

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC NO. 168 OF 2009

FRANKLIN KAMATHI KAMAU.....PLAINTIFF

VERSUS

TERCY INVESTMENT LIMITED.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 3rd March 2014 in which the Defendant/Applicant seeks for an order setting aside the consent order made on 9th December 2013 and proceedings be reinstated and submissions filed for court's delivery of judgment.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Betty Rashid, the Advocate having the conduct of this suit on behalf of the Defendant/Applicant, sworn on 3rd March 2014 in which she averred that on 9th December 2013, a consent order was entered into wherein the interlocutory proceedings were set aside and the case was to proceed for hearing *inter-partes*. She further averred that since 9th December 2013, the Plaintiff has not taken any steps to prosecute the case but is instead continuing with developing the suit plot in total contravention of the court's order of maintenance of *status quo*. She added that it has become clear that the Plaintiff has no intention of prosecuting his case but is hell bent on flouting the court's orders.

The Application is contested. The Plaintiff/Respondent, Franklin Kamau Kamathi, filed his Replying Affidavit sworn on 15th September 2013 in which he averred that a consent order can only be set aside on the grounds of fraud or other grounds that can justify the setting aside of a contract and that from the materials laid in this Application, the Defendant/Applicant has not demonstrated any such grounds. He added that part of the consent required the payment of Kshs. 30,000/- as throw away costs to the Defendant/Applicant which he duly paid. He further pointed out that Ms. Betty Rashid being the Advocate acting for the Defendant/Applicant is precluded by the Advocates Practice Rules from giving evidence on behalf of her client in contested matters which she has done in this Application. He added that there is no reason whatsoever that has been adduced as to why the Defendant himself could not swear the Supporting Affidavit. He stated that the Supporting Affidavit of Betty Rashid is incompetent for having been sworn by a person who lacked capacity to do so and ought to be expunged from the record and this Application dismissed. He further averred that he has not continued to develop the suit plot. He pointed out that the property in issue was long developed and on it stands a 5 storey building containing 25 flats of 2 bedrooms each. He annexed photographs of the same. He added further that there are no orders of maintenance of status quo issued by this court which he is contravening. He added that by a ruling delivered herein on 26th April 2010 by Justice Muchelule, the Defendant's application for a temporary injunction was found to lack merit and was dismissed with costs. He stated further that he has now filed all the documents required for this matter to be fixed for trial including witness statements, a list of witnesses, a list and bundle of documents and a list of issues. He added that it would be in the interest of justice that the matter proceeds on merit to a full hearing. On those grounds, he sought the dismissal of this Application.

The issue arising for my determination is whether the Court should set aside the consent. The leading

authorities on this subject are the cases of:

Flora Wasike V. Destimo Wamboko (1982 – 1988) IKAR 625 where the Court held that:

“It is now settled that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, for example, fraud, mistake or misrepresentation or if certain conditions remain to be fulfilled, which are not carried out.”

Brooke Bond Liebig (T) Limited – vs- Maliya (1975) E.A. 266 where the Court held that:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all the parties to the proceedings or action, and 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 the consent was given without material facts, or in misapprehension or in ignorance of material facts, or in general for reason which would enable the court to set aside an agreement.”

The circumstances of the instant suit are that there is no fraud, mistake, misrepresentation, or misapprehension of the law or ignorance of material facts pleaded by the Defendant/Applicant that would warrant this court to set aside the consent. However, the Court can still set aside the consent if certain conditions agreed upon by the parties in the consent remain to be fulfilled. The express term of the consent as captured hereinabove was the payment of the throw away costs which the Plaintiff duly paid on 10th December 2013 within the stipulated time. One of the prayers in the Plaintiff’s application leading to the consent was that he be allowed to file the pre-trial documents. Since the application was allowed, I am of the considered view that filing of the documents was condition in the consent. However, there was no timeline set for the filing of the said documents. Consequently, it would be prejudicial to state that the condition was not fulfilled. In any event, the Plaintiff filed the said documents albeit late in the day. In the circumstances, it would appear therefore that the consent cannot be set aside.

In light of the foregoing, this Application is hereby dismissed. Costs shall be in the cause.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF MARCH 2016.

MARY M. GITUMBI

JUDGE