



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 218 OF 2015

MARIAKANI ESTATE WELFARE ASSOCIATION APPLICANT

=VERSUS=

NAIROBI COUNTY GOVERNMENT1ST RESPONDENT

REGISTRAR OF TITLES.....2ND RESPONDENT

LOCAL AUTHORITIES PROVIDENT

FUND.....1ST INTERESTED PARTY

HON. MIKE MBUVI SONKO.....2ND INTERESTED PARTY

BADI ALI.....3RD INTERESTED PARTY

EDWARD THAIRU.....4TH INTERESTED PARTY

MONICA MUKUNYA.....5TH INTERESTED PARTY

PAUL ONDITI.....6TH INTERESTED PARTY

RULING

1. This ruling relates to two applications. The first application is the Notice of Motion by Mariakani Estate Welfare Association (the **Association**) dated 10/10/2016 seeking to set aside the consent order executed by the Association, the County Government of Nairobi, and the 1st Interested Party. The consent was adopted by the court on 22/7/2016. The second application is the Notice of Motion by Nairobi City County Government (the **County Government**) dated 20/7/2018 similarly seeking the setting aside of the said consent order.

2. It is noted from the court record that the suit against Roba Duba, George Aladwa Omwera, M O Okumu, Joshua Aduma and the Registrar of Titles was discontinued through a notice of discontinuance dated 19/5/2016 and filed on 31/5/2016.

3. The case of the applicant is contained in the joint affidavit in support of its application sworn on 10/10/2016. Its case is that prior to the acquisition of Mariakani Estate by the Local Authorities Provident Fund (the **Provident Fund**), the Estate belonged to the City Council of Nairobi and the residents were therefore tenants of the City Council. Aggrieved by the acquisition of the Estate by the Provident Fund, the Association through M/s Tenga W. Mandara & Co Associates Advocates brought a judicial review motion seeking to quash the disposal and to prohibit the County Government and the Provident Fund against disposing the Estate. The Association is aggrieved by the consent recorded by its advocates on instructions of its officials. It contends that the consent order was obtained through collusion, mischief and without authority and/or instructions from it. Consequently, it urges the court to set aside the consent order.

4. The County Government initially vehemently opposed the application through an affidavit by Mr Ayisi, Acting County Secretary, and asserted that the consent order was properly recorded. Subsequently, the County Government changed its position on the application. Its current position is contained in the supporting affidavit sworn by Peter Kariuki on 20/7/2018. Its case is that although the County Government opposed the setting aside of the consent order up to July 2018, it had subsequently changed its position on the matter and was for the setting aside of the consent order. It contends that any previous position taken by the County Government in this suit was taken without consent and or instructions of the current County Administration and the same was based on non-disclosure of facts and information relevant to the case. The County Government adds that the purported transfer of the Estate was done without the consent of the National Land Commission and was effected fraudulently without disclosure of full facts to the County Government.

5. The Provident Fund opposes the 1st application through a replying affidavit sworn by its Chief Executive Officer, Mr David Koross on 11/11/2016. It similarly opposes the 2nd application through a replying affidavit sworn by the same deponent on 20/9/2018. Its case is that the applicants in the 1st application are not officials of Mariakani Estate Welfare Association, contending that the *bona fide* officials are Badi Ali, Monica Nderitu and Paul Onditi. It urges the court to take the applicants' allegations with due caution given that they are asserting rights which are over and above what is rightly due to them as tenants in the Estate. The Provident Fund further urges the court to be alive to the fact that the Provident Fund's acquisition of the Estate was in the public interest in that the action was intended to prevent loss of pension by the pensioners of the County Government due to the County Government's failure to remit pension deductions to the Provident Fund.

6. The Provident Fund further contends that the County Government has perpetual succession by dint of the provisions of Section 6 of the County Government Act and has power to enter into contracts. It adds that the Provident Fund was registered as Proprietor of Mariakani Estate after it entered into a debt swap agreement with the City Council on 31/8/2012 to offset part of the debt arising from unremitted pension dues and a proper valuation of the Estate was done to determine the value of the Estate. It adds that the County Government is presently indebted to the Provident Fund to the tune of Kshs 20 Billions, which money remains unpaid to date and continues to accrue interest. It adds that the debt swap agreement was an idea fronted by the City Council and was duly sanctioned by the Transition Authority and the Parent Ministry.

7. At the hearing, Mr. Omari, counsel for the applicants submitted that counsel who recorded the impugned consent order did not have instructions to do so hence the consent contravened Article 10 of the Constitution. He added that the applicants as tenants in the Estate were never consulted before the Estate was disposed. Counsel further submitted that the Association did not have *locus standi* to initiate this suit and therefore the consent should be set aside on that ground but the court should allow the applicants to thereafter amend the plaint and bring on board officials of the Association.

8. Mr Ochieng, counsel for the County Government submitted that the consent order was procured through illegalities. He contended that the persons who signed the transfer did not have authority to sign it during the transition period. He added that the transfer required approvals by Treasury, Kenya Revenue Authority and the Cabinet Secretary and those approvals were not obtained. Counsel further submitted that the debt swap was for a consideration of Ksh 1 billion yet the value of the Estate was much higher.

9. Mr Allan Kamau for the Attorney General submitted that the Attorney General was not a party to the impugned consent. He added that in an application to set aside a consent order, the court is required to consider certain principles: (i) whether there is fraud; and (ii) whether the consent was procured without sufficient material facts or in misapprehension or ignorance of the same. The learned counsel added that the impugned consent was executed by parties' advocates and the applicants are obliged to demonstrate to the court that the advocates did not have instructions, an obligation which the applicants had failed to discharge. On the issue of locus, counsel submitted that the plaintiff being a self-help group had no *locus standi* to initiate or sustain a suit. He contended that the court has a duty to prevent litigation by bodies that do not have *locus standi*. He urged the court to decline the application.

10. Mr Gikera for the Provident Fund submitted that no ground had been put forth to justify the setting aside of the consent order, contending that mere allegations cannot be a ground for setting aside a consent order. Counsel added that the applicants were tenants and there was no requirement for them to be involved in the debt swap. He added that the consent was not a single event as there was correspondence between the City Council and the Association. Lastly, counsel submitted that nothing can be done to breathe life into the suit herein because the Association lacks *locus standi*.

11. Mr Madara, counsel for the 3rd to the 6th interested parties submitted that Articles 22, 48 and 258 of the Constitution provide for access to justice and Article 260 defines "person" to include a "company, association, incorporated or un-incorporated body of persons." Counsel urged the court not to peg its determination on the issue of locus because it was never raised by the parties substantively.

12. On the issue of setting aside the consent order, counsel submitted that the applicants had come to court belatedly. Secondly, he argued that the applicants had not satisfied the criteria for setting aside a consent order. He added that the County Government fully supported the consent. Mr Madara further submitted that County Governments had perpetual succession and change of political administration is not a basis for setting aside a consent order procured by the previous administration.

13. I have given due consideration to the two applications together with the materials presented in support of the applications. I have also considered the responses to the two applications and the parties' respective submissions. Similarly, I have considered the relevant legal framework and jurisprudence on the key questions in the two applications.

14. The issue of locus of Mariakani Estate Welfare Association was not raised by the parties. The court *suo motto* sought presentations by the parties on that issue at the time of submissions when it turned out that the two applications were challenging decisions taken by officials of the Association. It is noted that the impugned consent order fully settled this suit without the question of locus being raised by the parties. For this reason, I do not consider it appropriate to rest the court's determination on the question of locus. Had that question been raised by any of the parties, this court would have made unequivocal and definitive pronouncement on the issue. Having taken the above view, the only key issue for determination in the two applications is whether the respective applicants have satisfied the criteria for setting aside a consent order or judgment.

15. Our courts have umpteen times articulated the criteria upon which the jurisdiction to set aside a consent order or consent judgment is exercised. In *S M N v S M S & 3 others (2017)eKLR* the Court of Appeal reiterated the guiding principle thus:

“Generally 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 the parties.”

16. In *Flora N Wasika v Destimo Wamboku (1988)eKLR* the Court of Appeal stated thus:

“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”

In Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982]KLR 485, Harris, J correctly held, inter alia, that –

1. 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.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

In Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another [1998] eKLR this Court cited a passage in The Supreme Court Practice 1976 (Vol. 2) paragraph 2013 page 620 stating:-

"Authority of Solicitor - a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen, [1903] 1 Ch pp 817,818; Little vs Spreadbury, [1910] 2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice - see Welsh vs Roe [1918 - 9] All E.R Rep 620."

Finally in the Ugandan case of Lenina Kemigisha Mbabazi Star Fish Ltd (supra) the Court stated:

“The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”

17. The Court of Appeal stated the same principles in Board of Trustees National Social Security Fund v Michael Mwalo (2015) eKLR and Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited (2015)eKLR.

18. The applicant in the first application are tenants in Mariakani Estate. They do not contest the fact that the officials who were in office at the time of bringing this suit were duly authorized to bring the suit. Their gravamen is that they did not give authority or instructions to the firm of advocates representing the Association. The Association’s advocates together with the officials who initiated this suit contest that and contend that the consent was properly recorded after negotiations. The Provident Fund presented as evidence a certified extract dated 28/10/2016 showing that the officials of Mariakani Estate Welfare Association were Bodi Ali, (Chairperson) Monica Nderitu (Secretary) and Paul Onditi (Treasurer). That list has not been contested and no contrary evidence has been presented to the court. The said officials are represented by the Firm of Tengo Madara & Associates Advocates who have opposed the application and asserted that the impugned consent was validly recorded.

19. It does seem to me that the applicant in the first application holds the view that it is at liberty to walk to court and liberally set aside a consent order procured by its officials. My view is that it can only set aside the consent order if it satisfies the criteria for setting aside a consent order. Regrettably, it has not placed before the court any evidence to form the basis of impeachment of the consent order. The evidence before court is that the duly elected officials of the Association procured the consent order after lengthy negotiations with the County Government.

20. The application by the County Government similarly suffers the same deficiency. I have carefully examined the statement of account which contains the unremitted billions owed by the County Government to the Provident Fund; the debt swap agreements; the letter dated 1/10/2012 from the Town Clerk of City Council of Nairobi to the Chairman of Transitional Authority conveying the Council’s resolution to swap the debts; Council’s Resolutions; approval of debt swap by the Permanent Secretary of the parent Ministry; the letter dated 3/12/2014 from the County Government to the Provident Fund confirming the value of the Estate; and the affidavit of the acting County Secretary opposing the first application and stating that there was no fraud, collusion or any agreement contrary to policy in the recording of the consent.

21. What emerges from the subsequent affidavit of Peter Kariuki is that the subsequent political administration of the County Government wishes to disengage from the commitments made by their political predecessors. That in my view cannot be a ground for setting aside a consent order properly recorded. For the court to interfere with the consent order, the County Government must satisfy the jurisprudential criteria outlined above. Regrettably, it has not satisfied that criteria.

22. It is noted that the debt swap happened in August 2012 and the transfer in favour of the Provident Fund was effected in early 2013. The County Government has not brought any suit to challenge the debt swap. Similarly, it does not contest the fact that it owed and still owes the Provident Fund billions in unremitted pension money. In my view, the application by the County Government is not bona fide and is devoid of merit. The application is a ploy by the County Government to run away from its statutory obligation to pay pension deductions.

23. The upshot is that neither of the two applications satisfies the criteria for setting aside a consent judgment or a consent order. The net result is that both the notice of motion dated 10/10/2016 and the notice of motion dated 20/7/2018 are dismissed for lack of merit. The respective applicants shall bear costs of the applications.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF DECEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Njenga and Mr Gikera for the 1st interested party

Mr Ochieng for the 1st defendant

Mr Masaki holding brief for Mr Omari for the applicants

June Nafula - Court Clerk