



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO.83 OF 2011

HIDDEN TREASURE INVESTMENT LTD.....PLAINTIFF/RESPONDENT

VERSUS

ALI MSELEM SULEIMAN.....DEFENDANT/APPLICANT

RULING

1. By a Plaint filed in Court on 30th June 2011, the Plaintiff/Respondent Hidden Treasure Investment Ltd sought against the Defendant/Applicant Ali Mselem Suleiman;

(a) A declaration that the Plaintiff was the lawful owner of Plot No. 4260 Malindi Municipality.

(b) A finding that the Defendant is a trespasser on the suit property and an order of eviction against the Defendant.

2. In a Statement of Defence filed on 26th July 2011, the Defendant denied the Plaintiff's claim stating that he had the authority of the previous owner of the land one Ali Rashid Azzan to construct a structure on the premises which authority was given to him in 1993.

3. Subsequently by a consent dated 6/10/11 but filed in Court on 6th September 2011, the parties requested the Court to record the following consent:

“By consent of both parties, it is hereby agreed and/or consented as follows:-

(i) That the Plaintiff to pay a sum of Kshs 4,000,000/= to the Defendant within six months from the date hereof as compensation for the structure and/or any developments standing on the Plot No. 4260, Malindi situate at Malindi within Malindi Municipality.

(ii) That upon payment of the aforesaid sum the Defendant to hand over vacant possession of the above said Plot, together with all structures and/or developments on the Plot.

(iii) That costs of this suit be borne by the Defendant herein.

(iv) That upon fulfilment of the above said terms, this matter be marked as settled.

4. That consent order was adopted as an Order of the Court on 1st October 2015. From the record of the

day, the Honourable Justice Angote captured the intent of the Parties as follows:-

“The consent of 6/10/11 is adopted as an Order of the Court. The matter is marked as settled.”

5. Nothing else is recorded in the file until the 25th April 2017 when the Defendant filed the present application before me seeking orders:-

(a) That the Honourable Court be pleased to review its Orders made on 6th September 2011 which stated that this case be marked as settled.

(b) That the Honourable Court be pleased to order that this case is not yet settled due to the fact that clause 1, 2 and 3 of the Order have not been fulfilled.

(c) That the costs of this application be in the cause.

6. The Application is supported by the Defendant’s Affidavit sworn on 24th April 2017 and is based inter alia on the grounds that:-

(i) *The matter was to be marked as settled upon fulfilment of conditions 1, 2 and 3 of the consent agreed on by the parties;*

(ii) *The Court mistakenly and/or inadvertently marked the matter as settled while it was not; and*

(iii) *It is fair and just that the Court reviews the Orders of 1st October 2015 and make a finding that the matter is yet to be settled as a none of the conditions set out for its settlement had been fulfilled.*

7. In a Replying Affidavit sworn on 29th May 2017 through its Managing Director one Jebel Munene Ngere, the Plaintiff is opposed to the grant of the Orders sought. It is the Plaintiff’s case that the Court was not mistaken in marking the matter as settled since the Court acted within its Constitutional Powers to promote alternative means of dispute resolution with the parties herein who willingly negotiated and signed a consent to the effect that the matter was to be marked as withdrawn upon fulfilment of the conditions mentioned in the Order.

8. It is the Plaintiff’s case that in partial fulfilment of the said conditions the Plaintiff paid a sum of Kshs 500,000/= to the Defendant thus indicating their sincerity in complying with the orders of the Court. The Plaintiff denies any interference with the Defendant’s tenant’s possession of the premises and/or in any way taking advantage of the Court Orders.

9. The genesis of this application would appear to be the feeling on the part of the defendant that the Plaintiff is taking advantage of the fact that this matter was marked as settled. It is evident from the material placed before me that the Defendant had certain structures on the suitland. It is also apparent that the Defendant has tenants in the structures which he now accuses the Plaintiff of interfering with. The Plaintiff denies this. The Plaintiff does not however deny that they have moved into the ground floor of the said structures and began storing charcoal therein.

10. As Hancox JA(as he then was) stated in the case of ***Flora Wasike –vs- Destimo Wamboko(1992-1988) KAR 635,***

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

11. Thus a variation of a consent Judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement

being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.

12. It is clear from ground No. 4 of the consent executed by the parties and filed in Court on 6th September 2011 that the matter was to be marked as settled only upon fulfilment of conditions set out in Clause 1 to 3 thereof. Those conditions required the Plaintiff to pay a sum of Kshs 4000, 000/= to the Defendant within six months from 6th September 2011. In a feeble attempt to comply therewith, the Plaintiff admits that it has only paid Kshs 500,000/= to the Defendant so far. It cannot therefore be in the interest of justice and fairness to state that the dispute is settled.

13. Clearly, the consent signed by the parties was different from the manner in which it was captured by the Court. I think where there is an error apparent on the face of the record, it is pertinent that the same be rectified by the Court.

14. Accordingly, I find merit in the Defendant's application dated 24th April 2017. The same is allowed.

15. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 6th day of December, 2017.

J.O. OLOLA

JUDGE