



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: G.B.M. KARIUKI, J. MOHAMMED & KANTAI, JJ.A.)
CIVIL APPEAL NO. 7 OF 2014

BETWEEN

YASIN MOHAMED JAMAL APPELLANT

AND

ALI DAUD MOHAMED RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Waweru, J.)
delivered on 15th November, 2013*

in

HCCC No. 152 of 2004)

JUDGMENT OF THE COURT

The parties in Nairobi HCCC No. 152 of 2004 were **Ali Daud Mohamed** (the respondent herein as plaintiff); **Anthony Makilya Mwatnza** and **Joseph Kioko Mwanza** (named as administrators of the estate of **Philomena Mueni** (deceased) as 1st defendant, **Commissioner of Lands** as 2nd defendant and **Chief Land Registrar** as 3rd defendant.

That suit was compromised in a consent recorded by **Waweru, J.** on 14th September, 2009 which consent was signed by counsel for the parties. The consent in essence confirmed that the 1st defendant in that suit had sold property known as **L.R. No. 36/11/159 Eastleigh, Nairobi** to the plaintiff. On 17th September, 2009 counsel for the parties appeared before the said judge together with their clients. The said consent was confirmed and recorded by the learned judge and the parties also appended their signatures to the consent duly signed by the learned judge confirming that they had all agreed that the suit be compromised and the property be transferred to the respondent.

The appellant herein, **Yasin Mohamed Jamal**, who was not a party to that suit filed a Notice of Motion in the High Court where he named himself as an Interested Party and applied for a review of the consent judgment which had been entered. In the grounds in support of the motion and in a supporting affidavit the appellant stated that the consent judgment had been entered by use of fraud; that the same was as a result of undue influence and misrepresentation on the part of the respondent to defeat the appellant’s right

to the suit property and that the consent judgment was contrary to law and public policy of the Republic of Kenya.

Waweru, J. heard the motion and in a ruling delivered on 15th November, 2013 the learned judge did not find any merit in the motion and dismissed it. Those are the orders that have provoked this appeal which is premised on a memorandum of appeal where six grounds of appeal are set out. In the first ground the appellant faults the learned judge who he says misdirected himself in law in holding that parties to a suit can cure a fraud by consent. The appellant also states that the learned judge erred in law in failing to appreciate that fraud vitiates everything. The learned judge is also faulted for what the appellant says was failure to consider submissions and authorities cited before him.

When this appeal came for hearing before us on 26th January, 2017 **Miss Ontititi Kwamboka** learned counsel appeared for the appellant while **Mr. Roger Sagana** appeared for the respondent. Learned counsel highlighted written submissions that had been filed.

We have considered written submissions as orally highlighted, the record of appeal and the law and have taken the following view of this appeal. As already stated, a consent had been filed in the High Court on 14th September, 2009 and three days later on 17th September, 2009 counsel appearing for the various parties found it necessary to appear with their clients to have the consent re-recorded and signed not only by the advocates but also by their clients.

The law as relates the effect of a consent judgment is fairly well settled in Kenya and follows from agreed common law doctrines. This is what Setton on **Judgment and Orders 7th Edition Volume 1 page 124** says of consent judgments and setting aside of the same:

“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 fact., or in general for a reason which will enable the court to set aside an agreement.”

This Court in **Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR** quoting **Kenya Commercial Bank Limited v Specialized Engineering Company Limited [1982] KLR 485** had this to say on the issue of consent judgments:

“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 misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. 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.”

The learned judge considered the material placed before him. In his view, it was surprising that no application had been made to set aside the consent judgment by any of the parties who were involved in making of the same. The learned judge also wondered why the parties who appeared before him on 17th September, 2009 who were beneficiaries of the suit property did not complain of having been induced or forced to enter into the consent. Instead they fully endorsed the consent and the advocates present and the judge had the parties sign the consent.

Having examined all the material that was placed before the learned judge and the submissions made before us, it is clear to us that the consent that was endorsed by the court was entered by the parties with full knowledge of what they were doing. The consent judgment resulted in the property being registered in the respondent's favour. The consent judgment became a contract binding onto the parties to the same. The appellant who was a stranger to the contract could not for the allegations he made before the learned

judge disturb the contract that was binding on the parties. We can see no merit in this appeal which we accordingly dismiss with costs.

Dated and Delivered at Nairobi this 31st day of March, 2017.

G.B.M. KARIUKI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR