



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT KERICHO

ELC CASE NO. 61 OF 2014

STANLEY KORIR.....PLAINTIFF

VERSUS

WALTER KIPYEGON CHERUIYOT.....DEFENDANT

RULING

By a Plaint dated 26th November, 2014 the Plaintiff filed suit against the defendant for specific performance in respect of a parcel of land known as L.R Number KERICHO/SILIBWET/264 measuring 0.2 acres.

The background of the case is that the Plaintiff entered into a sale agreement with the defendant dated 3rd March, 2014 for the sale of the suit land at an agreed price of Kshs. 600,000. The defendant paid a deposit of Kshs. 300,000 upon signing the agreement and it was agreed that the balance would be paid in 3 installments of Kshs. 100,000 in May, July and September 2014.

It is the Plaintiff's case that he fulfilled his part of the agreement but the defendant has refused to hand over vacant possession of the suit land and effect transfer of the title to the plaintiff.

The defendant filed a Defence in which he denies that the plaintiff has honoured his part of the agreement and states that the plaintiff only paid Kshs. 300,000 upon signing of the agreement and promised to pay the balance of Kshs. 300,000 by 3 installments of Kshs. 100,000 by September 2014 but failed to do so. The defendant further states that in May 2014, the plaintiff took advantage of the defendant's wife's illiteracy and made her sign that she had been paid Kshs. 170,000 whereas the plaintiff had only paid Kshs. 70,000.

The case was set down for hearing on 22nd November, 2016 when both parties and their advocates attended. The plaintiff's advocate Mr. Orina informed the court that they had a consent to record. The court then recorded a consent dictated by the advocate in the following terms:

“By consent of the parties, this suit be compromised on the following terms:

- 1. That the plaintiff do pay to the defendant a sum of Kshs.100,000 within the next seven days being the balance of the purchase price.***
- 2. That the defendant do execute transfer documents in favour of the plaintiff of 0.2 acres comprised in L.R number KERICHO/SILIBWET/264 which should be done within seven days from today.***

3. That the sum of Ksh. 130,000 which is held by the firm of M/S J.K Koech & Company Advocates be released to the defendant immediately.

4. That each party to bear his own costs.

5. That upon the terms being complied with, the case be marked as settled.”

According to the court record, the defendant’s advocate, Mr Kirui confirmed the terms of the consent and both advocates signed against their names.

The court then adopted the consent as the judgment of the court and marked the suit as settled.

The instant application was filed on 3rd February, 2017 under **Section 3A** of the **Civil Procedure Act** and **Order 10 Rule 11** of the **Civil Procedure Rules**. The main prayer sought are as follows:

1. That pending the hearing and determination of this application inter partes, this honourable court be pleased to stay execution of the decree herein.
2. That this Honourable court be pleased to set aside the consent Judgment and decree entered herein against the defendant /applicant and any consequential orders thereof and allow the defendant/applicant leave to defend the suit herein.

The defendant has listed a number of grounds upon which the application is based the gist of which is that the defendants are unhappy with the consent that was recorded in court on the 22nd November, 2016. The defendant further elaborates that even though he was in court when the consent was recorded, his former advocate did not explain to him the terms of the consent. He adds that the terms of the consent have not been honored and bad blood has developed between the family of the defendant and that of the plaintiff. As a result of the foregoing, the defendant is ready to refund the purchase price of Ksh. 370,000 already paid by the plaintiff.

The defendant has also sworn a supporting affidavit whose contents are more or less the same as the above-stated grounds.

When the application came up for hearing on 14th March, 2017 it was agreed that the application would be canvassed by way of written submissions.

The issues for determination are:

1. Whether the consent recorded in court on the 22nd November 2016 was valid and binding on the parties.
2. Whether there are sufficient reasons to warrant the said consent being set aside.
3. Who should bear the costs of this application

In order to deal with the issue of the validity of the consent order, it is important to understand the intention of the parties and their advocates at the time of recording the said consent.

In his submissions counsel for the defendant states that the defendants former advocate had express instructions to defend the suit and the consent he entered into with the defendant’s advocate was contrary to the defendant’s instructions.

He further submits that the said advocate did not act bona fides because he departed from the defendant’s express instructions and proceeded to record the consent without consulting the defendant. As such, he submits, the defendant’s former advocate did not have sufficient material facts.

It is interesting to note that even though the defendant was in court at the time the consent was recorded, he claims that his advocate kept him in the dark and he therefore imputes ill motive, dishonesty and mischief on the part of his former advocate.

According to the Plaintiff, the consent is valid as it was recorded in court in the presence of both parties and their advocates and after the judge had satisfied himself that the parties were in agreement.

The defendant has not stated in his affidavit that he is illiterate or that he did not understand what was going on in court at the time the consent was recorded. Even though he maintains that his initial express instruction to his former advocate was to defend the suit, it is not unusual for parties to compromise suits either before or at the hearing of the suit. If indeed the defendant was opposed to the consent, it beats logic why he did not protest immediately and why it took him three months to apply to have it set aside. I find nothing untoward in the manner in which the consent was recorded and therefore find and hold that it is a valid consent.

Based on the above finding, should the said consent be set aside?

The principles for setting aside a consent judgment are elucidated in the case of **BROOK BOND LIEBIG (T) LIMITED V MALLYA 1975 EA** as follows:

“The circumstances in which a consent judgment may be interfered with were considered by this court in HIRAN KASSAM (1952) 19 EACA 131, where the following passage from Seton of Judgments and Orders 7th Edn, Vol 1 P.124 was approved;

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.”

It is settled law that a consent order may be set aside on the following grounds:

- a) Fraud.***
- b) Collusion or misrepresentation.***
- c) Concealment of material facts to induce another to act to his or her detriment.***
- d) Lack of express negative direction.***

As submitted by Counsel for the Defendant, it is also trite law that an advocate has a general authority to compromise the suit on behalf of his client the general authority must however be exercised on the following conditions;

- a) That he acts bona fides.***
- b) That the consent is not contrary to express negative instructions/directions.***
- c) The consent is not obtained by fraud or collusion.***
- d) The consent is not contrary to the policy of the court.***
- e) The consent is not given without sufficient material facts.***
- f) The consent is not given with misapprehension or in ignorance of material facts.***

It is the Defendant's submission that his former advocates failure to consult and involve him in the consent while he was in court amounted to collusion, ill motive and dishonesty. He further submits that the consent, was contrary to the courts policy to be open and transparent to all litigants.

Lastly, he submits that the consent was entered into without sufficient material as his former advocate was not aware of the bad blood that had since developed between the defendant and plaintiff's families.

On the other hand, the Plaintiff maintains that the consent was validly recorded in the presence of both parties and their advocates and there is therefore no good reason to set it aside.

I have carefully considered the pleadings, the instant application, affidavits and submissions of both counsel together with the authorities cited to me. I find no sufficient reason why the consent should be set aside as I am not persuaded that the threshold set out in the LIEBIG case has been met.

In my assessment the only reason why the defendant wants to set aside the consent is probably due to pressure from his family members who have since fallen out with the Plaintiff. That in my view is not a good enough reason to set aside a valid order of the court.

It is not lost to me that the defendant was present in court on the date the consent was recorded and signed by his advocate and at no point did he raise any objection. Parties should not abuse the process of the court at whim.

The upshot is that the defendant's application fails and is dismissed with costs to the plaintiff. I further direct that the plaintiff satisfies the terms of the consent order within the next seven (7) days failing which the defendant shall be at liberty to seek an appropriate remedy.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 14TH DAY OF JULY 2017.

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J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Oumo for the Defendant/Applicant.
2. Miss Kitur for Miss Chelimo for the Plaintiff/Respondent.