



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 435 OF 2018

ECOTACT LIMITED T/A IKO TOILETS.....PLAINTIFF/RESPONDENT

=VERSUS=

NAIROBI CITY COUNTY GOVERNMENT.....DEFENDANT/APPLICANT

RULING

1. This is the Notice of Motion dated 26th October 2018. It is brought under Section 1A, 1B, 3A, 63(c) and (e) of the Civil Procedure Act, Chapter 21 Laws of Kenya, Order 9 Rule 5 and 6, Order 40 Rule 7, Order 5 Rule 1, Order 50 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks order:-

1. Spent

2. Spent

3. The honourable court be pleased to discharge, vary, review and/or set aside the consent orders issued on 22nd October 2018.

4. The honourable court be pleased to make such further orders as it may deem fit to grant.

5. The costs of this application be provided for.

3. The grounds are on the face of the application and are listed as in paragraph 1 to 24.

4. The application is supported by the affidavit of David Oseko, the County Attorney of the defendant, sworn on the 26th October 2018.

5. The application is opposed. There are grounds of opposition dated 6th November 2018 and filed in court on 7th November 2018. There is also an affidavit by David Kamau Kuria, a director of the plaintiff, sworn on the 7th November 2018.

6. The gist of the defendant's/applicant's application is that the plaintiff filed a suit vide a plaint dated 8th October 2018 seeking injunctive orders against the defendant together with damages for alleged breach of contract and other assumed losses. They also filed a notice of motion application dated 8th October 2018 seeking interlocutory reliefs. Upon being served the defendant then instructed the firm of M/s Letangule & Co. Advocates to take up the matter and defend their interests.

7. By a letter dated 22nd October 2018 the said firm of Letangule & Co. Advocates informed the defendant of what had transpired in court on 22nd October 2018. They informed the defendant/applicant that the plaintiff/respondent had been granted interim orders. They however neglected to disclose that the orders had been entered by consent. They also omitted to attach a copy of the said orders.

8. It is also the defendant's/applicant's submission that it is aggrieved by the consent order of 22nd October 2018 as it's counsel never consulted them prior to entering into the said consent. The said firm of advocates did not act on the defendant's/applicant's best interest and had acted in bad faith.

9. It is the plaintiff's/respondent's case that there is no legal or factual reason put forth to warrant the setting aside and/or varying the consent

orders. That this application is meant to defeat the plaintiff's notice of motion dated 8th October 2018. They urge the court to find that the consent order was properly recorded hence there is no legal basis to interfere with it.

10. The plaintiff/respondent has relied on the cases of :- **(1) Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Limited, Civil Appeal No. 1 of 2015; (2) Kenya Commercial Bank Limited vs Specialized Engineering Company Limited HCCC No 1728 of 1979 and (3) John Warunge Kamau vs Phoenix Aviation Limited Industrial Cause No. 201 of 2013.**

11. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the grounds of opposition and the affidavit in reply. I have considered the oral submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

12. Attached to the affidavit in support sworn by David Aseko, County Attorney for the defendant/applicant is annexure DO1. It is a letter dated 12th October 2018 to M/s Letangule & Co. Advocates reads:-

“RE: ELC NO 435 OF 2018

ECOTACT LTD T/A IKO TOILETS VS NAIROBI CITY COUNTY”

The second paragraph reads;

“We herein give instructions to yourselves to take up the aforementioned matter with a view of defending the county's interest herein.”

According to Black's Law Dictionary, 'to defend' means;

- 1. To use arguments to protect someone or something from criticism or to prove that something is right.**
- 2. To deny, contest or oppose (an allegation or claim)”**

The second definition is more relevant to the instant case.

13. The matter came upon 22nd October 2018. Annexure “DO2” is a letter dated 22nd October 2018 from M/s Letangule & Co. Advocates to the defendant/applicant, in paragraph 4 they state:

“The plaintiffs were granted orders No2 and 5 as in their application as follows.....”

I note that the said advocates do not mention that the orders were granted by consent. They also stated that the matter would be coming up for mention on 20th November 2018, when they were well aware what was coming up on 20th November 2018 was the hearing of the plaintiff's notice of motion dated 8th October 2018. The defendant/applicant learnt of the consent order upon being served by the plaintiff's advocates on 24th October 2018. The same is marked as Annexure “DO3”.

14. Annexure “DO4” is a letter from the defendant to M/s Letangule & Co. Advocates seeking an explanation as to why they had compromised the application in the manner they did.

It is very clear that the said advocates did not intend to disclose to the defendant/applicant that they had consented to the said orders. The only logical explanation could be because they knew they had no instructions to enter into the said consent. The defendant/applicant has maintained they were not consulted prior to the said consent orders.

15. I find that the said firm of advocates may have been ignorant of material facts and had acted in bad faith. They ought to have sought time to consult the instructing client before entering into the said consent. They knew that they did not have instructions from the defendant/applicant to enter into the said consent.

In the case of **Simon Mbugua Ikumbu vs Barclays Bank of Kenya Limited [2015] eKLR** the Court of Appeal held that;

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

Also in **Brooke Bond Lubig vs Mailya [1975] EA 266** the Court of Appeal held:

“ A consent judgment may only be set aside for grand collusion, or for any reason that would enable the court to set aside an agreement”

In **Samson Ole Tina vs Clerk Transmara County Council [2010] eKLR** the court stated that:-

“Whereas an advocate has general authority to compromise on behalf of his client, he can only do so if he acts bona fide and not contrary to express and/or negative direction”.

I have considered the circumstances in the instant case and I am of the view that the defendant’s/applicant’s advocates previously on record did not act bona fide and/or in the best interest of the defendant/applicant.

I have gone through the authorities cited by the plaintiff/respondent and find that in most of them the advocate had the general authority to enter into consent. All in all I find that the consent order herein was not property entered.

16. I find merit in this application and grant the orders sought namely:-

a. That the consent orders issued on 22nd October 2018 are hereby discharged and/or set aside.

b. The costs of this application to abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 15TH day of NOVEMBER 2018

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant