REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.71 OF 2011

SAMUEL K. KANYORO (as Chairman).....1ST PLAINTIFF

FIELIX MALUKI (as Secretary.....2ND PLAINTIFF

(Suing on their behalf and on behalf of THE MILIMANI

RESIDENTS (NAKURU) WELFARE ASSOCIATION)

VERSUS

MT. KENYA UNIVERSITY COLLEGE.....1ST DEFENDANT

NAKURU MUNICIPAL COUNCIL.....2ND DEFENDANT

PHYSICAL PLANNING OFFICER, NAKURU DISTRICT.....3RD DEFENDANT

AND

STEP UP HOLDINGS (K) LTD .....INTERESTED PARTY

RULING

By a notice Of Motion dated 25th May 2012 and supported by an affidavit sworn by VICTOR GICHURU, the applicant prays that:-

(1) Victonnel Academy Ltd. be enjoined as an Interested Party.

(2) The consent judgment dated 16th December 2011 and filed in January 2012 be reviewed, varied and/or set aside.

(3) The consent orders issued on 18th January 2012, adopting and noting the consent dated 16th December 2011 be reviewed, varied and/or set aside.

(4) Upon the prayers sought being granted suit be had De Novo

The application is based on grounds that:-

- The Interested Party/Applicant is the registered proprietor of LR No. Nku /Municipality/ Block 11/138, LR No. Nku/ Municipality Block 11/140, Block 11/141 and Block 11/142. The Applicant as the registered proprietor is aggrieved by the adverse consent orders recorded by the respondents on 18th January 2012, relating to its properties and the same were done in total disregard of its rights to be heard.

- The Applicant believes there was a mistake and/or error apparent on the face of the record.

It is contended that the consent orders were obtained through collusion between the plaintiffs and the 1st and 2nd defendants, and were contrary to the Policy of the court, thus not binding on the Applicant.

Further, that the plaintiff's suit was fatally defective from the onset as in their plaint dated 31/03/2011, they purported to obtain injunctive orders against the 2nd defendant (a local authority) contrary to section **16** of the **Government Proceedings Act [Cap 40]**

Secondly, the suit was premature, and a non-starter under the Physical Planning Act, Cap 286, as the court lacked jurisdiction to deal with the change of user approvals granted to the applicant - the approval could only be challenged through the relevant Liason Committee.

The plaintiffs failed to sue the applicant as the legal proprietor, and the 1st defendant lacked the legal capacity to enter into any consents in the matter without the applicant's knowledge or any other party claiming in the applicant's name, more or less because the 1st defendant never sought any authority from the applicant. The applicant believes that the contentious orders were recorded based on deliberate misrepresentation/ misapprehension of material facts, material non-disclosure and concealment of pertinent facts without sufficient material being furnished to the court by the plaintiffs and the 1st defendant.

The orders are contested on grounds that they had the effect of invalidating the Change of User Approval dated 1st February 1996 in respect of LR No.11/138 and 11/141 which approvals had been obtained following due process subsequent to an application to the Nakuru Municipal Town Planning and Works Committee. Permission had been granted to develop the subject premises into an educational institution, especially because, the physical structure of the applicant's institution had been in use on LR 11/138 since the year 1996.

As a consequence of the consent orders, the Nakuru Municipal Council (2nd defendant) declined to renew the applicant's tenant's Public Health Licence under the pretext that that their hands were tied by the consent orders – this has affected both the applicant and its tenant as they cannot now utilise the premises.

The consent orders are described as having been entered into in a casual and pedestrian manner and the court needs to make a finding on the following:-

- Did the applicant adhere to due process in obtaining the Change of User approvals?

- Are the plaintiffs estopped from challenging the Change of User approvals granted to the applicant, when there are already infrastructural developments in existing use within the suit premises?

- Are the plaintiffs properly before this court, yet they failed to comply with the laid down Procedure of challenging the Change of user Approval.

- Whether the approved user of the suit premises infringes on the plaintiff's entitlement to a clean and healthy environment as set out under the Environment Management and Co-ordination Act especially with regard to noise and excessive vibration.

The applicant states it has spent a colossal sum developing the complex with several buildings and will suffer immensely if the orders sought are not granted.

The 1st defendant in opposing the application relies on the replying affidavit sworn by Samwel Kanyoru who is the Chairman of Milimani Residents Welfare Association, and a resident of Milimani. He deposes that the applicants had made an application to be enjoined as interested parties to the suit on grounds that the consent which the parties entered into on 17/01/2012 had conclusively resolved the dispute, and any interested party would have to file a separate cause against the 1st defendant. This in itself is said to render the present application an abuse of the court process. The 1st respondent denies that the consent orders were obtained through collusion, saying the 1st defendant was rightfully joined to the suit and had capacity to record a compromise, since its activities on the property were the subject of the cause of action by the plaintiffs, and the applicant lacked locus for the orders sought. Further that the applicant has not proved any material non-disclosure on the 1st respondent's part, and even if that was proved, the solution lies in filing a separate cause.

While acknowledging that change of user had been granted to the applicant, it is contended that, the plaintiff's cause of action arose from the action of the 1st defendant to establish its campus on the property without consultation and/or participation of the public and without getting an approved Change of User from the 2nd defendant. The 1st defendants had received a letter from the National Environment Management Authority (NEMA) which acknowledged the Environment Impact Assessment report and clearly barred the 1st defendant from taking off with developments and/or changes until it approved the same.

Further that the consent judgment was binding on all parties, including any interested parties, and the irreparable damage and loss alluded to cannot be substantial as the laid down Procedure for change from a low density residential area, to a commercial use was not fulfilled, thus the change was *void ab initio.*

The applicants are described as strangers in this matter, who are not entitled to the orders they seek; which fact was confirmed by the court in its ruling dismissing their application. Respondents also maintain that the applicant has not demonstrated that the intended lease which was to run from January 2011 to 31st March 2021 has been terminated and/or vacated. It is further contended that the fact that the lease resulting in the establishment of the 1st defendant institution within Milimani Estate in substance gave the 1st defendant locus to enter occupation and/or use the subject parcel and to enter into the compromise on the basis that he was in occupation and/or use of the suit parcels, and a party to the suit.

As regards the arguments that the change of user could only be challenged by way of an appeal to the National Liason Committee, the respondents state that this does not fetter the High Court's unlimited jurisdiction in civil matters.

The matter was disposed of by way of written submissions where counsel argues that the consent orders were obtained through collusion between the plaintiff, 1st and 2nd defendants, and were contrary to public Policy as the orders of injunction ran courtier to the provisions of the Government Proceedings Act. Reference is made to the case of **Kutuma Investments Ltd. V Muthoni Kihara and & another [2005] eKLR.**

(2) The second issue addressed is that the suit was premature as the court lacked the jurisdiction to deal with Change of User Approvals granted to the Applicant as this lies in the docket of the Liason Committee. The respondents had not exhausted the available dispute resolution mechanisms before filing suit.

(3) The 1st defendant's lack of capacity is challenged on grounds that at the time of entering the consent, it was no longer in occupation of the suit properties nor was it claiming under the applicant's name. Counsel supports this argument by relying in the case of **Flora Wasike V Destimo Wamboko (1988) 1 KAR 625** where Hancox J.A stated at pg 26 that:-

"It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside…….”

The argument advanced is that there was deliberate misrepresentation or misapprehension of material facts and material non-disclosure of pertinent facts. Further that given the situation on the ground, the developments and infrastructure having been in existence since 1996, then the consent was guided by malice and bad faith, and in any event, the Attorney General was not a party in the matter.

The respondents in their written submissions which I shall consider simultaneously as they address similar concerns, is that the application is an abuse of court process because there already exists a court ruling which dated 25/01/2012 which address the very issue, and the only avenue open to the applicants is to appeal against that decision. The matter is said to be res judicata as the application has similar facts and prayers to the application dated 19th January 2012 which was heard and determined.

Relying on the case of **Flora Wasike V Destimo Wamboto** (infra) and the case of **Kenya Commercial Bank Ltd. V Benjoh Amalgamated Ltd. and Another C.A. No.276 of 1997**, respondents argue that the applicant has not met the threshold for setting aside a consent, as was set in the two decisions. Counsel submits that from the Affidavit sworn by Victor Gichuru on 25/05/2012, there is no factual foundation for the allegation of fraud. Respondents urge this court to take note that allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities - reference is made to the case of **Koinange and 13 others V Koinange (1986) KLR 23.**

The respondents point out that the suit forming the substratum of this application is related to the dispute regarding occupation of the suit property by the 1st defendant. The relevant parties in the suit consented to the issues therein and the applicant cannot purport that it had interest in the suit.

Further, that, the import of the judgment was to resolve the dispute relating to the occupation of the suit property by the 1st defendant, and this did not jeopardise the applicant's interest. It is also submitted that, the jurisprudence obtaining in Kenya is that, in an application for review of consent judgment, the factors to be considered are different from those to be considered in a general application for review of judgment or ruling.

The respondents draw from the Court of Appeal decision in **Benson Mbuchu Gichuki V Evans Kamande Munyua & 2 Others [2008] eKLR** which stated:-

> **“ ..... The appellant was required to demonstrate ..... that he had discovered a new and important matter which after exercise of due diligence was not within his knowledge or which he could not produce when he, together with the respondents drafted and signed a handwritten consent that they handed over to the learned Judge for endorsement, and to be made a judgment of the court or that there was a mistake or error on the face of the record ..... They apply in general in all cases where an applicant is seeking review of a decree or order. However, in cases where an applicant seeks review and setting aside of a judgment or ruling that was recorded by the parties, the law requires something more**.
>
> **.....The rules that are applicable in law for setting aside a contract are the same ones applicable in setting aside a consent judgment.....**

Counsel contends that there is no error apparent or mistake on the face of the record, and the claims based on this ground are described as unfounded.

As for the orders issued being in violation of the provisions of the Government Proceedings Act, counsel argues that in arguments runs counter the provisions of **Article 23 (3)** of the **Constitution of Kenya**, which grants the court power to issue appropriate relief, including orders of injunction. Further, that **Article 20 (3) (a)** of the **Constitution** enjoins the court to apply and develop the law by applying the Bill of Rights to the extent that it does not give effect to a right or a fundamental freedom. The court is urged

to apply the provisions of **section 7(1)** of the **Sixth Schedule** to the **Constitution** which provides that:-

> **"All law in force immediately before the effective date continues in force shall be construed with the alterations, adaptions, qualifications and exceptions necessary to bring into conformity with this Constitution."**

The reason for referring to this provision is that the jurisprudence which does not ride with the transformative nature of the 2010 Constitution is inapplicable, under the new dispensation. In so far as it seeks to curtail access to justice, which is achieved by according the power to make appropriate orders.

In any event counsel draws from a conservative school which holds the view that injunctive reliefs can be granted against the Government. This is fortified by the view expressed by Ojwang J (as he then was) that, an injunction could be issued against the court in the case of **Kalyashi Farmers Co-operative Society & 6 Others V County Council of Narok** [2005]eKLR, where injunctive orders were issued against a County Council.

The issues for determination are:-

a) Is the application Res Judicata?

b) Can the applicants be enjoined as a party?

c) Has the applicant met the threshold for setting aside consent orders?

Application Res Judicata

The application dated 19th January 2012 was filed by the applicant, who contended that it was the registered proprietor of the land parcels already cited in this application. It had entered into a lease agreement for Purposes of running an educational institution, after acquiring change of user. It learnt about the now impugned consent and sought to be enjoined as an interested party saying its interest in the property was likely to be put in jeopardy. The court heard the application, and in a ruling dated 25th January 2012, dismissed it.

The present application is on all fours with the one which was dismissed earlier. The doctrine of res-judicata serves to prohibit a party from re-opening a subject matter which has already been dealt with. This doctrine is embodied in section 7 of the Civil Procedure Act which provides:-

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties... litigating under the same title ..... in which such issue has been subsequently raised and has been heard and finally decided by such court."**

This is re-echoed in the case of **Uhuru Highway Development Ltd. V Central Bank of Kenya and 2 Others CA No.36 of 1996**. The court stated:-

> **..... There must be an end to applications of similar nature, that is to say further, wider principles of res-judicata apply to applications within the suit …."**

Undoubtedly, res judicata applies to applications as well as substantive suit.

My finding is that revisiting the same application on substantially and directly the same issues is an abuse of court process. If the applicant was dissatisfied with the court's ruling, the avenue open was to appeal against that decision.

This application is res judicata.

Can the applicant be enioined as a party?

Order 1 Rule 3 of the Civil Procedure Rules provides that:-

> **"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transactions or series of acts or transactions is alleged to exist ..... where if... separate suits were brought against such persons ....."**

Although the applicant has endeavoured to demonstrate its interest in this matter, the issue was addressed earlier in the application referred to and dismissed, the issue of joinder as a third party cannot therefore be considered at this stage and in any event, the suit has been concluded.

Threshold for setting aside consent Judgment

Both parties have referred to the principles governing setting aside of consent judgment as enunciated in various decided cases. Broadly the consideration is the same as grounds that would vitiate a contract i.e.

1) Misrepresentation

2) Fraud or collusion

3) Mistake

4) An agreement contrary to policy of the court

I have read through the affidavit in support of the application - the allegation of fraud or misrepresentation is not supported by any evidence. It is simply a lamentation by the applicant that there was collusion between the parties. There is no specification of the nature of fraud committed and by which specific party. Was the consent contrary to the Policy of the court because an order of injunction was entered against the local authority? Whereas this argument may hold water in light of past decisions and provisions of the Government Proceedings Act, that could only apply if an applicant was first admitted as a party to this suit – since this has , not happened, then it would be pointless entertaining the prayer.

The upshot is that the application fails and is dismissed. The cost of the application is awarded to the respondents.

Delivered and dated this 27th day of June 2014 at Nakuru.

H. A. OMONDI

JUDGE