



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. 130 OF 2008

(Consolidated with Civil Case No. 165 of 2008)

JOSHUA NZIVE MULWA.....1ST PLAINTIFF
CHARLES M. MATHEKA.....2ND PLAINTIFF
RUCINA MUMBUA MBEVI3RD PLAINTIFF
CATHERINE MBALUTO.....4TH PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT
MATUMAINI VENTURES LTD.....2ND DEFENDANT

RULING

1. What is before me is the Application by the Plaintiffs dated 23rd June, 2008 seeking for the following orders:

a. That the consent judgment dated 21st February, 2008 and adopted as the Judgment of the court on 28th February, 2008 be set aside and/or reviewed.

b. That costs of this Application be provided for.

2. The Application is premised on the grounds that the 1st Respondent deponed in its Affidavit that the agreement between the 2nd Respondent and the 1st Respondent had been rescinded and hence the 2nd Respondent had no authority to sell L.R. No. 12867/23 on behalf of the 1st Respondent; that based on those depositions, the Plaintiffs entered into the consent judgment and that it has now emerged that the sale agreement between the 1st and 2nd Respondents was not rescinded and that the 2nd Respondent proceeded to sale the whole of L.R. No. 12867/23 on behalf of the 1st Respondent to Westlink Developers Limited.

3. The 1st Plaintiff has deponed that Westlink Developers Limited has sought to evict them from their respective portions; that they purchased the suit land from the 2nd Respondent and that the suit land was

transferred to Westlink Developers Limited on the 7th December, 2007 long after the Plaintiffs had paid to the 2nd Respondent the purchase price.

4. According to the Plaintiffs, it is as a result of the 1st Respondent's misrepresentation and false averment in its Replying Affidavit sworn on 14th January, 2008 that they instructed their advocate to record the consent dated 21st February, 2008; that the 2nd Respondent has breached the said consent and that unless the consent order is set aside, they are bound to be evicted.

5. In response, the 1st Defendant filed Grounds of Opposition in which it averred that the allegations of misrepresentation have not been particularized or substantiated; that there are no valid grounds for reviewing and or setting aside the consent judgment of 21st February, 2008 and that the Plaintiffs had the knowledge of the implication of the impugned consent.

6. The 2nd Defendant also filed Grounds of Opposition in which it averred that the Plaintiffs have already derived benefit from the consent order; that the Application makes allegations against third parties who are not parties to this suit and that the consent had a default clause which the Plaintiffs should enforce.

7. The Plaintiffs' advocate submitted that the 1st Defendant, through misrepresentation vide its Replying Affidavit, stated that the agreement between the 1st Defendant and the 2nd Defendant had been rescinded; that it is that misrepresentation that caused the parties to enter into the consent and that the contents of the letter marked "annexture 6" shows that the property in question had been transferred to a nominee of the 2nd Defendant.

8. Counsel submitted that it is preposterous to refer to the third parties as innocent purchasers for value because while the order for *status quo* was existing, the suit property was sold to the said third parties.

9. The Applicants' counsel relied on authorities which I have considered.

10. The 2nd Defendant's counsel submitted that the Plaintiffs have already derived a benefit from the consent and that the suit property has already been transferred to 3rd parties.

11. This suit was commenced by way of a Plaint dated 29th January, 2008.

12. In the Plaint, the Plaintiffs alleged that they had purchased the suit land from the 2nd Defendant who eventually refused to transfer the same to them.

13. The Plaintiffs prayed for an order directing the Defendants to effectually effect transfer of the suit property by executing the transfer documents in their favour.

14. The Plaintiffs also filed an Application dated 29th January, 2008 in which they prayed for an order of injunction.

15. Before the Application for injunction could be heard, the Plaintiffs entered into a consent with the Defendants in which they agreed to receive a total of Kshs. 5,175,243 being the sum they had paid to the 2nd Defendant for the suit land.

16. According to the said consent, the 2nd Defendant was to pay them Kshs. 1,000,000 on or before 28th February, 2008 and the balance of Kshs. 4,175,243 in ten (10) equal monthly instalments of Kshs. 417,243 per month.

17. The consent further provided that in default of any one instalment by the 2nd Defendant, execution was to issue.

18. The consent order further provided that the Plaintiffs were to vacate the suit property on or before 30th April, 2008 and that upon payment of the agreed amount, the suit was to be marked as settled.

19. The Plaintiffs' main reason as to why they want the consent order which was entered into to be set aside is because they believed that the 2nd Defendant had no capacity to sell the land to them. However, they later discovered that indeed the 2nd Defendant had the capacity to sell the land as at the time of signing of the agreement because he went ahead to sell the same property to Westlink Developers Limited on 7th December, 2007, way before the consent of 21st January, 2008.

20. I have looked at the Replying Affidavit that was filed by the 1st Defendant on 15th February, 2008. In the said Affidavit, the 1st Defendant was categorical that it was the registered proprietor of the suit land.

21. It would appear that as at the date of filing the Plaint, the suit property had already passed from the 1st Defendant to Westlink Developers Limited as per the grant that has been annexed on the Plaintiffs' Affidavit.

22. According to the copy of the grant, the suit property was transferred to Westlink Development on 7th December, 2007.

23. In my view, whether the suit was registered in the name of the 1st Defendant or Westlink Developers as at the time of filing of the suit, the 2nd Defendant could not have had the legal capacity to sell it to the Plaintiffs without the consent of the registered proprietor.

24. It is because of the state of affairs that were existing as at the time the consent was signed that the Plaintiffs agreed to have the monies paid to the 2nd Defendant refunded so as to pull out of the transaction that they had entered into. The Plaintiffs must have considered all those issues before they instructed their advocates to record the consent.

25. The law relating to setting aside or discharging a consent order was captured in the case of **Purcell v. F.C. Trigell Limited (1970) 2 ALL ER 671** in which Winn LJ stated as follows:

“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 person.”

26. The above position was followed by the Court of Appeal in the case of **Flora N. Wasike vs. Destino Wamboko (1988) eKLR** in which it was held as follows:-

“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 aside, or if certain conditions remain to be fulfilled, which are not carried out.”

27. It is trite that a consent order, just like a contract, can only be set aside if a party shows that he entered into the consent by fraud, mistake or misrepresentation.

28. Having gone through the pleadings, I am satisfied that the Plaintiffs did not enter into the consent of 23rd June, 2008 by fraud, mistake or misrepresentation.

29. I say so because the Plaintiffs were aware or ought to have been aware that by the time they were filing the suit, the suit property had already been transferred to another entity either by the 1st or 2nd Defendant.

30. Having agreed to receive a refund of the monies paid in lieu of pursuing the suit, the Plaintiffs cannot be heard to complain that they all along believed that the 2nd Defendant did not have authority to sell the

land, and that they have since realised that that is not the position.

31. The fact that the Plaintiffs were made to believe that the 2nd Defendant did not have the capacity to sell the suit land, which turned out to be untrue, cannot be a ground in setting aside the consent considering that they were represented by an advocate. It is their advocate who should have checked the legal status of the suit land before entering into the consent of 21st February, 2008.

32. The Plaintiffs should pursue the refund of their money, if they have not been refunded yet, and allow the registered proprietor of the suit land to deal with the land as he pleases.

33. For those reasons, I dismiss the Notice of Motion dated 23rd June, 2008 with costs to the 1st and 2nd Defendants.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF JULY, 2017.

O. A. ANGOTE

JUDGE