



United States International University & 2 others v Moi & 10 others (Environment & Land Case 840, 771 & 1040 of 2016 (Consolidated)) [2023] KEELC 21122 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21122 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 840, 771 & 1040 OF 2016 (CONSOLIDATED)
MD MWANGI, J
OCTOBER 26, 2023

BETWEEN

UNITED STATES INTERNATIONAL UNIVERSITY 1ST PLAINTIFF
MUTHAIGA LUXURY HOMES LIMITED 2ND PLAINTIFF
MAESTRO CONNECTIONS HEALTH SYSTEMS LIMITED 3RD PLAINTIFF

AND

ESTATE OF H.E DANIEL TOROITCH ARAP MOI 1ST DEFENDANT
CHIEF LAND REGISTRAR 2ND DEFENDANT
ICEA LION LIFE ASSURANCE COMPANY LTD 3RD DEFENDANT
DIRECTOR OF SURVEY 4TH DEFENDANT
THE HON. ATTORNEY GENERAL 5TH DEFENDANT
BALOZI COOPERATIVE SOCIETY LTD 6TH DEFENDANT
OMWANZA OMBATI 7TH DEFENDANT
ANDREW SUNKULI 8TH DEFENDANT
TRIPPLE OK LAW ADVOCATES LLP 9TH DEFENDANT
RILEY SERVICES LTD 10TH DEFENDANT
DPS INTERNATIONAL LTD 11TH DEFENDANT



RULING

Background

1. The subject matter of this ruling is the ‘Partial Consent and Stipulations’ dated 20th April, 2023 filed in Court on 30th May, 2023. The Partial Consent is between the 3rd Plaintiff, represented by Muma & Kanjama Advocates, the 1st Defendant, represented by Kemboy Law and TripleOKLaw Advocates LLP, the 9th Defendant.
2. In the said Partial Consent and Stipulations, the 3 parties agree as follows:
 - a. The 3rd Plaintiff validly acquired L.R. No. 12422/19 (I.R 36415). From the late H.E. Daniel Toroitich Arap Moi *vide* Agreement for Sale dated 27th January, 2016 and subsequent transfer dated 6th June, 2016.
 - b. TripleOKLaw Advocates LLP carried out the aforementioned transaction on behalf of and with the express instructions from the late H.E. Daniel Toroitich Arap Moi.
3. Consequently, the parties agree:
 - a. That the 1st Defendant admits paragraphs 3, 5, 6, 9 and 12 of the 3rd Plaintiff’s further Amended Plaint dated 26th July, 2019 and supports the declaration that title number L.R. 12422/19 is the property of the 3rd Plaintiff.
 - b. That the 1st Defendant shall therefore summon Mr. Stephen Kipkenda Kiplagat and Mr. Sylvester K. Kaitany as part of its witnesses to speak to the role they played in the transactions between the 3rd Plaintiff and the late H.E. Daniel Toroitich Arap Moi.
 - c. That the 3rd Plaintiff’s suit against the 9th Defendant be and is hereby marked as withdrawn with no order as to costs.”
4. The three parties hereinafter referred to as ‘Proponents’ pray for the adoption of the ‘Partial Consent and Stipulations’ as an order of this Court. The 3rd Plaintiff in its submissions, while urging the Court to adopt the Partial Consent termed the move by the Proponents ‘a positive step in ensuring just, expeditious, proportionate and affordable resolution of the disputes and issues in this matter’. It was the 3rd Plaintiff’s position that the move is in accordance with Article 159(2)(c) of the [Constitution of Kenya](#), the overriding principle under Sections 1A, 1B and 59(c) of the [Civil Procedure Act](#), Section 3 and 20 of the [ELC Act](#) and the General Rules of equity and justice.
5. Mr. Kanjama, Senior Counsel, submitted that the ‘Partial Consent and Stipulations’ determines and settles 6 issues amongst the proponents consequently condensing the issues available for hearing and determination by the Court.
6. The 3rd Plaintiff further argued that the Partial Consent and Stipulations will save the Court time and resources since upon its adoption, it (3rd Plaintiff) will only require to call 2 witnesses. The other impact of the Partial Consent is that it will accord this Court the opportunity to plan, prepare and manage in advance the hearing and determination of this suit.
7. The 3rd Plaintiff submitted that no prejudice would be suffered by the opponents as the Partial Consent only settles its suit against the 9th Defendant on the terms set out in the Partial Consent. Further that the action by the Proponents was legal and should not be impeded by the Opponents. In any event,



the 3rd Plaintiff argued that by signing the Partial Consent, the Proponents formed a binding Contract. The Stipulations constitute the Proponents' position and serve as admissions therefore condensing the issues in dispute amongst themselves.

8. Mr. Kanjama, SC in his oral submissions reiterated the above position urging the Court to adopt the Partial Consent for purposes of efficiency and effectiveness of these proceedings. This, according to the Advocate corresponds with the Letter and Spirit of Article 159 of the [Constitution of Kenya](#) and the overriding objectives.
9. Counsel for the 3rd Plaintiff further referred to the Provisions of Order 13 of the [Civil Procedure rules](#) which allow any party in a suit to give notice by its pleadings or otherwise in writing that it admits the whole or any part of the case by any other party.
10. Advocate Julius Kemboi for the 1st Defendant fully associated himself with the submissions by the 3rd Plaintiff. He submitted that all that the Proponents had done was to first record admissions by the 1st Defendant in respect of the 3rd Plaintiff's claim against the 1st Defendant. The other issue was the withdrawal of the 3rd Plaintiff's claim against the 9th Defendant.
11. The 1st Defendant made reference to the doctrine of 'dominus Litis' arguing that the 3rd Plaintiff is the master of its case – 'the captain of its ship', and therefore has the freedom to compromise its case against any party or even withdraw its entire suit. Not even the Court can direct the 3rd Plaintiff to prosecute a claim it does not wish to proceed with. The Court is an impartial arbiter. To be persuaded by the Opponents to disallow the consent would amount to judicial overreach according to the 1st Defendant.
12. The 1st Defendant further submitted that it had the choice to either admit or defend the claims against it by the 3rd Plaintiff. In this case, it had opted to admit the claim against it by the 3rd Plaintiff and the other parties have no business objecting to the admission.
13. Learned counsel for the 1st Defendant argued that the Partial Consent is in the nature of a private agreement binding between the parties to it. It is not in the nature of a decree that settles the suit to the detriment of the other parties.
14. Mr. Ochieng, Advocate for the 9th Defendant associated himself wholly with the submissions of the 3rd Plaintiff and the 1st Defendant. His position was that the Partial consent and Stipulations was legal and therefore urged the Court to adopt it as an Order of the Court.

Response by the Opponents:

15. The proposition by the Proponents was strenuously opposed by the other two Plaintiffs and the other Defendants, (hereinafter referred to as 'the Opponents').
16. The 1st Plaintiff filed grounds of opposition dated 24th May 2023 which were elaborated in the submissions before the Court. The 2nd Plaintiff filed submissions urging the Court not to adopt the Partial Consent and Stipulations since it was only made by 3 parties to the exclusion of all other parties in the suit. The 2nd Plaintiff further pointed out that the Partial Consent contradicted the 1st Defendant's pleadings before the Court. Finally, that if adopted, the Partial Consent would effectively determine the suit without all the parties having been heard. The 2nd Plaintiff through its Advocate, Mr. Wamai in his oral submissions reiterated the averments in the written submissions.
17. The 5th and 6th Defendants too filed written submissions, which they highlighted before the Court opposing the adoption of partial Consent. On his part, the 7th Defendant filed elaborate grounds of



opposition dated 15th May, 2023. I say elaborate because they even quote case law. The 7th Defendant further made oral submissions before the Court.

18. The 2nd, 3rd and 4th Defendants who are all represented by the office of the Attorney General made oral submissions before the Court opposing the adoption of the Partial Consent and stipulations.

Issues for determination

19. From the extensive submissions made before this Court in favour of adoption of the Partial Consent and Stipulations and those against the adoption, I am of the view that the only issue for determination is whether the court should adopt the said partial consent and stipulations as an Order of this court.

Analysis and Determination

20. In making this determination, I am acutely conscious of the fact that this suit is partially heard before this court. Meaning that the suit is still pending for hearing.
21. The submissions by the parties before me went far beyond the partial consent and stipulations. Indeed, parties dived deeply into the merits of their respective cases. That is to be expected. Advocates are agents of their clients and seek to put their best foot forward at every opportunity to advance their client's position.
22. I will be deliberately frugal with my words in order not to prejudice or embarrass the ongoing hearing of this case.
23. The suit before me comprises of three consolidated suits being ELCC 771 of 2016 (Maestro Connections Health Systems Ltd v Riley Services Ltd and 8 others, ELCC No. 840 of 2016 (USIU v Maestro Connections Health Systems & 5 others) and ELCC No. 1040 OF 2016 (Muthaiga Luxury Homes Ltd v USIU & 7 others). As I stated above, the suit is partially heard. The 1st Plaintiff has indeed already closed its case.
24. The Plaintiffs' claim is on the same suit property. Noteworthy is that there are even counter-claims against the Plaintiffs.
25. It is not in doubt, and this has clearly come out from the submissions that the Court has power to inquire into the propriety of a proposed consent order before adopting it. Counsel for the 6th Defendant referred to the case of *Onesmus Munio Ndumbi v Joseph Njogu Paulo & Anoter* [2017] eKLR where Sila Munayo, J stated that,

“Generally, Parties are free to enter into consents. However, the Court is not bound to adopt, as orders of the Court all consents of the parties, and may in some instances reject them. The Court always bears oversight over a matter that is before it and may reject a consent, if for example, it is aimed at stealing a march on one of the parties, if it is a clear fraud apparent on the face of it, if it is out rightly illegal, or if it is against public policy. A consent is therefore always subject to scrutiny by the presiding judicial officer.”

26. The proponents have invited the Court to adopt the Partial Consent as presented.
27. Adopting the Partial Consent and Stipulations as presented by the parties as an order of the Court would result in the following orders:

“It is hereby ordered that:



- i. The 3rd Plaintiff validly acquired L.R. No. 12422/19 (I.R 36415). From the late H.E. Daniel Toroitich Arap Moi vide Agreement for Sale dated 27th January, 2016 and subsequent transfer dated 6th June, 2016.
 - ii. TripleOKLaw Advocates LLP carried out the aforementioned transaction on behalf of and with the express instructions from the late H.E. Daniel Toroitich Arap Moi.
 - iii. That the 1st Defendant admits paragraphs 3, 5, 6, 9 and 12 of the 3rd Plaintiff's further Amended Plaint dated 26th July, 2019 and supports the declaration that title number L.R. 12422/19 is the property of the 3rd Plaintiff.
 - iv. That the 1st Defendant shall therefore summon Mr. Stephen Kipkenda Kiplagat and Mr. Sylvester K. Kaitany as part of its witnesses to speak to the role they played in the transactions between the 3rd Plaintiff and the late H.E. Daniel Toroitich Arap Moi.
 - v. That the 3rd Plaintiff's suit against the 9th Defendant be and is hereby marked as withdrawn with no order as to costs."
28. The net effect of adopting the Partial Consent and Stipulations as presented is that it will obviously determine the suit in its entirety. Stipulating that the 3rd Plaintiff acquired the suit Property from the late H.E D.T Moi as proposed in clause 1(a) essentially determines the ownership of the suit property which is the core of the dispute before me without according the other claimants an opportunity to present their own cases and interrogate the Proponents' position. It would literally be pulling the carpet under the feet of the other parties.
29. Advocate for the 1st defendant, Mr. Kemboy argued in support of adoption of the partial consent. Referring to the doctrine of 'dominus litis', he suggested that a party to a suit, in this case the 3rd plaintiff, is the captain of his ship. He therefore has the liberty to do what he wills with his suit. However, just like a ship in the sea is subject to the law of the sea, the doctrine of dominus litis is not absolute and cannot be exercised in an arbitrary or capricious manner. It is open to objections by the opposite party and, therefore, subject to judicial scrutiny. Just like the Captain of a ship has to follow the defined shipping routes in the high seas, a party who files a case in court subjects himself to the dictates of the law and the established rules of practice and procedure.
30. I must however be quick to point out that any party in the suit is at liberty to admit the whole or part of the case of any other party. That is the import of the Provisions of Order 13 Rule 1 of the [Civil Procedure rules](#). It allows a party who wishes to admit the case of the other party either wholly or in part to give notice to that effect either in his pleadings or otherwise in writing.
31. Ideally, this notice of admission, if not in the pleadings should be filed and served at the pre-trial stage of the case to enable the court pick out, early enough the contested and uncontested issues and narrow down or resolve outstanding issues as provided for under Order 11 of the [Civil Procedure Rules](#). The Intention would be to facilitate the expeditious disposal of cases and case management.
32. If the intention of the Proponents was to communicate the 1st Defendant's admission of the 3rd Plaintiff's case as submitted by Mr. Kemboy, all they needed to do was to file a notice of admission as contemplated under Order 13 rule 1 of the [Civil Procedure Rules](#). They are still at liberty to do so.



33. The ripple effects of adoption of the partial Consent and Stipulations would be felt by all and sundry in this matter. Once a Consent is adopted by the Court, it becomes an order of the Court. As stated in the case of *Edward Acholla v Sogea Satom Kenya Branch & 2 others* [2014] eKLR, cited by the 3rd Plaintiff:
- “A Consent becomes a judgment or order of the Court once adopted as such. Once it is adopted, it automatically changes character and becomes a consent judgment or order.”
34. By implication, the consent judgment or order becomes a determination of the dispute before the Court and has the effect and force of Law like any other judgment or order. It would therefore be prejudicial to all the other parties especially on the party who has already closed its case.
35. The upshot is that the Court declines to adopt the Partial Consent and Stipulations dated. dated 20th April, 2023 filed in Court on 30th May, 2023.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF OCTOBER, 2023.

M. D. MWANGI

JUDGE

