



**Njonge v Narankaik (Environment & Land Case 238 of 2013)
[2023] KEELC 18805 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18805 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 238 OF 2013**

**LA OMOLLO, J
JULY 13, 2023**

BETWEEN

PETER NJUGUNA NJONGE PLAINTIFF

AND

JULIUS NARANKAIK DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 5th December, 2022 expressed to be brought under Order 51 of the *Civil Procedure Rules* which seeks the following orders:
 - a. Spent
 - b. That the consent adopted by the court on 31st October, 2018 is unexecutable as well as the direction issued by the Deputy Registrar on 29th August 2022 due to the fact that the suit land Narok Cis Mara/Enabelbel/279 is non-existent.
 - c. That in the alternative this court be pleased to vacate/review its orders given on the 29th August 2022 as well as 31st October 2018 for reasons above tendered.
 - d. That this matter be certified as urgent.
 - e. That cost of this application be provided for.
2. The application is based on the grounds on the face of the application and supported by the affidavit of Julius Narankaik sworn on 5th December, 2022.



Factual Background.

3. This suit was commenced vide the Originating Summons dated 4th December, 2009. The Plaintiff/Respondent seeks the following prayers:
 - a. That Peter Njuguna Njonge be declared the owner of thirty (30) acres of land in Narok/Cis-Mara/Enabelbel/Enenetia/279 by adverse possession having occupied, cultivated and tilled the said thirty (30) acres of land continuously and uninterrupted for over 28 years since 1981 and that this honourable court do direct that Narok District Land Registrar rectify the Land Registrar accordingly and register Peter Njuguna Njonge as the sole proprietor of thirty (30) acres of land which should be hived from Narok/CIS-Mara/Enabelbel/Enenetia/279 and that the Plaintiff herein be issued with a title deed for the said thirty (30) acres.
 - b. That the costs of this suit be borne by the Defendant who has occasioned this action.
4. The Defendant/Applicant in response filed a Replying Affidavit sworn on 28th January, 2010. He deposed that the matters raised in the application had already been adjudicated upon in Narok SRMCC No. 28 of 2003 and judgment delivered on 9th December 2005.
5. He also deposes that an appeal was filed in Nakuru High Court Appeal No. 206 of 2005 and denied that the Plaintiff/Respondent had ever enjoyed uninterrupted peaceful stay on the suit property.
6. On 31st October, 2018, the Defendant/Applicant and the Plaintiff/Respondent entered into a consent judgment which was in the following terms:
 - a. Judgment be and is hereby entered in favour of the Plaintiff against the Defendant to the extent that the Plaintiff be and is hereby entitled to and shall forthwith take possession, use and occupation of thirty acres of land comprised in and to be excised from all that parcel of land known as Narok/CIS Mara/Enabelbel/Enenetia/279.
 - b. That in order to realize the aforesaid thirty acres of land which should be excised from Narok/CIS Mara/Enabelbel/Enenetia/279, the plaintiff and the defendant shall equally share the fees, costs, disbursements and charges for the appropriate survey, sub division and duties for procurement of a title deed in the plaintiff's names the said thirty acres with the remainder of the area being in the Defendant's names.
 - c. That the costs of this suit shall be to the Plaintiff.
7. The said consent was adopted as judgment of the court on 31st October 2018. It is as follows;

“Having heard the Defendant in person, having perused the consent dated 31st October, 2018 and filed on 31st October, 2018 and having perused the certified extract of title annexed to the supplementary affidavit of Peter Njuguna Njonge filed on 28th May, 2018. I hereby order as follows;”

 1. Judgment is hereby entered in terms of the consent dated 31st October, 2018 and filed in court on the same date.
 2. The hearing which had been scheduled for 1st May, 2019 is hereby vacated.
8. On 12th November, 2018, the Defendant/Applicant filed an application seeking to set aside the consent judgment entered against him on 31st October, 2018.



9. This court in its ruling delivered on 12th June, 2019 dismissed the said application with costs to the Plaintiff/Respondent.
10. The application under consideration first came up for hearing on 8th December, 2022 and the court granted the Plaintiff/Respondent time to file a response to the Defendant/Applicant's application.
11. On 8th February, 2023 the application came up again for hearing and the court gave directions that the application be heard by way of written submissions.
12. On 22nd February, 2023, it was confirmed that the parties had filed their submissions and the matter was reserved for ruling.

The Defendant/Applicant's Contention.

13. The Defendant/Applicant contends that the present matter traced its origin from the proceedings filed in Narok SRMCC No. 28 of 2003 between Julius Narankaik Ologollimot and Joseph Ologollimot vs Peter Njuguna Njoge which was determined in favour of the Defendant/Applicant herein.
14. The Defendant/Applicant also contends that the Plaintiff/Respondent filed an appeal from the said decision being Nakuru HCC Appeal No. 206 of 2005. He contends further that the appeal succeeded in terms that the decision in Narok SMRCC No. 28 of 2003 between Julius Narankaik Ologollimot and Joseph Ologollimot vs Peter Njuguna was set aside.
15. The Defendant/Applicant further contends that immediately after, the Plaintiff/Respondent filed an adverse possession suit HCC No. 338 of 2009 (OS) where the parties entered into a consent judgment under duress.
16. It is the Defendant/Applicant's contention that he challenged the said consent and a ruling was delivered in favour of the Plaintiff/Respondent and his Application was dismissed.
17. It is also the Defendant/Applicant's contention that the Plaintiff/Respondent has tried to execute the terms of the consent adopted in the present suit on several occasions but his efforts have not borne any fruits.
18. It is further the Defendant/Applicant's contention that the Deputy Registrar on being moved by the Plaintiff/Respondent and upon being supplied by the necessary documents went further to order for the production of the original title which was no longer in his hands.
19. It is the Defendant/Applicant's contention that the suit property land parcel No. Narok Cis Mara/ Enabelbel/Enengatia/279 does not exist and therefore he cannot deposit a title to a land that does not exist.
20. The Defendant/Applicant contends that the land was subdivided in favour of third parties who were not subject to the present suit.
21. The Defendant/Applicant also contends that he submitted a letter written by the District Land Registrar Narok dated 31st January, 2022 to the Deputy Registrar which confirms that the suit property is non-existent.
22. The Defendant/Applicant further contends that the failure to produce that document when the matter comes up for mention may lead to contempt of court.
23. It is the Defendant/Applicant's contention that there is need to vacate all the orders issued to avoid a situation of an order that cannot be executed.



24. It is also the Defendant/Applicant's contention that upon the setting aside, review or vacation of the orders issued on 31st October, 2018 and 29th August, 2022, he will be at liberty to APPLY for further orders which may include joinder of the 3rd parties not subject in the present matter.
25. It is further the Defendant/Applicant's contention that the Plaintiff/Respondent would not be prejudiced in any way if the orders sought are granted. He ends his deposition by stating that it is in the interest of justice that the Application be granted as prayed.

The Plaintiff/Respondent's Response.

26. In response to the Defendant/Applicant's application, the Plaintiff/Respondent filed a Replying Affidavit sworn on 13th March, 2023 and filed on 21st March, 2023.
27. The Plaintiff/Respondent contends that the Defendant/Applicant's application lacks any basis and is only intended to misguide the court in the pronouncement and administration of justice.
28. The Plaintiff/Respondent also contends that the parties entered into a consent on 31st October, 2018 which marked the end of litigation in this matter and is only intended to circumvent the due process of the law.
29. The Plaintiff/Respondent further contends that the Defendant/Applicant did not present any evidence to portray any form of duress and/or undue influence was exacted upon him during the entering of the consent.
30. It is his contention that he is advised by his advocates on record that a consent order entered into by the parties binds all the parties in the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud.
31. It is also his contention that he is further advised by his advocates on record that for the court to set aside and/or vacate the said consent order, there has to be sufficient cause inclusive of sufficient material facts or that the consent was entered into in misapprehension or ignorance of such facts for the court to exercise such a discretion. He deposes that the Defendant/Applicant has not been able to demonstrate this.
32. The Plaintiff/Respondent contends that the Defendant/Applicant only intends to waste the court's time by seeking to Reopen a case which had been formally completed.
33. The Plaintiff/Respondent also contends that the reasons advanced by the Defendant/Respondent do not have any weight and are holding the parties and the court hostage without any due regard to natural principles and procedural laws and thereby deterring him from enjoying the fruits of justice.
34. The Plaintiff/Respondent further contends that the court is functus officio and that he has always adhered to all the substantive and procedural rules as pertaining to the present matter.
35. It is his contention that he stands to suffer great prejudice as he had already considered the case file closed and even paid his advocates. He further contends that taking into consideration the years gone and length of the case, substantive issues of the matter have been greatly dissipated.
36. He ends his deposition by stating that the Defendant/Applicant has not offered any plausible explanation to substantiate the present application and has also failed to annex a copy of the court order that they seek to have reviewed by this Honourable Court.



Issues for Determination .

37. The application was canvassed by way of written submissions. The Defendant/Applicant filed his submissions dated 10th February, 2023 while the Plaintiff/Respondent filed his submissions on 15th March, 2023.
38. The Defendant/Applicant relies on the cases of *B vs Attorney General* [2004] IKLR 431, *Wildlife Lodges Ltd vs County Council of Narok & Another* [2005] 2EA 344 HCK and submits that the orders issued by the court as well as those issued by the Deputy Registrar were spent as at the time they were issued and so they expose the court to ridicule as the subject matter is no longer in existence.
39. The Defendant/Applicant further submits that his application is an attempt to bring respect to the court and avoid the actual progressing of ridicule.
40. He concludes his submissions by seeking that the court takes into account the peculiar circumstances of this suit and allow the application as prayed.
41. The Plaintiff/Respondent on the other hand submits on whether the Defendant/Applicant had met the threshold for reviewing the consent order adopted by the court on 31st October, 2018.
42. The Plaintiff/Respondent reiterates that the suit has already been settled vide a consent order dated 31st October 2018 and that the Defendant/Applicant has not demonstrated whether the consent was arrived at either unprocedural or through some illegal course to enable the court set aside the said orders.
43. The Plaintiff/Respondent relies on the cases of *Kericho Guest House Enterprises Limited v Kenya Breweries Limited* [2018] eKLR, *Board of Trustees National Social Security Fund vs Michael Mwalo* [2015] and submits that this suit was in court for several years and the Defendant/Applicant never informed the court on the status of the suit property and only attempts to do so after the consent was adopted as a judgment of the court.
44. The Plaintiff/Respondent also relies on the case of *Kenya Commercial Bank v Specialized Engineering Co. Ltd* [1982] KLR 485 and submits that the Defendant/Applicant has not demonstrated sufficient ground to set aside the said consent order and so he seeks that the Defendant/Applicant's application be dismissed.

Analysis and Determination.

45. After considering the application, the response thereto and the submissions, it is my view that the following issues arise for determination:
 - a. Whether the consent adopted by the court on 31st October, 2018 and the orders issued by the Deputy Registrar on 29th August 2022 are incapable of execution on the ground that land parcel No. Narok Cis Mara/Enabelbel/Enengatia/279 is non-existent.
 - b. Whether the court should review its orders issued on 31st October 2018 and 29th August 2022.
 - c. Who should bear the costs of the application.



a. Whether the consent adopted by the court on 31st October, 2018 and the orders issued by the Deputy Registrar on 29th August 2022 incapable of execution on the ground that land parcel No. Narok Cis Mara/Enabelbel/Enengatia/279 is non-existent.

46. The Defendant/Applicant is seeking that the court issues an order that the consent adopted by the court on 31st October, 2018 and the orders issued by the Deputy Registrar on 29th August, 2022 are incapable of execution on the ground that land parcel No. Narok Cis Mara/Enabelbel/Enengatia/279 is non-existent.
47. The Plaintiff/Respondent on the other hand argues that the suit progressed for a number of years before the parties entered into the consent judgment and the Defendant/Applicant is only now claiming that the suit property is non-existent.
48. The Defendant/Applicant in his supporting affidavit outlines the history of the dispute as between himself and the Plaintiff/Respondent over the suit property.
49. As indicated before, the Defendant/Applicant states that they initially filed Narok SRMCC No. 28 of 2003 that was determined in his favour and overturned on appeal in favour of the Plaintiff/Respondent.
50. It was after the determination of the appeal that the Plaintiff/Respondent filed the present suit seeking orders of adverse possession.
51. In 2018, the parties herein entered into a consent judgment wherein the Defendant/Applicant granted possession use and occupation of thirty acres to be excised from the sit property.
52. In support of his application the Defendant/Applicant annexed a letter dated 31st January, 2022 addressed to the Deputy Registrar indicating that the suit property land parcel No. CIS Mara/Enabelbel/Enengatia/279 was subdivided and the register closed on 1st April 2010.
53. The Land Registrar also indicated that the suit property was subdivided into land parcel No's 970, 971 and 972 and that land parcel No. CIS Mara/Enabelbel/Enengatia/970 registered in the name of the Defendant/Applicant measures 7.90 Hectares which is short of the thirty acres that was required to be excised and transferred to the Plaintiff/Respondent.
54. As aforementioned, the Defendant/Applicant is seeking that the court makes an order that the consent judgment entered into by the parties on 31st October, 2018 is incapable of execution on the same ground that the suit property is non-existent.
55. The Defendant/Applicant is also seeking that the court makes an order that the orders issued by the Deputy Registrar on 29th August, 2022 are incapable of execution on the same ground that the suit property is non-existent.
56. My view is this application is disguised as an application for review while what it really intends to achieve is to set aside the consent judgment and make a mockery of the execution process that has been commenced by the Plaintiff/Respondent. This application has been made after Deputy Registrar wrote a letter dated 29th August, 2022 calling for the original title.
57. As pointed out in the foregoing paragraphs, the Defendant/Applicant had prior to this application made an application to set aside the said consent judgment on the ground that it had been obtained illegally which application was dismissed on 12th June, 2019.



58. This application is another failed attempt to circumvent the law. By dint of Section 7 of the Civil Procedure Act, I find that this application is Res judicata.

59. Section 7 of the *Civil Procedure Act* provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

60. The Court of Appeal in the case of *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1996] eKLR held as follows:

“...That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our *Civil Procedure Act* caters for.”

61. Consequently, this court is precluded from considering another application seeking to set aside the said consent judgment. This court already considered a previous similar application filed on 12th November, 2018 and delivered a ruling on 12th June, 2019, by which ruling the said application was dismissed.

62. The Defendant/Applicant is also praying that the court makes an order that the directions issued by the Deputy Registrar are incapable of execution for the reason that the suit property is non-existent.

63. Essentially, the Defendant/Applicant is seeking that the court reviews the Deputy Registrar’s orders issued on 29th August, 2022.

64. Section 80 of the *Civil Procedure Act* provides as follows:

“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.” (Emphasis mine)

65. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:

“(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.”

66. In summary, Section 80 of the *Civil Procedure Act* and Order 45 Rule (1) of the Civil Procedure Rules provide that when a party intends to seek review of an order made by the court, the said party may apply to the court which made the said order.
67. In the present matter, the Defendant/Applicant is seeking that this court reviews the orders made by the Deputy Registrar on 29th August, 2019. My view is that only the Deputy Registrar can review orders issued by her I decline to grant this prayer.
68. I find that the consent adopted by the Court on 31st October, 2018 and the orders issued by the Deputy Registrar on 29th August, 2022 are capable of execution. There is in place a valid decree issued by this court. It has neither been set aside nor has its terms been varied. Importantly, the suit land continues to exist. It has only been sub-divided which sub-division can also be undone if found to have been undertaken after judgment of this court.
69. The Defendant/Applicant has deposed that he is fearful that contempt proceedings might be instituted against him. He has every reason to be! What the Defendant/Applicant needs to do is to comply with the order of this court and that of the Deputy Registrar. It is not for this court to advise him on how to do so or entertain excuses as to why he cannot comply.

b. Whether the court should review its orders given on 31st October 2018 and those issued by the Deputy Registrar on 29th August 2022.

70. Bearing in mind my findings on issue (a) above, this court declines to review the consent judgment entered into on 31st October, 2018. I have found that this application is disguised as being for review while in effect seeks to set aside the consent Judgment. In any event the criteria for review as set out in Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules has not been met.
71. The application for review of the Deputy Registrar’s orders issued on 29th August, 2022 should be filed before her.

c. Who should bear costs of the application?

72. The general rule is that costs follow the event and this is in accordance to the provisions of Section 27 of the *Civil Procedure Act*.

Disposition.

73. In the result, I find that the Defendant/Applicant’s Application dated 5th December, 2022 lacks merit and is hereby dismissed with costs to the Plaintiff/Respondent.
74. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAUU THIS 13TH DAY OF JULY 2023.

L. A. OMOLLO
JUDGE



In the presence of:

Mr. Koome for the Applicant

Mr. Kanjara Mbugua for Respondent

Court Assistant: Ms. Monica Wanjohi.

