REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 994 of 2012

JULIUS KIGEN KIBIEGO.....PLAINTIFF

VS

ANGELINE KORIR & ANOTHER.....DEFENDANT

(Application seeking to set aside a consent order – principles to be applied in application to set aside consent – applicants refuting that their counsel had instructions to act for them and to enter into consent – consent on application for injunction – consent binding plaintiff and a school not party to the proceedings – consent order binding a person not party to suit improper – consent order set aside)

R U L I N G

The application before me for determination is the application dated 16 January 2012 filed by the two defendants. It is a Motion brought under the provisions of Order 45 and 51 of the Civil Procedure Rules, and Sections 1A,1B, 3A and 80 of the Civil Procedure Act, CAP 21, Laws of Kenya. Principally, the application seeks an order to set aside a Consent Order entered on the 23rd June 2010. The application is opposed.

This is the background giving rise to the subject application.

The plaintiff instituted this suit by way of Plaint filed on 7th October 2008. In his pleadings, the plaintiff averred that he is the owner of a land identified as ELDORET 25/95/7 measuring 0.2 Hectares. It is his case that the defendants have encroached onto his land parcel. To put clear his case, I will set out paragraphs 6-12 of the Plaint which are drafted in the following terms:-

6. *The Plaintiff further contends that his allocated parcel of land borders with the Moiben Primary School compound.*

7. *It is the Plaintiff's contention that 1st and 2nd Defendants purport to be members of the neighbouring school committee and hence using their positions to encroach into the plaintiff's parcel of land and commence acts of waste in total disregard to the proprietary interests of the plaintiff.*

8. *The 2nd Defendant is the chairman of the Moiben Primary School and he's using his position to intimidate, harass and embarrass the plaintiff in the use of his lawfully acquired parcel of land and the 1st Defendant being a potential farmer and financier is being used to frustrate the plaintiff.*

9. *On or about February, 2008, the Defendants without any color of right forcefully entered, trespassed, encroached and/or interfered with the plaintiff's quiet possession of the aforesaid parcel of land contrary to the vesting proprietary rights of the plaintiff.*

10. *The Plaintiff further contends that the Defendants have wantonly laid fictitious claim of ownership and are using the land in planting perennial crops, grazing livestock contrary to the vesting rights of the plaintiff thus causing irreparable damage and/or loss to the plaintiff.*

11. *It's the plaintiff's contention that the purported interference and/or fictitious claim of ownership is illegal, null and void and actuated by malice.*

12. *The Plaintiff's claim against the defendant jointly and severally is for a permanent injunction restraining the defendants its agents, servants from interfering, trespassing, threatening, harassing, intimidating with the quiet possession of the foresaid parcel of land and/or to do any act that is inconsistent with the plaintiff's right as a proprietor of the land.*

It is discernable from the above pleadings that the plaintiff claims that the defendants are using their positions as members of the school committee of Moiben Primary School to encroach onto his parcel of land.

Appearance on behalf of the defendants was entered by the State Law Office on the 17 November 2008 and a Statement of Defence filed on 20 February 2009. On 2 March 2010, the plaintiff filed an application under certificate of urgency seeking an injunction to restrain the defendants from using the suit land pending the hearing and determination of this case. The defendants opposed this application through a Replying Affidavit sworn by the 2nd Defendant on his own behalf and also on behalf of the 1st Defendant. This affidavit was drawn by the Attorney General through the State Law Office as counsels for the defendants. I will set out a few paragraphs of their reply which I think are significant to this application.

1. *THAT I am the 2nd defendant/respondent in this matter and I have the authority of the 1st Defendant/respondent to depone on her behalf hence competent to swear this affidavit.*

2. *THAT I have read the application dated 2nd March, 2010 and sought advice from the State Counsel on record and wish to respond as hereunder.*

3. *THAT I am the Chairman of the School Management Committee of Moiben Upper primary School while the 1st Defendant/Respondent is a licensee of the School: currently cultivating part of the School land.*

4. *THAT it is within my knowledge that the School, being a public utility was established in 1950 by white settlers and moved to its present site in 1959 where it has been the last fifty (50) years.*

5. *THAT I am also aware that the School's occupation of the land it stands on has been uninterrupted for all the period it has existed.*

Several maps of the area and physical development plans were annexed to the affidavits in support and in reply. The same demonstrates a proposal to zone the town to take into account the different users. The plaintiff's land is said to be in Zone 6 which comprises of residential plots. Moiben Primary School is placed in Zone 22 which abuts Zone 6. The plaintiff's plot is alleged to be in Zone 6 which comprises several residential plots totaling 27 in number. I think it is part of the defendants' case that Zone 6 comprises partly or wholly of the school land.

The application for injunction was compromised by a consent recorded in court on 23/6/2010 which consent reads as follows.

" By Consent the plaintiff do occupy the parcel of land designated as 06 and the school do occupy that designated as 22 in accordance with the surveyor's report filed in court today. Each party be at liberty to apply."

It is this consent order that the defendants wish to set aside. It is founded on the following grounds :-

(I) The plaintiff sued the defendants claiming a parcel of land which he purportedly owns.

(II) The defendants were sued in their own capacity.

(III) The parcel of land in question belongs to Moiben Upper Primary School.

(IV) A suit against a school can only be institute the School Committee or against a Board of Governor's as the case may be. (sic)

(V) The 1st Defendatn is not and has never been an official of the school.

(VI) The 2nd defendant though one of the several officials of the school management committee was sued in his private capacity.

(VII) Notwithstanding the fact the defendants had been sued in their private capacities the Attorney General entered appearance for them and entered into a consent order giving out part of the school land.

(VIII) The consent was recorded without instruction from the defendants.

(IX) The defendants cannot also bind the school and give away its land.

(X) The consent order entered into on 23rd June 2010 is therefore irregular, void, and contravenes the provisions of the Education Act.

(XI) The consent order should therefore be set aside.

The application was canvassed before me on 5/12/2012. Mr. Omusundi, learned counsel for the defendants urged me to set aside the consent order. He stated that the consent was entered into without the approval of the defendants. He also contended that appearance by the Attorney General and the involvement of the State Law Office in this suit was without the consent of the defendants. He argued that the suit land belongs to Moiben Primary School and that the defendants do not have any personal interest in the suit land hence could not concede to the consent. He stated that the defendants have no capacity to give out public land and that the consent order is being used to irregularly access entry into the suit land.

On the other hand, Mr.Kamau, learned counsel for the plaintiff, argued that the applicants have not set out the grounds upon which a consent order may be set aside. He argued that the suit land was private land and not public land. He urged me to dismiss the application.

It is settled law that a consent can only be set aside on the same grounds that a contract may be set aside. In Hirani vs Kassam (1952) 19 EACA 131 the court stated as follows, at page 134:

"The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in ***Seton on Judgments and Orders (7th edn.)****, vol 1, p 124, as follows:*

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them … and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court …; or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

The counsel for the applicant herein has gone to great lengths to argue that the consent order was in effect giving away public land to the plaintiff. I do not think that is the effect of the consent. The consent only provided that the school do occupy plot No.22 and the plaintiff plot No.06. There was no giving away of land belonging to the public by way of this consent.

Counsel has also argued that the consent order was entered into by the Attorney General who acted without instructions to enter such consent by the defendants matter which I will turn to shortly.

There has been a deposition by the defendants disowning the appearance and defence filed by the Attorney General. From the record, the defendants have been cooperative with the office of the Attorney General. Through the office of the AG, they have filed numerous affidavits including an affidavit in opposition to the application for injunction dated 2nd March 2010. I cannot take seriously their assertion that the office of the Attorney General did not have their instructions to act for them in this matter. I think this position has been taken by the defendants so as to buttress their argument that the AG did not have instructions to enter into the consent judgment being sought to be set aside.

As to whether the AG had instructions to record the said consent, no material has been placed before me to suggest that the AG acted without sufficient instructions from the defendants. There is absolutely nothing to indicate that the AG did not have such instructions save for the bare assertion that the AG did not have the instructions of the defendants to record the consent. It is generally assumed that counsel as agent acts on the instructions of his principal and unless there is evidence that the agent acted without instructions of his principal, a mere assertion that the agent acted without instructions cannot be taken seriously.

That said, I do think that the defendants through the AG did not have capacity to record the subject consent. In my view, the suit herein is against the defendants in their private capacity. I set out what I thought is the plaintiff's cause of action early in this ruling. I do not see anywhere in the Plaint where the defendants have been sued in their capacities as representatives of Moiben Primary School. The main prayer in the suit, the permanent injunction, is sought to restrain the defendants themselves from interfering with the suit land. It is not sought to restrain Moiben Primary School. Indeed, the plaintiff from his pleadings has only insinuated that the defendants have used their positions in Moiben primary School to trespass into the suit land. The defendants have been sued in their private capacity. The School is not a party to these proceedings.

However, the consent as signed was to the effect that the plaintiff should occupy the suit land and the School plot No.22. It is therefore a consent between the school and the plaintiff and not the plaintiff and defendants. This is the quarrel I have with the consent, for in my view, it was improper for counsel for both plaintiff and defendants to bind the school vide this consent. The much that counsels for the parties could have done was to record a consent that only binds the two parties to the proceedings. They did not have capacity to enter into a consent that affects a third party. Just as in a contract, the parties to a contract can only agree on rights and duties amongst themselves. Parties to a contract cannot rope in a third party without his consent as this will go against the doctrine of privity of contract. An agreement attempting to bind a third party is one that cannot be binding on the third party without his consent. It is for this reason that I take the position that the subject consent was irregular. The parties herein could not enter into a consent directing the school on what to do. The consent, in so far as it went to bind the School (presumably Moiben Primary School) to occupy a certain piece of land was to that extent irregular.

I must impress upon the parties herein that the suit is a case of trespass against the defendants and not the school.

For the above reasons I therefore set aside the consent order made on 23/6/2010. Both defendants and plaintiff were culpable in the recording of this consent and thus for the costs of this application, each party will bear its own costs.

DATED and DELIVERED THIS 20TH DAY OF DECEMBER 2012.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of

Mr. Omusundi of M/s Gicheru & Co Advocates for the defendants/applicants.

Miss. Ngelechei holding brief for Mr. Kamau of M/s Kamau Lagat & Co Advocates for the plaintiff/respondent.