



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 661 OF 2013

ERICK GAKUYA MWATHAITA.....PLAINTIFF

VERSUS

MAGANJO JOSHUA KAGO.....DEFENDANT

RULING

In the case of **BROOKE BOND LIEBIGIT) LIMITED VS MALLYA (1975) E.A 266, LAW Ag. President** stated the law in setting aside consent orders or judgments as follows:

“The circumstances in which a consent judgment may be interfered with were considered by this Court in HIRANI VS KASSAM (1952) 19 E.A.C.A 131, where the following passage from SETON ON JUDGMENTS AND ORDERS 7th EDITION VOL 1 PAGE 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 also the law that an advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to any express directions. In the absence of proof of any express negative instructions, the order shall bind the client- see also **SAMUEL MBUGUA IKUMBO VS BARCLAYS BANK OF KENYA LTD C.A CIVIL APPEAL No. 1 of 2015 (NBI) (2015 e K.L.R.**

On 23rd August 2013, the plaintiff filed this suit claiming that he is the registered proprietor of land parcel No. INOI/THAITA/611 (the suit land) which the defendant had illegally caused to be registered in his names and was holding the title thereto. The plaintiff therefore sought an order that the defendant transfers the suit land to him and pays costs and interest.

On his part, the defendant denied that averment pleading instead that by a friendly loan agreement dated 3rd October 2012, the plaintiff borrowed Ksh. 400,000 payable before 2nd January 2013 with a condition that in default, the plaintiff would surrender the suit land. There was a default and so on 25th January 2013, the suit land was transferred to him after all the statutory formalities had been complied with. The defendant therefore sought in his counter-claim that all the restrictions placed on the suit land removed.

The plaintiff filed a reply to the defence and defence to the counter-claim and denied having received a friendly loan of Ksh. 400,000.

On 9th November 2015, the following consent order was recorded by this Court in the presence of both **MR. KARIITHI** advocate for the plaintiff and **MR. NGIGI** advocate for the defendant:

- 1. "That the defendant do transfer title No. INOI/THAITA/611 to the plaintiff**
- 2. That the Land Registrar Kirinyaga County do remove the caution placed on title No. INOI/THAITA/611**
- 3. That the plaintiff do pay the defendant Ksh. 450,000 all inclusive**
- 4. Each party to bear their own costs"**

On 13th June 2016, the plaintiff citing the provisions of **Order 10 Rule II, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Rules** filed this Notice of Motion seeking the following orders:

- 1. That the order by consent given on 9th November 2015 be vacated.**
- 2. That this case do proceed by way of viva voce.**
- 3. That costs of this application be provided for.**

The application is premised on the grounds listed therein and is also supported by the plaintiff's affidavit. The gravamen of the application is that the plaintiff had no dealing with the defendant when the alleged debt was incurred and that it was his (plaintiff's) father who dealt with the defendant and later refused to pay. That he (plaintiff) later learnt that the actual sum given to his father was Ksh. 200,000 and not Ksh. 400,000. That his finger prints and signature were forged and that his father had promised to pay back the money but later backed out of the deal. That he is unable to pay the Ksh. 400,000 to the defendant and wishes to have title to the suit land transferred back to him.

The defendant filed grounds of opposition to the application describing it as incompetent, bad in law and not meeting the threshold of granting the orders sought.

I have considered the application, the supporting affidavit, the grounds of opposition and the submissions by counsel.

In his submissions, **MR. A.P. KARIITHI** advocate for the plaintiff has stated as follows:

"The plaintiff had not taken any part at all in dealing with his title. He did not apply for any loan, he had not signed any papers to enable any dealing with his title"

However, among the documents filed by the defendant is an agreement dated 3rd October 2012 in which the plaintiff is the borrower and the defendant the lender. The agreement bears both the signatures and thumb prints of both parties including the common witness one **DANIEL MWATHAITA NJERU**. The salient parts of that agreement read as follows:

"IS HEREBY AGREED AS FOLLOWS:

- 1. That the borrower herein acknowledges a receipt of Ksh. 400,000 (four hundred thousand only) being a friendly loan.**
- 2. That the borrowed amount shall be refunded on or before 2nd January 2013.**
- 3. That the security for the borrowed amount shall be the title deed for land parcel No. INOI/THAITA/611 of which the original title deed shall be retained by the tender until payment of the loaned amount in full.**

4. That in default on the part of the borrower, he shall surrender land parcel No. INOI/THAITA/611 and further authorizes the relevant Land Control to issue a consent to transfer the same to the tender his presence notwithstanding”

Although his counsel has submitted that the plaintiff reported to the Police about his “**signature and finger prints**” having been forged, that averment is missing from the plaintiff’s supporting affidavit. That is therefore an averment from the bar as there is nothing to prove when the report to the Police was made and with what results. What I find strange is the plaintiff’s claims that he had no dealings with his title yet his own Identity Card No. 24602088 appears on the loan agreement. It is not suggested that even his Identity Card was stolen or forged. He also does not explain how the title deed to the suit land ended up in the possession of the defendant if he (plaintiff) did not execute the agreement. Did the defendant steal it? The plaintiff appears to lay the blame on his father who is not even a party in this case and neither has he filed an affidavit to corroborate what the plaintiff is now alleging. For instance, if his father had received only Ksh. 200,000 and not the Ksh. 400,000 as alleged, nothing would have been easier than to say so. The plaintiff says he is not able to repay the Ksh. 400,000. If that is his reason for trying to renege from the agreement and consent herein, this Court must tell him that he cannot be permitted to do so.

The record herein is very clear that the consent order recorded on 9th November 2015 was in the presence of his advocate **MR. KARIITHI**. As is also clear from the case of **SAMUEL MBUGUA IKUMBU** (supra), his advocate, in the absence of any evidence to the contrary, had the authority to compromise on his behalf. Nowhere in his application is it suggested that **MR. KARIITHI** had no authority to record the consent dated 9th November 2015 or that it was obtained through fraud, collusion or contrary to Public Policy.

The up-shot of the above is that there is no merit in the plaintiff’s Notice of Motion dated 13th June 2016 and filed here on the same day seeking the main prayer that the consent order recorded on 9th November 2015 be set aside. That being the case, this Court cannot even consider the prayer that this case be determined by viva voce evidence. This is because, since the suit has been compromised, there is nothing left to consider.

The application is therefore dismissed with costs.

B.N. OLAO

JUDGE

29TH SEPTEMBER, 2017

Ruling delivered, dated and signed in open Court this 29th day of September 2017

Mr. Kariithi for Applicant present

Mr. Ngigi for the Respondent present.

B.N. OLAO

JUDGE

29TH SEPTEMBER, 2017