



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1026 of 2003

1. Land and Environmental Law Division
2. Subject of main suit Land
 - a) Plot RA – Kariobangi North
 - b) Related suit HCCC 1680/99
3. Application dated 6 August 2007
 - a) Consent entered on 7 June 2007 to enjoin plaintiff 4,5,6 & 7 to this suit.
 - b) Plaintiff 1, 2 & 3 state that they did not give authority for their advocate to enter consent to enjoin plaintiff 4,5&6
 - c) Note plaintiff No 1 is said to have since passed away.
4. Reasons for setting consent aside
 - a) Illegal
 - b) Contrary to law procedure and policy
- c) No application on record to enjoin plaintiff (note 7.6.2006)
 - d) Fraud
 - e) Misrepresentation
 - f) Non disclosure
5. In reply, 1st defendant (brief held)
 - a) The application bad in Law
 - b) Should be dismissed
6. Held: To set aside a consent is similar, to setting aside a contract.

Mistake fraud and misrepresentation must be proved. This has not been done.

Application dismissed.

7. Case Law

a) Gichuki V Munjua & 2 Others (No.2) Ang'awa J.

2004 1KLR34

b) Flora N. Wasike v Destimo Wamboko

(1982-88) I KAR 626

8. Advocates

A.J.T. Gulenywa of A.J.T. Gulenywa & Co. Advocates for the 2nd and 3rd plaintiff/applicants – present

Ndummo K.T.N. & Co. Advocates for the 4th – 7th plaintiffs

P.T. Kiiru & Co. Advocates for the 2nd defendant/respondent

B.W. Milimo of Mose & Mose Advocates for the 1st defendant/Respondent

GEORGE WAWERU & OTHERSPLAINTIFFS

VERSUS

NAIROBI CITY COUNCIL & ANOTHERDEFENDANTS

RULING

I Application to set aside consent orders of the court entered into by parties on 7 June 2007

I: INTRODUCTION

1. This suit was originally filed by plaintiff No 1, 2 & 3 against the 1st & 2nd defendant herein. It concerns a dispute on Land ownership.

2. The plaintiff informs this court that there is a related suit Hccc1680/99 to this case. I was further informed that since June 2007 the 1st plaintiff has since passed away.

3. On the 7 June 2007 the plaintiff 1, 2 & 3 were represented by M/s Abuodha and Omino & Co. Advocates. Franklin Owino was present. The 1st defendant was represented by Benson Wekesa of M/s Mose & Mose Advocates. The 2nd defendant was represented by P.T. Kiiru of M/s Kiiru of M/s Kiiru Wainaina & Co. Advocates.

4. On the 7 June 2007, an application of 7 June 2007 was filed by parties who wished to be enjoined to this suit. The said application was conceded by consent by their respective advocate. The applicants were represented by A.O Oyalo & Co Advocate (He later withdrew representing the applicants). The effect of the consent is that the applicants now became plaintiffs 4, 5, 6 & 7 to the suit.

5. The plaintiffs 1,2 & 3 changed advocates & filed the present application to court dated the 6 August 2007 seeking leave to have the consent orders entered into on 7 June 2007 set aside.

II: Application 6 August 2007

6. The plaintiffs 1,2 & 3 pray that the consent orders be set aside on grounds that it was entered into

- (i) Illegally
- (ii) Contrary to procedure
- (iii) Contrary to there being an application
- (iv) Fraudulently
- v) Misrepresentation
- (vi) Non disclosure of material facts.

7. The advocate argued that the said proposed plaintiffs should never have been party of the suit as they have their own case else where and or piece of property. Their actions to be enjoined were fraudulent.

In reply

8. The 1st defendant whose advocates brief was held argued that in effect the application is bad in Law and ought to be dismissed.

III: Opinion

9. The application of 6 August 2008 is for setting aside a consent order. I must point out that the allegation stating that no application to enjoin the plaintiff was not correct. There was an application dated 7 June 2007 which was the basis of the consent.

10. The applicant states that "fraud" was involved in the consent. I am not informed of any fraud that may have been committed by parties.

In the case Law of *Flora N. Wasike V Destimo Wamboka (1982-88) I KAR 626*

Whereby the court of Appeal held that a consent Judgement can only be set aside on the same grounds as would justify the setting aside of a contract e.g Fraud mistake or misrepresentation”

I relied on this authority in the case of *Gichuki v Munjua & 2 Others (No.2) 2004 IKLR 22*

12. The plaintiffs 1, 2 & 3 must therefore demonstrate that there was fraud, mistake or misrepresentation.

13. At the time the consent was entered to they were represented by counsel /advocate. The said advocate did not depon to an affidavit that he was misrepresented or was defrauded into recording the consent.

14. I would accordingly dismiss this application as having no merits. I award the costs to the 1st & 2nd defendant herein. I award costs to plaintiffs 4 -7.

Dated this 21 day of February 2008 at Nairobi

M.A. ANG’AWA

JUDGE

A.J.T. Gulenywa of A.J.T. Gulenywa & Co. Advocates for the 2nd and 3rd plaintiff/applicants – present

Ndummo K.T.N. & Co. Advocates for the 4th – 7th plaintiffs

P.T. Kiiru & Co. Advocates for the 2nd defendant/respondent

B.W. Milimo of Mose & Mose Advocates for the 1st defendant/Respondent