



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 428 OF 2013

PROF. ALEX CHEMTAI.....PLAINTIFF

VERSUS

DAVID MBUGUA KURIA.....1ST DEFENDANT

SAMSON KIMANI KARAO.....2ND DEFENDANT

BISHOP JULIUS MAINA MATHENGE.....3RD DEFENDANT

ROSE ANYANGO.....4TH DEFENDANT

BUSH KAMAU.....5TH DEFENDANT

RULING

On the 20th January, 2014, the parties herein entered into a consent in the following terms:-

- (i) That the 1st and 3rd defendants have agreed to buy the suit land from the plaintiff at an agreed price of Kshs.5,000,000/= (Five Million Only).***
- (ii) The parties have mutually agreed that the first and third defendants shall on or before the 3rd February, 2014 pay to the plaintiff's account Kshs.500,000/= deposit and the balance of Kshs.4,500/= be paid on or before the 31st May, 2014.***
- (iii) That the plaintiff has agreed to hand over the possession of the suit land to the first and third defendants for the purposes of sub-division and sale from the date of this consent.***
- (iv) That the parties further agree that the interim injunction in respect of the suit land be and is hereby discharged to enable prospective buyers access to the suit land and all sale agreements to be done by the plaintiff's Advocates and sale proceeds to go to the plaintiff's account until the agreed Kshs.5,000,000/= is paid in full.***
- (v) The parties have also mutually agreed that in the even of default on payments, the plaintiff shall be at liberty to take back the land and the issue of costs to be agreed between the parties at the conclusion of this matter.***

On 12.5.2015, the plaintiff came back to court after a period of more than 12 months seeking orders that the consent order entered between the plaintiff and the 1st, 2nd, 3rd and 4th defendants on 20th January, 2014 and filed in court on the 3rd February, 2014 be set aside on account of breach and non compliance on the part of the 1st, 2nd, 3rd and 4th defendants and that this Honourable court be pleased to order that

this matter be set down for hearing and determination of the main suit subject to parties complying with the relevant Civil Procedure Rules.

The application is supported by the affidavit of **Prof. Alex Chemtai** who states that he is the plaintiff/applicant herein, the registered owner of the suit land known as Eldoret Municipality Block 15/1846 situated at Kipkaren Estate and therefore competent to swear this affidavit.

That on 4th February 2014, he brought this suit against the defendants herein seeking orders stated in the plaint. The defendants entered appearance and immediately thereafter through their counsels on record initiated an out of court settlement process. He knows of his own knowledge that through his counsel on record, there was intense negotiations and/or deliberation in a bid to compromise this suit and have this matter amicably resolved out of court once and for all.

That the end result was a consent order signed between his counsel on the one part and the defendants' respective counsels on the other part.

However, the 1st, 2nd, 3rd and 4th defendants have upto date failed to make good their part of the bargain and are therefore in total breach of the signed consent and they have continued to ignore, neglect and/or refuse to live upto the terms of the consent.

That he is informed by his Advocate on record which information he verily believe to be true that when this matter was last in court on 13.10.2015, the 1st defendant indeed confirmed that he was in breach of the terms of the contract and only prayed for more time. The 2nd, 3rd and 4th defendants were unrepresented in court showing the lack of seriousness and commitment on their part.

He claims that the 1st defendant has been selling the land to third parties after subdivision who are taking over possession without remitting the proceeds of sale to him. In the circumstances, he fears it may be difficult for him to get his land back if this state of affairs is allowed to continue.

He believes that as it stands, the said consent has been overtaken by events and that it is in the best interest of justice that the orders sought be granted as the application has been brought promptly and in good faith.

David Mbugua Kuria replied stating that the purported order does not constitute a consent agreement since the same was not filed neither was it signed by the Deputy Registrar for its adoption and that even if the same was to be construed as consent judgment, the same cannot be set aside other than on grounds that would invalidate a contract. He depones that no evidence of fraud or collusion has been established by the plaintiff. That the defendant remitted a sum of Kshs.300,000/= to the plaintiff as the initial deposit which sum he acknowledges. That he further deposited a sum of Kshs.1,850,000/= in the plaintiff's account in respect of the purported consent. That the plaintiff had the benefit of his competent legal adviser while negotiating and entering into consent. That the plaintiff has brought this application on the wrong provisions of the law. That the purported consent order cannot be set aside on the issues of breach of its terms since none has arose.

When the matter proceeded for submission on 2.7.2015, the plaintiff and 1st defendant were represented, however, there was no appearance for 2nd to 5th defendants though duly served. **Miss Adhiambo, learned counsel for the applicant** argues that the consent was between the plaintiff and the 1st and 3rd defendants that the plaintiff gives the land to the 1st and 2nd defendants at a price of Kshs.5 million. The first deposit was paid on or before 3.2.2014. The remaining balance was to be repaid on or before 31.5.2014. The 1st and 3rd defendants took over possession. The bone of contention is that the 1st and 3rd defendants have defaulted.

The defendants through **Miss Kimani** argue that there is no evidence of fraud or collusion and that the plaintiff can only apply for review or file a fresh suit.

I have considered the submission of both parties and do find that the consent herein was entered as a

judgment of the court on 3.2.2014 hence became the final decision of the court. *Clause V* provides that the parties have also mutually agreed that in the event of default on payments to plaintiff shall be liberty to take back the land and the issue of costs to be agreed between the parties at the conclusion of the matter.

It is apparent that the defendants have breached the conditions of the consent as all the amount has not been paid as agreed.

It is trite law that a consent judgment can only be set aside on grounds of nullifying an agreement, thus misrepresentation or fraud.

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 Edition), 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, (as he then was) 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: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civil Apps 28 of 1982 and 69 of 1983. 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.***

I do not see such grounds in this case to warrant the setting aside of the consent judgment and do find that breach of a consent judgment is a new cause of action.

I do agree with M/s Kimani that the plaintiff has the option of filing a fresh suit as the facts in this matter have materially changed and that there is a likelihood that third parties have acquired interest in the suit property. The application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF NOVEMBER, 2015.

ANTONY OMBWAYO

JUDGE