REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC. NO. 461 OF 2007

KENYA ANTI-CORRUPTION COMMISSION.....PLANTIFF

VERSUS

JOHN FAUSTIN KINYUA.....1ST DEFENDANT

JOHNSTONE J.GITHAKA.....2ND DEFENDANT

MBUYU FARMS LIMITED.....3RD DEFENDANT

SULMAC MICROFINANCE BANK LIMITED.....OBJECTOR

SAMMY MICHUGU NJENGA..... INTERESTED PARTY

RULING

1. The outcome of the matter before Court may very well rest on an old principle restated by Harris J in the decision 0f **Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd[1980] eKLR:-**

"The 7th Edition of Seton was published in the year 1912, that is, more than sixty five years ago. It does not take into account the decision of McCardie J in Welsh v Roe (1918), 87 LJ KB 520, where the earlier authorities were carefully considered and it was held that after the commencement of an action, the solicitor for a party has an implied general authority to compromise and settle the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the notice of the other side. This decision is accepted as authoritative by the editors of the Supreme Court Practice (1979), vol 2 para 2013, where it is stated that 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."

2. Sammy Michugu Njenga **(Njenga or the Interested Party**) brings a Notice of Motion dated 7th October 2019 in which he seeks that the Consent Order made on 23rd July 2019 be set aside.

3. Njenga found himself drawn into these proceedings after he purchased land known and described as LR No.209/10611/30 at a public auction on 28th October 2016. Without going into detail that is unnecessary in resolving the controversy at hand, the auction was conducted at the behest of Sumac Microfinance Bank Limited (**Sumac or the Objector)** who held a charge over the property which was and is still registered in the name of Mbuyu Farms limited **(Mbuyu or the 3rd Defendant)**. On the other hand, Kenya Anti-Corruption Commission (**KACC or the Plaintiff**) holds a money decree as against Mbuyu.

4. In the scheme of things, Sumac, being the undisputed secured creditor, had first priority over the land and in a Ruling of 29th July 2016 this Court ordered the Chargee to sale the property in exercise of its statutory power and offset its debt and only then would a surplus be available towards the Decree. It was against that backdrop that the auction took place.

5. KACC would have an interest in the how much the auction would return. A better price would make more money available towards meeting the Decree and the converse would also be true. In a Notice of Motion dated 13th April 2018, KACC sought to declare the auction a nullity on the ground that Sumac had failed to obtain the best possible price taking into consideration the prevailing market prices at the time of sale.

6. That Motion was compromised by the consent of 23rd July 2019 which read;

“By Consent of the parties, the sale by public auction conducted on 28th October 2016 is set aside for lack of compliance with section 97 of the Land Act.

The Objector shall within 30(thirty) days of today commence the exercise of its statutory power of sale by public auction in terms of the order of Court of 29th July 2016.

The valuation report prepared by the Objectors valuers shall be availed by the Objector to all parties at least 7 days before the sale. All parties to be at liberty to attend and observe the auction’’

7. Although Njenga concedes that he instructed Ngani and Olouch Advocates to act on his behalf in the Motion, he is emphatic that he did not instruct them to consent. He points out that the Consent is inconsistent with the express position he had taken up in response to the Motion where he had pleaded the case of an innocent purchaser without notice (see his affidavit sworn on 8th July 2019). Further, that he could not possibly have acceded to the said compromise when he had already taken up possession of the property and made extensive developments and improvements, something he revealed in the said affidavit.

8. As demonstration that he could not have been party to the consent, Njenga has in the affidavit sworn on 7th October 2019 in support of the setting aside Motion annexed a copy of his letter of 29th May 2019 (perhaps wrongly dated as it makes reference to a letter of 27th August 2019) to Mr Ngani of Ngani and Olouch Advocates. In the letter he expresses shock and surprise at the turn of events and poses several questions to his advocate. One such question is **“did you protect your client bank to my detriment"”**

9. Taken up on the face of the Motion and rehashed in argument by his new Advocates on record is that by entering the Consent, the advocates who were party to it purported to determine the legality of the sale which was the preserve of the Court.

10. John Faustin Kinyua, KACC and Mbuyu oppose the application. The latter two filed grounds of opposition, while Mr Kinyua made his position known through an oral address to Court. In brief, the three argue that the consent was not obtained through fraud, mistake or misrepresentation. Further, that the Consent was entered with sufficient material facts and the firm of advocates representing the Interested Party had the capacity to enter the consent.

11. Mr Ngani who represented Njenga at the time of the consent did not file any response. At the hearing of the Motion, he took a somewhat ambivalent stance. He says that some discussions in Court preceded the entering of the consent and that none of the counsel stepped out to take instructions. He says that the discussions were held in good faith and defends the consent as being done within the law and without collusion.

12. While asserting that the application did not meet the threshold for setting aside, Counsel nevertheless asked the Court to allow the spirit in which it was entered to prevail and that parties return to KACC’ s application. I understood Counsel then to be urging that the application be allowed in spite of any shortcomings it may have.

13. At the opening of this decision this Court set out a long held principle which is of relevance to this matter. Another is that a consent order binds all the parties to it and cannot be set aside unless it is proved that it was obtained by fraud or collusion or was given in ignorance of material fact or in misapprehension or is against the policy of the Court or public policy. As is often said a consent will only be set aside on grounds that justify the setting aside of a contract.

14. I agree with Counsel for the applicant that the Consent was at odds with the position that the Applicant had all along held, that he was an innocent purchaser for value whose interest in the property was protected. Indeed, the consternation with which he received the news of the consent is evidence that he did not authorise his advocate to enter into it. Mr Ngani himself who represented him seems to confirm that whilst he had general conduct and authority over the matter, he did not seek Njenga's instructions on the particular issue of the Consent. These put together leads the Court to accept Njenga's contention that he did not instruct his advocates to enter into the impugned Consent.

15. Yet the law is that a duly instructed advocate has ostensible authority to compromise and settle an action on behalf of his client unless the authority is expressly circumscribed and that limitation brought to the notice or attention of the other side or otherwise known by the other side. In the matter before Court, the Interested Party does not assert that he had made reservations in respect to his advocate's implied general authority and so the impugned consent can only fall for reopening or setting aside if grounds which would justify the setting aside of a contract exist or if the consent is against the policy of the Court or otherwise against public policy.

16. Not once in the entire application does the Applicant suggest that the Respondents obtained the consent through fraud or misrepresentation. It is not alleged that it was arrived at by mistake. What I hear the applicant to say is that it was obtained in disregard of material facts. Those material facts are not elaborated. But let me assume that in entering the Consent on behalf of the Applicant, Counsel was ceding the property of his client. Can this be said to be in disregard of a material fact" I would think not because the very essence of the Consent was the setting aside of the auction in which the Applicant had purchased the property and a natural consequence of the Consent was that he would have to give it up. That was so central to the Consent that all Counsel and Kinyua who entered the it could not have possibly been unaware of this material and defining fact.

17. The Applicant also puts forth the proposition that it is the Court which could have called out the legality or otherwise of the auction and the parties usurped the role of the Court in consenting that the auction did not comply with the provisions of section 97 of the Land Act. What is to be made of this argument"

18. It has to be recalled that the Consent compromised the application of 13th April 2018 by KACC. In that application, the case by KACC was that the sale of the property at Kshs. 5,200,000.00 was at under value because two valuations commissioned by the Objector had returned forced sale values of Kshs. 9,000,000.00 and Kshs. 6,000,000.00 on 20th June 2014 and 20th June 2016 respectively. The essence of that application was that the auction abridged the provisions of section 97 of the Land Act which reads:-

97. Duty of chargee exercising power of sale

(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and

(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).

(4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.

(5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).

(6) The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.

(7) Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.

19. In entering the Consent, the Court would take it that each party, and in particular Sumac, had assessed their positions and come to a conclusion that the sale was indeed at an undervalue within the contemplation of the law. As for Njenga, through Counsel, he gave up the defence he had held that his purchase of the property was protected notwithstanding that it may have been at an undervalue. This was a compromise which in the view of this Court could be made within the ostensible authority of Counsel. It has not been demonstrated that the Consent was an affront to statute or public policy and this Court cannot see any reason to fault it.

20. Citing the decision in **Julius Kigen Kibiego v Angeline Korir & another [2012]eKLR,** Counsel for the Applicant urged this Court to look at the merits of the Consent and to find that it could not stand. I have read that decision. The reason why Munyao J set aside the consent in that matter was not on the merits of the consent but because it infringed on the rights of a school which was not party to the consent. In the case at hand Njenga was represented by Counsel and was in that sense a party to the consent.

21. Yet I need to say this. The Court has noted that Njenga's assertion that he did not instruct Counsel to enter the Consent is not without basis. The Court is not unsympathetic to his plight. Indeed, it was on the Court's own motion that Njenga was invited to be heard on the application of 13th April 2018. Yet as a matter of public policy consents entered by Counsel who have ostensible authority to bind their clients should only be set aside on the exceptional grounds rehashed elsewhere in this decision. If Consents were to be set aside willy-nilly then parties would have little faith that a consent entered today, and perhaps acted upon, will last the test of time. That would greatly undermine one avenue by which disputes are settled or compromised.

22. Njenga has made assertions that he had legitimate expectation that his previous advocates would zealously and lawfully guard against any act and or omission that would dispossess him of his property. He alleges that his previous advocates were in a conflicted position as they also acted for Sumac. He now thinks that it was strange that the advocates convinced and assured him that he need not appear in Court on the day the Consent was entered. These are allegations that the advocate either misconducted himself or was negligent or both. It may well be that Njenga is not without legal redress. He will have to take advise.

23. Otherwise, for the reasons set out ,the Court does not find merit in the Notice of Motion of 7th October 2019 and dismisses it with costs

Dated, Signed and Delivered in Court at Eldoret this 6th Day of May 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT: