



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC APPEAL 312 OF 2014

JUMA MUSA ALLI.....PLAINTIFF

-VERSUS-

BIASHA OMAR SEIF.....DEFENDANT

RULING

1. The application before me for determination is the Notice of Motion dated 14th June 2017 and filed on 5th July 2017 in which the plaintiff/application mainly seeks an order to set aside the consent entered by the parties on 15th May 2015. The application is supported by the affidavits of the applicant, Juma Musa Ali sworn on 14th June 2017 and 7th November 2017 and the grounds in the face of the motion.

2. The applicant avers that he attended court on 15th May 2015 pursuant to a call from his former advocate Mr. Peter Omwenga but was arrested and later charged in Shanzu court with the offence of forgery. He further avers that Mr Omwenga advocate, had no instructions from the applicant to enter into the consent and was not informed of the said consent between him and the defendant. It is therefore the applicant's contention that the said consent was entered fraudulently, by misrepresentation, mistake of law and fact.

3. The application is opposed by the defendant who filed a replying affidavit sworn by herself on 16th October 2017. It is deponed inter alia, the consent was entered into with full instructions and that no coercion, undue influence and or fraud on the part of plaintiff's previous advocates or the defendant that has been shown to warrant the setting aside of the consent. That the matter has proceeded in court since 15th May 2015 on the basis of that consent and the plaintiff never raised any issue for all this period.

4. The application was canvassed by way of written submissions but only the plaintiff filed submissions which were highlighted by the plaintiff's advocate.

5. I have considered the application, the affidavits on record and the submissions filed and authorities cited. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated and well settled.

6. In the case of *Board of Trustees National Social Security Fund –vs- Micheal Mwalo [2015]eKLR*, the court of Appeal 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 collusion or by an agreement contrary to the policy of court.”

In the case of *Brooke Bond Liebig (T) Ltd –vs- Mallya (1995) EA EA 266*, Law JA stated the law at P. 269 in these terms:

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani-vs- Kassam (1952) 19 EACA 131, where the following passage from Seton on Judgments and orders, 7th edition, Vol. 1P.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 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.”

Similarly, in the case of *Flora Wasike –vs- Destimo Wamboko (1988) KAR 625*, Hancox, JA (as he then was) stated:

“It is now settled law that a consent judgement 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.”

7. The issue for determination in this application is whether the applicant has met the threshold for setting aside of the consent entered by the parties herein on 15th May 2015. The record shows that there were negotiations going on between the parties to settle some matters in the suit. Indeed on 23rd February 2014, the parties agreed to have the income from the suit property deposited in a joint interest account to be opened in the names of the advocates for the parties. When the matter came up before court on 16th April 2015, the court was informed that the parties were negotiating and requested for a mention date to record a consent. The court granted the parties time to negotiate and fixed the matter for mention on 15th May 2015 to confirm settlement.

8. The record shows that when the matter came up before court on 15th May, 2015, the plaintiff's then advocate Mr Omwenga, informed the court that they were almost reaching a consent when the plaintiff was arrested in court over matters related to this case. He wanted the defendant to agree to have the plaintiff released for the consent to be recorded. Mr Aboubakar, counsel for the defendant informed the court that they had negotiated and he had given a counter proposal and added that he had no problem recording the consent in terms of that counter-proposal. It was then that the plaintiff's Counsel asked the court to record a consent to the effect that the suit property be owned 50:50 between the plaintiff and the defendant to which the defendant's counsel responded that he had no problem with and the court went ahead and recorded the consent in those terms.

9. It is clear that there were negotiations going on prior to 15th May 2015 when the consent was recorded. However, what is not clear is whether the consent that was recorded in court was what was agreed by all the parties. There is no doubt that the consent was recorded in court in the presence of the then advocate for the plaintiff and that of the defendant. As already stated, when the matter came up before court on 15th May 2015, the record shows that the plaintiff's advocate informed the court that they were almost reaching a consent when the plaintiff was arrested in court. The record further shows that the plaintiff's advocate wanted the defendant to agree to have the plaintiff released for the consent to be recorded. However, the defendant's advocate insisted in having the consent recorded in terms of the proposal made by the defendant. The consent was then recorded even though the plaintiff had not been released.

10. From the foregoing, it is clear that the parties had been negotiating but had not reached an agreement. Whereas consent was recorded, the same was done when the plaintiff was under arrest over matters relating to this case and no doubt at the instigation of the defendant. In my view, this was clearly a case where there was coercion and undue influence. The defendant did not accede to the plaintiff's request to be released before any consent was recorded. The plaintiff has stated that he never gave instructions to his advocate then on record to record the consent herein. He states that the consent was entered into as he was being escorted to the police station and that he was not aware of the consent having been entered. There is no evidence that the plaintiff's advocate went to seek instructions from the plaintiff before recording the consent.

11. The court record of 15th May 2015 supports the plaintiff's contention. The plaintiff could not have given instructions while he was under arrest. I find that the applicant has proved that there was misrepresentation, mistake, undue influence and coercion. As already stated, a court cannot interfere with consent order except in such circumstances as would afford a good ground for varying or rescinding a contract between parties. I am of the view that such circumstances do exist in this case and those circumstances do favour the applicant.

12. Accordingly, I find that the notice of motion dated 14th June 2017 is merited. The consent entered herein on 15th May 2015 is set aside.

Each party to bear their own costs.

Delivered, signed and dated at Mombasa this 7th day of May 2018.

C. YANO

JUDGE