



REPUBLIC OF KENYA

IN THE ENVIRONMENT LAND COURT AT MAKUENI

ELC CASE NO. 198 OF 2017

GRACE MUMO MBALU ----- 1ST PLAINTIFF/RESPONDENT

ANGELA KANINI MBALU ----- 2ND PLAINTIFF/RESPONDENT

KELVIN MBOLE MBALU ----- 3RD PLAINTIFF/RESPONDENT

VERSUS

STEPHEN MUTIE ----- DEFENDANT/APPLICANT

RULING

1) What is before this court for ruling is the notice of motion application expressed to be brought under Sections 3, 3A and 80 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Rules 44 and 45 of the Civil Procedure Rules 2010 and all enabling provisions of the law for orders that:-

1. That the honourable court be pleased to review and/or vary the consent entered into by the parties in court on 8th March, 2018.

2. That the honourable court be pleased to order that the notice of motion application dated 12th February, 2018 proceeds to hearing interpartes in respect of prayer 4, that is to say, the Defendant/Applicant's prayer that his counter-claim be reinstated.

3. That costs be provided for.

2) The application is dated 27th April, 2018 and was filed in court on even date. It is predicated on the grounds on its face and is supported by the supporting and supplementary affidavits of Anthony Mwanzia Mutunga, the advocate for the Defendant/Applicant, sworn at Nairobi on the 27th April, 2018 and 9th July, 2018.

3) The Plaintiffs/Respondents have opposed the application vide the replying and further affidavits of Angela Kanini Mbalu, the second Plaintiff/Respondent herein, sworn at Machakos on the 4th June, 2018 and 27th July, 2018.

4) On the 16th July, 2018 the court directed that the application be disposed off by way of written submissions. On the 23rd October, 2018 the Plaintiffs/Respondents informed the court that they would not file submissions and would instead rely on their replying and further affidavits. By the time of writing this ruling, the Defendant/Applicant had not filed his submissions.

5) The grounds upon which the application is predicated upon are:-

1. The matter came up before this court on 8th March, 2018 for hearing of the Defendant/Applicant's notice of motion application dated 12th February, 2018 which was unopposed.

2. That in the interest of expeditious disposal of the main suit, the counsels on record for the parties held discussions as to the recalling of the witnesses who had earlier testified in the *ex parte* proceedings of 29th January, 2018.

3. That all the orders sought in the compromised notice of motion application were consented to save for the substantive prayer for an order on the reinstatement of the Defendant/Applicant's counterclaim.

4. That the same was due to an oversight/mistake/omission on the part of the counsel for Defendant/Applicant's Advocate.

5. That considering the nature of the claim, the ends of justice will be better served by allowing the Defendant/Applicant to ventilate his claim by allowing him to seek the inherent jurisdiction of this honourable court to reinstate his counterclaim.

6. That this honorable court is clothed with inherent and unfettered jurisdiction to review the consent order aforesaid to ensure the ends of justice are met.

6) Mr. Anthony Mwanzia Mutunga has raised the same issues in his supporting affidavit while on the other hand, the second Defendant/Respondent in paragraphs 6, 7, 8 and 9 of her replying affidavit deposed that should the Defendant/Applicant's counterclaim be reinstated, it will call for the Respondents who have already testified to come back to defend that counterclaim, that it would cost Kshs. 300,000 for either of them to come back from Kansas City, Missouri, United States of America, that it would be very expensive financially for them to come back from the USA without prior arrangement in terms of money and time and that it is restricted for either of them to come back to Kenya at a short notice due to the nature of their employment and travel laws of the USA to which the Defendant/Applicant through Mr. Mutunga replied in his supplementary affidavit that no receipt or documentation were provided to support the depositions. The Defendant/Applicant contends that he stands to suffer irreparable damage if the counter claim is not reinstated as he shall be denied his very critical right to ventilate his claim and will end up being condemned for the mistakes of his advocate which mistake is curable. In her further affidavit the second Defendant/Respondent annexed documents to prove that they live in Kansas City, Missouri in United States of America. She further annexed a plane ticket in Kenya shillings amounting to Kshs. 161,327.

7) Having read the application, the supporting and supplementary affidavits together with the replying and further affidavits, it is clear that there arises the question of how the consent was recorded by the parties herein on 8th March, 2018. That is consent which the Defendant/Applicant seeks to set aside. In the case of the **Board of Trustees National Social Security Fund Vs Michael Mwato [2015] eKLR**, the Court of Appeal had this to say regarding setting aside of consent orders;

“the law pertaining to setting aside of consent judgments or consent orders has been clearly 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, or collusion or by an agreement contrary to the policy of court”

8) From the affidavit evidence, I do note that the Defendant/Applicant has not shown that the consent of 8th March, 2018 was obtained by fraud, or collusion or by an agreement contrary to the policy of the court. On the other hand, the Plaintiffs/Respondents are opposed to the application solely on the grounds of expenses that they would incur to travel from Kansas City, Missouri in the United States of America to Kenya to testify should the application be allowed. In my view, to deny the Defendant/Applicant the chance to ventilate his counter claim would amount to a denial of justice notwithstanding the grounds upon which consent can be set aside. I am satisfied that there exist circumstances to warrant the varying of the consent of 8th March, 2018. The expenses to be incurred by the Respondents should not be a bar to the Applicant's desire to prosecute his counterclaim.

9) In the circumstances my finding is that the application has merits. I will grant it in terms of prayers 1 and 2. The Applicant will bear the costs of the application.

Signed dated and delivered at Makeni this 28th day of December, 2018.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

Mr. Kyalo holding brief for Mrs. Nzau for the Plaintiffs/Respondents

No appearance for the Defendant/Applicant

Mr. Kwemboi - Court Assistant

MBOGO C.G, JUDGE

28/12/2018