



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR. MISCELLANEOUS APPLICATION NO. 239 OF 2014

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE LAND REGISTRATION ACT (CAP 300) LAWS OF KENYA

AND

IN THE MATTER OF PARCEL OF LAND TITLE NUMBER GITHUNGURI/GIATHIEKO/412

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

VERSUS

KIAMBU COUNTY REGISTRAR..... 1ST RESPONDENT

KIAMBU COUNTY SURVEYOR..... 2ND RESPONDENT

AND

KARIUKI MAREGA.....1ST INTERESTED PARTY

PETER MUNGAI MAREGA

(AKA GIKUIYU MAREGA).....2ND INTERESTED PARTY

EX PARTE - STEPHEN WANYOIKE KINUTHIA

RULING

Introduction

1. On 23rd July 2014, this Court issued an order of mandamus an order of mandamus is hereby issued compelling the Respondents to determine, ascertain and/or fix the boundaries of parcel of land Title

Number Githunguri/Giathieko/412. Subsequently, on 19th September, 2014, a consent was entered herein in the presence of **Mr. Kago** for the ex parte applicant and **Miss Githaiga** for proposed the Respondent in which the said parties agreed that the interested parties be joined to the suit; that the survey which was scheduled for 23rd September, 2014 pursuant to the said judgement proceeds; that in addition to the determination of the boundaries the parcel No. Githunguri/Giathieko /412 the Respondent would also fix and point out boundaries of LR Nos No. Githunguri/Giathieko /377 and 468; that the Respondents file their report on the survey exercise within 14 days from the date of the thereof; that the matter would be mentioned on 14th October, 2014 for further orders; and that the status quo in respect of the said properties would be maintained.

2. By a Notice of Motion dated 24th February, 2016, the interested parties herein seek that the consent order recorded herein on 19th September, 2014 be set aside and that they be given an opportunity to challenge the suit on its merits. As usual they also seek that there be a provision for costs.

3. According to the said applicants, there have been rigorous endless litigation over the years revolving around the suit property known as Githunguri/Giathieko/412 and that the suit herein emanates from a parcel of land owned by the said applicants' father, the late **Marega Kinuthuia** (the deceased) which was previously registered as Githunguri/Giathieko/179. However in 1978, one of the interested parties/applicants challenged the subdivision of the sit property and on 1st October, 1981, the High Court ordered that all matters in dispute in relation to the suit property be referred to arbitration by clan elders which arbitration gave rise to subdivision. However the interested parties challenged the said decision and a consent order recorded in favour of the interested parties.

4. According to the interested parties, they only became aware of these proceedings when they were served with the summons to assist in determination of the boundaries in respect of properties which were no longer in existence following the nullification of the titles. To them, the orders of mandamus issued herein are incapable of being implemented and this state of affairs was well within the knowledge of the applicant.

5. The interested parties revealed that upon being aware of these proceedings, they engaged the services of **Waithaka Wachira Advocate** who filed an application dated 17th September, 2014 but on the date of the inter partes hearing a **Ms Githaiga** appeared in Court ostensibly to hold brief for **Mr. Waithaka** and instead of arguing the application recorded the contentious consent without appraising herself of the history of the dispute and without instructions to record the said consent which according to the interested parties highly prejudiced them.

6. The interested parties were of the view that the grant of these orders would not prejudice the ex parte applicant's case.

7. The application was opposed by the ex parte applicants. According to them, the issues raised by the interested parties were untrue as they were not parties to the cases cited by the interested parties.

8. It was averred that the interested parties participated in the discussions relating to the suit land at a meeting called in the Department of Lands Office Kiambu on 29th October, 2014 and that they were parties to the exercise of ascertaining and/or fixing the boundaries for the subject land conducted by the 2nd and the 3rd Respondents pursuant to the subject consent order herein. The ex parte applicants averred that the interested parties have never challenged the report that was filed by the 2nd and the 3rd Respondents.

9. It was contended that the interested parties have in lieu of impeaching the consent order preferred to continually impeach and seek to set aside the decree of this Court arising from the ruling of 9th February, 2016 that concluded that the proceedings herein had been fully spent and there was nothing to adjudicate upon. In the ex parte applicants' view, there ought to be an end to litigation. As the consent order herein had been executed, the ex parte applicant contended that the orders sought herein would be merely

academic.

10. It was contended that the consent recorded herein was not prejudicial to the interested parties hence the Court ought not to act in vain.

Determinations

11. I have considered the foregoing.

12. The Court of Appeal in **Wangechi Kimita & Another vs. Mutahi Wakibiru [1985] KLR 317; [1986] KLR 578; 1 KAR 977; [1976-1985] EA 229**, while citing **Flora N. Wasike vs. Destimo Wamboko [1988] KLR 429; [1982-88] 1 KAR 625**, and **Sadar Mohamed vs. Charan Singh [1959] EA 793** expressed itself as follows:

“Notwithstanding the contractual effect of a consent order Section 67(2) of the Civil Procedure Act is not a bar to setting aside a Judgement and decree by consent or grounds which would justify setting aside a contract...The acts of the appellant in visiting the land to witness the surveying and establishing once and for all the acreage of the land is sufficient reason analogous to the discovery of new and important matter. There is no reason why the words “for any other sufficient reason” need be analogous with the other grounds in Order 44 because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words “for any other sufficient reason” need not be analogous with the other grounds specified in the Order.”

13. With respect to the grounds upon which such a consent would be set aside, the same Court in **Flora N. Wasike vs. Destimo Wamboko** (supra) held that it is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons. In other words *Prima facie* a consent 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 the 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. The East African Court of Appeal on its part in **Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266** expressed itself 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 agreement contrary to the policy of the court... or if the 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... It is well settled that a consent judgement can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.”

14. However, in **Ismail Sunderji Hirani vs. Noorali Esmail Kassam [1952] 19(1) EACA 131** the same Court held that where a suit has been settled by a compromise the decree is passed upon the new contract between the parties which supersedes the original cause of action and in that case the contract of the parties is not the less a contract, and subject to the incidents of a contract because there is superadded the command of a Judge.

15. In this case, what falls for determination is whether this Court ought to set aside the consent entered herein. The interested parties contend that the said consent was recorded by counsel who had no

instructions to do so. The ex parte applicant has not seriously disputed this contention but has instead concentrated in attacking the merits of the interested parties' case.

16. From the record it is clear that the effect of the consent was to materially alter the substance of the mandamus which this Court had issued. If the said consent was entered without instructions, it may well adversely affect not only these proceedings but the proceedings alluded to by the parties herein. Since in these proceedings the substantive order of mandamus is not being challenged, it is my view and I hold that it would be in the interest of justice that the said consent be set aside.

17. In the premises, I hereby issue an order setting aside the consent order recorded herein on 19th September, 2014. The costs of the application are however awarded to the ex parte applicant in any event.

18. It is so ordered.

Dated at Nairobi this 22nd day of May 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Stephen Wanyoike Kinuthia ex parte applicant in person

Mr. Kariuki Marega 1st interested party in person

CA Gitonga