



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 22 OF 2010 (OS)**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**AND IN THE MATTER OF A CLAIM FOR ADVERSE POSSESISON PURSUANT TO SECTION 38 OF LIMITATIONS OF ACTIONS ACT**

BETWEEN

BONFACE OJANGO RHANGHO .....  
PLAITNIFF

VERSUS

JAMES OBUYA ONYANGO ..... 1<sup>ST</sup>  
DEFENDANT

MESHACK ODHIAMBO ONYANGO

(Sued as the legal administrators of

ONYANGO OGWA, DECEASED) ..... 2<sup>ND</sup>  
DEFENDANT

**RULING**

1. Through an agreement for sale dated 6<sup>th</sup> February 1972 made between the plaintiff on the one hand and one, Onyango Ogwa, deceased on the other hand, **Onyango Ogwa** (hereinafter referred to only as “**the deceased**”) sold to the plaintiff a portion measuring 3 ½ acres (hereinafter referred to as “**the suit property**”) of all that parcel of land known as **LR No. Central Kasipul/Kachieng/696** (hereinafter referred to as “**Plot No. 696**”). It was a term of the said agreement for sale that Plot No. 969 was to be surveyed and the suit property curved out therefrom. Pending the survey, the parties marked the boundary of the portion of Plot No. 696 that was sold by the deceased to the plaintiff with a hedge and the plaintiff was given possession thereof.

2. The agreement for sale between the parties was subject to the land control board consent pursuant to the provisions of the Land Control Act, Cap. 302 Laws of Kenya since Plot No. 696 was an agricultural land. The deceased died on a date which is not clear from the record before he obtained the necessary consents to sub-divide Plot No. 696 and transfer the suit property to the plaintiff. The plaintiff however remained in possession of the portion of Plot No.696 that was sold to him albeit without proper survey

having been done to ascertain the actual measurements thereof.

3. Following the death of the deceased, the defendants herein who are the sons of the deceased got registered as proprietors of Plot No. 696 on 14<sup>th</sup> September 1998. It is not clear whether the defendants got registered as proprietors of the suit property in their capacity as the legal representatives of the deceased or as purchasers of the same from the deceased. Whereas the plaintiff has contended that the defendants are the legal representatives of the deceased and are registered as proprietors of Plot No. 696 in that capacity, the defendants have contended that they purchased Plot No. 696 from the deceased.

4. The plaintiff brought this suit against the defendants by way of Originating Summons dated 18<sup>th</sup> January 2010 seeking the following reliefs:-

**(i) A declaration that the defendants right to recover a portion measuring 3.5acres (“the suit property”)of Plot No. 696 is barred under the Limitations of Actions Act, Chapter 22 Laws of Kenya and that the defendants title to the same has been extinguished on the grounds that the plaintiff has occupied and remained in possession of the suit property, peacefully, openly and continuously for a period exceeding 38 years.**

**(ii) An order that the plaintiff be registered as the proprietor of the suit property in place of the defendants.**

**(iii) A permanent injunction to restrain the defendants by themselves or through their agents, servants and/or employees from interfering with the plaintiff’s peaceful possession and occupation of the suit property in any manner whatsoever and/or howsoever.**

5. The Originating Summons was brought on the grounds that the deceased had sold to the plaintiff the suit property on 6<sup>th</sup> February 1972 and gave him vacant possession thereof. Although the deceased never obtained the requisite consents to enable him transfer the suit property to the plaintiff, the plaintiff remained in occupation of the same. The plaintiff contended that he had been in occupation of the suit property for a period in excess of 38 years and as such he had acquired title to the same by adverse possession. The plaintiff contended that his occupation of the suit property was open, continuous and without interruption. He contended that the defendant’s right to recover the suit property was extinguished by effluxion of time and that the suit property should be registered in his name.

6. The Originating Summons was opposed by the defendants through a replying affidavit sworn by the 1<sup>st</sup> defendant on 1<sup>st</sup> March 2010. The defendants contended that Plot No. 696 was registered in their joint names on 14<sup>th</sup> September 1998 after they purchased the same from their father, Onyango Ogwa Okelo (“the deceased”). They contended that they had no knowledge that the plaintiff had purchased a portion of Plot No. 696 measuring 3.5acres. The defendants contended that together with the deceased, they had exclusive possession of Plot No. 696 at all material times. The defendants denied that they are legal representatives of the estate of the deceased and contended that the plaintiff’s suit is incurably defective.

7. On 21<sup>st</sup> April 2010, the court gave direction that the Originating Summons shall be heard by way of viva voce evidence. The Originating Summons was thereafter listed for hearing on a number of occasions but for one reason or the other, the same was not heard. On 24<sup>th</sup> September 2012, the parties entered into a written consent on the following terms:-

(i) The plaintiff herein be and is hereby declared to be entitled to the portion currently occupied by him and measuring 3.5acres of LR No. Central Kasipul/Kachieng/696, (hereinafter referred to as the suit land) registered in the names of the defendants.

(ii) The defendants herein be and are hereby ordered to subdivide LR No.

Central Kasipul/Kachieng/696 and thereby transfer the portion measuring 3.5 acres to the plaintiff.

(iii) The defendants undertake to seek for and obtain the requisite land control board consent, to facilitate the sub-division and transfer of the suit parcel of land herein within 60 days from the date of adoption of the consent hereof.

(iv) In default of compliance with limb (iii) hereof, the deputy registrar of the honourable court, shall execute and/or sign all the relevant documents and/or instruments, to facilitate the sub-division of the suit land and transfer of one of the resultant portions in favour of the plaintiff.

(v) The plaintiff shall bear the surveyor's costs solely.

(vi) Upon the sub-division and transfer of the resultant portion of the suit land in favour of the plaintiff, in line with limbs (i) and (ii) hereof, the defendants be and are hereby restrained from interfering with the plaintiff's possession and/or occupation of the resultant portion.

(vii) Upon compliance with the terms hereof, the suit herein be and is hereby marked as settled.

(viii) Each party be and is hereby at liberty to apply.

(ix) Each party to bear own costs of the suit.

8. The said consent was entered as judgment of the court by the deputy registrar on 18<sup>th</sup> February 2013 and a decree was subsequently issued in terms thereof on 19<sup>th</sup> February 2013. The defendants did not comply with the terms of the decree. On 28<sup>th</sup> July 2014, the deputy registrar ordered on application by the plaintiff that the court shall execute the documents required to give effect to the decree aforesaid. It is not clear from the record as to the nature of the documents that were presented to the deputy registrar for execution pursuant to the order made on 28<sup>th</sup> July, 2014 aforesaid. The only document that I have seen in the court file is an application dated 7<sup>th</sup> August 2014 for consent of the land control board to sub-divide Plot No. 696 into two portions measuring 5.5 acres and 3.5 acres.

9. On 1<sup>st</sup> September 2014, the defendants filed an application by way of Notice of Motion dated 1<sup>st</sup> September 2014 under certificate of urgency seeking the variation and/or review of the consent judgment that was entered herein on 18<sup>th</sup> February 2013. The defendants sought the review of the said consent on the grounds that when they entered into the consent, they were of the mistaken belief that the portion of Plot No. 696 that was occupied by the plaintiff measured 3.5 acres. However, when a surveyor was engaged following the said consent to curve out the portion that was occupied by the plaintiff so that the plaintiff may be issued with a separate title in terms of the said consent, it was discovered that the portion of Plot No. 696 that is under the plaintiff's occupation measures 2.16 acres only and not 3.5 acres as earlier thought.

10. The defendants contended that Plot No. 696 is occupied by the plaintiff and the defendants and if the plaintiff was to be given a portion thereof measuring 3.5 acres, the plaintiff's parcel of land would encroach on the portions of Plot No. 696 that are occupied by the defendants. The defendants annexed to the affidavit of the 1<sup>st</sup> defendant sworn on 1<sup>st</sup> September 2014, a copy of a mutation that was prepared by J. R. R Aganyo & Associates that shows the layout of Plot No. 696 on the ground and the portions thereof which are occupied by the plaintiff and the defendants. It is indicated in the said mutation that the portion of Plot No. 696 that is occupied by the plaintiff measures 2.16 acres. The defendants have sought the variation of the said consent judgment so that the plaintiff becomes entitled to a portion of Plot No. 696 measuring 2.16 acres and not 3.5 acres.

11. The defendants' application was opposed by the plaintiff through grounds of opposition dated 16<sup>th</sup> September 2014. The plaintiff contended that the defendants have not established the conditions set out in Order 45 rule 1 of the Civil Procedure Rules for reviewing a decree and/or order. The plaintiff contended that there was no mistake or error as to measurement of the portion of Plot No. 696 that he was entitled to the same having been expressly set out in the Originating Summons. The plaintiff contended further that the defendants' application has been brought after unreasonable delay and contrary to the provisions of order 9 rule 9 of the Civil Procedure Rules.

12. On 16<sup>th</sup> October 2014, the parties agreed to argue the application by way of written submissions. Both parties filed their submissions and the same are on record. I have considered the defendants' application together with the affidavit in support thereof. I have also considered the grounds of opposition filed by the plaintiff in opposition to the same. Finally, I have considered the parties' respective submissions and the authorities cited in support thereof. The law on setting aside and/or review of consent judgments is well settled. As was held in the case of **Brooke-Bond Liebig (T) Ltd. –vs– Mallya [1975] E. A 266**, a consent judgment may only be set aside for fraud, collusion or any reason which would enable the court to set aside an agreement. Under the law of contract, an agreement can be set aside on account of fraud, misrepresentation, mistake or frustration. The onus was upon the defendants to establish the existence of any of these grounds in relation to the consent judgment that was entered herein on 18<sup>th</sup> February 2013. The only ground that has been put forward by the defendants as a basis for the present application is mistake. The defendants have contended that they had agreed to transfer to the plaintiff a portion of Plot No. 696 measuring 3.5acres on the mistaken belief that the portion of Plot No. 696 that is occupied by the plaintiff measures 3.5acres. What I need to determine is whether the defendants entered into the consent dated 2<sup>nd</sup> August 2012 which gave rise to the decree of 18<sup>th</sup> February 2013 which is sought to be varied by mistake.

13. I had at the beginning of this ruling set out the facts that gave rise to this suit. The plaintiff contended that the deceased (father of the defendants) had sold to him a portion measuring 3.5acres of plot No. 696. The plaintiff contended that he took possession of the said portion of Plot No. 696 and occupied the same although the same was never transferred to him by the deceased. The plaintiff contended that by the time of filing this suit, he had occupied the said portion of Plot No. 696 for uninterrupted period exceeding 38 years. In the Originating Summons, the plaintiff expressly sought a declaration that the defendants' right to recover a portion measuring 3.5acres of Plot No. 696 is barred under the Limitation of Actions Act and an order that the plaintiff be registered as the proprietor of the said portion of Plot No. 696 measuring 3.5acres.

14. It is clear from the foregoing that the defendants were well aware of the nature of the plaintiff's claim when they entered into the consent dated 2<sup>nd</sup> August 2012 with the plaintiff. In his replying affidavit in opposition to the Originating Summons, the 1<sup>st</sup> defendant stated that he was not aware that the deceased had sold to the plaintiff a portion of Plot No. 696 measuring 3.5acres. The 1<sup>st</sup> defendant also stated that the deceased, the 2<sup>nd</sup> defendant and him were all along in exclusive occupation of Plot No. 696. In view of these averments by the defendants, there was a dispute before the parties entered into the subject consent whether the deceased had sold to the plaintiff a portion of Plot No. 696 measuring 3.5acres and whether the plaintiff was in occupation of the said portion of land.

15. In the consent letter dated 2<sup>nd</sup> August 2012, the defendants agreed that the plaintiff is in occupation of a portion of Plot No. 696 and that the said portion measures 3.5acres. The defendants agreed further that Plot No. 696 be sub-divided and a portion thereof measuring 3.5acres be transferred to the plaintiff. On the material before me, I am unable to agree with the defendants that they entered into this consent by mistake. They were well aware of the plaintiff's claim which they had denied in their replying affidavit. By accepting a claim that they had earlier denied, the defendants must be taken to have made a conscious decision. I am of the opinion that it is not the duty of the court to come to the aid a party who wishes to walk out of a bad bargain. The court will only intervene and provide relief where such bargain is procured as I have stated above through, fraud, misrepresentation, duress, undue influence or genuine mistake. The defendants have not stated as to what made them to believe that the portion of Plot No. 696 that is occupied by the plaintiff measures 3.5acres and not more or less. The defendants have also not

explained why they did not find it necessary to carry out a survey of Plot No. 696 to ascertain the measurement of the portion thereof which is occupied by the plaintiff before committing themselves to a consent judgment. The situation in which the defendants have found themselves in my view is not as a result of a mistake but failure to consider all pertinent issues raised in the suit before consenting to judgment. The court cannot give relief in this kind of scenario otherwise all consent judgments and orders will be opened for re-consideration as a matter of course.

16. Due to the foregoing, I am not persuaded that the defendants entered into the consent dated 2<sup>nd</sup> August 2012 by mistake. There is no basis therefore for reviewing the consent judgment that was entered herein on 18<sup>th</sup> February 2013 pursuant thereto. I would wish to add that even if the defendants had established good grounds for review of the said judgment, I would still not have allowed the application on the ground that the same was brought after inordinate delay which has not been explained. The consent letter dated 2<sup>nd</sup> August 2012 that was signed by the advocates for the parties was filed in court on 24<sup>th</sup> September 2012. Judgment was entered in terms thereof by the deputy registrar on 18<sup>th</sup> February 2013. The present application was not filed until 1<sup>st</sup> September 2014. The defendants have not explained why it took them over 1½ years from the time the consent judgment was entered to apply for the review of the same. Order 45 rule 1 (1) provides that an application for review must be made without unreasonable delay. I find a delay of 1½ years unreasonable more particularly when no explanation or justification for the same has been put forward. The delay should therefore disentitle the defendants to the review sought.

17. The upshot of the foregoing is that the defendants' application dated 1<sup>st</sup> September 2014 has no merit. The same is accordingly dismissed with costs to the plaintiff.

**Delivered, Signed and Dated at Kisii this 17<sup>th</sup> day of April, 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Omwenga for Oguttu            for the plaintiff

N/A                                        for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Mr. Mobisa                            Court Clerk

**S. OKONG'O**

**JUDGE**