



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

ELC CASE NO. 332 OF 2015 (O.S)

1. ALEX TONNY GITONGA NJERU

2. MARY GORETTI WANJA

3. GRACE HELLEN MUTHONI

4. JOHN NYAGA KIBOKO

5. ANGELO NJAGI BONIFACE

6. ANSELIMO KATHUNI NJERU

7. CHARLES NJUE NJERU

8. SAMUEL MUNENE NJERU

9. ROSE EVERLYN NJOKI

10. ANN WAWIRA

11. BETTY NJAGI

12. LAWRENCE MUNYI

13. BONIFACACE NJERU

14. PHILIP NJERU KARO

15. DENNIS MUGABI NJERU

16. ALFRED MURIITHI NJAGI

17. ANTONY NJAGI

18. MARGARET M. NJAGI

19. MARGARET WANYAGA

20. LUKA MUNYI NJAGI.....PLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF EMBU.....DEFENDANT

AND

1. NDWIGA WAINAINA

2. PETER WTHIGA

3. NJERU KARIUKI

4. ANSTACIA MUNYI (Suing as the representative of TARACISIO KAMANJA)

5. TARACISIO MWANGI

6. FERDINARD NYAGA

7. THOMAS NJERU

8. FELISTA IKAMBA (Suing as the representative of SILVERIA NYAGA)

9. JOHN NYAGA

10. MBUGUA CHARAGU

11. NJUE CHARAGU

12. FEDINARD NJIRU

WAINAINA.....PROPOSED INTERESTED PARTIES/APPLICANTS

RULING

On 8th October 2015, the plaintiffs moved this Court vide their Originating Summons brought under **Order 37 Rule 6 of the Civil Procedure Rules** seeking the Court to determine the following questions:-

- 1. Whether the defendant is registered as trustee of land parcel No. GATURI/NEMBURE/3072 in trust for the Muthige Clan.***
- 2. Whether there is any ground upon why the trust ought not to be determined and terminated.***
- 3. Whether the defendant should transfer land parcel No. GATURI/NEMBURE/3072 to the plaintiffs for themselves and on behalf of the member of Muthige Clan.***
- 4. Who should pay costs of these proceedings.***

The Originating Summons was based on the grounds set out therein and supported by affidavit of **ALEX TONNY GITONGA** the 1st plaintiff herein sworn on behalf of the nineteen (19) other plaintiffs. From the affidavit, it is clear that the plaintiffs' case is premised on the pleading that all the plaintiffs are members of the Muthiga Clan who own parcel of land No. GATURI/NEMBURE/3072 (suit land) which is registered in the defendant's names to hold in trust for them. They therefore seek a determination of that trust and that the said suit land is transferred to them. Annexed to that affidavit is a copy of the certificate of search in respect of the suit land showing that it is registered in the names of the defendant.

Simultaneously with the filing of that Originating Summons, the plaintiffs filed a Notice of Motion under certificate of urgency seeking that prohibitory orders be issued restraining all dealings with the suit land pending the hearing and determination of that application and the suit.

That application came before the Deputy Registrar of this Court Mr. V.O. Nyakundi on 8th October 2015 who directed that it be served upon the defendants. That was done and on 16th October 2015 counsel for the plaintiffs and defendant appeared before Mr. Nyakundi and informed him that they had filed a consent which should be adopted as a judgment of the Court. The Deputy Registrar thereupon gave orders accordingly. That consent is important for purposes of this ruling and I shall therefore quote it. It provides as follows:-

“CONSENT ORDER

Upon reading consent letter dated 16th October 2015 signed by both the plaintiff and defendant presented to this Honourable Court before Hon. V.O. NYAKUNDI, DEPUTY REGISTRAR

IT IS HEREBY ORDERED

- 1. That judgment be and is hereby entered for the plaintiff against the defendants in the following terms:-***
- 2. That the County Government of Embu is and hereby admits that it is registered as trustee of land parcel No. GATURI/NEMBURE/3072 in trust for Muthiga Clan and trust be determined by the respondent transferring land parcel No. GATURI/NEMBURE/3072 to ALEX TONNY GITONGA NJERU, MARY GORETTI WANJA, GRACE HELLEN MUTHONI, JOHN NYAGA KIBOKO, ANGELO NJAGI BONIFACE and ANSELIMO KATHUNI NJERU for themselves and on behalf of the other respondents and members of Muthiga Clan within the next 7 days.***
- 3. That the Executive officer of this Court is hereby authorized to sign all documents on behalf of the parties to facilitate the transfer of land parcel No. GATURI/NEMBURE/3072 to ALEX TONNY GITONGA NJERU, MARY GORRETI WANJA, GRACE HELLEN MUTHONI, JOHN NYAGA KIBOKO, ANJELO NJAGI BONIFACE and ANSELIMO KATHUNI NJERU for themselves and on behalf of the other respondents and members of Muthiga Clan within the next 7 days.***
- 4. That the Land Registrar Embu is hereby authorized to dispense with the production of the original title deed of the land parcel No. GATURI/NEMBURE/3072 during the registration process.***
- 5. That all encumbrances registered over land parcel No. GATURI/NEMBURE/3072 be and are hereby lifted.***
- 6. That costs of this suit be met by the respondent.***

GIVEN UNDER MY HAND AND THE SEAL OF THIS HONOURABLE COURT

THIS 16TH DAY OF OCTOBER 2015

V.O NYAKUNDI

DEPUTY REGISTRAR”

On 4th November 2015 the proposed interested parties herein moved this Court vide their Notice of Motion brought under **Sections 1A, 1B, 3B, and 63 (e) of the Civil Procedure Act, Order 1 Rule 10 (2) and Order 10 Rule II of the Civil Procedure Rules** seeking the following orders:-

1. *Spent.*
2. *That this Honourable Court be pleased to grant any order setting aside the consent order and judgment issued on 16th October 2015 by the Deputy Registrar V.O. Nyakundi.*
3. *That this Honourable Court be pleased to grant an order allowing the twelve interested parties to be enjoined in this suit.*
4. *That this Honourable Court be pleased to issue an order striking out the Originating Summons and the consent order for being res-judicata.*
5. *That costs of this application be borne by the plaintiffs and defendants jointly.*

That application which is the subject of this ruling is premised on the grounds set out therein and supported by the affidavit of **NDWIGA WAINAINA** the 1st proposed interested party herein sworn on behalf of the other eleven (11) proposed interested parties and their case is that they are in fact the rightful owners of the suit land held in trust for them by the defendant herein. That this suit has been the subject of other cases being:-

a. NAIROBI H.C.C.C No. 1369 of 1970

b. PROVINCIAL LAND DISPUTES TRIBUNAL CASE No. NYERI 201 of 2000 where it was ruled that the suit land be transferred to the interested parties which judgment was adopted by the HIGH COURT NYERI.

c. EMBU HIGH COURT C.C. No. 14 of 2014 seeking to set aside the judgment of the HIGH COURT NYERI which application was dismissed.

d. NYERI E.L.C. CASE No. 201 of 2001 where it was ordered that the defendant transfer the suit land to the Wainaina family who are the interested parties herein.

That application was opposed in a replying affidavit sworn by **RAYMOND NJAGI KINYUA** the County Secretary of the defendant in which he deponed, inter alia, that the proposed interested parties have not proved to be the rightful owners of the suit land which has been awarded to one **KARUKINYA KARIUKI** (deceased) the grandfather of the plaintiffs by the **NEMBURE AFRICAN COURT CIVIL CASE No. 241/43**, that this suit is not res-judicata, that the consent judgment did not transfer property rights but only dissolved the trust and the application therefore lack merit.

The applicant's counsel Mr. Mbugua holding brief for Ms Wangari appeared before the Deputy Registrar Mr. V.O. Nyakundi on 5th November 2015 who, upon hearing the application ex-parte gave the following orders:-

1. *A stay of execution of the judgment dated 16.10.2015.*
2. *The interested parties were allowed to be enjoined in these proceedings.*

When counsel for the parties herein appeared before me on 9th December 2015 when I started visiting Embu to hear land cases, it was agreed that the said application be canvassed by way of written submissions. However, only counsel for the plaintiff and the proposed interested parties have filed their submissions as directed.

I have considered the application, the rival affidavit and submissions by counsel.

There are five remedies sought by the proposed interested parties herein in their Notice of Motion which is the subject of this ruling and as indicated above, these are:-

1. *Spent.*
2. *The setting aside of the consent judgment dated 16th October 2015.*

3. *An order that the proposed interested parties be enjoined in this suit.*
4. *That this Court do strike out the Originating Summons for being res-judicata.*
5. *The costs of this application be borne by the plaintiffs and defendants jointly.*

I shall start with prayer No. 3 seeking the enjoining of the proposed interested parties herein. That order has already been granted by the Deputy Registrar in his orders dated 5th November 2015. All I can say is that the special powers granted by **Order 49 Rule 7 of the Civil Procedure Rules** to the Deputy Registrar includes the power to join a party to proceedings under **Order 1 Rule 10 of the Civil Procedure Rules**.

With regard to the order to set aside the consent judgment dated 16th October 2015, Ms Thungu counsel for the plaintiffs has submitted that there is no fraud or mistake demonstrated to justify the setting aside of that judgment. Ms Wangari counsel for the interested parties has submitted that this suit is infact res-judicata and therefore there was no basis upon which that consent judgment could be entered.

Again it is not in doubt that among the powers donated to the Deputy Registrar vide **Order 49 of the Civil Procedure Rules** is the jurisdiction to enter consent judgments. **Order 49 Rule 3** of the said Rules states:-

“Any order may, by consent of the parties evidenced in writing, be entered by the registrar, or, in a subordinate Court, by an executive officer so authorized in writing by the Chief Justice”

Section 2 of the Civil Procedure Rules defines a Registrar to ***“include district registrar and a deputy registrar”***. Mr. V.O. Nyakundi as a deputy registrar therefore had the requisite jurisdiction to adopt as a judgment of the Court the consent judgment addressed to him by the counsel for the plaintiff and defendant in writing. He cannot be faulted on that. Indeed if he had failed to comply with that request, that would have amounted to a dereliction of his official duties.

What this Court is called upon to do is set aside that consent judgment and the reasons given by the interested parties is that this suit is infact res-judicata. Whether or not this suit is res-judicata could only be brought to the attention of the Deputy Registrar by the parties themselves. The interested parties had not been enjoined to the suit when that consent was signed and so the Deputy Registrar could not have been in a position to interrogate that issue before exercising his jurisdiction in the way that he did. Only now have those issues been raised.

In **BROOKE BOND LIEBIG LIMITED VS MALLYA 1975 E.A 266 LAW J.A** stated as follows:-

“The circumstances in which a consent judgment may be interfered with were considered by the Court in HIRANI VS KASSAM 1952 19 E.A.C.A 131 where the following passage from SETON ON JUDGMENTS AND ORDERS 7TH EDITION VOL. 1 PAGE 124 was approved

“Prima facie, any order made in the presence 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 public 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”

In the **BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND VS MICHAEL MWALOI C.A CIVIL APPEAL NO. 293 of 2014**, the Court of Appeal cited with approval the following decision from the Ugandan Court of Appeal in **MAKULA INTERNATIONAL LTD VS HIS EMINENCE CARDINAL NSUBUGA & ANOTHER (1982) H.C.B II:-**

“.... a Court of law cannot sanction what is illegal and illegality once brought to the attention of the Court overrides all questions of pleadings including admissions made thereunder.” emphasis added

It is therefore clear that when it can be shown that a consent judgment was obtained through fraud, collusion or by an agreement contrary to public policy or without sufficient material facts or in ignorance of such facts, it may be set aside. Further, where the consent is illegal, it will not get approval by the Court.

In the course of hearing this application, the Court has gained sight of the certificate of search in respect of the suit land which is the plaintiffs' annexure **ATGN 1**. It shows that the cautions were placed on the suit land as follows:-

1. **On 3.7.2000 Caution placed vide Civil Case No. 1369 of 1970 Nairobi**
2. **On 31.8.2000 Caution placed in favour of Victor Aloys Njagi of P.O. Box 1772 EMBU claiming as licensee.**

The effect of the consent judgment dated 16th October 2015 was to lift those cautions without giving the parties who lodged them an opportunity to be heard. That would be contrary to **Section 73 of the Land Registration Act** and also an affront to the Rules of Natural Justice.

Although this Court has been addressed on the issue of res-judicata, all that the interested parties did was avail the judgment in those other previous cases. To enable the Court make an informed decision on res-judicata, the pleadings would be useful. I am afraid not much was placed before this Court to help it determine whether in fact this suit is res-judicata and that decision must be left for another forum.

What is instructive however, is that in filing this Originating Summons, the plaintiffs did not disclose that there have been other suits involving the same suit land. As indicated above, the interested parties simply referred to those other suits without availing the full pleadings to indicate who were the parties in the previous suits. What is clear from the plaintiffs' own annexure **ATGN 1** is that this suit land has been the subject of NAIROBI H.C.C.C No. 1369 of 1970 and a caution has been placed on the land following that suit. Surely, this must be a matter that is within the knowledge of the plaintiffs or, could, with due diligence, be ascertained from those pleadings. It is also instructive to note that even in the replying affidavit of the defendant's County secretary, Mr. **RAYMOND NJAGI KINYUA**, there is no mention of **NYERI H.C.C.C No. 201 of 2000** in which the interested parties obtained an order directing the defendants to give vacant possession of the suit land to the interested parties herein – see **NDWIGA WAINAINA's** annexure **NW 6**. The defendant cannot claim ignorance of the orders issued in **NYERI H.C.C.C No. 201 of 2000** to which they were parties. In the face of that very clear order, it is difficult to understand how the defendant could now turn around and consent to a judgment giving the same land to another party. That action can only be evidence of collusion between the plaintiffs and the defendant bearing in mind that the defendant was well aware that another party was claiming the same suit land and that in fact there was a Court order directing the defendants to give the interested parties that land. That consent judgment was therefore void ab initio and should be discharged - **FLORA WASIKE DESTIMO WAMBOKO (1988) K.L.R 429**. Prayer No. 2 must therefore be allowed.

Prayer No. 4 seeks the striking out of the plaintiffs' Originating Summons. Striking out a pleading is a draconian remedy to be only in the clearest of cases. In **D.T. DOBIE & COMPANY LTD VS MUCHINA 1982 K.L.R 1**, the late **MADAN J.A** (as he then was) stated as follows:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with matters without discovery, without oral evidence tested by cross-examination in the ordinary way” - emphasis added

In the same case of **D.T DOBIE VS MUCHINA** (supra), the Court went on to state as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and

obviously disclose no cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without full facts of the case before it” - emphasis added

Looking at the Originating Summons and the submissions by the interested parties herein, the main complaint is that this suit is res-judicata. However, as I have already observed above, it is clear that the suit land has been the subject of other litigation. This Court cannot, in the absence of the full benefit of those previous pleadings, be in a position to make any useful determination of res-judicata. The doctrine of res-judicata involves many components and an order from a previous suit may not in itself satisfy a Court that the issues are res-judicata. Each case must however be decided on its own particular circumstances. While there is evidence that the defendant and interested parties have litigated over the same suit land, the evidence that the plaintiff has also been a litigant in those previous suits appears rather scanty. So on the issue of res-judicata, I do not see how the plaintiffs’ case can be a clear and obvious case for striking out. Nor has it been suggested that the plaintiffs’ Originating Summons disclose no reasonable cause of action or is frivolous and otherwise an abuse of the process of the Court. I am therefore not satisfied that I should exercise the discretion to strike out this suit.

Ultimately therefore, and upon considering all the matters herein, this Court makes the following orders with respect to the interested parties Notice of Motion dated 4th November 2015:-

- 1. The consent judgment dated 16th October 2015 is set aside.***
- 2. The interested parties are enjoined in this suit.***
- 3. The prayer to strike out the Originating Summons for being res-judicata is disallowed.***
- 4. As this application was precipitated by the plaintiffs and the defendant’s collusion in recording the consent judgment which has now been set aside, they will jointly and severally bear the interested parties costs thereof.***

It is so ordered.

B.N. OLAO

JUDGE

9TH JUNE, 2016

Ruling delivered, signed and dated in open Court this 9th day of June 2016.

Mr. Muyodi for Ms Wangari for the Interested parties present

Ms Thungu for the Plaintiffs absent

Mr. Ndegwa for the Defendant absent.

B.N. OLAO

JUDGE

9TH JUNE, 2016