



Gathogo & another v County Government of Kiambu & another (Environment & Land Case 18 of 2019) [2023] KEELC 16843 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 18 OF 2019**

**JG KEMEI, J
APRIL 13, 2023**

BETWEEN

CHARLES KIBUTHI GATHOGO 1ST PLAINTIFF

EMILY ANN NJERI MAINA 2ND PLAINTIFF

AND

THE COUNTY GOVERNMENT OF KIAMBU 1ST DEFENDANT

DEROW CONSTRUCTION COMPANY LTD 2ND DEFENDANT

RULING

The Background of the suit before the Court

1. On the 28/1/2019 the Plaintiff filed suit against the Defendants seeking the following Orders;
 - a. An order of eviction against the 1st and 2nd defendants on the properties known as LR No Ruiru/Township/2045 and LR No Ruiru/Township/717 (suit lands) belonging to the 1st and 2nd Plaintiffs.
 - b. An Order compelling the 1st and 2nd Defendants to demolish all the illegal structures constructed on the suit lands belonging to the 1st and 2nd Plaintiffs and restore the said properties to their original state.
 - c. General damages for illegal trespass and forceful occupation of the suit lands
 - d. Costs of the suit.
2. Simultaneously the Plaintiffs filed an Application of even date seeking the following Orders;
 - a. That this matter be certified urgent and be heard ex parte in the first instance.



- b. Thatpending the interparte hearing of this Application, a temporary order of injunction do hereby issue restraining the 1st and 2nd Defendant/Respondents and/or their agents, servants and/or employees from entering, trespassing, accessing, constructing, building, erecting, enclosing, subdividing, placing building materials or carrying away any material from the properties known as Ruiru Township/2045 and Ruiru Township/717.
 - c. Thatpending the hearing and determination of this Application, a temporary order of injunction do hereby issue restraining the 1st and 2nd Defendant/Respondents and/or their agents, servants and/or employees from entering, trespassing, accessing, constructing, building, erecting, enclosing, subdividing, placing building materials or carrying away any material from the properties known as Ruiru Township/2045 and Ruiru Township/717.
 - d. Thatpending the hearing and determination of the suit, a temporary order of injunction do hereby issue restraining the 1st and 2nd Defendant/Respondents and/or their agents, servants and/or employees from entering, trespassing, accessing, constructing, building, erecting, enclosing, subdividing, placing building materials or carrying away any material from the properties known as Ruiru Township/2045 and Ruiru Township/717.
 - e. Thatthat the cost of this Application be costs of this Application be borne by the 1st and 2nd Defendant/Respondent.
3. Upon service the 1st Defendant entered appearance in the this matter through the County Attorney - County Government of Kiambu on the 25/2/2019 and opposed the Application vide the grounds of opposition dated the 25/2/2019 on the following grounds interalia; that the Application is subjudice on account of another similar Application in ELC 11 of 2019 dated the 15/1/2019 in respect to the same parties thus the Applicants are abusing the process of the Court by filing numerous Applications seeking the similar Orders on the same subject matter.
 4. Interalia, the 1st Defendant filed a Preliminary Objection of even date in line with the grounds set out in the grounds of opposition on account of subjudice.
 5. On the 7/3/2019 the 1st Defendant was served interalia with the Notice of Motion, the plaint dated the 28/1/2019 as shown in the affidavit of service dated the 25/3/2019. The claim that it was not served is unsupported. The 1st Defendant had the liberty to examine the process server on the issue but it chose not to.
 6. On the 31/1/2019 the Plaintiffs withdrew the suit and the Notice of Motion dated the 14/1/2019 under Order 25 rule 1 of the *Civil Procedure Rules, 2010*.
 7. Following the service of the plaint upon the 2nd Defendant, it filed a notice to co-Defendant under Order 1 rule 15 of the *Civil Procedure Rules* against the 1st Defendant claiming indemnity on the grounds that it was acting as its agent and contractor at all material times to the suit.
 8. On the 9/4/2019 the Plaintiffs and the 1st Defendant filed a consent in Court as follows;

“By consent the Notice of Motion dated the 28/1/2019 shall be settled as follows;

The Notice of Motion Application dated 28th January 2019 shall be settled as follows:-

 - a. The 1st Defendant recognizes that the properties known as Ruiru Township/2045 and Ruiru Township/717 legally and lawfully belong to the 1st and 2nd Plaintiffs.



- b. The 1st and 2nd Plaintiff hereby allow the 1st Defendant and/or the traders within Ruiru Market to temporary use and/or occupy the said properties known as Ruiru Township/2045 and Ruiru Township/717 until November 30, 2019 to enable the construction of the main market to be complete.
- c. The 1st Defendant undertakes to relocate, vacate and/or remove all persons and/or traders from the 1st and 2nd Plaintiff's properties known as Ruiru Township/2045 and Ruiru Township/717 by the 30th of November 2019 and hand over vacate possession accordingly.
- d. The 1st Defendant further undertakes to demolish and/or remove all the temporary structures that will have been erected on the 1st and 2nd Plaintiff's properties known as Ruiru Township/2045 and Ruiru Township/717 by the 30th of November 2019.
- e. In default of nay of the terms 3 and 4 above, the Honourable Court shall issue an eviction Order against the 1st Defendant or any other person deriving its occupation by virtue of the 1st Defendant thereof.

Thanks you.

Yours faithfully,

E. M. Washe & Associates J. J. Cheserek

Advocates For The 1st and 2nd Plaintiff Advocates For The 1st Defendant.”

- 9. The above consent was adopted by the Court on the October 29, 2020 in the following terms;
 - a. That it is now one year since the consent was signed.
 - b. Thatthe 1st Defendant recognizes that the properties known as Ruiru Township/2045 and Ruiru Township/717 legally and lawfully belong to the 1st and 2nd Plaintiffs.
 - c. Thatthe 1st and 2nd Plaintiff hereby allow the 1st Defendant and/or the traders within Ruiru Market to temporarily use and/or occupy the said properties known as Ruiru Township/2045 and Ruiru Township/717 until 30th November 2019 to enable the constructions of the main market to complete.
 - d. That1st Defendant undertakes to relocate, vacate and/or remove all persons and/or traders from the 1st and 2nd Plaintiff's properties known as Ruiru Township/2045 and Ruiru Township/717 by the November 30, 2019 and hand over vacate possession accordingly.
 - e. Thatthe 1st Defendant undertakes to demolish and/or remove all the temporary structures that will have been erected on the 1st and 2nd Plaintiff's properties known as Ruiru Township/2045 and Ruiru Township/717 by the November 30, 2019.
 - f. Thatin default of any of the terms 3 and 4 above, the Honourable Court shall issue an eviction Order against the 1st Defendant or any other person deriving its occupation by virtue of the 1st Defendant thereof.
 - g. Thatthe 1st Defendant is granted fourteen (14) days to comply.
 - h. Thatmention on 1st December 2020 to confirm compliance.



10. On the 1/12/2020 the Court issued eviction Orders against the 1st Defendant in the following terms;
 - a. That the Notice of Motion Application dated October 19, 2020 is not prosecuted and no appearance for the County Government of Kiambu.
 - b. That the Application is therefore dismissed for not being prosecuted.
 - c. That the Plaintiff has alleged that the Defendants have failed to comply with the Consent Order adopted as the Order of the Court.
 - d. That as per the said Consent Order in default, the Court was to issue Eviction Order against the 1st Defendant: consequently, the Court invokes Clause No 5 of the Consent Order that was adopted on October 12, 2019 and proceeds to issue an Eviction Order against the 1st Defendant and or any other person deriving its occupation by virtue of the 1st Defendant.
Further Orders;
 - e. That Mention on April 19, 2021 for further Orders on the main suit.
 - f. That Mention Notices to be issued by the ELC Registry.

The Application dated the 9/11/2022

11. Against that Background, the Applicant, the County Government of Kiambu in this case filed a Motion dated the 9/11/2022 seeking the following Orders That;
 - a. Spent.
 - b. There be a stay of Orders issued on the 9/4/2019 and all consequential Orders issued therein pending the hearing and determination of the Application.
 - c. The Orders issued on the 9/4/2019 and all the consequential Orders issued therein be set aside.
 - d. The Court review its Orders issued on the October 29, 2020.
 - e. That the Notice of Motion dated the 28/1/2022 (sic) be heard on its merits.
 - f. Costs be provided for.
12. The Application is based on the grounds thereto and the supporting affidavit of the Daniel Kiraithe sworn on the 9/11/2022. He introduced himself as the County Solicitor and competent to depone on the matter pertinent to the Application.
13. In his chronology of events, the deponent stated that on the 9/4/2019 the parties (The Plaintiffs and the 1st Defendant) entered into a consent to settle the Plaintiffs Notice of Motion dated the 28/1/2022 (sic). That the main suit is yet to be heard on its merits and the same having been filed on 28/1/2019 has abated on account of being dormant for the last 3 years and 10 months. Equally that the summons to enter appearance expired for non-extension on expiry of 24 months.
14. Further the Applicant averred that there is discovery of new and important evidence after the exercise of due diligence that the CEC Lands Housing Physical Planning Municipal Administration & Urban development had informed the Principal Secretary Nairobi Metropolitan that the suit land is public land. This information was not within the knowledge of the Counsel on record at the time the consent was signed. He referred to a letter dated the 25/3/2019 where the CEC Kiambu wrote a letter to the Principal Secretary that the suit land is public land and any claim on this particular land is irregular. The County Attorney was then advised to defend the matter and the irregular acquisition nullified.



- However, the instructions received from the said County Attorney by the Counsel on record were different from the instructions from the Applicant herein had given through the CEC lands. That the new evidence shows that the suit property is public land
15. Pursuant to the consent Order on record, the Plaintiffs are in the process of enforcing the Order to evict the members of the public from the suit land that is currently being used as a public market.
 16. That the mistake and misinformation on the part of the Counsel on record should not befall and prejudice the Applicant who holds the suit land in trust for the public. That unless this Application for review is determined on merits in the light of the new evidence the public stands to suffer great loss. Interalia, the Plaintiffs stand to suffer no prejudice if the matter is heard on merit.
 17. The Application is denied. Charles Kibuthi Gathogo, the 1st Respondent /Plaintiff deponed via a Replying Affidavit sworn on 1/12/2022 on his behalf and that of the 2nd Plaintiff. He averred that they are the legal and bonafide owners of the suit lands, facts which were in the knowledge of the Applicant at the time they entered into the consent Order. Their titles have never been impeached nor any inquiries into the validity of the same been made. The Application has been brought 3 years after the completion of the construction of the new market and relocation of the traders who hitherto operated from the suit lands at the request of the Applicant and which formed the core of the consent Orders. The Applicant is therefore avoiding its obligations under the consent Orders in force by avoiding the expenses involved in the removal or demolition of the structures on the property. In addition, that there has been an inordinate and unexplained delay in filing the Application hence the Application is an abuse of the process of the Court. He opined that the Application is made in bad faith and is intended to defeat the Orders in favour of the Plaintiffs. That the allegation that the suit is public land is unsubstantiated and made without any factual legal basis given that the Applicant is relying on a letter drafted by one of its officers and an undated unanimous report which goes to show the extent of the malice vexation and bad faith at the behest of the Applicant.
 18. That the provisions of Order 45 rule 1 of the Civil Procedure Rules are not applicable to the Application since the letter dated the 25/3/2019 has been at all times been in the possession of the Applicant and the Applicant cannot be heard to argue that the said letter constitutes new evidence which was not available at the time of the consent. That said letter was with the County Attorney and was therefore within his disposal to deal with it as it deemed appropriate. The impugned consent Orders were signed by the same Counsel who is currently in conduct of the matter on behalf of the Applicant. The said Counsel had the mandate and the authority to compromise the suit on behalf of the Applicant. The terms of the Orders favoured the Applicant by allowing it temporary use of the Plaintiff's property without any form of compensation.
 19. In addition, the Plaintiffs have urged the Court that a consent Order can only be set aside on grounds that vitiate a contract, which grounds are absent in this matter.
 20. The Plaintiffs stated that the suit has not abated for want of service of summons given that the Applicants had notice of the suit and have duly participated in the same including recording a consent Order that has far and large compromised the suit. That the Applicant has not demonstrated how non-service of the summons have prejudiced it. It is their view that they have suffered none. That the Applicant is now precluded from insisting on service of summons as the consent Order settled the Notice of Motion dated the 28/1/2019 and to a great extent compromised the suit.
 21. On the 26/10/22 and the 6/12/2022 parties took directions to file and exchange written submissions by close of business the 9/1/2023. By the time of writing the ruling none of the parties had complied.



22. The 2nd Defendant / Respondent informed the Court that since the consent did not affect it they would take a neutral position in the Application.

Analysis and determination

23. Having read and considered the Application, the proceedings on record, the affidavit evidence and all the material placed before the Court the issues for determination are;
- a. Whether the Applicant is entitled to the Orders of review of the said consent Orders
 - b. Whether the consent Order can be set aside
 - c. Who meets the costs of the Application?
24. The legal provisions governing this Court's power to review its Judgment/Orders are found in Section 80 of the *Civil Procedure Act* and amplified by Order 45 Rules 1 & 2 of the Civil Procedure Rules that;

“ 80. Review

Any person who considers himself aggrieved—

- (a) by a decree or Order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or Order from which no appeal is allowed by this Act, may apply for a review of Judgment to the Court which passed the decree or made the Order, and the Court may make such Order thereon as it thinks fit.

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.”

25. It is trite that Review is a creation of the statute as opposed to the Court's inherent powers. The power of review must be conferred by law or by necessary implication. For an Applicant to succeed in such an Application, he must therefore demonstrate the following; Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the Order made; On account of some mistake or error apparent on the face of the record or for any other sufficient reason and



whatever the ground there is a requirement that the Application has to be made without unreasonable delay.

26. In this case the Applicant has averred that the suit lands are public land and that the same was brought to the attention of the County Attorney by the CEC lands with clear instructions to defend the matter in Court. The main ground for review is that there is discovery of new and important evidence which could not have been obtained with due diligence. This evidence is embodied in the letter authored by the CEC Lands and addressed to the Principal Secretary – Nairobi Metropolitan that the suit lands are public lands. That this information was not within the knowledge of the Counsel that recorded the consent. I have anxiously considered this letter dated the 25/3/2019 which states as follows;

“KCG/LHPP/MKT/VOL.II/69 25th March, 2019

The Principal Secretary

Nairobi Metropolitan

PO Box 30130-00100

Nairobi

Re: Contract NoNCB/MoTIH&UD/SDoH&UD/DoU&MED/NaMSIP/WKS-03/2018-2019: For Construction of Ruiru Market – Kiambu Count

Reference is made to your letter ref DOU & MED/Namsip/wks-03/2018-2019/24 dated March 14, 2019 on the headlined subject.

I wish to state that the land parcel proposed for market relocation is unsurveyed and therefore not registered. It is however important to note that the same is earmarked for public water works (see attached copy of proposed PDP for Ruiru town) indeed RUJAWASCO is already in occupation and has elevated a water tower that facilitate adequate pressure while distributing water in Ruiru town.

In view of the foregoing any claim on this particular land is therefore irregular and the County Governemtn of Kiambu has a responsibility to safeguard public interest at all times.

By a copy of this letter the County Attorney is advised to take over the Court case filed by the two person with a view to defend the County and have the irregular acquisition nullified.

J. M. MAINA

CECM – Land Housing Physical Planning Municipal Administration & Urban Development

CC Hon. Ferdinand Waititu Baba Yao

HE the Governor Kiambu

Principal Secretary

Urban & Metropolitan Development

CECM Trade Tourism Co-operative and Enterprise Development

Kiambu County Attorney

Deputy Director Social Infrastructure

Liason Officer Kiambu County



Ag. Director Land Survey & Geo-Informatics.”

27. The gist of the letter is that the suit lands are unsurveyed and unregistered. That they are earmarked for public water works and a PDP is annexed to the said letter. It is not clear whether this letter is referring to the same suit lands which clearly have been registered as parcels Nos 717 and 2045. The annexed document christened PDP is not approved to guide the Court on its authenticity. The letter was copied to the County Attorney in Order to take action and Defendant the irregular allocation of the land. There is no evidence that the County Attorney did not receive this letter. The Counsel who recorded the consent has not sworn any affidavit to aver that this letter was not brought to her attention, neither has the County Attorney done so nor that there indeed was a mistake. It is the finding of the Court that the consent recorded by the 1st Defendant was done with the knowledge and custody of the letter dated the 25/3/2019. The claim that it is a discovery of new and important evidence has no basis. It is rejected.
28. Further notwithstanding the above contents of the letter, the 1st Defendant in the impugned the consent acknowledged that the suit lands belong to the Plaintiff.
29. Finally, the 1st Defendant has not given any other sufficient reasons to warrant the review of the said Orders. The delay of over 3 years in my view is inordinate in the circumstances.
30. The issue is answered in the negative.

Whether the consent Order can be set aside

31. I have set out the consent of the parties above and I need not regurgitate the same.
32. The law on variation of a consent Judgment is now settled to the effect that the variation of a consent Judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.
33. In the case of *Flora Wasike v Destimo Wamboko* [1982 -1988]1 KAR 625, held as follows:

“It is now 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.”
34. The Court of Appeal in the case of *Brooke Bond Liebig v Mallya* 1975 EA 266 held as follows:-

“A consent Judgment may only be set aside for fraud collusion, or for any reason which would enable the Court to set aside an agreement.”
35. Further in *Hirani v Kassam* [1952] 19 EACA 131, the Court of Appeal with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.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 and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”



36. The Court of Appeal in the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR P. 485 held that:

“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 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.”

37. In the same case the Court further 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 direction. In the absence of proof of any express negative direction, the Order shall be binding.”

38. This Court has not been informed that the Defendant/Applicant’s Counsel who is currently on record had no authority at all to enter into the consent in which case the consent Decree/Judgment would have been a nullity. There is no evidence to show that the Counsel did not have full authority nor that she did not represent the best interests of the 1st Defendant and that perhaps explains why the 1st Defendant is yet to file a defence in this case.

39. The Applicant has not laid down evidence to show that the consent was procured by way of misrepresentation on the part of the Plaintiffs. The 1st Respondent duly acknowledged the title ownership of the Plaintiffs and requested the Plaintiffs for the use of the land albeit on temporary basis to house the market traders pending the completion of the new market, a request that was obliged by the Plaintiffs.

40. In the case of *Purcell v F. Trigell Ltd.* [1970] 3 All ER 671, Winin CJ said at page 676 as follows:-

“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 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.”

41. A similar position was taken by the Court of Appeal in the case of *Broke Bond Liebig Ltd v Methya* [1975] EA 266 and 269 in which Law Ag. P. said:

“A Court cannot interfere with a consent Judgment except in such circumstances as would afford a good ground for varying or rescinding a contract between the parties.”

42. The Court of Appeal gave the grounds upon which consent Judgment may be set aside in the case of *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR as follows;

“The Judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent Judgments or consent Orders has been clearly stated. A Court of law will not interfere with a consent Judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent Order or a consent Judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”



43. In the end the Court finds that none of the vitiating factors that warrant a Court to set aside its Orders/ Judgment exist in this case. None has been proven.
44. In the upshot I find that the Application is rejected on this ground.
45. Costs follow the event and I see no reason to deny the Plaintiffs the costs of the Application.
46. Final Orders for disposal
 - a. The Application has no merit.
 - b. It is dismissed with costs in favour of the Plaintiffs/Respondents.
47. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Omondi for 1st and 2nd Plaintiffs

Ms. Cheserek for 1st Defendant

2nd Defendant – Absent

Court Assistants – Kevin/Lilian

