



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC CASE NO. 27 OF 2020**

**(CONSOLIDATED WITH ELC PETITION 6 OF 2020)**

**LAWRENCE MAINA MWANGI.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF NAKURU.....1<sup>ST</sup> DEFENDANT**

**NAKURU AUTOMOBILE HOUSE LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the application dated **16/08/2021** and filed on **23/08/2021** filed by the plaintiff in **ELC 27 of 2020**. It seeks the following orders:

**(1) ...spent**

**(2) That the Honorable court be pleased to review and set-aside the consent order of 28<sup>th</sup> of May 2020 consolidating Nakuru ELC Petition No. 6 of 2020 and Nakuru ELC No. 27 of 2020**

**(3) That costs of this application be provided for.**

2. The application is supported by the affidavit sworn on **16/08/2021** by the plaintiff/applicant. The grounds on the face of the application and the supporting affidavit are that the court adopted a consent on **28/05/2020** which consolidated **Nakuru ELC Petition No. 6 of 2020** and **Nakuru ELC No. 27 of 2020**; that at the time of recording the consent, there was another matter pending for judgement between the plaintiff and Nakuru Automobile House Limited which was **Nakuru ELC No. 204 of 2014**; that in that matter, Nakuru Automobile House Limited was seeking for the cancellation of the plaintiff's title deed on the basis of fraud; that in the judgement delivered on **15/01/2021** the suit was dismissed; that therefore any dispute between the plaintiff/applicant and Nakuru Automobile House Limited over the suit property is *res judicata* and that the two matters should be separated.

**3. Benjamin Njoroge Kiragu** filed a replying affidavit sworn on **17/09/2021** on behalf of the 1<sup>st</sup> Defendant. He deposed that he is the County Secretary and Head of Public Service of the County Government of Nakuru; that by consent of the parties, **ELC Petition No. 6 of 2020 and ELC Case No. 27 of 2020** were consolidated; that in both matters, land parcel No. **Nakuru Municipality Block 9/110** is the subject matter where both parties are claiming ownership; that he is advised by his advocates on record that where two or more matters are pending in court and they raise common questions of law or facts, they should be consolidated; that the court in its judgement in **Nakuru ELC 204 of 2014** indicated that the court did not resolve the question of who between the applicant and the 2<sup>nd</sup> Defendant is the valid registered owner of the suit property; that it would be fair that both matters be consolidated to settle all the questions over the ownership of Land parcel **Nakuru Municipality Block 9/110**.

**Submissions**

4. By the time of the preparation of this ruling, there were no submissions filed by any of the parties into the court record as ordered on **14<sup>th</sup> December 2021**.

**Analysis and Determination**

5. After considering the application, supporting affidavit and replying affidavit, the only issue for determination is whether the

plaintiff/applicant has met the requirements for setting aside a consent order.

6. The court in the case of ***Brooke Bond Liebig vs Mallya (1975) EA 266*** set out the principles of setting aside consent orders as follows:

***“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”***

7. This was reiterated in the case of ***Flora N. Wasike vs Destimo Wamboko [1988] eKLR*** where the court quoted ***Setton on Judgments and orders (7<sup>th</sup> edition) vol 1 page 124*** as follows:

***“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 general for a reason which would enable a court set aside an agreement.”***

8. From the above authorities, a consent order can only be set aside if it is demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or any reason that would enable the court to set it aside. The plaintiff/applicant has to therefore demonstrate whether there was fraud, misrepresentation or mistake that would lead to the setting aside of the consent order.

9. On **28/05/2020**, a consent order was entered by all the parties to have this matter consolidated with **ELC Petition No. 6 of 2020** and the present case be the lead file. From the court record, counsel for all the parties in the present matter and **ELC Petition No. 6 of 2020** were present in court as the consent was recorded.

10. The applicant in his application indicates that at the time they entered into the consent, there was pending in court for judgement **ELC case No. 204 of 2014** between **Nakuru Automobile House Ltd versus Lawrence Maina Mwangi & District Land Registrar Nakuru**. In that case, the plaintiff was seeking for a declaration that it is the legally registered owner of **LR No. Nakuru Municipality Block 9/110** among other orders. The court in its judgment dismissed the plaintiff’s suit and at **paragraph 36** of its judgement stated as follows:

***“I am alive to the fact that the outcome of this case does not resolve the question of who between the plaintiff and the 1<sup>st</sup> defendant is the valid registered owner of the suit property.”***

11. It is my view that though the issue of ownership of title to the suit land was thus not resolved, that non-resolution should not be the focus of the instant application. The principles upon which a consent order can be set aside are. As was admitted by the plaintiff, all the parties in the consolidated suits were aware as they were entering into the consent that **ELC Case No. 204 of 2014** was pending before the court for judgement and therefore the questions of fraud, misrepresentation or mistake does not arise. The application for setting aside the consent order of 28<sup>th</sup> May 2020 should fail principally for this reason.

12. It is also this court’s view that even if there was good ground for setting aside the consent order which is not the case now, there are also other public policy considerations that would influence the court’s exercise of discretion in the instant application. It is clear that the parties in **ELC 204 of 2014** were accorded a hearing and it appears that neither of them proved their case against each other to the required standard.

13. Now the same parties in that case have to each face the claim of the 1<sup>st</sup> respondent in the petition and the petition had been consolidated with this suit, the latter being the lead file.

14. At present, the dispute between the plaintiff in **ELC 27 of 2020** against the County Government of Nakuru has not been tried neither has the dispute between the 2<sup>nd</sup> defendant in **ELC 27 of 2020** and the County Government of Nakuru.

15. The County Government of Nakuru is a common party in both the Petition and **ELC 27 of 2020** but it was not party in **ELC 204 of 2014**.

16. It is noteworthy that there are new allegations brought about by the County Government of Nakuru in the petition to the effect that that the suit property had been planned and reserved for public use and was later irregularly re-planned for other purposes which issue was not determined in **ELCC No. 204 of 2014**. The essence of the consolidation was that all the claims of all the parties including the claim of public utility land were to be fully and finally adjudicated in the same consolidated suit and that each party would be able to answer the others’ claims. Since all the three parties who claim the suit land are in this consolidated matter and one of them was not party to previous litigation, this matter should proceed to hearing as consolidated so that the court can determine all the issues involved once and for all so that all the parties will become conclusively bound by the same judgement. The County Government’s dispute with the two civilian litigants who are parties in all the cases mentioned herein cannot be said to be *res judicata* as the applicant seems to imply since the County Government was not joined to the now concluded suit before it was heard. If there are any issues that may be *res judicata* by virtue of the judgement in **ELCC No. 204 of 2014**, then the court will be aware of them in the future proceedings in the consolidated suit and appropriate orders can be made then.

17. In conclusion therefore, it is my opinion that the applicant’s application dated **16/08/2021** lacks merit and it is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 28TH DAY OF FEBRUARY, 2022.**

**MWANGI NJORGE**

**JUDGE, ELC, NAKURU**