



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 124 OF 2008**

**DAMA CHARO.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**THE MUNICIPAL COUNCIL OF MOMBASA**

**TAIB ALIBAJABER**

**ABDALLA ALI BAJABER.....DEFENDANTS/RESPONDENTS**

**RULING**

1. The plaintiff/applicant has moved the Court vide his application dated 23<sup>rd</sup> June 2017 and brought under the provisions of sections 1A, 1B, 3A, 63 (e) and 80 of the Civil Procedure Act and Order 22 rule 22 (1); Order 45 & Order 51 of the Civil Procedure Rules seeking the orders:

- i) That this application be certified as urgent and that the same be heard ex-parte in the first instance.**
- ii) That this Honourable Court be pleased to review, vary and/or altogether set aside the consent order adopted as Order of the Court dated 4<sup>th</sup> May, 2017.**
- iii) That this Honourable Court be pleased to stay any other consequential Orders made herein pending the hearing of this application.**
- iv) That costs of this application be provided for.**

2. The brief summary of the grounds for seeking to vacate the consent judgement by the applicant as contained in her affidavit in support of the application is inter alia; that the 2<sup>nd</sup> Respondent obtained notice to act in person fraudulently and or illegally and or through misrepresentation of facts as on the day she attended Court to record the consent, she was critically ill and admitted at Coast General Hospital and was thus incapable of coming to Court. She also denied receiving any monies from the 2<sup>nd</sup> Respondent as per the deed of settlement and she is not interested in receiving such monies. She annexed to her affidavit copy of the order sought to be set aside, copy of the deed of settlement and copies of documents from coast general hospital.

3. The application is opposed by the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents by the affidavit deposed to by Abdalla Ali Bajaber on 13<sup>th</sup> September 2017. Mr Abdalla deposed that before the impugned consent was recorded in Court, there was a process and a deliberate documentation trial executed by affixing of thumb prints plus attestation and witnessing by independent advocates. That the consent was freely and willingly negotiated by the parties without any coercion or apprehension.

4. He deposed further that the applicant affixed her left thumb print on her notice to act in person and filed the same in Court and she cannot now deny without stating the particulars of the alleged fraud or misrepresentation. Further that the applicant does not disclose who forced her to sign the documents, when and in the presence of what witness. That besides the applicant's signature was witnessed by her son Omar Charo and her cousin Kenga Ngumbao Jefa. The Respondents also blame the applicant of delay of 5 months in bringing this application. The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents contend that the application fails to meet the threshold principles for setting aside consent judgement. He has made reference to cases in paragraphs 40 of his replying affidavit and urged the Court to dismiss this application.

5. The parties filed written submissions which I have read and considered. Both parties have made reference to the Court of Appeal decision of **Flora N. Waside vs Destnio Wamboko (1988) eKLR** where that Court stated that **"a consent order can only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons."**

The plaintiff/applicant also cited the case of **Brooke Bond Liebig (T) Ltd vs MALLYA (1975) E A 266** which was also referred to in the **Flora Wasike** case. At page 269, Law Ag P. said thus **“A Court cannot interfere with a consent judgement except in such circumstances as would afford good grounds for varying or rescinding a contract between two parties.”**

6. In the application before Court, the applicant alleges that if she signed the consent, then it was done under duress and or misrepresentation and that on the date of adoption of the consent in Court, she was absent as she was critically ill and admitted at Coast General hospital. The Deed of Settlement is dated on 15<sup>th</sup> February 2017 and is said to have been signed on the same day. The applicant’s signature is witnessed by Omar Charo, Kenga Ngumbao Jefa and George Odongo advocate. The consent letter also dated 15.2.2017 is signed by the applicant and her witnesses by thumbprinting. The applicant does not deny signing the document but during cross-examination she said she was forced to sign the document by Omar Charo who is her son (going also by the name Baraka Charo). She however did not know what documents she was forced to sign but got to know its content in June when she was fully recovered.

7. The applicant also said she signed the document without reading as she is illiterate. She stated her signature was obtained in a fraudulent manner because she is illiterate and she was sick. That she did not serve her advocate with the notice to act in person. She denied coming to Court on 4.5.2017 as she was unwell in hospital. In re-examination, the applicant stated that she was admitted or one month in April that just by looking at the documents (deed of settlement) she cannot say the thumbprint is hers. She does not know an advocate called George Odulo or advocate Taib. She also did not know the 3<sup>rd</sup> defendant and denied signing any document on 15.2.2017. She denied being served with the mention notice or authorizing Omar to receive Court process on her behalf. That she got the documents of consent from Mr Kenga advocate. That she never signed any document to settle this matter.

8. The charge sheet and treatment notes annexed by the applicant shows admission done on 9<sup>th</sup> April 2017 and discharged on 21<sup>st</sup> April 2017. The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents questioned the authenticity of the treatment notes but I will not delve into the same as there was no expert examination conducted to confirm there was eraser made on the copies presented to the Court. Secondly, the Respondents did not apply to be served with originals of the questioned documents. Now taking the documents on their face value, does it lend credence to the averment that the applicant was critically ill at the time of signing the impugned deed of settlement and letter of consent? The admission was done in April. The discharge summary reads the patient present had cough, chest pain and associated with night sweat.

9. There was no indication of previous illness noted in the discharge summary. There is also no evidence presented by the applicant that when she signed the deed settlement on 15<sup>th</sup> February 2017 she was critically ill. The applicant deposed that she was coerced to sign the agreement by her son Mr Baraka Omar. However, there are two people who witnessed her signature. If Omar forced her to sign the document, she did not say what role Mr Jefa did apart from signing. The applicant has also not annexed any letter or affidavit from the advocate who witnessed her signing to contest that indeed the applicant did not appear before him.

10. It is the rule of evidence that the burden of proof lies on a party who wishes the Court to believe the set of facts as set out favour her (as provided in sections 107 – 109 of the Evidence Act Cap 80). The applicant has not apportioned any blame of coercion or misrepresentation on the part of the 2<sup>nd</sup> or 3<sup>rd</sup> Respondents. She has also not shown there was collusion between the said Omar Charo alias Baraka Charo and the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents. In the absence of proof of misrepresentation and or mistake and or fraud on the part of the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents, this Court finds no reason to disturb the consent signed by the parties.

11. The Court record does show that on 4.5.17 when the matter came up for hearing the plaintiff was not present. By this time, the deed of settlement and letter of consent had been signed and filed in Court. The two documents were filed on 1.3.2017. Therefore the role of the Court was merely to endorse the same and not necessarily hear the parties. In my view, the appearance of the applicant on 4.5.17 in Court was thus not mandatory.

12. In conclusion, it is my finding that the application has failed to fulfill the grounds for setting aside the consent judgement as the party who is alleged to have coerced the applicant to sign the consent is a member of her family and the coercion if at all was not proved. The result is that the application is dismissed. Each party to bear their respective costs of the application.

**Dated, signed & delivered at Mombasa this 16<sup>th</sup> day of March 2018.**

**A. OMOLLO**

**JUDGE**