



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 246 of 2005

JOHN KAMAU KARUMBA

PATRICK WAITITU MUCHAI

SAMSON KIBARU NG'ANG'A (As the Trustees of

Gatundu Film & History Self Help Group.....PLAINTIFFS

VERSUS

DAKAGI HOLDINGS LIMITED.....1ST DEFENDANT

DANIEL KAMITA GICHUHI2ND DEFENDANT

R U L I N G

The application before court has been brought by the Defendants in the suit by way of a Notice of Motion dated 30th July, 2008. The application is expressed to be brought under Order XLIV rule 1 and Order L rule 1 of Civil Procedure Rules and Section 80 of Civil Procedure Act. It seeks to have this courts decrees issued on 19th March, 2008 and 5th May, 2008 reviewed and set aside.

There are seven grounds upon which the application is premised.

- (i) On 26th July 2007 the Court recorded a consent order which parties dictated to the Judge which stated *inter alia* that the Plaintiffs would buy 200 acres from the defendants and the said 200 acres would be excised from L.R. No. 10719/4.
- (ii) That on 12th March 2008, the Advocates for the applicants signed a consent letter sent by respondents' advocate which showed that the 200 acres to be sold was to be excised from L.R. No. 10716/2 instead of L.R. No. 10719/4.
- (iii) That the said consent letter was tainted with an error or mistake as the intention of the applicants was to sell 200 acres from L.R. No. 10719/4 not L.R. No. 10719/2.
- (iv) That the said L.R. No. 10719/2 belonged to a third party namely Theta Tea Factory Company Limited having been sold and transferred to the said third party on 23rd April 2007 well before the date of the said consent.

(v) That L.R. No. 10719/4 which is adjacent to L.R. No. 10719/2 is 210 acres as opposed to L.R. No. 10719/2 which is 187.5 acres.

(vi) The respondents extracted two decrees issued on 19th March 2008 and 5th May 2008 which both conflicted and were tainted with the said glaring mistake.

(vii) Sufficient grounds exist to review and set aside both decrees.

The application is supported by an affidavit of even date sworn by Daniel Kamita Gichuhi, the 2nd Defendant in the suit.

I have considered the contents of the said affidavit. The gist of the affidavit is that the Defendants at one time owned land L.R. No. 10719/2 comprising 187.5 acres. The 2nd Defendant deposes that the Defendant's entered into an Agreement with a third party, namely Theta Tea Factory Company to sell to the latter, the entire parcel of land L.R. No. 10719/2. The agreement is annexed and is dated 15th March, 2006. The deponent has also annexed a certificate of title of the said parcel of land in the name of Theta Tea Factory Company dated 23rd April, 2007.

The 2nd Defendant deposes that in July 2007, the Defendants and the Plaintiffs resolved to negotiate in order to settle the instant suit out of court. It deposes further that the parties agreed that the Defendants would sell to the Plaintiffs 200 acres out of 210 acres comprised in L.R. No. 10719/4. The 2nd Defendant deposes that the parties Advocates recorded a consent before Hon. Warsame J. in those terms on 26th July, 2007. However, it is deposed, the consent recorded by the judge went missing. The 2nd Defendant concludes by stating that the consent letter exchanged by the Advocates in order to have the negotiated agreement entered into by the parties to this suit filed had a mistake in that the L.R. No. of the parcel of land the Defendants agreed to sell to the Plaintiffs was erroneously recorded as L.R. 10719/2 instead of L.R. No. 10719/4. The application was seeking to have the error or mistake reviewed and corrected.

The application is opposed. The three plaintiffs, sued as trustees of Gatundu Film & History Self Help Group swore a replying affidavit dated 11th September, 2008 and filed in court on the same day. The gist of the affidavit is summarized as follows. The deponents aver that the portion of land which the Plaintiffs agreed to buy from the Defendants for their members was part of the original parcel of land L.R. No. 10719. They depose that in 2002, with the Defendant's consent and approval as the Plaintiffs sub-divided the land to their members, paid survey fees and beacons planted. The Plaintiffs depose further that the portion of land surveyed and on which beacons were planted for its members fell on L.R. No. 10719/2. They depose that the sale of the said parcel of land to Theta Tea Factory was fraudulently done and that it was done after the sub-division of the land to the Plaintiff's members. They depose that the error alleged by the Applicants was none existent and they attached the extracted decree issued on 5th May, 2008 and the consent letter on which decree was based dated 5th March 2008 as JPS-2.

I have also considered the submissions by Mr. Chege for the Defendants/Applicants and Mr. Kahuthu for the Plaintiffs/Respondents. Mr. Chege's argument is that what the Plaintiffs and Defendants agreed was that the Plaintiffs would buy 200 acres in one block from the Defendants comprised in L.R No. 10719/4. Mr. Chege argues that by the time the parties recorded the now missing consent order before Hon. Warsame, J, the land L.R. No. 10719/2 was not available to the Plaintiffs and did not belong to the Defendants and therefore the Defendants could not have agreed to sell it to them. Mr. Chege submitted that after dictating the consent order to Warsame, J. on 26th July, 2007, they came later to extract it only to find the consent order missing. Mr. Chege submitted that subsequently he sent a draft to the Plaintiff's Advocate who instead of signing it re-drafted a different one which he signed and sent to him to sign. Mr. Chege submitted that he inadvertently signed the re-drafted consent without realizing the change made to it of the L.R. No. from 10719/4 to L.R. No. 10719/2. The two consent letters are DK5 B and DK6B.

Mr. Kahuthu on his part opposed the application on behalf of the Plaintiffs. Counsel submitted that he

was surprised by the court file record of 26/7/07 since the two Advocates had dictated the consent to the judge. Counsel submitted that the two advocates were forced to exchange a consent. Mr. Kahuthu submitted that he did not sign Mr. Chege's version of the consent as it was not in the terms agreed upon by the parties. Mr. Kahuthu expressed shock at annexure DK8 (a), a decree dated 19th March, 2008 and submitted same contradicted DK8 (b) which is decree of 5th May, 2008 and which was the one signed by the Applicants advocate. Mr. Kahuthu submitted that the Applicant did not explain in his affidavit where he got the decree. Mr. Kahuthu also submitted that the Applicant had not shown that the Respondent misrepresented any facts to them to warrant the consent order being set aside or that there was fraud on Respondent's part, or a mistake. Counsel concluded by saying that the Applicants wanted the decree set aside but were not offering a solution after the setting aside.

A consent order can be set aside on grounds similar to those of a contract. In the cited case of Flora Wasike vs. Destimo Wamboko [1982-88] 1 KAR 625, Hancox JA, Nyarangi and Platt, Ag. JJA held:

"It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation."

The application has been necessitated by the disappearance of the order dictated by the parties to Hon. Warsame, J. in open court on 26th July, 2007. The record of that day shows

"26/7/07

Coram: Warsame, J.

Ojuki CC

Mr. Kangethe H/B Mutiso for Plaintiff

Miss Mulwa for Defendant

Ct. S.O.G.

Signed

Warsame, J."

Considering that record, it is not correct to say that the consent dictated to the Hon. Judge by the parties is missing. The correct position should be that the Hon. Judge recorded the consent in a different and wrong file. That should be the explanation for the notes on the record of the material day. The record shows that Mr. Kangethe held in Mutiso's brief for the Plaintiff and Miss Mulwa was for the Defendant. Mutiso and Mulwa Advocates have never been on record for the parties to this suit at any one time.

The second point I wish to note is that it is clearly shown that the Deputy Registrar of this court recorded a consent order extracted from a letter sent to court dated 5th March, 2008, signed by the two advocates to the parties. That is the letter Mr. Chege claims he signed inadvertently and which he says contained an error at paragraph 7. Paragraph 7 provides:

"THAT the two hundred (200) acres will be excised from LR. No. 10719/2 Makuyu and shall be in one unit i.e. one block."

I have since found the consent order that was recorded before the Hon. Judge on the 26th July, 2007. I found in HCCC No. 264 of 2006, a matter that came before the same court on the same day and in which Mr. Kairo and McCoult were for the Plaintiff and Mr. Mutiso was for the Defendant. It is obvious that the judge interchanged the two files because in 264 of 2006, on the 26th July, 2007, the Judge indicated the Coram as Mr. Chege for the Defendants and Mr. Kahuthu for the Plaintiffs. These are the Advocates

for the parties in this case. There is a consent recorded with eleven paragraphs which is also signed by both parties, i.e. Mr. Kahuthu for the Plaintiffs and Mr. Mwangi Chege for the Defendants. I believe the discovery of the order should settle the issue that is now before this court. Under paragraph 6 of that order it is shown that the parties agreed by consent:

“6. the two hundred acres would excised (sic) from L.R. No. 10719/4 Makuyu and shall be on one unit, that is one block.”

I must say I noted that there is an overwriting on the letter four (4) in that order. It appears the judge initially wrote the number 14 and then corrected it to read the number 4 so that the parties agreed by consent that the 200 acres would be excised from L.R. 10719/4 Makuyu. That being the case, the Applicant’s advocate’s submission that the consent entered by the parties was for the excision of 200 acres from L.R. No. 10719/4 is correct.

Even if the consent order signed in court was not found, I could still have allowed the application to correct the errors on the decrees issued on the 19th March, 2008 and 5th May, 2008 by reflecting the L.R. No. 10719/4 in place of LR. No. 10719/2. The simple explanation for this is that I am satisfied that as at the 26th July 2007, when the consent order was entered in court, L.R. No. 10719/2 was not in the possession of the Defendants. They could therefore not enter into any consent to transfer it to the Plaintiffs who are already registered as the owners. Secondly and more importantly, L.R. No. 10719/2 has been shown to comprise an acreage of 187.5 which is far below the 200 acres that the parties agreed the Defendants should transfer to the Plaintiffs. I would have found that it would have been a mistake on the face of the record that the L.R. No. reflected on the consent order was 10719/2 while in fact the said land could not have been sufficient to satisfy the consent order.

For these reasons, I allow the application with costs in the following manner.

1. That the decrees issued by this court on the 19th March, 2008 and 5th May, 2008 be and are hereby reviewed.
2. The review is limited to paragraph 7 of the decree by setting aside the entire paragraph and substituting it as follows

“7. That the 200 acres will be excised from L.R. No. 10719/4 Makuyu and shall be in one unit i.e. one block.”

3. Each party to bear its own costs.

Those are the orders of the court.

Dated at Nairobi this 21st day of November, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Chege for the Applicant

N/A Mr. Kahuthu for the Respondent – absent

Respondents all present

LESIIT, J.

JUDGE