REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. 1 OF 2012

IN THE MATTER OF ENVIRONMENT DAMAGE AND VIOLATION OF THE RIGHT TO CLEAN AND HEALTHY ENVIRONMENT

AND

IN THE MATTER OF A CONSTITUTIONAL PETITION UNDER ARTICLES 42 AND 70 OF THE CONSTITUTION OF KENYA

BETWEEN

MICHAEL KIBUI.....1ST PETITIONER

GEORGE OSUNDWA.....2ND PETITIONER

BALLET MURENGU.....3RD PETITIONER

(SUING ON BEHALF OF RESIDENTS OF MWAMBA VILLAGE)

VERSUS

IMPRESSA CONSTRUZIONI GIUSEPPE MALTAURO S.P.A.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....3RD RESPONDENT

RULING

The 1st respondent, ***Impressa Construzioni Giuseppe Maltauro S.P.A.*** has come to this court under Order 51, Rules 1, 3 and 4 of the Civil Procedure Rules and Section 159(2) d of the Civil Procedure Act praying that the consent recorded on 22.9.2014 adopting the Control Audit Report filed on the 11.8.2014 by the 3rd respondent be set aside and that the consent recorded on the 2nd day of March, 2015 that the matter be set down for determination of liability as between the 1st and 2nd respondents be set aside. The application is supported by the affidavit of Gad Gathu and on the grounds that the consent was entered into on misapprehension of facts. The applicant in the supporting affidavit states that the consent was based on misapprehension of facts including that the petitioners were claiming claims that fall outside the jurisdiction of this honourable court including claims for compensation of land through compulsory acquisition. Moreover, that negotiations were on a "without prejudice" basis.

The Advocate for the 3rd respondent filed a statement of grounds of opposition to the Notice of Motion dated 6.7.2015 stating that the application is not sound in law for setting aside a consent and that the

application has no merit and that counsel for applicants on material date has not sworn affidavit. The 2nd respondent filed a replying affidavit through Stella Amisi Orengo supporting the application for setting aside the consent judgment. The 2nd respondent raises issues of jurisdiction of the court in matters of compulsory acquisition. Moreover, the 2nd respondent raises issues of fraud, collusion, policy of court interalia.

I have considered the submissions of the Petitioners and the respondents and do find that ***on 14.7.2014,*** the court made an order that pursuant to the agreement of the parties, National Environment Management Authority **(NEMA)** was to proceed to make a report to verify compliance with the EIA licence conditions and consider the PCC recommendations. The report to be prepared and served within 30 days and that the matter was to be mentioned ***on 22.9.2014*** for further directions. ***On 22.9.2014,*** in presence of the Advocates for all parties, the court adopted this agreement and allowed the parties to finalize and agree on how to implement the compliance report filed ***on 11.8.2014.*** The matter was to be mentioned ***on 30.10.2014*** for a final settlement. On 30.10.2014, the parties were still negotiating on the final settlement as the only issue pending was quantum payable. The parties were directed to enter into modalities of assessing quantum payable. Moreover, the other issue was as to who was to pay compensation. It appears the parties did not agree on how much to be paid and who to pay. Due to the above confusion, the 1st respondent decided to file the application to set aside the consent judgment. The applicant relies on the ground that there was misapprehension of material facts.

I would at this point state that the supporting affidavit is so sketchy that it does not bring out clearly how the applicant misapprehended material facts. The applicant has not demonstrated that there was misapprehension of material facts. Moreover, the issue of fraud and collusion is raised in the replying affidavit of the 2nd respondent which is just stated and not proved. The agreement between the parties which started with negotiation on 14.7.2014 to the to the consent of 22.9.2014 was negotiated by three senior advocates. There is no indication that any of the advocates was engaged in fraud or collusion and therefore, the argument that there was fraud or collusion does not hold any water.

The extent of authority of a solicitor to compromise is set out in a passage in The Supreme Court Practice 1976 (Vol.2) paragraph 2013 page 620 as follows:-

> "Authority of Solicitor- a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen, [1903] 1 Ch pp 817,818; Little vs Spreadbury, [1910]2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice- see Welsh vs Roe [1918 - (9] All E.R Rep 620."

There is a plethora of cases in the High Court and Court of Appeal stating the law on the issue of setting aside of a consent judgment.

In Wasike v Wamboko the High Court at Kakamega (Gicheru J, as he then was) held -

> *"1. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.*
>
> *2. The Civil Procedure Act (Cap 21) Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid ab initio and should be rescinded or that there exist circumstances to warrant varying the decree.*
>
> *3. In this case, there were no grounds which would justify the setting aside of the consent judgment.*
>
> *Appeal dismissed."*

The position is clearly set out in Setton on Judgments and Orders (7th Edn), Vol.1 pg 124 as follows-

"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...

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 sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."

This passage was followed by the court of appeal in Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269 in which Law Ag P said:

"A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

In Kenya Commercial Bank Ltd V. Benjoh Amalgamated Ltd, Githinji J, considered the circumstances under which a consent Judgment can be set aside and referred to and relied on the decision in Hirani V. Kassam [1952] 19 EACA 131 in which the above passage from Seton on Judgments and Orders was approved.

"It is now well 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, or if certain conditions remain to be fulfilled, which are not carried out:

In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-

"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 the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."

In Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485, Harris J correctly held inter alia, that –

1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

In the case o***f Brooke Bond Liebig (T) Limited vs Mallya [1975] E.A. 266***, Law JA, stated the law at p. 269 in these terms:- "The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19EACA 131, where the following passage from Seton on Judgments and Orders, 7th edhition, Vol.1 p.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."

No such circumstances have been shown to exist in this case. There is no evidence of fraud or collusion. All material facts were known to the parties, who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham, J, said, in the introduction to the passage quoted above from Hirani's case, a court cannot interfere with a consent

judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

The applicant herein has not placed any evidence of fraud collusion or misrepresentation to show illegality in the consent giving rise to the orders sought to be set aside. Moreover, on the issue of jurisdiction, the court finds that the jurisdiction of the Environment and Land Court is set out clearly in section 13 of the Environment and Land Court Act which provides that ***the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land. Subsection (2) provides that in exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes relating to environmental planning and protection, climate issues,land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.***

Clearly, the court has jurisdiction to hear this dispute as it relates to compulsory acquisition. Ultimately, I do find that the application lacks merit and is dismissed with costs.

DATED AND DELIVERED AT ELDORET ON 20TH DAY OF DECEMBER 2016.

ANTONY OMBWAYO

JUDGE