



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 738 OF 2013**

**PARMJIT KAUR ALIAS MANDEEP KAUR.....PLAINTIFF**

**-VERSUS-**

**AVTAR SINGH SURI.....DEFENDANT**

**RULING::**

**INTRODUCTION**

1. Vide Notice of Motion Application dated the 17<sup>th</sup> August 2021, the Defendant/Applicant has sought for the following Orders:

*I. ....(Spent).*

*II. This Honourable Court do issue a Stay of Execution of the Orders issued by this Honourable Court on the 10<sup>th</sup> day of December 2020, pending the hearing and determination of this Application.*

*III. This Honourable Court do issue a Stay of Execution of the orders issued by this Honourable court on the 10<sup>th</sup> day of December 2020, pending the Defendant's/Applicant's Intended Appeal.*

*IV. The Consent Order recorded by Lady Justice Nyamweya, Judge, on 14<sup>th</sup> March 2014, Varied and/ or be set aside.*

*V. That Time within which the Defendant/Applicant produces the updated Rental accounts for the period of August 2015 to date be extended to one twenty (120) days.*

*VI. The Costs of this Application be provided for.*

2. That the subject Application is premised on the grounds, which have been enumerated at the foot thereof and same is supported by the Affidavit of the Defendant/Applicant sworn on the 5<sup>th</sup> January 2021, whereby the deponent has made several averments, essentially challenging the propriety of the consent that was entered into and endorsed on the 4<sup>th</sup> March 2014.

3. Upon being served with the Application under reference, the Plaintiff/Respondent herein responded thereto vide the Replying Affidavit sworn by her advocates, namely, Virinder Goswami, sworn on the 24<sup>th</sup> March 2021 and to which the deponent has attached two sets of Rulings, which have hitherto been made and/or rendered in respect of the subject matter post the adoption and/or endorsement of the impugned consent.

**DEPOSITIONS BY THE PARTIES:**

**DEFENDANT'S/APPLICANT'S DEPOSITION:**

4. Vide Supporting Affidavit sworn on the 5<sup>th</sup> January 2021, the Applicant herein has averred as hereunder;
5. That upon the filing of the subject suit, same instructed and/or retained the law firm of M/s A. I Onyango & Company Advocates, to defend the subject suit for and on his behalf.
6. Pursuant to his instruction, the said Law firm proceeded to and entered appearance and thereafter filed a Statement of Defense in the matter.
7. However, it is further averred that on or about the 4<sup>th</sup> March 2014, the said advocate, namely, A. I. Onyango proceeded to and entered into a Consent, which was thereafter endorsed and adopted by the Honourable court and which consent, effectively compromised the Applicant's Defense.
8. Be that as it may, the Applicant has averred that same was not an aware of such a consent and besides, same did not instruct and/or authorized his erstwhile advocate to enter into any such consent.
9. It is therefore averred that the consent under reference was entered into, endorsed and adopted by the court, albeit without his knowledge, involvement and/or blessings.
10. On the other hand, the Applicant has further averred that he only came to discover and/or to know about the consent in the Month of October 2019, when he enquired from his erstwhile advocate about the subject matter.
11. Upon the discovery of the offensive consent, the Applicant herein has averred that same thereafter proceeded to and filed an Application dated the 25<sup>th</sup> November 2019, whereby same sought to vacate, review and/or set aside the impugned consent, which was stated to have been entered into without instructions.
12. On the other hand, the Applicant has also averred that same also filed another Application dated the 17<sup>th</sup> August 2020, and in respect of which same sought to review the orders of the court that were made in respect of the previous Application. For clarity, the second Application dated the 17<sup>th</sup> August 2020, sought to review the order made on 5<sup>th</sup> May 2020.
13. It has further been averred that the Application dated 17<sup>th</sup> August 2020, was dealt with and/or disposed of vide Ruling rendered on the 10<sup>th</sup> December 2020, whereupon same was dismissed.
14. Be that as it may, the Applicant has averred that following the dismissal of the Application dated 17<sup>th</sup> August 2020, vide the Ruling dated the 10<sup>th</sup> December 2020, same was aggrieved and/or dissatisfied and therefore lodged a Notice of Appeal dated the 22<sup>nd</sup> December 2020, a copy of which has been annexed and/or attached to the Supporting Affidavit.
15. Essentially, the Applicant has averred and/or reiterated that the consent order which was endorsed on the court record and adopted on the 4<sup>th</sup> March 2014, was fraudulent and erroneous and same was informed by misrepresentation on the part of M/S A. I Onyango Advocates.
16. Based on the foregoing, the Applicant has therefore impressed upon the court to reconsider the matter and to set aside the consent dated the 4<sup>th</sup> March 2014, which was recorded and adopted by Lady Justice Pauline Nyamweya, Judge,(as she then was).

**PLAINTIFF'S/RESPONDENT'S RESPONSE:**

17. Vide Replying Affidavit sworn by her advocates, the Respondent herein has averred that the subject Application is the third Application, which has been filed by the Defendant/Applicant, over and in respect of the consent order that was endorsed and adopted by the court on the 4<sup>th</sup> March 2014.

18. It has been averred that following the endorsement and adoption of the consent, the Applicant herein filed the Application dated the 25<sup>th</sup> November 2019, whereby same made several allegations against his erstwhile advocate and in respect of which, same sought to review and set aside the consent.

19. Further, it has been averred that the said Application was latter heard and disposed of, culminating into the Ruling of the court rendered on the 5<sup>th</sup> May 2020, where the Honourable court found and held that the consent was legitimate and lawfully entered into.

20. Besides, it has been averred that upon the delivery of the Ruling dated the 5<sup>th</sup> May 2020, the Applicant herein returned back to court with a second Application seeking review and which Application was dated the 17<sup>th</sup> August 2020, and which Application was heard and similarly dismissed vide ruling rendered on the 10<sup>th</sup> December 2020.

21. Finally, it has been averred that following the delivery of the ruling dated the 10<sup>th</sup> December 2020, the Applicant herein proceeded to and filed a Notice of Appeal dated the 22<sup>nd</sup> December 2020, whereby same sought to Appeal to the Court of Appeal, against the second Application for review.

22. Based on the foregoing averments, it has been stated that the Applicant herein is merely intent of abusing of the Due process of the court and effectively frustrating the Plaintiff/Respondent from enjoying the massive rental income arising from the suit property, which was registered in the Joint names of the Applicant and the Plaintiff's late husband, as Joint tenants.

#### **SUBMISSIONS BY THE PARTIES:**

23. The subject matter came up for mention on the 26<sup>th</sup> July 2021, before Lady Justice Kossy Bor, Judge, whereupon directions were given pertaining to and/or concerning the manner of disposal of the subject Application.

24. For clarity, it was ordered and/or directed that the Application herein be canvased and/or be disposed of by way of written submissions. Besides, the Honourable Court also fixed time lines for the filing and exchanged of the said submissions.

25. Pursuant to the foregoing, the Defendant/Applicant filed his submissions dated the 6<sup>th</sup> December 2021, in support of the Notice of Motion Application dated the 5<sup>th</sup> January 2021.

26. On her part, the Plaintiff/Respondent filed two sets of written submissions, the first dated the 21<sup>st</sup> April 2021, and the latter being dated the 7<sup>th</sup> February 2022. For coherence, the latter submissions by the Plaintiff/Respondent is titled as Plaintiff's written submissions in response to the Defendant/Applicant's submissions dated 6<sup>th</sup> December 2021.

27. It is imperative to note that the three (3) sets of written submissions are on record and same have been duly evaluated, analyzed and considered.

28. Essentially, the Defendant/Applicant has contended and repeated his position that the consent which was endorsed and adopted by the court on the 4<sup>th</sup> March 2014, was endorsed without his knowledge, instructions and/or blessings. In this regard, the Applicant seeks that the consent be reviewed, varied and/ or set aside.

29. On her part, the Plaintiff/Respondent has contended that the issue of setting aside the consent has been the subject of two previous Applications filed by the Defendant, namely, the Application dated the 25<sup>th</sup> November 2019, and the one dated 17<sup>th</sup> August 2020.

30. It has further been submitted that the two previous Applications, were heard and determined and that the court found and held that the consent order was entered into with due instructions to counsel and that no fraud and/or vitiating circumstances, have been established.

31. Finally, the Plaintiff/Respondent has submitted that the Applicant herein is filing a plethora of Applications and same are merely intended to frustrate her from realizing and/or benefiting from the rental income from the suit property.

32. In short, the Plaintiff/Respondent has termed the antics by the Defendant/Applicant as an abuse of the Due process of the court,

and therefore same ought not to be entertained and/or tolerated. Simply put, the Plaintiff/Respondent has contended that the Defendant/Applicant is being vexatious.

**ISSUES FOR DETERMINATION:**

33. Having reviewed and/or evaluated the Application dated the 5<sup>th</sup> January 2021, the Supporting Affidavit thereto, as well as the Replying Affidavit sworn in opposition thereto and upon consideration of the submissions filed on behalf of the Parties, I find the following issues germane for determination;

- I. *Whether this court is seized of jurisdiction to entertain and/or adjudicate upon the Application dated the 5<sup>th</sup> January 2021.*
- II. *Whether the subject Application is Res-judicata and therefore barred by the provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.*
- III. *Whether the subject Application constitutes or amounts to an abuse of the Due process of the court.*

**ANALYSIS AND DETERMINATION:**

**ISSUE NUMBER 1**

**Whether this Court is seized of Jurisdiction to entertain and/or adjudicate upon the Application dated the 5<sup>th</sup> January 2021.**

34. Before a court of law can attend to and/or deal with a particular dispute, it is incumbent upon the court to interrogate and/or ascertain whether the court is seized and/or possessed with the requisite Jurisdiction.

35. Suffice it to say, that Jurisdiction is everything and where a court of law comes to the conclusion that a court is not seized of Jurisdiction, then it behooves the court to down its tool, at the earliest moment.

36. In support of the aforesaid trite position, one needs to only re-visit the case of **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd 1989 KLR 1**, where the court observed as hereunder;

*"Jurisdiction is everything. Without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution, Constitutional Application No. 2 of 2011; the Supreme Court noted that The Lillian 'S' case [1989] KLR 1] establishes that "jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein.*

*Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity..."*

37. On the other hand, it is imperative to point out that the jurisdiction of a court is donated either by the constitution or by the statute, namely as an Act of Parliament, which establishes the Court and delineate the Court's jurisdiction.

38. In support of the foregoing position, it is imperative to refer to the decision in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, where the Supreme Court stated at paragraph 68 as hereunder;

*A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.*

39. Based on the foregoing background, it is now appropriate to consider the Notice of motion Application dated the 5<sup>th</sup> January

2021, and to authenticate whether this Court has Jurisdiction to entertain it and/or adjudicate upon same.

40. The starting point therefore is by taking cognizance of the provisions of **Order 45 Rule 6 of the Civil Procedure Rules 2010**, which provides as hereunder;

***Bar of subsequent Applications [Order 45, rule 6.]***

***No Application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.***

41. It is important to note, that the Applicant herein had filed the Application dated 25<sup>th</sup> November 2019, where same sought to review the consent order that was endorsed and adopted on the 4<sup>th</sup> March 2014.

42. It is common ground that the said Application was heard and disposed of by the court and a ruling was thereafter rendered on the 5<sup>th</sup> May 2020, whereupon the Application was dismissed.

43. One would have expected the Application herein to proceed on appeal, if same was aggrieved and/or dissatisfied with the ruling and/or decision rendered on the 5<sup>th</sup> May 2020. However, the Applicant herein sought to and indeed filed a second Application for review, the Application dated 17<sup>th</sup> August 2020.

44. I beg to point out that the said second Application for review, was similarly heard and disposed of, culminating into the ruling rendered on the 10<sup>th</sup> December 2020.

45. Notwithstanding the foregoing, the Applicant has now come back with the Application dated 5<sup>th</sup> January 2021 and in respect of which, same is still seeking to review the consent that endorsed and/or adopted on the 4<sup>th</sup> March 2014.

46. Clearly, this is the third Application attacking the consent and whose import is to address, challenge and/or vary the rulings that emanated from the previous Applications seeking review.

47. The critical question that thus arises; is whether this court is possessed of jurisdiction to entertain either the 2<sup>nd</sup> and the 3<sup>rd</sup> Application of review, in line of Order 45 Rule 6 of the Civil Procedure Rules 2010.

48. Sadly, to my mind, I am afraid that this court has no such jurisdiction and in the absence of jurisdiction, this court is called upon to comply with and/or adhere to the age old caution, which was disseminated in the famous case of the ***Owners Motor Vessel Lilian S (Supra)***, where the court must down it tools the moment it discovers it has no jurisdiction.

49. Secondly, in respect of the Application dated 17<sup>th</sup> August 2020, which was filed by the same Applicant and whose purpose was to challenge the ruling rendered on the 5<sup>th</sup> May 2020, which touched on and/or concerned the consent, the Applicant herein proceeded to file a Notice of Appeal dated the 22<sup>nd</sup> December 2020.

50. I need to point out that the ruling and/or decision that was rendered on the 10<sup>th</sup> December 2020, and which is the subject of appeal, touched on and/or concerned the review of the consent order. For clarity, the Notice of Appeal has not been withdrawn.

51. Where a Party, has proceeded to and filed a Notice of Appeal against a particular decision or a decision that impacts a related ruling, such a Party cannot file an Application for Review until or unless a Notice of Appeal has been withdrawn, which is not the case beforehand.

52. In respect of the foregoing position, the starting point is by taking cognizance of the provisions of **Order 45 Rule 1 of the Civil Procedure Rule 2010**, which provides as hereunder;

***1. Application for review of decree or order [Order 45, rule 1.]***

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

53. Other than the foregoing provisions of the law, whose terms are explicit, it is also important to restate the position of the law as captured in the decision in the case of **National Bank of Kenya Limited v Otieno Ragot & Company Advocates [2020] eKLR**, where the Court Of Appeal stated as hereunder;

*“Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place.*

*There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal. (See: **Kamalakshi Amma v A. Karthayani [2001] AIHC 2264**). The respondent’s application for review was therefore incompetent hence the court did not have jurisdiction to grant the orders sought under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. This determination is sufficient to dispose off the appeal. However, for completeness sake, I will venture further.*

54. In respect of the subject matter, the Defendant/Applicant has already filed a Notice of Appeal against the decision dated the 10<sup>th</sup> December 2020, which traces its origin to consent order entered into on the 4<sup>th</sup> March 2014, but despite the subsistence of the said Notice of Appeal, same has filed the subject Application for review.

55. Clearly, this court does not have jurisdiction, to entertain and/or adjudicate upon the subject Application, which is essentially the third one in the que for the review of the consent order.

## **ISSUE NUMBER 2**

**Whether the subject Application is Res-Judicata and therefore barred by the provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.**

56. Vide Application dated the 25<sup>th</sup> November 2019, the Defendant/Applicant herein sought to review the consent order which was endorsed and adopted by the court on the 4<sup>th</sup> March 2014.

57. It is important to recall that vide the said Application, the Applicant had contended that the consent order was entered into, endorsed and adopted by the court, albeit without his instructions, knowledge and/or participation.

58. Nevertheless, the court reviewed the various depositions made by the Applicant vide the Supporting Affidavit which was sworn on the 25<sup>th</sup> November 2019, the submissions made thereunder and thereafter the court came to the conclusion that the consent order was legitimately entered into by the duly instructed advocate.

59. Pursuant to and upon making the foregoing findings, the court proceeded to and dismissed the Application for review.

60. I am aware that a second Application for review was also filed and same was dated the 17<sup>th</sup> August 2020, which led to the ruling delivered on the 10<sup>th</sup> December 2020. However, the point that I wish to make is that issues being raised in the current Application were predominant and prominent in the Application dated 25<sup>th</sup> November 2019, which the court considered and disposed of vide the Ruling dated the 5<sup>th</sup> May 2020.

61. To the extent that the issues at the foot of the current Application have been raised and ventilated before the court and same were ruled on, the same issue cannot be re-agitated for a second or third time, in the manner that the Defendant/Applicant wishes to do.

62. In short, the subject Application dated 5<sup>th</sup> January 2021, is Res-judicata and thus in contravention of the provisions of Section 7 of the civil Procedure Act, Chapter 21 Laws of Kenya.

63. At any rate, the issues that constitutes Res-judicata were considered and duly addressed in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**, where the court observed as hereunder;

*The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts.*

*It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence.*

64. From the foregoing, it is my finding and holding that the current Application revisits issues that have been dealt with and disposed of in the previous Application, which also sought review of the consent order.

65. Consequently, the said Application is res-judicata and thus same is barred by the Provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

### **ISSUE NUMBER 3**

#### **Whether the subject Application constitutes or amounts to an abuse of the Due Process of the court.**

66. The Defendant/Applicant herein has previously filed two Applications, namely, the one dated the 25<sup>th</sup> November 2019 and the one dated 17<sup>th</sup> August 2020, respectively, seeking to challenge the same consent order.

67. It is common ground that the two Applications which were filed by the Defendant/Applicant, were indeed heard and disposed of vide rulings delivered on the 5<sup>th</sup> May 2020 and the 10<sup>th</sup> December 2020 respectively, whereby same were dismissed for want of merits.

68. Unperturbed by the previous findings, the Defendant/Applicant has chosen to file the said Application before the same court. Clearly, the conduct of the Defendant/Applicant is reprehensible and must be frowned upon.

69. If there was any conduct that fits the discretion of abuse of the court process, then the one exhibited by the Defendant/Applicant herein, best exemplifies such conduct. For clarity, a court of law must take stern action and/or measures to safeguard her integrity and to wade off illegal conduct, propagated by vexatious litigants like the Applicant herein.

70. Without belaboring the point, the conduct displayed by the Applicant herein fits the description that was alluded to and amplified in the case of **MUCHANGA INVESTMENTS LTD v SAFARIS UNLIMITED (AFRICA) LTD & 2 others [2012] eKLR**, where the Court of Appeal discussed the Concept of abuse of judicial process in the following case;

*In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264 156 at 188-189 (e) the concept of abuse of judicial process was defined:-*

*“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”*

*The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-*

*(a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.*

*(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.*

*(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.*

*(d) (sic meaning not clear))*

*(e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”*

71. In a nutshell, the court has inherent jurisdiction and the inherent jurisdiction, must be invoked to stall the kind of litigation and unnecessary applications, like the one herein, lest the Court opens the flood gates for the vexatious litigation and unending Applications.

#### **FINAL DISPOSITION:**

72. Having reviewed the issues for determination, it is evident and/or apparent that the Notice of Motion Application dated the 5<sup>th</sup> January 2021, constitutes and/or amount to an abuse of the Due process of the court.

73. In the premises, the Application herein be and is hereby dismissed with costs to the Plaintiff/Respondent.

74. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>th</sup> DAY OF FEBRUARY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

#### **JUDGE**

In the Presence of;

**June Nafula     Court Assistant**

Mr.Moturi for the Defendant/ Applicant.



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