



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL SUIT NO. 63 OF 2004

JOHN NDARA KONES.....PLAINTIFF

VERSUS

BEN NICODEMUS OMAMBIA MOGAKA..... DEFENDANT

RULING

The Applicants Agricultural Finance Corporation and Simplex Kenya Limited hereinafter referred to as the AFC and the Company respectively filed a Notice of Motion against Robinson Chesiro Ngeywa, Stanslous Mutai Kones and Ben Nicodemus Omambia Mogaka hereinafter referred to as the Respondents seeking orders that the orders of 1st March, 2013 issued pursuant to a consent recorded by the Respondents be varied or set aside. Before the AFC and the Company were joined as parties to this suit, the Respondents' Advocates had entered into a consent in which Robinson, Chesiro Ngeywa and Stanslous Mutai Kones' application dated 27/02/2013 against Ben Nicodemus Omambia Mogaka was allowed. The consent order restrained Ben Nicodemus Omambia Mogaka who was the Defendant from doing three things namely:

1. *Interfering with the peaceful possession and occupation by the Plaintiff of all that parcel of land known as Parcel No. Trans-Nzoia/Kipsoen/11 pending hearing and determination of the suit.*
2. *Removing the caution registered against Land Parcel No. Trans-Nzoia/KIipsoen/11 by the Plaintiff/or his legal representatives pending hearing and determination of the suit.*
3. *Alienating and or selling land Parcel No.. Trans-Nzoia/KIipsoen/11 pending hearing and determination of the suit.*

The AFC and the Company contend that as at the time Ben Nicodemus Omambia Mogaka entered into the consent, he had no interest in the suit land as the same had been sold by the AFC to the Company after Ben Mogaka failed to repay a loan which he had taken from the AFC. The AFC had exercised its statutory power of sale and sold the suit property to the Company. The AFC and the Company contend that Ben Mogaka knew that the property had been sold after he failed to repay the loan but went ahead to record a consent which has affected others who were not party to it. The AFC and the Company contend that the entry into the consent by Ben Mogaka was fraudulent and the same ought to be set aside.

Robinson Chesiro Ngeywa & Stanlous Mutai Kones who are the legal representatives of the estate of John Ndara Kones have opposed the application by the AFC and the Company arguing that the consent was entered into for the sole purpose of preserving the suit land until the hearing and determination of the same. They contend that the AFC was aware that there was a suit by them against Ben Mogaka regarding ownership of the suit land and that the application herein is only meant to defeat the interests of the Plaintiffs in the suit.

I have carefully considered the application herein as well as the opposition to the same by the

Plaintiff/Respondent. There is no contention that the orders being challenged herein were issued before the AFC and the Company became parties to this suit. The consent was recorded on 01/03/2013 and the order allowing the AFC and the Company was given on 25/04/2013. The suit property was charged to the AFC by Ben Mogaka who secured a loan of Kshs. 1,730,000/-. There is a notification of charge dated 09/03/1994 which was annexed to the application by the AFC and the Company. The loan was not repaid and the suit property was sold at a public auction to the AFC. The AFC Act allows it to bid during auctions involving property charged to it. The AFC then sold the land to the Company as per the Sale Agreement dated 24/01/2013. The charged property had been sold on 20/05/2008 as per the Certificate of Sale by Joyland Auctioneers. It is therefore clear that Ben Mogaka was aware that the property had been sold to AFC yet he purported to enter into a consent restraining him from dealing with the property in any manner or removing the caution lodged against the title or even selling the same. Ben Mogaka knew that his interest had been extinguished upon sale of the suit property for failure to repay the loan. His signing of the consent was therefore fraudulent and was only meant to frustrate the transfer of the suit land into the Company which had bought the same from the AFC.

The Company had taken possession of the land it bought from the AFC and went ahead to plough it ready to plant during the last planting season but it could not proceed because of the restraining orders which were in place over the suit land. The AFC and the Company have demonstrated that the consent was entered into by Ben Mogaka who had no interest in the suit land. He had no capacity to enter into the same, the suit land having changed hands after his failure to repay the loan he took from AFC. Ben Mogaka did not oppose this application as he neither filed any grounds of opposition nor Replying Affidavit to answer to the AFC and the Company's application. The contention by the Respondents that the AFC is trying to cover itself from liability for accepting an illegal charge has no basis. I find that there are sufficient grounds which have been shown to warrant the setting aside of the consent of 01/03/2013. Ben Mogaka clearly knew that he had no interest in the land, yet he purported to sign a consent restraining him from carrying on certain activities over land which he had no control over. These orders have gone to affect other parties who were not party to the consent. The orders were obtained by fraud. The same should not be allowed to stay. I allow the application with the result that the consent order of 01/03/2013 is hereby set aside. As the AFC and the Company are now parties to this suit following orders of 25/04/2013, they are entitled to be served with the application whose consent orders have been set aside. The Respondents shall pay costs of this application to the AFC and the Company.

It is so ordered.

Dated, signed and delivered in Open Court on this 19th day of August, 2013.

E. OBAGA

JUDGE

In the presence of Mr. Ndarwa for Mr. Kiaire for Applicant.

Court Clerk: Lobolia.

E. OBAGA

JUDGE

19/08/2013