



**Mhandisi Enterprise Limited v Kamiti Farmers Company Limited; Macharia
& another (Interested Parties) (Environment and Land Case Civil Suit
571 of 2016) [2022] KEELC 13496 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13496 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 571 OF 2016
MD MWANGI, J
SEPTEMBER 30, 2022**

BETWEEN

MHANDISI ENTERPRISE LIMITED PLAINTIFF

AND

KAMITI FARMERS COMPANY LIMITED DEFENDANT

AND

MICHAEL KAMAU MACHARIA INTERESTED PARTY

BERNADETE WAMBUI INTERESTED PARTY

RULING

(Ruling in respect of the Notice of Motion Application dated the 20th May, 2022 seeking to set aside a consent order recorded between the Plaintiff and the Defendant)

Introduction

1. Before this court is an application by the two intended interested parties seeking to set aside the consent order dated 1st March, 2022 executed between the Plaintiff and the Defendant herein and adopted as an order of this court.
2. In the Notice of Motion application dated the 20th May, 2022, the 1st and 2nd Interested Parties herein seek the following orders:
 - a. That the consent order dated 1st March, 2022 executed between the Respondents and filed and adopted as an order of the court be set aside together with consequential orders emanating therefrom.



- b. That a temporary injunction be issued against the Respondents and/or their agents from entering, demolishing, disposing or interfering in any way with the peaceful enjoyment of suit property Plot 80/324/8570 situate behind Kenyatta University within Nairobi City County.
 - c. That the Intended Interested Parties/Applicants be joined in the proceedings as Interested Parties.
 - d. That upon such leave in (c) being granted, the Interested Parties be granted leave to file pleadings as pertains this matter.
 - e. That the OCS Kasarani Police Station to supervise and/or enforce orders herein.
3. The application is premised on the grounds on the face of it and the affidavit of Michael Kamau Macharia. The Applicants contend that the consent recorded by the Respondents before this court was in respect of the suit property described as Plot 80/324/8570 situated behind Kenyatta University within Nairobi City County. However, the said title, Plot 80/324/8570 no longer exists as the same has been subdivided into different units with different title numbers. The 1st and 2nd Interested Parties/Applicants are the registered, legal and beneficial owners of property title No. Nairobi Block 117/255 which arose from the alleged suit property Plot 80/324/8570.
 4. In the affidavit in support of the application, the applicants aver that they are the registered owners of the suit property known as title. No. Nairobi Block 117/255 forming part of the suit property after purchasing it from the Defendant Company. Upon acquisition of the said land, they subdivided it into new titles some of which they have disposed off to other individuals who have built their homes.
 5. The 1st and 2nd Interested Parties/applicants state that they were not aware of this suit and that the consent order was recorded fraudulently as the Respondents misled the court by concealing material facts.
 6. The Respondents opposed the application by way of grounds of opposition dated 30th June, 2022 as well as a Replying Affidavit sworn by one John Morrison Litondo deponed on the 20th June 2022.

Replying Affidavit

7. The deponent, John Morrison Litondo avers that he is a Director of the Plaintiff company herein. He avers that the consent order does not affect the Interested Parties at all as the consent is in respect of land/property which was initially owned by Kamiti Farmers Co. Ltd and not the Applicants' land. That upon sub-division, it was allocated to its members through ballot cards.
8. He deposed that the consent before the court was in respect to the parcel known as No. 80/324/8570 and not the property described by the applicants as Nairobi Block 117/255. The Applicants have not in their application explained the relationship between the two properties. The deponent contends that the purported Certificate No.88 presented by the Applicants is a forgery since the plots registered under the regime of Nairobi Block 117/255/3 could not have been directly allotted to a member without a ballot card.
9. The deponent annexed documents of ownership by Mhandisi Enterprise Ltd for Plot No. 80/324/8570 including the ballot card No. 324, Certificate No. 453 and a Letter of Allotment for transfer purposes. He challenged the applicants to produce the ballot card by which they obtained their particular plots.



Supplementary Affidavit

10. The Applicants filed a Supplementary Affidavit in response to the Replying Affidavit by the Plaintiff/Respondent upon being granted leave by this court. The Supplementary Affidavit was deponed on the 2nd July, 2022 by the 1st Applicant herein. The deponent alleges that the Respondents have not disputed the fact that the consent executed by their counsel was done fraudulently. The 1st Applicant affirms that he is the chairman at the Defendant company yet he was not aware of the said consent.
11. The 1st Applicant further deposed that although the Plaintiff/Respondent had alluded that property title No. Nairobi Block 117/255 and Plot No. 80/24/8570 were distinct, the allotment letter he had presented indicated Block No. 117/255. The letter of allotment is the only title document adduced and without any other proof of ownership, Plot No. 80/24/8570 does not even exist. The allotment letter proves that the origin of the Plaintiff's property was the same as that of the Applicants. Further, the Certificate No.453 and the Letter of Allotment dated 8/3/2011 indicates the Defendant/Respondent company as the registered owner of the property. The Applicants purchased their property from the Defendant/Respondent company.
12. Finally, the Applicant insisted that the Respondents deliberately used a different title number so as to conceal from the persons in occupation of the suit property the existence of the suit herein. The innocent parties who are in occupation of the suit property stand to suffer irreparable damage if the consent adopted herein is not set aside.

Court's Directions

13. The Court directed that the application be canvassed by way of written submissions. The Interested Parties/Applicants filed their submissions dated the 12th July, 2022 in compliance to the court's direction. The Respondents did not file any submissions.

Issues for determination

14. Having considered the Interested Parties' Application herein, the affidavit evidence tendered in support and against the application, the only issue for determination is whether the Applicant's Notice of Motion has met the requirements for setting aside a consent order.

Analysis and Determination

15. The principles of setting aside a consent order were stated in the often cited case of *Brooke Bond Liebig vs Mallya* (1975) EA 266 where it was stated that:

“...It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract....”

16. This was reiterated in the case of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR where the court quoted ‘Setton on Judgments and orders (7th edition) Vol 1 page 124, as follows:

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 general for a reason which would enable a court set aside an agreement.”



17. Further the Court of Appeal in *Samuel Wambugu Mwangi Vs. Othaya Boys High School* (2014) eKLR held that;

“a consent order has a contractual effect upon the parties. That it cannot be set aside unless there is fraud collusion or any of the reasons that can justify the setting aside of the consent as in a contract.”

18. From the above authorities, a consent order can only be set aside if it is demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or any reason that would enable the court to set it aside. A party seeking to set aside a consent order has to therefore demonstrate that there was fraud, misrepresentation or mistake or any other reason that would lead to the setting aside of the consent order.

19. The Plaintiff and the Defendant in this case recorded the consent dated the 1st March, 2022 which was later adopted as an order of this court. It was agreed in the said Consent that the Plaintiff was the lawful owner of all that parcel of land known as Plot No. 80/324/8570. That an order do issue for the Defendant to remove any developments on the suit property. Further, the Defendant was to assist the Plaintiff in demolishing any developments undertaken on the suit property.

20. The Interested Parties/Applicants, allege that they are the registered owners of the suit property. They deny knowledge of the proceedings herein. The 1st Interested Party, who is the Chairman of the Defendant/ Respondent deny knowledge of the suit herein. He categorically denounces the Consent recorded herein in his Supplementary Affidavit.

21. The Plaintiff's director in his Replying Affidavit, confirms that the 1st Applicant is indeed the Chairman of the Defendant herein. However, his contention is that the suit property in respect of which the consent order was recorded is distinct from the Applicants' parcel of land. The Consent recorded herein does not therefore affect their interests whatsoever.

22. A perusal of the documents of ownership adduced by the Plaintiff, particularly the Letter of Allotment dated 8/3/2011 shows the Defendant/Respondent company as the registered owner of parcel of the land known as Nairobi/ Block 117/255. The description of the origin of the Plaintiff's Plot corresponds to the 1st Applicant's property. The Title documents adduced by the 1st Applicant confirm that he is indeed the registered proprietor as evidenced by the Certificate No.0188, Lease as well as approval for the subdivision by the Commissioner of Lands. All these documents indicate the 1st Applicant as the registered owner of Nairobi Block 117/ 255.

23. Although the 1st Applicant is the Chairman of the Defendant, he is distinct from the Defendant company which is a legal entity on its own. Their proprietary interests in the suit property are distinct.

24. Further, the Defendant/Respondents' have not contradicted the 1st Applicant's allegation that the consent recorded was not ratified by a resolution of the Defendant company.

25. Black's Law Dictionary defines "fraud" as;

“Knowing misrepresentation or knowing concealment of material fact made to induce another to act to his or her detriment.”



26. The same dictionary defines misrepresentation as;
- “ 1. The Act or an instance of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.
 2. The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.”
27. The court’s finding is that the Applicants have established sufficient grounds for the setting aside the consent order recorded herein.
28. The Interested parties having established that they have proprietary interests over the suit property, this court finds that the Applicants were necessary parties to these proceedings and ought to have been served with the pleadings in the first place. Their application to be joined into the suit as Interested Parties is therefore allowed. It is also appropriate to issue interim injunction orders to preserve the suit property pending the hearing and determination of the suit. The Court too allows that application.
29. Accordingly, the Applicants’ application is allowed in the following terms;
- a. That the consent order dated 1st March, 2022 executed between the Respondents and filed and adopted as an order of the court is hereby set aside together with all consequential orders emanating therefrom.
 - b. That a temporary injunction be and is hereby issued against the Respondents and/or their agents from entering, demolishing, disposing or interfering in any way with the suit property Plot 80/324/8570 situate behind Kenyatta University within Nairobi City County pending the hearing and determination of this suit.
 - c. That the Intended Interested Parties/Applicants be joined in the proceedings as Interested Parties.
 - d. The Interested Parties are hereby granted leave to their necessary pleadings within 14 days from the date of this Ruling.
 - e. The Plaintiff and the Defendant are hereby granted leave to file and serve their responses to the Interested Parties’ pleadings, if need be, within 14 days from the date of service.
 - f. The costs of the application are awarded to the Interested Parties/Applicants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Wangu holding brief for Mr. Kago for the Defendant/Respondent.

Mr. Isingima for the 1st and 2nd proposed interested parties.

No appearance for the Plaintiff/Respondent.

Court Assistant Hilda.



M.D. MWANGI
JUDGE

