



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 616 OF 2013

NICHOLAS KIPROP KOSIBEI & 49 OTHERS.....PLAINTIFFS/APPLICANTS

VERSUS

WILLIE KIPNGENO KOMEI & 33 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

(Application to set aside a consent; allegation that consent was not that agreed by applicant; consent recorded in court by counsels; no proof that the consent recorded was not that contemplated by the parties; application dismissed)

1. The application before me is that dated 15th May 2015. The substantive order sought is to set aside a consent recorded in court on 13th May 2015. The application is opposed and before I go to the gist of it, I think it is necessary to set down a little background to this suit.

2. This suit was commenced by way of plaint filed on 18th December 2013. There are 50 plaintiffs. The first 49 plaintiffs are individuals whereas the 50th plaintiff, Kalenjini Enterprises Limited, is a land buying company. The first 49 plaintiffs are members of the 50th plaintiff. The defendants were originally 34 in number but the plaint was later amended to reduce the number of defendants to 29. The first 28 defendants are individuals, who are members of the 29th defendant, Mwariki Company Limited, another land buying company. In the plaint, it is pleaded that the two land buying companies bought certain parcels of land from Rhonda Sisal Estates.

3. There developed a dispute soon after on the boundaries, which dispute is said to have been resolved by the First President, His Excellency President Jomo Kenyatta in the year 1971. It is claimed however that the 29 defendants encroached into the portion of the plaintiffs measuring 83 acres and carved out plots of land in favour of its members, without affecting the occupation of the plaintiffs on the ground.

4. These parcels of land in issue are now owned by the 1st – 28th defendants. In the suit, the plaintiffs want the titles of the defendants on the disputed portion cancelled and in the alternative a declaration that they have obtained title through adverse possession.

5. Together with the suit, the plaintiffs filed an application for injunction which was later amended to accommodate the amendments in the plaint which reduced the number of defendants. They wanted orders to have the some of the defendants, specifically the 25th, 26th, and 27th defendants, stopped inter alia from harvesting sand in the plot number Miti Mingi/Mbaruk Block 6/698.

6. It also sought other interlocutory orders aimed at stopping dealings in all the disputed plots, pending hearing and determination of the suit. That application was opposed by the defendants.

7. Before the application was heard, it emerged that this suit was related to another suit that had been filed in the Magistrates Court at Nakuru, that is Civil Suit No. 534 of 2014. An order to have the two suits consolidated was issued. In this suit, the plaintiff is one Sammy Mwangi Wanyoike suing on behalf of the Estate of Eunice Wambui Mwangi (deceased). Eunice Wambui Mwangi (deceased) had been named as the 29th defendant in the original plaint before it was amended. Her name was however removed after the plaint was amended. In the suit, it is pleaded that the plaintiff is proprietor of the land parcel Miti Mingi/Mbaruk Block 6/254 (Mwariki) and that he has been operating a quarry since the year 2012. It is averred that in the month of April 2014, the defendants illegally entered the said land and started interfering with the plaintiff's use of it. In the case, he wanted the defendants permanently restrained from any further interference. Together with the plaint, an application for injunction (dated 3rd June 2014) was filed, seeking to stop the defendants from interfering with the use of the land by the plaintiff pending hearing of the suit. The defendants replied to oppose this application.

8. The two matters came before court on 13 May 2015. Mr. Cheruiyot appeared for the plaintiffs (which can only mean the plaintiffs in the original ELC No. 616 of 2013 and defendants in the original Nakuru CMCC No. 534 of 2014) and Ms. Kipruto held brief for Mrs. Ndeda (who acts for defendants in the original ELC No. 616 of 2013 and plaintiff in the original Nakuru CMCC No. 534 of 2014). The recording was done in the suit Nakuru CMCC No. 534 of 2014. Mr. Cheruiyot addressed the court on the pending applications and stated that they had a consent to record. He proceeded to dictate the consent as follows :-

"By consent status quo be maintained meaning that the parties herein not to continue harvesting sand on the suit properties."

9. The above statement was confirmed by Ms. Kipruto. The court then made the following order :-

"As agreed status quo be maintained and no party to harvest sand on the suit properties pending hearing of the suit." The court then directed parties to comply with the provisions of Order 11 and gave a mention date of 4th November 2015.

10. Thereafter, this application was filed two days later on 15th May 2015. It will be observed that the application seeks to have the above consent set aside. The grounds upon which the application is made are as follows :-

(a) That the defendants/applicants more specifically the plaintiff in the NKU CMCC No. 534/2014 has been adversely aggrieved by the consent order of the 13th May 2015.

(b) That prior to the consolidation of the two suits, the plaintiff in NKU CMCC No. 534/2014 had been enjoying the orders of the subordinate court issued on the 6th June, 2014 and extended by this Honourable Court.

(c) That the plaintiff in NKU CMCC No. 534/2014 livelihood (sic) is pegged on the sand harvesting on the subject property and the proceedings and consent order issued on the 13th May, 2015 will condemn him to unfair suffering and loss unlike the other parties in this suit.

(d) That there was a communication breakdown between the Advocate who was holding brief on behalf of Mrs. Ndeda Advocate for the applicants when she intimated to the Honourable Court to enter into a consent order to abandon the two applications and maintenance of status quo.

(e) That it will be unfair and unjust if a client is left to suffer due to an omission on the part of his Advocate.

(f) That it is only fair and just to allow this application in order to meet the ends of justice.

11. The application is supported by the affidavit of the applicant, who is the plaintiff in the original CMCC No. 534/2014. He has stated inter alia that he has been enjoying interim orders in his favour given by the Magistrates Court and extended by this court.

12. He has deposed that on 13 May 2015, his advocate hinted to him that she had consulted with the respondent's advocate and had reached an agreement to abandon the pending applications and enter a consent that status quo be maintained. He agreed to this knowing that since he was already enjoying the orders of the court, that is in relation to occupation and use of the suit land Miti Mingi/Mbaruk Block 6/254 (Mwariki), he would continue doing so until the hearing and determination of this suit.

13. On the day, his advocate, Mrs. Ndeda, informed him that he had another matter in another court and had instructed Miss. Kipruto to hold her brief and enter the consent that status quo be maintained to the effect that the orders issued on the 6/6/2014 by the subordinate court to remain in force. While in court, he heard that the consent order was to the effect that status quo be maintained, which he had no objection to, but there was a condition that all parties to the suit do not harvest sand pending hearing and determination of the main suit.

14. On hearing this, he alerted Mrs. Ndeda who gave further instructions to counsel holding her brief to adjust the consent order but the court directed that a formal application be filed. He has stated that the omission on the part of his advocate should not adversely affect him and that the sand harvesting business is his only source of income. It is for these reasons that he has asked to have the consent order set aside.

15. The replying affidavit is sworn by Michael Chepkwony, one of the defendants in the original Nakuru CMCC No. 534 of 2014 and one of the plaintiffs in the original ELC No. 616 of 2013. He has stated that the consent order recorded was pursuant to their instructions and that it was freely entered into. It is his view that the same should remain in force as counsel holding brief had authority to enter into it.

16. I have considered the matter together with the written submissions of both counsels for the applicant and respondent.

17. I will start by saying that it is not easy to set aside a consent. As stated in the case of **Brooke Bond Liebig Ltd vs Mallya (1975) EA 266 at 269**, "*A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.*"

18. This was affirmed in the Court of Appeal decision of **Flora Wasike vs Destimo Wamboko (1982-88) 1 KAR 625**. In the suit, an advocate entered into a consent which the appellant sought to set aside. The court declined, holding inter alia that the advocate had ostensible authority to enter into the said consent and there was no material tendered to make the court set it aside.

19. It was affirmed that a consent can only be set aside on the same principles that one would set aside a contract.

20. A contract can be set aside if it is illegal, is entered into by fraud or collusion, or by mistake. It is not suggested that the counsels who appeared before me colluded or entered into the consent actuated by malice. No fraud is alleged. The closest one can get, is to say that there was a mistake. The view of the applicant is that what was to be recorded, and which was not, was that status quo to be maintained and according to him, this did not involve stopping him from harvesting sand.

21. It will be observed that the consent as recorded did state that status quo be maintained but went further to record that there be no harvesting of sand by any of the parties. I do not see how the consent regarding the harvesting of sand could have been recorded if there had not been prior discussion on it. It will be noted that the respondent on his part is of the view that what was recorded was what was agreed.

22. I have no affidavit from Ms. Kipruto to say that she was mistaken when she entered into the subject consent or that the consent she recorded was not that which she was informed by Mrs. Ndeda to record.

Neither is there any affidavit by Mrs. Ndeda to specify what exactly she advised Miss. Kipruto to record.

23. There is also no documentary evidence to show that the applicant had instructed counsel to record something different from what was recorded. In essence, save for the words of the applicant, it is difficult for me to see any evidence that the advocates were mistaken when they recorded the subject consent.

24. A lot has been said about the fact that the applicant was previously enjoying interim orders. As correctly put, those were interim orders. They were not orders made until the conclusion of the suit. There was no error in the parties recording a consent that varied the interim orders given by the court. The fact that there were interim orders is not therefore a reason to say that the consent order was entered into by mistake.

25. From my discussion above, it will be seen that I am not convinced that there was any error in the manner in which the consent was recorded. I have not been given any material to suggest that the consent recorded was not one that was not intended to be recorded.

26. The only way in which the parties can reverse the consent recorded is by negotiating another consent which they are free to do.

27. But I see no reason why I should allow this application on the material tendered and I have no option but to dismiss the same with costs.

28. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 19th January, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:-

Mr. Kairu holding brief for Mrs Ndeda for defendant/applicant

Ms. Alwala holding brief for Mr. Mwalo for plaintiffs/respondents

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU