiff/Applicant

3. Court assistant - Wambany