



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 438 OF 2013**

**BRAHAT ISHWARAL MARU.....PLAINTIFF**

**VERSUS**

**DEEPAK ASHWIN KUMAR MARU.....DEFENDANT**

**RAHEMAT ESSA DOSANI.....INTERESTED PARTY/APPLICANT**

**RULING**

**Background:**

The plaintiff instituted this suit against the defendant through a plaint dated 27<sup>th</sup> March, 2013 which plaint was amended and further amended on 1<sup>st</sup> July, 2014. The plaintiff's claim against the defendant was that he was a co-owner of all that parcel of land known as L.R No. 209/3345 (herein after referred to as "the suit property") with his deceased brother, one, Dinesh Ishwaral Maru as tenants in common in equal shares. The plaintiff contended that the acquisition of the suit property was financed by Bullion Finance Ltd. who had a charge registered in its favour as security against the property. The plaintiff averred that he relocated to Australia in early 2000 and left the management of the suit property to his said brother, Dinesh Ishwaral Maru who died on 29<sup>th</sup> August, 2000.

The plaintiff averred that upon the demise of his brother, the defendant, who is a nephew of his said brother, took over control of the suit property. The plaintiff averred that on 14<sup>th</sup> September, 2000, the defendant through misrepresentation led him to execute documents purporting to transfer the plaintiff's half share in the suit property to the defendant. The plaintiff averred that upon realization of the mistake, he wrote a letter to the defendant and his advocate revoking the purported agreement for sale and transfer for want of consideration. The plaintiff averred that at no time did he discuss with the defendant the sale of his half share in the suit property neither did he receive any consideration from the defendant in respect thereof.

The plaintiff averred that upon his return to the country, he discovered that the defendant had unilaterally obtained letters of administration and transferred his deceased brother's share in the suit property solely to himself in disregard of the other relatives of the deceased who had priority over the defendant. Further, without his knowledge, the defendant had purported to register a power of attorney which he used to obtain a provisional title for the whole property. The plaintiff sought among others, a declaration that the purported agreement for sale and transfer were null and void as well as a declaration that the defendant held one half share in the suit property previously owned by Dinesh Ishwaral Maru (deceased) in trust for the deceased's estate.

The defendant denied the plaintiff's claim in his statement of defence dated 29<sup>th</sup> July, 2013. The defendant contended that on 14<sup>th</sup> September 2000, the plaintiff transferred his half share of the suit property to him and his spouse. The defendant denied that there were obligations owed by the late Dinesh Ishwaral Maru to the plaintiff and further denied having taken over such obligations.

The interested party who claimed to be the widow of Dinesh Ishwaral Maru (deceased) sought to be joined in these proceedings through an application by way of Notice of Motion dated 15<sup>th</sup> December, 2014. In the said application, the interested party sought in addition to the prayer for joinder, a stay of all further proceedings herein pending the outcome of an appeal she had filed in the Court of Appeal arising from ELC No. 658 of 2011 whose subject matter was the suit property herein. The interested party also sought an order for the setting aside all adverse orders that had been granted in this suit prior to her joinder. The interested party contended that the defendant had sued her in ELC No. 658 of 2011 and had her evicted from the suit property without serving her with court summons. The interested party contended that her attempt to set aside the judgment that the defendant had obtained against her in that suit failed prompting her to appeal. The interested party's prayer seeking leave to join this suit as interested party was allowed by the court on 8<sup>th</sup> April, 2015. The other prayers that she sought in her application that was brought by way of Notice of Motion dated 15<sup>th</sup> December, 2014 are still pending.

### The application before me:

What is now before the court is the interested party's Notice of Motion application dated 23<sup>rd</sup> November, 2015 in which the interested party (hereinafter referred to only as "the applicant" where necessary) is seeking the following substantive orders:-

1. That an order of injunction does issue restraining the sale, transfer and taking of vacant possession of the suit property pending the hearing and determination of the Notice of Motion application dated 15<sup>th</sup> December, 2014 or until further orders of the court.
2. That the consent dated 14<sup>th</sup> January, 2015 filed in court on 14<sup>th</sup> January, 2015 and adopted as an order of the court on 10<sup>th</sup> June, 2015 be set aside together with all acts done consequently to the adoption of the consent including but not limited to the sale of the suit property *ex debito justitiae*.
3. Costs of the application be personally borne by the plaintiff's and defendant's advocates and in any event, such costs be punitive.

### The applicant's case:

The applicant's case as set out in her affidavit sworn on 23<sup>rd</sup> November, 2015 is as follows. The applicant was added to this suit on 8<sup>th</sup> April, 2015 as interested party when the court also directed the parties to negotiate and reach an out of court settlement. Her advocate was served with a mention notice for the purposes of taking a hearing date on 10<sup>th</sup> June, 2015. When the matter came up for mention on 10<sup>th</sup> June, 2015 in her absence, the defendant's advocate made an application for the adoption of a consent between the defendant and the plaintiff that had been reduced into writing, signed by the advocates for the defendant and the plaintiff and filed in court on 14<sup>th</sup> January, 2015. The court approved and adopted the said consent as it had been requested by the advocates for the defendant and the plaintiff. The said advocates did not disclose to the court that the applicant was not present. According to the applicant, the court had earlier declined an application to adopt the said consent and had issued specific directions on the hearing of the outstanding prayers in the applicant's application dated 15<sup>th</sup> December 2015.

Through a letter dated 23<sup>rd</sup> April, 2015, the defendant's advocate notified her advocate that he would advise the defendant to consider rescinding the consent dated 14<sup>th</sup> January, 2015 to allow the parties to re-open their defences and/or claims. The intention to rescind the consent was reiterated in the defendant's advocates' further letter dated 4<sup>th</sup> May, 2015. On 4<sup>th</sup> November, 2015, the defendant's advocate notified her advocate of their readiness to perform their obligation under the consent. The applicant had accepted the notice to rescind the consent and as such there was no consent to be performed.

In her further affidavit sworn on 3<sup>rd</sup> February 2016, the applicant stated that the dispute before the court was whether the consent aforesaid could stand in light of the court's directions issued on 3<sup>rd</sup> February, 2015, 20<sup>th</sup> March, 2015 and 8<sup>th</sup> April, 2015. The applicant averred that clause (iv) of the consent that was entered into between her and the defendant in the succession cause was clear and unambiguous that the consent would only be presented for adoption by the court upon payment of the sum of Kshs. 8,000,000/-. The applicant averred that by his own admission, the defendant had not paid to her the sum of Kshs 8,000,000/- as at 8<sup>th</sup> December, 2015 when he swore his replying affidavit. The applicant contended that the defendant presented the consent for adoption by the court in breach of the same consent.

### The plaintiff's case:

The application was opposed by the plaintiff through a replying affidavit sworn on 9<sup>th</sup> December, 2015. The plaintiff averred that the application before the court had been overtaken by events. The plaintiff stated that pursuant to the said consent, the suit property was sold and transferred to Top Con. Ltd. on 9<sup>th</sup> October, 2015. The plaintiff averred that Top Con. Ltd. acquired absolute and indefeasible rights in respect of the suit property and took possession thereof with effect from 3<sup>rd</sup> November, 2015. The plaintiff stated that the applicant is bound by the terms of the consent dated 14<sup>th</sup> January, 2015 that was entered into between her and the defendant in Succession Cause No. 3253 of 2007 wherein she agreed to receive from the defendant a sum of Kshs. 8,000,000/- in full and final settlement of any claims she might have on the suit property. The plaintiff averred that the applicant was therefore estopped from revisiting and re-opening a closed matter to the detriment of the other parties.

The plaintiff averred that the applicant had not pleaded or demonstrated any vitiating factors capable of upsetting the consent. The plaintiff averred that the application before the court was brought in bad faith and militated against the doctrine of judicial finality in litigation which forbids parties from instituting vexatious proceedings. The plaintiff contended that, the orders of injunction sought were misconceived since there was no foundation upon which they were rooted there being no pending suit by the applicant. The plaintiff accused the applicant of being guilty of unreasonable and unexplained delay in bringing the instant application and contended that she was undeserving of the exercise of the court's discretion.

With respect to the applicant's assertion that the adoption of the consent on a mention date was irregular, the plaintiff contended that the applicant's advocate had instructed another advocate to hold his brief and that the said contention is baseless. The plaintiff averred further that the scope of a mention entails the taking of such directions and making of such orders as are appropriate and is not limited to the taking of hearing dates. Lastly, the plaintiff stated that the averment that the court had earlier on declined to adopt the consent was not true and had not been substantiated.

### The defendant's case:

The defendant responded to the application through a replying affidavit sworn on 8<sup>th</sup> December, 2015 where he stated that, on 14<sup>th</sup> January, 2015, he entered into a consent with the applicant whose effect was to compromise Nairobi ELC No. 658 of 2011, Succession Cause No.

3253 of 2007 and Nairobi CA No. 198 of 2013(UR 142/2013). The defendant averred that the consent was conditional upon payment to the applicant of Kshs 8,000,000/- from the proceeds of sale of the suit property. The defendant averred that the suit property was sold as contemplated under the consent and that the proceeds thereof had been disbursed save for the Kshs 8,000,000/- which he was willing to remit to the applicant upon being furnished with the applicant's bank details. The defendant denied that his advocates took advantage of the applicant's absence and averred that the applicant had been duly served with a mention notice which indicated that in default of appearance, the court would proceed to issue orders/directions which it would deem fit and just to grant. Lastly, the defendant contended that the allegation that the court had earlier on declined to adopt the consent was unfounded and unsubstantiated.

#### The submissions by the parties:

The application was argued before me on 26<sup>th</sup> September, 2017. The advocate for the applicant, Mr. Muturi submitted that the orders that were made by the court on 8<sup>th</sup> April, 2015 to the effect that the court would give directions on the outstanding prayers in the applicant's Notice of Motion dated 15<sup>th</sup> December, 2015 and the consent under challenge had not been set aside or appealed against. Counsel submitted that when the suit came up for mention on 10<sup>th</sup> June, 2015 for purposes of taking a hearing date, the plaintiff's and defendant's advocates elected to adopt a consent which the court had stated it would issue directions over. He submitted that none of the aforementioned advocates informed the court that there was an absent party or that directions were to be given in respect to the consent and the pending application.

The applicant's advocate submitted that immediately after the adoption of the consent, the plaintiff and defendant sold the suit property. He submitted that the issue which arises for determination is whether the plaintiff and the defendant could shut out the applicant from agitating her claim by entering into the disputed consent. Counsel argued that the applicant who was not a party to the said consent could not be bound by its terms. He stated that the application was filed under certificate of urgency and that the issue of delay does not arise. He submitted that clause 4 of the consent recorded in the succession cause referred to other cases and not the instant case. He submitted that the consent was to be adopted after payment of Kshs 8,000,000/- and that the applicant was not bound by the consent before receiving the said sum. Lastly, the applicant's advocate submitted that the consent that was arrived at in the succession cause had not been adopted by the court and was therefore not an order of the court.

In response, Mr. Luseno for the defendant submitted that the applicant had not put forward any grounds that would justify the setting aside of the consent in contention. Counsel submitted that the applicant had been served with a mention notice but elected not to appear before the court on 10<sup>th</sup> June, 2015 when the consent was recorded. The defendant's advocate submitted that the consent which was an agreement between the parties would still stand even if the court was to set aside the proceedings.

The defendant's advocate submitted further that the defendant had entered into a consent with the applicant in Succession Cause No. 3253 of 2007 to take care of the applicant's interest in the suit property. He stated that in the aforesaid consent, it was agreed that the applicant would be paid Kshs 8,000,000/- out of the proceeds of sale of the suit property after which the applicant's claim would be deemed settled. The defendant argued that it was against this background that they entered into the contested consent. Counsel submitted that paragraph 8 of the contested consent made specific reference to the succession matter and therefore, the applicant's interest was secured.

The defendant's advocate urged the court to consider the intention of the parties when entering into the consent stating that no application had been made to set aside the consent in the succession cause. He submitted that the defendant was ready and willing to pay to the applicant a sum of Kshs 8,000,000/- agreed upon in the succession cause. He argued that the court did not err in adopting the consent since the dispute between the parties had been settled by the two consents dated 14<sup>th</sup> January, 2015. Counsel stated that the applicant had not demonstrated that the consent was obtained irregularly. He contended that the suit property had been transferred to a third party and that setting aside the consent would affect the third party. He urged that the court to dismiss this application which was brought five months after the fact.

Mr. Njoroge for the plaintiff associated himself with the defendant's advocate's submissions and added that the consent was adopted after the applicant's advocate had been served with a mention notice and given an opportunity to appear in court. He urged the court to consider the background of the consent. He submitted that the applicant's interest in the suit property was secured under paragraph 8 of the consent. He argued that the consent in the succession cause where the applicant had agreed to accept a sum of Kshs 8,000,000/- in full and final settlement of her claim had not been set aside.

The plaintiff's advocate contended that the claim which the applicant was pursuing in the succession cause was the same interest she was seeking to pursue in this suit. The plaintiff's advocate submitted that the applicant had admitted that she had instructed her advocate to enter into a consent in the succession cause and that she had agreed to take Kshs 8,000,000/- in full and final settlement of her claim. He argued that the intention of the parties was to sell the suit property and that the court could not now be called upon to set aside the transaction where a third party had acquired an interest.

In his further submission, the plaintiff's advocate argued that the law on setting aside consents is very clear. He submitted that the applicant had not shown any valid grounds for setting aside the consent in question since no allegations of fraud and non-disclosure had been made. He argued that the application had been brought after unreasonable delay despite the applicant being aware of the consent soon after its adoption.

#### Analysis and determination:

I have considered the interested party's application together with the affidavits that were filed in support thereof. I have also considered the affidavits that were filed by the plaintiff and the defendant in opposition to the application. Finally, I have considered the submissions of counsel. The only issue that arises for determination in the application before me is whether the consent dated 14<sup>th</sup> January, 2015 that was adopted as an order of the court on 10<sup>th</sup> June, 2015 should be set aside.

It is not in dispute that the consent in question was entered into between the plaintiff and the defendant only and was adopted by the court in the presence of and with the concurrence of the plaintiff's and the defendant's advocates on a day that was set for the mention of the suit. In the Court of Appeal case of Board of Trustees National Social Security Fund vs. Micheal Mwalo Nairobi CA No. 293 of 2014 the court

stated as follows with regard to the setting aside of consent orders:-

*“...The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. 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 Court.*

In the case of, Flora Wasike vs. Destimo Wamboko (1982-1988) 1 KLR 625, the Court of Appeal held that a consent judgment can only be set aside on the same grounds as would justify the setting aside of contract such as fraud, mistake or misrepresentation. In the case of Julius Kigen Kibiego vs. Angeline Korir & another Eldoret ELC No. 994 of 2012 (2012)eKLR the court stated as follows:-

*“The much that counsels for the parties could have done was to record a consent that only binds the two parties to the proceedings. They did not have capacity to enter into a consent that affects a third party. Just as in a contract, the parties to a contract can only agree on rights and duties amongst themselves. Parties to a contract cannot rope in a third party without his consent as this will go against the doctrine of privity of contract. An agreement attempting to bind a third party is one that cannot be binding on the third party without his consent. It is for this reason that I take the position that the subject consent was irregular...”*

It is not disputed that the applicant was a party to this suit as at the time the plaintiff and the defendant appeared before the court on 10<sup>th</sup> June, 2015 and urged the court to adopt the consent dated 14<sup>th</sup> January, 2015 as an order of the court. It is also not in dispute that on 10<sup>th</sup> June, 2015, the parties had appeared before the court for a mention. It is not disputed that a mention notice that was served upon the interested party's advocates on 4<sup>th</sup> June, 2015 was to the effect that the matter was being mentioned for the purposes of fixing a hearing date. I have noted from the record, that on 3<sup>rd</sup> February, 2015, the advocates for the plaintiff and the defendant had informed the court that they had filed a consent in court that they wanted the court to adopt. They told the court that the consent took into account the interest of the applicant. The court did not adopt the consent. The court ordered that it would peruse the consent and the applicant's Notice of Motion dated 15<sup>th</sup> December, 2014 before giving directions on the way forward. When the matter came up again on 20<sup>th</sup> March, 2015, the court was once again asked to adopt the consent but the court declined and sought more time to peruse the same. The same position obtained when the matter was mentioned again on 24<sup>th</sup> March, 2015. When the matter came up on 8<sup>th</sup> April, 2015, the court allowed the applicant to join the suit and directed that the other prayers in the applicant's application dated 15<sup>th</sup> December, 2014 were to await the court's direction on the consent that had been filed in court on 14<sup>th</sup> January, 2015 by the advocates for the plaintiff and the defendant. The court fixed the matter for direction on 12<sup>th</sup> May, 2015 when the court did not sit. During all these court appearances, the matter was being handled by Nyamweya J.

The next time the matter came up was on 10<sup>th</sup> June, 2015 when the consent in dispute was adopted by the court. On that date, the matter was listed for mention before Mutungi J. who had not handled the matter before. As I have mentioned earlier, the mention notice that was served upon the applicant's advocates indicated that the matter was coming up for fixing of a hearing date. When the matter was called out on 10<sup>th</sup> June, 2015, the advocates for the plaintiff and the defendant mentioned to the court that they had entered into a consent that they wanted the court to adopt as an order of the court. The said advocates did not mention to the court that the court was supposed to consider the consent and the applicant's application and was to give direction on the same. The proceedings of 10<sup>th</sup> May, 2015 leaves no doubt that the defendant's advocates who had taken the mention date had fixed that date for the purposes of having the consent in question adopted by the court and that they intentionally misled the applicant's advocates that the mention was for the purposes of fixing a hearing date. The advocates for the plaintiff and the defendant did not mention to the court that there was an interested party who was interested in the consent that they wanted the court to adopt and that the court had wanted to consider her interest before adopting the consent.

I am in agreement with the submission by the applicant's advocate that the plaintiff's and the defendant's advocates had the consent dated 14<sup>th</sup> January, 2015 adopted by the court through concealment of material facts. I am of the considered view that if the attention of the court had been drawn to the earlier orders that had been given regarding the said consent, the court would not have adopted the same in the absence of the applicant. The court would also not have adopted the consent if its attention had been drawn to the fact that there was another party to the suit who was interested in the suit property and who had not endorsed the consent and that the party had been served with a mention notice that indicated that the matter was coming up for fixing of a hearing date.

The plaintiff and the defendant submitted at length about the alleged consent that the applicant and the defendant had reached in the Succession Cause No. 3253 of 2007. In my view, the existence of that consent or the absence thereof is not relevant to the issue before me. The fact that the applicant and the defendant had entered into consent in the said succession cause could not justify the adoption of the consent in dispute in the absence of the applicant. It could also not justify the concealment of material facts to the court. In any event, the contention by the applicant that the consent in the succession cause had not been adopted by the court was not contested by either the defendant or the plaintiff.

In my view, the applicant having been joined in this suit as a party was entitled to be heard before the suit was compromised by consent. I am satisfied that the applicant has satisfied the conditions for setting aside a consent order. The applicant has demonstrated that the plaintiff and defendant sought to compromise this suit in its entirety without involving the applicant and by concealing to the court the fact that there was a party not present before the court who had not endorsed the consent and that the court was supposed to give directions on the said consent. An order of a court obtained through concealment of material facts cannot stand. Again as I have stated earlier, the plaintiff and the defendant cannot bind the applicant in the agreement that was reached between them without the involvement of the applicant.

A part from the setting a side of the said consent order, the applicant as I have stated earlier had also sought an order that all acts done in pursuance and consequent to the adoption and approval of the impugned consent dated 14<sup>th</sup> January, 2015 including but not limited to the sale of the suit property be set aside. The applicant had also sought an injunction restraining the sale, transfer and the taking of vacant possession of the suit property pending the hearing and determination of the interested party's application dated 15<sup>th</sup> December, 2014. There is no dispute that the suit property has been sold and transferred to a third party. The plaintiff placed before the court a copy of a search

showing that the suit property was transferred to a third party, Top Con Limited on 9<sup>th</sup> October, 2015 at a consideration of Kshs. 86 million. The said third party was not joined in these proceedings. It will be prejudicial for the court to issue orders injunctive or otherwise that will adversely affect a party who is not before the court and who has not been given an opportunity to be heard.

The upshot of the foregoing is that the interested party's application dated 23<sup>rd</sup> November, 2015 succeeds in part. The application is allowed on the following terms:

1. The orders that were made herein on 10<sup>th</sup> June, 2015 are hereby set aside.
2. The interested party shall have the cost of the application.

**Delivered and Signed at Nairobi this 26<sup>th</sup> day of April 2018.**

**S.OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Botany h/b for Njoroge for the Plaintiff

Mr. Mutia h/b for Luseno for the Defendant

No appearance for the Interested Party

Catherine Court Assistant