



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL SUIT NO. 26 OF 2004

FREDRICK NAFTALI ONDIEKIPLAINTIFF

VERSUS

SOPHIE CAROLINE SAVAKODEFENDANT

R U L I N G

1. The applicant Sophie Caroline Savako filed a notice of motion dated 12th April, 2013 in which she sought the following orders;-

(1) That the consent order entered herein on 18/9/2007 be set aside and or reviewed and an order be given that each party to get his/her own surveyors to re-visit the disputed parcels of land in the presence of both parties and file a report thereof.

(2) That costs be provided for.

2. The applicant is the registered owner of L.R. No. Trans Nzoia/Sinyerere/716 which neighbours the applicant's parcel.

3. On 8/3/2004, the respondent filed a suit against the applicant in which he alleged that the applicant had trespassed on to his land by about 2 acres. The applicant filed defence and counter-claim in which she too alleged that the respondent had trespassed into her land by about 2 acres.

4. Both the applicant and the respondent contend that each obtained their respective titles fraudulently.

5. On 18/9/2007 the advocates for the applicant and respondent entered into a consent in which it was agreed that the District Surveyor Trans – Nzoia do visit the two parcels of and and determine the boundary between the two parcels and further determine which of the two parcels encroaches on the other and by what acreage.

6. The consent order was duly extracted and served upon the District Surveyor Trans-Nzoia

who visited the two parcels and filed a report dated 27/11/2007 in court. In the surveyor's report he found that the applicant had encroached on to the respondent's land by approximately 0.91 hectares which is about 2 acres.

7. The applicant now wants the consent set aside on the ground that she was not aware that the suit herein had been filed against her and that the advocate who was involved in the consent had no instructions from her

8. The applicant also contends that she was not aware that M/S Ngeywa & Co. Advocates were on record for her and that she was never informed about the terms of the consent. She further contends that messers Ngeywa & Co. Advocates had no instructions to act on her behalf.

9. The applicant further contends that she engaged a private surveyor to surveyed the two parcels and made findings which were contrary to those of the District Surveyor.

10. I have given due consideration to the applicant's application as well as the grounds of opposition by the respondent's advocate as well as their submissions. The grounds upon which a consent order can be set aside are clear. They are the same as ones which can overturn a contract.

11. The applicant herein has deponed in paragraph 2 of her supporting affidavit that she was not aware that a suit had been filed against her. This cannot be true. When summons to enter appearance were served upon her, she entered appearance through Messers J. M. Wafula & Co. Advocates who then filed defence and counter-claim. She cannot then claim that she was not aware of any suit filed against her unless she wants the court to believe that the defence and counter-claim were filed without her instructions and or knowledge.

12. The applicant has had to change lawyers seven times in the course of the proceedings. Though it is her constitutional right to change lawyers, she cannot be heard to say that this was without her knowledge. Her present lawyer has been in and out of the case three times.

13. Messers Katama Ngeywa & CO. Advocates took over the conduct of this case from Messers J. M. Wafula & Co. Advocates on 9/5/2006. It is Mr Ngeywa of the said firm who entered into a consent with the respondent's lawyer.

14. Mr Ngeywa had instructions to act on behalf of the applicant and he acted in the best interest of the applicant. There is no way the dispute herein would have been resolved without a surveyor being sent to the ground to ascertain the position. The mere fact that the applicant took a private surveyor to the ground who found otherwise is no ground for setting aside the consent entered herein.

15. The applicant is not alleging any impropriety on the part of the District Surveyor. She is also not attributing any bad motive on the part of Mr Ngeywa. She is merely saying that Mr Ngeywa had no instructions to act for her. It is clear from the supporting affidavit that she is merely seeking to set aside the consent because the survey by the District Surveyor did not favour her. She is seeking to set aside the consent almost seven years after the same was entered. She has had a number of Advocates after that. The court cannot take seriously her averments in the supporting affidavit that all this time she was not aware that a suit had been filed against her and that her own lawyers had no instructions to act for her.

16. This suit was filed 10 years ago. It should have been concluded by now. There are no grounds at all shown why the consent should be set aside. If the applicant feels that the District Surveyor did not do his job properly, she is at liberty to prove that during the hearing.

17. I find that the applicant's application has no merits. It is only meant to delay the finalisation of this case. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 19th day of March, 2014.

E. OBAGA,

JUDGE

In the presence of Mr J. M. Wafula for defendant/Applicant and Mr Kiarie for Mr Onyantha for Plaintiff/Respondent.

Court Clerk – Emily.

E. OBAGA,

JUDGE