



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC PETITION CASE NO. 46 OF 2019

LALO LUGWE LALO AND 227 OTHERS.....PETITIONERS

VERSUS

1. FARIDA KARONEY OGW

2. DICKSON SAFARI

3. CABINET SECRETARY, MINISTIRY OF LANDS & PHYSICAL PLANNING

4. LAND REGISTRAR KWALE

5. ADJUDICATION & SETTLEMENT OFFICER, KINANGO

6. DIRECTOR OF LAND ADJUDICATION 7 SETTLEMENT

7. CHIEF LAND REGISTRAR

8. ETHICS & ANTICORRUPTION COMMISSION.....RESPONDENTS

NDEGWA NGUNDI CHIMUMU AND 1,183 OTHERS.....INTERESTED PARTIES/APPLICANTS

RULING

The application is dated 16th September 2021 and is brought under the Constitution of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 Rule, 3, 4, 7, 19, 23, 25 29 seeking the following orders;

1. That this application be certified as urgent in the first instance and service thereof be dispensed with and it be heard ex parte;
2. That upon hearing of the application ex parte the Honourable Court be pleased to issue a conservatory Order and stay of execution, implementation and/or enforcement and/or further execution of the Consent Order given on 21st July 2021 and issued on 23rd July 2021 herein pending the hearing of this application inter partes on a date to be ordered by the Court;
3. That upon the hearing of this application inter partes the Honourable Court be pleased to Order the discharge, quashing and setting aside and/or of vacation of the Order given on 21st July 2021 and issued on 23rd July 2021 herein.
4. That any other Order that the Honourable Court may deem just and fit to make be granted.
5. That the costs of this application be provided for.

It is based on the grounds that the order given on 21st July 2021 and issued on 23rd July 2021 was in excess of jurisdiction. Some of the Petitioners for example Lalo Lugwe Lalo Petitioner No. 1 had died on 15th May 2020 and therefore could not have given instructions to execute the Consent on 21st July 2021. The Consent executed on 21st July 2021 excluded the 8th Respondent who was a party to the Petition and the Interested Parties named in the Petition. The Consent dated 21st July 2021 and the Order issued on 23rd July 2021 was without the leave of the Court and in violation of the Rules and consequently invalid and void. The Consent Order issued on 23rd July 2021 denied and deprived the Interested Parties an opportunity to be heard and have access to justice contrary to the protection and guarantees anchored in the Constitution. The Order issued on 23rd July 2021 is unlawful and unenforceable and does not disclose the Identity of the Deputy Registrar who executed it.

The 53rd Petitioner in this Petition submits that Ndegwa Ngundi Chimumu and 1,183 others are not parties in this Petition. They filed the application or Joinder in February 2020 but did not prosecute it. They are blaming Covid-19 for not prosecuting the application. The Courts have been working and that main suits and applications have been heard and determined by Courts in Kenya between March 2020 and September 2021. They were under no obligation to consult the intended Interested Parties as they were not parties and are still not parties. Article 159(2)(c) of the Constitution encourages and mandates alternative dispute resolution. The dispute we had with the 1st to 7th Respondents was negotiated between our Advocate and their Advocates which resulted into the consent letter. Any parties to any suit or Petition are free to negotiate their dispute and to resolve their disputes through appropriate consent letters. The 6th Respondent filed a Replying Affidavit on behalf of the 1st to 7th Respondents on 11th February 2021 agreeing that the process of adjudication went on smoothly the only problem being that when the Titles were printed there was an error in the dating and the Titles were therefore recalled to correct that error. That Affidavit resolved the entire dispute between the Petitioners and the 1st to 7th Respondents. The hearing of the Petition will not alter that position. The correction of the dates of the Titles does not violate the intended Applicants alleged rights. The consent did not deny the Applicants access to justice. It did not stop them from filing their own suit or Petition.

The Assistant Director of Land Adjudication and Settlement stated that she is aware of the issues surrounding the adjudication process and later the parcels of land registered as Maji ya Chumvi Adjudication Section. That Maji ya Chumvi Adjudication Section was set aside for settlement of natives of the Maji ya Chumvi area who claim native customary interest in the suit parcel, and the suit parcel is trust land held in trust for them. That the adjudication was conducted properly and in accordance with the Land Adjudication Act sec 23, 24 and 25. The affected public duly participated, several meetings with the area Chiefs conducted, officials from both County and National Government as well as area residents took part. Officers from the National and County Governments were consulted as well as the Community which was represented in the Committee of the Maji ya Chumvi Adjudication Section. That in accordance with section 5 of the Land Adjudication Act the Maji ya Chumvi Adjudication section was established vide the letter dated 24th September, 2014. The letter identifies for the boundary of the Maji ya Chumvi Adjudication section. (Attached and marked PI is a copy of the Letter dated 24th September, 2014). That after proper consultation involving other stakeholders in the Maji ya Chumvi Adjudication Section and thorough due diligence, the Sub-County Land Adjudication Officer for Kinango vide a letter dated 26th July, 2018 reported that the Land Adjudication Register for Maji ya Chumvi Adjudication Section was complete. (Attached and marked P-2 is a copy of the Notice of Completion of Register). That vide a letter dated 31st October, 2018 the Sub County Land Adjudication and Settlement Office of Kinango transmitted to the Director Land Adjudication and Settlement the Adjudication Register and all records for parcels that were not subjected to objections and the Section Area List of Maji ya Chumvi Adjudication Section. (Attached and marked P-3 is a copy of the Letter together with the Area List). That the intended interested parties/ applicants herein neither raised an objection to the adjudication nor registered any objection to the adjudication process. That the period prescribed by law for registering objection lapsed without the applicants raising any objection. That after the completion of the adjudication process, a Certificate of Finality was issued and a list of all land owners of the Maji ya Chumvi Adjudication Scheme compiled. That vide a letter dated 5th December, 2018, Senior Land Registration Officer of the National Titling Centre forwarded 293 title deeds of the Maji ya Chumvi Adjudication Section to the District Land Registrar, Kwale who collected them on 13th December, 2018. (Attached and marked P-4 is a copy of the letter from the National Titling Centre). That the intended interested parties/applicants herein were not parties to this suit and there is no order joining them to this suit as interested parties. They are therefore outsiders to this suit and have no legal standing to make the instant application. That vide a letter dated 21st July, 2021 duly signed by the advocates for the Petitioners and for the Attorney General, the parties agreed to settle the suit through a Consent and further extracted the decree on 23rd July, 2021. (Attached and marked P-5 is a copy of the resultant decree dated 21st July, 2021). That the application offends Section 1A of the Civil Procedure Act which provides that the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. That it is the duty of the court to ensure the realization of the overriding objective of expeditious justice, and this can be achieved through alternative dispute resolution mechanisms and through mechanisms like consent. That the applicants ignore the fact that the principal parties to the case have reached an agreement to solve the matter without going through a full trial and none was compelled or coerced to enter into the consent. That it is in the interest of justice that the consent entered into by the parties to this suit be upheld.

*This court has considered the application and submissions therein. The application is by intended interested parties is based on the grounds that the order given on 21st July 2021 and issued on 23rd July 2021 was in excess of jurisdiction. Some of the Petitioners for example Lalo Lugwe Lalo Petitioner No. 1 had died on 15th May 2020 and therefore could not have given instructions to execute the Consent on 21st July 2021. The Consent executed on 21st July 2021 excluded the 8th Respondent who was a party to the Petition and the Interested Parties named in the Petition. On the issue of setting aside consents courts have stated as follows; in *Flora N. Wasike vs Destimo Wamboko (1988) eKLR* this Court stated:*

*"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in *J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.*"*

*In *Purcell vs F C Trigell Ltd (1970) 2 All ER 671, Winn LJ said at 676;**

"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons.."

*In *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485, Harris, J correctly held, inter alia, that -**

"1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement."

In *Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR*, the Court of Appeal stated as follows:

“A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

In **Setton on Judgments and Orders (7th Edition), Vol.1 page 124** the author states that:

“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... it 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 general for a reason which would enable the court to set aside an agreement.”

In the Court of Appeal in the case of **Brooke Bond Liebig Ltd vs Mallya (1975) EA 266 at 269** the court stated that;

“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.”

In **Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd (1982) KLR 485, Harris J** correctly held inter alia, that;

1. *A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.*

2. *A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.*

In **Hirani vs Kassam (1952) 19 EACA 131** the Court of Appeal held;

*“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in **J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-***

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

From the court record, which the court has perused, a Consent dated 21st July 2021 was entered into by the petitioners on record then represented by Kinyua Muyaa Advocates and the respondents represented by Nguyo Wachira from the Attorney General's office and the same was adopted by the court and issued on 23rd July 2021 by the Deputy Registrar. At all material times the applicants/ intended Interested Parties were not and are still not parties to this suit. I find that the applicants have no locus to bring this application for setting aside a validly entered consent by the parties to this suit let alone submit on behalf of Petitioners who were represented by counsel. I find that this application is an abuse of the court process and is not merited and I dismiss it with costs.

The second application is dated 24th November 2021 for the intended 9th Respondent to be enjoined. It is based on the grounds that they are the owners of the suit property. The Petitioners submitted that there is no suit as it has been settled.

This court has considered the application and the submissions therein. This application cannot be granted as there is no suit in existence. The matter has already been settled by the parties and their remedy would be to file a fresh suit. This application is dismissed with costs to the Petitioners.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF JANUARY 2022.

N.A. MATHEKA

JUDGE