



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.134 OF 2011

PEPE TERESA.....PLAINTIFF/APPLICANT

=VERSUS=

1. ROSALBA POTA

2. MARIO AGLIONED.....DEFENDANTS/RESPONDENTS

CONSOLIDATED WITH

ELC CIVIL SUIT NO. 133 OF 2011

1. ROSALBA POTA

2. MARIO ANGLIONE.....PLAINTIFFS

=VERSUS=

PEPE TERESA.....DEFENDANT

R U L I N G

1. The Application before me is the one dated 11th September 2014 by Pepe Teresa, the Plaintiff in HCCC No. 134 of 2011. In the Application, the Plaintiff is seeking for the following orders:-
 - (a) **The Hon. Court be pleased to review, vary and set aside a compromise dated 27th August 2012 and adopted as an order of the court on 18th December 2012.**
 - (b) **Pursuant to prayer (iii) above being allowed, the suit herein be set down for hearing on merit and on priority basis**
 - (c) **Costs of this application be provided for.**

The Plaintiff's/Applicant's case:

2. According to the Affidavit of Pepe Teresa, on 27th August 2012, the counsel on record entered into a consent without her instructions.
3. The Plaintiff has deponed that her then advocate informed her that he recorded a consent on 27th August 2012 on her husband's instructions whom he has since divorced and that the bargain and recording of the fraudulent consent was done while she was sick and undergoing treatment in Italy.
4. According to the Applicant, the fraudulent compromise has infringed on her rights; that the nature of the dispute between the Defendants and herself cannot be amicably determined by way of a compromise and that the said compromise should be set aside because it was obtained by fraud.

The Defendant's/Respondent's case

5. The then advocate of the Plaintiff, Binyenya Benjamin, deponed in his Replying Affidavit that he had the Plaintiff's instructions to file this suit; that on 27th August 2012, he held a lengthy telephone conversation with Sean De Caro, a grandson to the Applicant, Antonella De Caro, a daughter of the Applicant and Giovanni De Caro in the presence of the Applicant in regard to the consent and agreed on the compromise that was recorded in court.
6. The advocate has deponed that following the said conversation, he did an email to them and annexed a copy of the compromise and that he had the Applicant's authority to record the consent.
7. The advocates filed their respective submissions and authorities which I have considered.

Analysis and findings:

8. This suit was consolidated with Malindi HCCC No. 133 of 2011 in which the Defendants herein are the Plaintiffs while the Plaintiff herein is the Defendant.
9. In HCCC No. 133 of 2011, the Defendants sued the Plaintiff, Pepe Teresa and sought for an order compelling the Defendant to refund the 70,000 Euros paid to her. The Plaintiffs in that suit also sought for an order compelling the Defendant/Applicant to hand over vacant possession of apartment number C-01 to them.
10. The firm of Gekanana & Co. Advocates, where Mr. Benyenya was working as an advocate, entered appearance for the Applicant on 8th September 2011 and also filed a Defence on the same date.
11. In the Defence, the Applicant herein admitted having executed two agreements dated 5th January 2009 relating to apartments B102, B103 and C01. The Defendant/Applicant also admitted that she is the registered owner of Apartment B102 and B103.
12. While HCCC No. 133 of 2011 was pending, the Plaintiff herein filed the current suit being HCCC No. 134 of 2011. Curiously, the two Plaintiffs were filed on the same day, that is 22nd August 2011.
13. In her suit, the Applicant has sought for a declaration that the Agreement of 5th January 2009, is null and void; general damages for breach of contract, special damages of 20,000 Euros and a refund of 40,000 Euros.
14. The two suits were consolidated and on 27th August 2012, a compromise was entered into between the Plaintiff's advocate and the Defendants' advocate in the following terms:

(1) That the sale transaction evidenced by an Agreement dated 3rd January 2008 and 5th January 2009 be and are hereby rescinded.

(2) That this matter be mentioned in a month's for the following purposes;

(a) To confirm when Pepe Teresa will refund the same of 70,000 only paid herein;

(b) To ascertain damages incurred by each respective party in transaction herein;

(c) To record a consent on the costs herein.

(3) That in the meantime, the Rosalba Pota and Mario Agilione keep possession of Apartment Number B102/B103 at Oasis village and Pepe Teresa Keep possession of Apartment number C01.

15. The Plaintiff has now denied that she gave to her then advocate instructions to enter into the above consent; that it was her estranged husband who gave the instructions and that all along she was in Italy indisposed.
16. The Plaintiff's then advocate has stated in his affidavit that he received instructions on phone to enter into the above consent from the Plaintiff and even forwarded to the Plaintiff's children an email with the draft compromise. The email dated 28th August, 2012 has been exhibited on the Repeating Affidavit.
17. The law relating to compromising of suits by an advocate who is seized of a matter is now settled.
18. In the case of **Welsh Vs Roe (1918) 87L LTRE520**, it was held that **after the commencement of an action, the solicitor for a party has an implied general authority to compromise the settlement of an action and no limitation of such implied authority can be relied upon by the client as against the other side unless such limitation had been brought to the knowledge of the other side before the compromise was arranged. The onus is upon the Plaintiff to show that that authority had been limited and there could be no limitation of that general authority by secret instructions.**
19. In the case of **Waugh & Others Vs H.B (Clifford & Sons Limited & Others (1982) IALLER 1095**, it was held as follows:

“In litigation, the Ostensible or apparent authority of a solicitor or counsel to bind his client to a compromise if the action or counsel held himself out as possessing viz-a-aviz the opposing litigant could be wider than his implied authority to compromise the action without prior reference to his client for his consent.”

20. In **Kenya Commercial Bank Limited Vs Specialised Engineering Company Limited (1982) KLR 485**, it was held 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 express negative directions.**
21. The Plaintiff has not stated what her express instructions were in the two matters.
22. Indeed, the reading of the pleadings that were filed on behalf of the Applicant shows that her intention was to have the agreement that she entered into with the Defendants declared null and void. That is what the first part of the compromise dealt with.
23. In fact, the compromise that was entered into by counsels and adopted by the court did not in itself compromise the two suits.
24. The issue of who is supposed to pay which damages for breach of contract was left open. The parties' advocates did not also consent on the payable costs, or who should, ultimately, own the suit properties.
25. On the issue of refund of 70,000 Euros that is captured in the consent, the Plaintiff herein has not denied that she received 70,000 Euros in four installments being the purchase price for apartment number B102 and B103.
26. The sale having fallen through, the Plaintiff's advocate acted bonafide in agreeing to have the said 70,000 Euros refunded to the Defendants pending the outcome of a determination as to who was in breach of the agreements of 5th January 2009.
27. Consequently, I do not see the prejudice that the Plaintiff will suffer if the compromise that was signed by the advocates herein remain as it is. This amount can be set off in the event the Defendant's suit succeeds.
28. The way forward is to set down the matter for hearing to enable the court determine the party that was in breach of the agreements and the payable damages if any.
29. In the absence of evidence to show that the Plaintiff's then advocate was in breach of the express instructions when he signed the compromise of 27th August 2012, I dismiss the Application dated 11th September 2014 with costs.

Dated and delivered in Malindi this 2nd day of October 2015.

O. A. Angote

Judge