

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 379 OF 2012

ANNAH WANJIKU KAMAU.....PLAINTIFF

VERSUS

JOSEPH KIMANI MBUGUA.....1ST DEFENDANT

JANE GACHUKI KIMANI.....2ND DEFENDANT

RULING

The plaintiff has come to court by way of Notice of Motion dated 16.2.2015 for prayers that the honourable court be pleased to set aside the consent judgment entered on the 21.11.2014 and the court be pleased to set aside the matter for hearing. The application is based on grounds:

(a) That through a consent judgment entered on the 21st November, 2014, the 2nd defendant paid the plaintiff a sum of Kshs.700,000/= towards consent judgment and Kshs.50,000/= as Advocate's costs.

(b) That through the above consent, both parties to the suit appended their signatures affirming that there would be no other claims upon payment of the aforementioned amounts.

(c) That the plaintiff entered the consent judgment unconsciously believing it was fair upon her.

(d) That the defendant had enriched herself unjustly with the rent of the suit property they have been collecting from the rental houses.

The application is supported by the affidavit of Annah Wanjiku who states that she entered into a consent order over this matter on 21st November, 2014. That the terms of the said consent were that the 2nd defendant was to remit Kshs.700,000/= towards the consent judgment.

That the aforesaid consent judgment also obligated the 2nd defendant to pay Kshs.50,000/= to her advocates being his costs. That she entered into this contract subconsciously without comprehending consequences arising therefrom. That a refund of Kshs.700,000/= to her being the purchase price of the plot way back in 2007 is miscarriage of justice. She was shocked upon comprehending its consequence and as a result, she has been diagnosed with hypertension, diabetes and subdural hematoma. The defendants have unjustly enriched themselves through the consent judgment. She is advised by her advocate on record that consent agreement can be set aside whenever fraud is alleged. The sum of Kshs.700,000/= refunded to her is too little considering that the defendants have been collecting rent since July, 2007 to date. The consent judgment is unfair and oppressive to her.

The 2nd defendant/applicant filed a replying affidavit stating that the application is a misconception as a consent judgment cannot be set aside other than on the grounds which would invalidate a contract and that no evidence of fraud has been established by the plaintiff since the consent was entered into on a willing basis. That the plaintiff had the benefit of his competent legal advisor while negotiating and entering into the consent. That his legal advisor cannot now purport to file an application to vacate a consent that he keenly pursued for it to be entered. That this suit was mentioned before the Judge severally to enable the parties to agree on the contents of the consent, which gave the plaintiff

ample time to reflect hence no mistake can arise. That the signed consents are clear that the matter is fully settled with no further claims whatsoever and that the plaintiff and her Advocate were paid in full. That as a confirmation of the payment, the court issued an order on 21st November, 2014 confirming that this matter was closed. This court has no jurisdiction to set aside the consent when its terms are fully settled. The plaintiff is being malicious and motivated by improper purposes by claiming that rent was being collected which issue was never raised in the pleadings hence to reopen the matter is futile as the court cannot try an unpleaded issue.

I have considered the application, affidavits on record and submissions of counsel and do find that both parties agree on the law applicable in guiding setting aside of a consent agreement which is the same law guiding the setting aside of a contract. The grounds for setting aside such a consent judgment are misrepresentation, fraud, mistake, duress, incapability and illegal contract. Though the plaintiff pleads that there was misrepresentation and fraud together with unconsciousness, there is no evidence of the same. The burden of proving misrepresentation and fraud are on the plaintiff and the standards are higher than a balance of convenience. This burden has not been discharged to the required standards.

I agree with the 2nd defendant that the plaintiff was represented with an able counsel who should have detected that the bargain for his client was not favourable. Ultimately, the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF APRIL, 2016.

ANTONY OMBWAYO

JUDGE