



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT SIAYA

ELC CASE NO.37 OF 2021 (O.S.)

SIPROSA ACHIENG ONDARI.....PLAINTIFF

VERSUS

JOSIAH OBUOGI OKUMU.....DEFENDANT

RULING

Defendant's case

1. Within the provisions of **Sections 1A, 1B, 3, 3A and 100** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules** the defendant filed a motion dated 11/03/2020 seeking the following main verbatim relief:

a). The Honourable Court be pleased to rectify and amend the order of this court dated 5/03/2020 by deleting paragraphs 2 and 3 thereon

2. The defendant's motion is supported by the affidavit of the defendant dated 11/03/2020 together with several annexures. The motion is mainly anchored on the grounds that;(i) The order does not reflect the status quo of the land that is the substratum of the suit (ii) That his brother one Peter Ouma Okumu misled the court on the status quo of the land and, (iii) Using the consent order, the plaintiff and her brother in law one Wilfred Ochieng Ombayo had breached peace.

Respondent's case

3. The respondent filed grounds of opposition. The grounds were mainly;(i) The motion is misconceived and bad in law (ii) The motion is defective *ab intio* and that it does not challenge the validity of the consent order.

The defendant's rebuttal

4. Vide a further affidavit dated 1/12/2021, the defendant contended that he never instructed his brother Peter Ouma Okumu or his advocate to record a consent and that the parties' advocates had colluded in recording the impugned consent order.

5. As directed by the court, the parties disposed of the motion by way of written submissions.

Defendant's submissions

6. The defendant filed written submissions dated 7/12/2021. He contended that the court did not take into consideration that he is the registered proprietor of the suit property and that the plaintiff had encroached on his parcel of land known as **SIAYA/GOT AGULU/100**.

7. It was the defendant's submission that upon purchase of **SIAYA/GOT AGULU/100**, his brother and his step mother had been residing on it. He contended that the impugned consent order had highly prejudiced him and it had made him a squatter in his own parcel of land.

Plaintiff's submissions

8. The plaintiff filed written submissions dated 10/01/2022. She submitted that the consent order was recorded in the presence of the defendant's then advocate one Mr. Odhiambo B.F. and that the that the motion was incurably defective because the court was moved pursuant to wrong provisions of law and that it had not met the ingredients of a *slip rule* as envisaged by **Section 99** of the **Civil Procedure Act**. It was her submission that the consent order was not entered by means of coercion, fraud or misrepresentation.

Analysis and determination

9. Having considered the motion, supporting affidavit, annexures, grounds of opposition and rival submissions, this court is of the considered view that the single issue falling for determination is whether the consent order issued on 5/03/2020 should be rectified by deleting orders 2 and 3 thereof.

I will proceed to analyze the legal and jurisprudential framework on the issue.

10. Within the provisions of **Section 100** of the **Civil Procedure Act**, the defendant has urged this court to amend the consent order issued by the court on 5/3/2020. The purpose of this section of law was elucidated in the case of **JOSEPH FRANCIS MAKOKHA v RAPHAEL SIMIYU WEKESA & another [2009] eKLR** where the court held thus;

“Section 100 of the Civil Procedure Act empowers the court to amend any pleading to rectify a minor defect or error in any proceeding in a suit for purposes of determining any question or issue raised there”

11. Within the provisions of **Section 99** of the **Civil Procedure Act**, this court has jurisdiction to rectify errors in its judgements or orders. The *slip rule* provides as follows;

“Clerical or arithmetical mistakes on judgments, decree or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or the application of any of the parties.”

12. At times judges and judicial officers inadvertently make typographical errors in their judgments or orders and the *slip rule* was intended to cure these accidental errors that did not reflect the actual decision of the judge.

13. The *slip rule* is similarly provided for within **Section 21 (4)** of the **Supreme Court Act**. In the case of **Fredrick Otieno Outa v Jared Oduyo Okello & 3 others [2017] eKLR** the Supreme Court of Kenya held as follows;

“By its nature, the Slip Rule permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the Court... The main purpose therefore, of Section 21(4) of the Supreme Court Act, is to steer a Judgment, decision, or Order of this Court, towards logical, or clerical, perfection”.

14. The consent order that the defendant wants this court to rectify was duly entered into by consent of the parties advocates in open court and from the evidence in the court record, there is no evidence that the defendant’s brother one Peter Ouma Okumu attended court on 10/2/2020. The defendant’s advocate was present in court and being satisfied that the terms of the consent were in accordance with instructions from his client, the defendant’s advocate proceeded to execute the consent order.

15. A rectification of the consent order as prayed for would substantially alter the substance of the order and modify the intention of the parties as at the time of executing the consent order and in my view would be tantamount to setting aside or reviewing the consent order and it is my finding that the motion is not merited.

16. It is trite law that costs follow the event and I award costs to the plaintiff and ultimately make the following disposal orders;

- a. **The Notice of Motion dated 11/03/2020 is hereby dismissed.**
- b. **Costs shall be borne by the defendant.**
- c. **Parties to comply with Order 11 of the Civil Procedure Rules within 14 days from today.**
- d. **The case to be mentioned for directions before the Deputy Registrar on 23/03/2022.**

Ruling delivered virtually.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF FEBRUARY, 2022

In the presence of:

Mr. Okello for the plaintiff

No appearance for the defendant

Court assistant: Sarah Ooro

HON. A. Y. KOROSS

JUDGE

24/2/2022