



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 4 OF 2017

ANGELIUS MAINA MWANGI - PLAINTIFF/RESPONDENT

VS

AGNES WAITHIRA KARIUKI - DEFENDANT /APPLICANT

RULING

1. The Applicant filed a Notice of Motion on 4/4/2018 against the Respondent seeking the following orders;-

a. That consent entered into by the parties in the case be set aside/vacated as the Plaintiff has failed to fulfil his part as he was ordered by this Honourable Court to do.

b. That the Plaintiff be ordered to pay the costs of this suit.

2. The application is premised on the supporting affidavit of the Applicant filed on the 4/4/2018. In it she deponed that on the 2/3/2017 she and the Plaintiff recorded a consent in Court to transfer two plots measuring 50ft *100ft out of LOC 17/KAMAHUHA/870. That the Plaintiff has declined to have the survey done and has dismissed the Surveyor. That the Plaintiff is not willing to have the plots be surveyed so as to transfer the plots to her.

3. The Respondent opposed the application and in his Replying Affidavit dated the 7/5/2018 deponed that the consent recorded by the parties in Court on 2/3/2017 was to the effect that 40ft* 80ft would be excised from the suit land. That the costs of the subdivision and registration of the resultant plot would be met by the Applicant. That during the process of survey the Applicant insisted on taking the portion in the middle of the land while the remaining two portions on each side to go to the Respondent. That the rectangular portion is too small to be registered. That this is a variation of the orders recorded in court.

4. Parties elected to file written submissions which I have read and considered.

5. The key question for determination is whether the Applicant has met the grounds for setting aside a consent order. It is not in dispute that the parties appeared before the Court on the 2/3/2017 and recorded the consent in the following terms;

a. A plot measuring 40ft by 80 ft be excised from the plaintiff's land Reg LOC 17/KAMAHUHA/870 on the developed part of the parcel.

b. The cost of subdivision and registration to be provided for by the Defendant

c. The full exercise to take 2 months from today's date.

d. Parties to mention the matter within 3 months to confirm settlement and withdrawal the suit with no orders as to costs."

6. It is trite law that a consent order can only be set aside on grounds that vitiate a contract. By its nature a consent is an agreement by the parties on how they have settled a matter. A Court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between parties such as fraud, misrepresentation, contrary to public policy and or illegality inter alia. As submitted by the Respondent, legal authorities are abundant to support this point. I shall just state a few;

7. In the case of **Flora N. Wasike vs Destimo Wamboko [1988] eKLR** this Court stated:

"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 Appeals 28 of 1982 and 69 of 1983.**"

8. In the case of **Purcell vs F C Trigell Ltd [1970] 2 All ER 671**, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons..”.

9. In the case of **Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485**, Harris, J correctly held, inter alia, that -

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.

10. The Applicant has given the reason for setting aside the consent as non-compliance with the Court orders by the Respondent. With respect, that cause of action attracts another cause of action which is contempt of Court. She has stated that the Respondent is unwilling to comply with the orders. I note that the Applicant is claiming two plots of 50ft by 100ft which is contrary to the order of the Court aforesaid. The orders provided for excision of one plot measuring 40ft by 80 ft.

11. The onus to proof that any of the actions that vitiate a consent have been committed by the other party is on the party asserting. The Applicant has not given evidence to proof that those factors stated in Para 6-9 are present to warrant the consent to be set aside. The reasons proffered by the Applicant therefore are not sustainable. The application is devoid of merit.

12. I have considered the submissions of the Applicant in which she purports to withdraw the application in her written submissions. The application is now for determination. It is not available for withdrawal and at the very least, not by way of submissions. I note the Applicant is a lay person but that notwithstanding the justice of this application is that it is for dismissal. It is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF OCTOBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff – Absent

Defendant – Present in person

Irene and Njeri, Court Assistants