



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 433 OF 2013

TELEPOSTA PENSION SCHEME TRUSTEES REGISTERED.....PLAINTIFF

VERSUS

CHARLES ONTITA BWORERA.....1ST DEFENDANT

HENRY YOPHES OKENYE.....2ND DEFENDANT

SAMWEL MATAYO MOSETI3RD DEFENDANT

LEONIDA KWAMBOKA ORINDO..... 4TH DEFENDANT

STEPHEN A.....5TH DEFENDANT

ARIKA S.....6TH DEFENDANT

WILFRED MONYENYE YOGA.....7TH DEFENDANT

RULING

1. Introduction;

On or about the 23rd and 30th August 2011, the 2nd defendant was issued with Certificate of Lease over and in respect of **LR No's Kisii Municipality/Block I/855 and 861** (hereinafter also known as "the suit property") respectively. Following the said issuance of the Certificates of Lease over and in respect of the suit properties, the 2nd defendant entered upon, took possession of the suit properties and even proceeded to develop the same with Permanent Residential Units. On or about October 2013, the plaintiff filed the instant suit whereby it sought to revoke the titles of various properties inter alia the suit property registered in the name of the 2nd defendant. The parties filed in court a duly signed letter of consent dated 6th May 2014 whose effect was basically to compromise the suit. The consent was adopted by the court on 19th June 2014 and a partial judgment entered and a decree issued on 24th June 2014. As a result of the consent and pursuant to the decree, the plaintiff has since lodged civil proceedings vide KISII ELC Case No. 71 of 2017 seeking to execute the decree emanating from the consent with a view of evicting the 2nd defendant. The 2nd defendant on his part has maintained that he was not served with the pleadings and incidental documents in respect of the suit hence he was neither aware nor knowledgeable of the instant proceedings.

2. The Application;

The defendant filed a Notice of Motion application dated 10th November 2017 under Order 45 Rules 1, 2 & 5 of the Civil Procedure Rules 2010, Orders 51 rules 1, 3 & 4 of the Civil Procedure Rules 2010, Sections 1A, B, 3, 3A & 63e of the Civil Procedure Act and Articles 20(2), 27(1), 48, 50(1) 159(2) & 165 of the Constitution 2010 seeking inter alia:-

1) The Honourable court be pleased to review, rescind, vary and/or set aside the consent orders entered into and/or allegedly executed on the 6th day of May 2014 and (sic) adopted by the court on the 19th day of June 2014 more particularly the limb thereof touching on revocation of titles in respect of LR No's Kisii Municipality/Block I/855 & 861 (herein after also referred as suit property) respectively registered in the names of the 2nd defendant.

2) In the event that a statement of defence was (sic) filed on behalf of the 2nd defendant without the instructions and

knowledge of the 2nd defendant, same be expunged from the court record.

3) The honourable court be pleased to grant leave to the 2nd defendant to enter appearance and file a statement of defence, in opposition to the claim by or at the instance of the plaintiff.

4) Consequent to prayer (2) herein above being granted, the honourable court be pleased to restore the suit herein for hearing and determination denovo and on merits.

5) Such further orders be made as the court may deem fit and expedient.

3. The application was supported by the affidavit of Henry Yophes Okenye, the 2nd defendant herein who averred that on or about October 2013, the plaintiff filed the instant suit seeking various reliefs against the defendants concerning inter alia the suit properties. The 2nd defendant further stated that even though the plaintiff lodged the instant suit, part of which concerned the suit properties registered in his name, the plaintiff neither extracted nor served the summons to enter appearance and plaint on him. He has further contended that owing to the fact that no summons to enter appearance and plaint were ever extracted and served upon him, he was not aware/knowledgeable of the existence of the suit or any incidental proceedings.

4. The 2nd defendant further averred that he established that the plaintiff proceeded to generate a consent letter, concerning the suit premises herein. He attached a copy of the consent letter dated 6th May 2014 which was marked “HYO1”. That following the preparation of the consent letter, the plaintiff and its advocate on record proceeded and caused the consent letter to be executed and signed by M/s Minda & Company Advocates allegedly on behalf of all defendants including the 2nd defendant herein.

5. The 2nd defendant further averred that he was never served with any summons to enter appearance in respect of the instant suit hence he was not able to instruct an advocate to act in respect of a matter for which he was not aware of in the first place. He further stated that the consent order purported to revoke the titles over the suit properties which lawfully belongs to him and there was no way he could have consented to revocation of legitimate titles in the manner purported by the consent. He produced copies of the certificate of lease in respect of the suit properties which were marked as “HYO2(a) & (b)”.

6. The 2nd defendant further averred that he has already established permanent structures on the suit properties which are currently occupied by various tenants. He attached copies of photographs attesting to the developments on the suit properties which was marked as “HYO3”. Hence, it was his contention that the consent which is alleged to have been executed on his behalf was prepared without his knowledge, he had not instructed any advocate or M/s Minda & Co. Advocates in particular to act for him in this matter and he thus termed the consent generated by the plaintiff's advocate and executed on his behalf as a forgery.

7. The 2nd defendant further averred that the issue of consent and its consequences only came to his attention when the plaintiff filed Civil Proceedings vide Kisii ELC No. 71 of 2017. He attached copies of the plaint, Notice of Motion Application and affidavit in support thereof as “HYO4 (a), (b) & (c)”. The 2nd defendant termed the consent order as unlawful, illegitimate null and void and asserted that unless the instant application is allowed, he is bound to suffer prejudice and loss of interests over the suit properties which are already fully developed and currently occupied.

8. The above application by the defendant was opposed through the plaintiff's replying affidavit dated 24th January 2018 sworn by Peter K. Rotich an Administrator and Trust Secretary of the plaintiff. In the said replying affidavit the plaintiff acknowledged that it filed a suit on 28th October 2013 and when its advocates instructed a process server to effect service of the plaint, and summons, the 7th defendant who was then a Member of County Assembly (MCA) Kisii County received summons on behalf of all the defendants. The plaintiff further averred that the defendants entered appearance on 18th March, 2014 through the firm of Minda & Associates and attached a copy of the Notice of Appointment of Advocates which was marked as ‘PKR 1’. The plaintiff further averred that apart from civil proceedings, it also lodged a criminal complaint with the Directorate of Criminal Investigation against the defendants for fraudulent acquisition of titles in respect of the plaintiff's properties including the suit properties and that upon investigations, the 7th defendant was arraigned in court, criminal charges for fraudulent acquisition of suit properties were preferred against him and that the plaintiff was advised by the investigating officer that they were in the process of tracing the other defendants including the 2nd defendant with a view of preferring similar charges against them.

9. The plaintiff further averred that before the defendants were arrested and charged, they (defendants) through their advocates on record approached them (plaintiff) and offered to surrender their interests and claim over the suit properties on condition that the plaintiff withdraws the criminal complaint against them. The plaintiff averred that pursuant to the out of court negotiations, the plaintiff accepted the defendants offer culminating to a consent letter dated 6th May 2014 being signed and filed in court on 9th May 2014 which consent order was adopted as an order of the court. That pursuant to the said consent order, the Land Registrar cancelled all the titles issued to the defendants and restored the registers of the suit properties in the plaintiff's favour as per the attached copies of certificates of official search annexed as exhibit ‘PKR2’. The plaintiff further contended that apart from the 2nd and the 6th defendants, the rest of the defendants complied with the consent order and handed over possession of the suit properties to the plaintiff.

10. The plaintiff further averred that vide a letter dated 21st November 2014 (“PKR3”), their advocates on record notified the 2nd and 6th defendants that they had disobeyed the court order and demanded that they vacate the respective suit properties. The plaintiff's advocates on record had earlier filed an application dated 11th September 2014 which sought to have the 2nd and 6th Defendants vacate the suit premises annexed as “PKR4” but the application was not heard as the defendant's advocate passed away before it was heard and the court in the course of giving directions on the disposal of the application expressed the view that since the plaintiff had not sought for eviction orders in the plaint, the best approach was for the plaintiff to perhaps file a fresh suit against the two defendants and seek orders for their eviction. The plaintiff consequently filed a fresh suit namely Kisii ELC No. 71 of 2017 against the 2nd and 6th and seeking orders to compel them to vacate the suit properties or they be evicted as per the pleadings of the said suit exhibited as “PKR5”.

11. The plaintiff further averred that even after the defendants advocate passed away, the 2nd defendant was duly notified of the pending application filed by the plaintiff as per the annexed copies of the affidavits of service confirming the said position marked as **“PKR6”**. It is thus the plaintiff’s contention that the 2nd defendant’s allegations that he was not served with summons and plaint are false as he was notified of the subsistence of the suit even after the advocate passed away but he neglected to appoint a new firm of advocates or enter appearance in person.

12. It is the plaintiff’s case that it continues to incur huge financial loss and inconvenience as it is unable to earn any income from the property in which the 2nd defendant continues to be in unlawful occupation and possession to the detriment of its pensioners whose benefits are derived from the assets that vest in the plaintiff.

13. **Analysis and Determination;**

I have considered the application by the 2nd defendant, the replying affidavit by the plaintiff, the annexures attached by each of the parties and their respective submissions. After considering the above application by the 2nd defendant, the matters arising for determination in this case are as follows:-

1) Whether proper service of the summons and plaint was effected on the 2nd defendant?

2) Whether the 2nd defendant was duly represented in court?

3) Whether any basis has been made to vitiate the consent entered into by the parties and/or to review or vary or set aside the resultant judgment.

14. With regard to the first issue for determination, the deponent of the replying affidavit in response to the 2nd defendant’s application averred that the summons for all the defendants were received by the 7th defendant who was an MCA who arranged for the representation of all the defendants.

15. Notwithstanding the averment by Peter K. Rotich in his replying affidavit that the 7th defendant received all the summons to enter appearance on behalf of all the defendants, the record shows that on 23rd December 2013 the plaintiff wrote to the court through their advocates on record asserting that the defendants had been served and had not entered appearance and sought a date for formal proof hearing. An affidavit of service sworn by Omambia Mososi Godfrey sworn on 3rd December 2013 and filed on 30th December 2013 alongside the letter requesting for a hearing date attached the affidavit of service and paragraph 12 of the affidavit of service states as follows:-

“12. That also on the same date at around 12.28pm we proceeded to Jogoo near Kisii prisons where Mr. Henry Yophes Okenye resides as instructed and directed by Francis. On arrival we found a middle aged woman by the name Mrs. Jane who confirmed to us she was the wife to the 2nd defendant herein. I introduced myself to her and told her the purpose of my visit and she told us that Mr. Henry was not around at the moment. She accepted service on his behalf by saying she will inform him but declined to append her signature on my copies as required by law. I therefore left her with service copies and return herewith my original copy of summons to enter appearance to this honourable court as duly served on 26th day of November, 2013 at 1.24pm.”

The affidavit of service attached all the original copies of the summons to enter appearance which were returned to the court.

16. Order 5 Rule 8(1) of the Civil Procedure Rules makes provision for service of summons on an agent and it provides as follows:

“Wherever it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient”.

17. None of the parties entered appearance within the prescribed period but on 18th March 2014 the firm of Minda & Co. Advocates entered appearance for all the defendants who were named by name including the 2nd defendant. The memorandum of appearance filed was in compliance with Order 6 Rule 5 of the Civil Procedure Rules which provides thus:-

5. If two or more defendants appear in the same suit by the same advocate and at the same time, the names of all the defendants so appearing shall be inserted in the same memorandum of appearance.

18. On the material placed before the court, I am satisfied that the 2nd defendant/applicant was in fact served with summons to enter appearance and that the defendants collectively engaged the services of Minda & Co. Advocates to represent them more particularly because the defendants wanted to negotiate a settlement of the matter out of court with the plaintiff. The plaintiff avers that it had lodged a criminal complaint with the CID relating to the fraudulent acquisition of its various properties and that the defendants were being investigated and were being sought to answer to criminal charges. The plaintiff avers it was on that account the defendants through the advocate they had appointed sought to negotiate a compromise of the suit in return for the plaintiff withdrawing its criminal complaint. These were the circumstances that led to the entering of the consent that the 2nd defendant now wishes to impugn firstly, on the ground that he was not served with summons to enter appearance, and secondly, on the ground that he had not instructed the firm of Minda & Company Advocates

to represent and/or act for him.

19. I have illustrated herein above that the summons to enter appearance were served on an agent of the 2nd defendant. The firm of Minda & Co. Advocates also entered a valid memorandum of appearance for all the defendants who included the 2nd defendant and that Mr. Minda advocate duly signed the letter of consent dated 9th May 2014 and was in court on 19th June 2014 when the consent was approved and adopted by the court.

20. The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.

21. **Hancox, JA. (as he then was)** in the case of **Flora Wasike -vs- Destimo Wamboko (1982 -1988)**1 KAR 625, said in his judgment at page 626 -

"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 a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

See the decision of this Court in **J. M. Mwakio -vs- Kenya Commercial Bank Ltd Civil Apps. No. 28 of 1982 and No. 69 of 1983.**

In the case of **Brooke Bond Liebig -vs- Mallya 1975 E.A. 266** the court held thus:-

"A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement."

In the case of **Hirani -vs- Kassam (1952), 19 EACA 131**, the Court of Appeal while considering the circumstances under which an order made by consent may be set aside quoted with approval the following passage from Seton on judgments and orders, 7th Edition, Vol. 1 pg. 124 as follows:

"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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

22. The Court of Appeal in the case of **Wasike -vs- Wamboko (1976-1985) 1 EA 625** laid the test upon which a consent judgment or order may be set aside thus:-

"A consent judgment or order whether final or interlocutory, deliberately made with full knowledge, with the full consent of the parties or advocates on both sides, is regarded as having a full binding contractual effect on which the other party is perfectly entitled to insist and normally it cannot be set aside or varied, if, however a consent judgment or order is to be set aside or varied, it can really be set aside or varied on grounds which would justify the setting aside or variation of a contract entered into with full knowledge of the material matters by legally competent persons, such as fraud, mistake, misrepresentation, collusion, duress, undue influence, agreement contrary to policy of the court, lack of capacity of parties, misapprehension or ignorance of material facts, or if certain conditions remain to be fulfilled which are not carried out and there is very little distinction between interlocutory orders and final decrees in this respect. In the instant case no valid reasons could be detected on the record for saying that there existed grounds which would justify the setting aside of the judgment as a contract."

23. In the present case, it is my view that the 2nd defendant is not acting in good faith in presenting this application. The 2nd defendant having perhaps benefited from the negotiated compromise of the suit where the plaintiff in terms of the filed consent pursuant to clause (4) withdrew the criminal complaint pending before the Kisii Chief Magistrate's Court and undertook not to institute any future criminal complaint against all the defendants, the 2nd defendant now wants to renege on the agreement that led to the consent being entered. The 2nd defendant being well aware that Mr. Minda Advocate of Minda & Co. Advocates is now deceased has the confidence to say he never instructed him knowing that **"dead men tell no tales"**.

24. The 2nd defendant curiously even after the death of Mr. Minda Advocate, and having become aware of the consent order and the consequent decree soon after the said advocate's death did not take any action to challenge the consent order until November 2017 when he filed the present application. There is evidence that the 2nd defendant was served with the plaintiff's Notice of Motion dated 11th September 2014 where the plaintiff sought to execute the consent order dated 6th May 2014 as adopted and varied by the court on 19th June 2014. Specifically the plaintiff sought an order that the 2nd defendant delivers vacant possession of land parcels **Kisii Municipality/ Block I/855 and 861** respectively. Mention notices in regard to the application were served on the 2nd defendant on 3rd November 2014 as per the affidavit of service sworn by one Omambia Mososi Godfrey on 5th November 2014 annexed to the plaintiff's replying affidavit. The plaintiff further vide a letter dated 21st November 2014 served the 2nd defendant notification to vacate and deliver vacant possession to the plaintiff of the aforesaid land parcels pursuant to the court orders issued by the court on 19th June 2014 in the instant suit.

25. In the premises, I am persuaded the 2nd defendant is merely feigning ignorance of the consent and the ensuing court order in an attempt to wriggle out of a consent judgment that was validly entered.

26. My view is that the firm of Minda & Co. Advocates was properly on record for the defendants and Mr. Minda advocate possessed the ostensible authority to enter into the consent that he did on behalf of the defendants as their duly constituted agent. I do not find any basis upon which the consent and/or the judgment can be set aside. In the case of **Hiten Kumar A. Raja -vs- Green Span Limited and 4 Others [2015] eKLR** this court sitting at another station while considering a somewhat similar situation where a party had denied instructing counsel who had consented to an order, I rendered myself as follows after making a finding that the client had in fact instructed the counsel:-

“An advocate acting for a party is clothed with general authority to represent the client and whatever actions he takes on behalf of the client as long as the same fall within the scope of his authority binds the client. If in taking the action the advocate acts negligently to the prejudice of the client, such a client has a separate cause of action against the advocate for negligence and/or professional misconduct. Such action for negligence and/or professional misconduct cannot be properly prosecuted in the same suit where the advocate represented the client.”

27. The 2nd defendant has not suggested there was any fraud or collusion on the part of the plaintiff in dealing with the firm of Minda & Co. Advocates which could have vitiated the consent recorded. There is no basis for the court to interfere with the consent entered into between the parties and/or to review the order made by the court. The 2nd defendant's application dated 10th November 2017 lacks merit and the same is dismissed with costs to the plaintiff.

28. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 27TH DAY of JULY 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Ochwangi for the 2nd defendant

N/A for the 1st, 3rd, 4th, 5th, 6th, 7th defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE