Njeru & 7 others v Attorney General & 4 others (Environment & Land Case 211 of 2014) [2022] KEELC 15108 (KLR) (22 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15108 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 211 OF 2014

A KANIARU, J

NOVEMBER 22, 2022

BETWEEN

ANDREW IRERI NJERU ..... 1ST APPLICANT

ELISHA MIGWI NJURURI ..... 2ND APPLICANT

NYAGA NJUE ..... 3RD APPLICANT

IRERI KUBUTA ..... 4TH APPLICANT

STEPHEN NDWIGA KABARAGWI ..... 5TH APPLICANT

DORRIS MBUI JOSEPH ..... 6TH APPLICANT

MOTOKAA NTHAUTHO ..... 7TH APPLICANT

KIVUTI NGUKU AND OTHERS ..... 8TH APPLICANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

D.O GACOKA DIVISION ..... 2ND RESPONDENT

LAND ADJUDICATION OFFICER MBEERE/EMBU ..... 3RD RESPONDENT

EMBU COUNTY GOVERNMENT ..... 4TH RESPONDENT

CHAIRMAN NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

RULING

1. This ruling is on a notice of motion dated June 17, 2021 and filed on June 22, 2021. The application is expressed to be brought under order 8 rule 6 sub-rule 5(1) and sub-rule 7(2)(3) of the *Civil Procedure Rules* and all other enabling laws of Kenya.

Application

2. The parties in the application are Andrew Ireri Njeru, Elisha Migwi Njururi, Nyaga Njue, Ireri Kubuta, Stephen Ndwiga Kabaragwi, Dorris Mbui Joseph, Motokaa Nthautho & Kivuti Nguku & others. These parties are the plaintiffs in the suit and applicants in the application. The Attorney General, DO Gacoka Division, land adjudication officer Mbeere/Embu, Embu Government and the chairman National Land Commission are the defendants in the suit and respondents in the application.

3. The motion came with three (3) prayers, which are as follows:

> Prayer 1: That this honourable court be pleased to amend the consent dated December 22, 2015 No 3 2(a) and (b).
>
> Prayer 2: That this honourable court be pleased to struck (sic) out No (a) and (b) filed and it to be read as follows:-
>
> a. The agreed spatial and survey plan to read;- scheme plan for Embu Mwea land settlement No 26461.
>
> b. The List of beneficiaries as generated and agreed by plaintiffs be directed to the National land Commission for consideration to read;- the list of beneficiaries as generated and agreed by plaintiffs be directed to the CS Ministry of Land And Physical Planning.
>
> Prayer 3: That there be no orders as to costs.

4. The application is premised on grounds, inter alia, that the CEC member of Embu County Ministry of Land, Josphat N Kithumbu misled the applicants in the manner of drawing a consent dated December 22, 2015. It was deposed that the National Lands Commission has no mandate to demarcate land according to article 67(2)(a)(b)(c) of the *Constitution* and that it's mandate only extends to advising the government and managing of public land. It was further deposed that the ministry of lands, housing and physical planning is mandated to demarcate land throughout Kenya. In a supporting affidavit sworn by the 1st applicant, he reiterated the grounds in the application and averred that the County Government is only a trustee under article 63 (3) (4) of the *Constitution*. He also alleged that the Mbeere County Council had tried to demarcate the land known as Embu Mbeere settlement Scheme No 26461, approximately 17,831 ha, but they had failed. He urged the court to consider the application filed herein and allow it.

Response

5. The 4th respondent opposed the application by filing grounds of opposition which grounds are set out as follows;

> i. That the application herein is incomprehensible, incurably defective, incompetent, misconceived, flivorous, vexatious and therefore an abuse of the court process.
>
> ii. That there is no existing suit upon which the applicant's application dated June 17, 2021 is founded since the matter was marked as settled on December 31, 2015.

iii. That the court lacks jurisdiction to entertain and determine the application dated June 21, 2021 since there is no suit pending between the parties herein.

iv. That it is trite law that you cannot amend a consent that has already been adopted by the court.

v. That it would be illegal to amend the consent dated December 22, 2015.

vi. That it is in the interest of justice, the application should be dismissed with costs to the respondents.

6. The parties canvassed the application by filing written submissions. The applicants filed their submissions on July 12, 2022. They submitted that the grounds of opposition had been overtaken by events for reason that the 4th respondent had already signed the consent dated December 22, 2015. They averred that there was another case ELC Petition 1 of 2014 over the same parcel of land in which a ruling was delivered by Justice Angima on February 6, 2020. They submitted that upon reading the consent they realised that it was not clear according to the *Land Adjudication Act*. They submitted that the ruling quoted shows that the court had developed the law according to article 20 (3)(a) of the *Constitution*. They averred that the 2nd applicant in the suit is a party to the petition as a respondent. They urged the court to allow the amendment as prayed.

7. The 4th respondent field his submissions on June 22, 2021. It submitted that a consent cannot be amended unless all the parties to the consent so consent. They contended that the affidavit sworn was confusing and did not disclose the reasons for seeking for the amendment. The affidavit was also termed as incomprehensible and that it shed more darkness than light to the application. It was also submitted that the matter had been marked as settled and there was therefore no basis for the application. According to the 4th respondent, the applicant would have to revive the suit before making any application in relation to it. He maintained that the application was defective and ought to be dismissed with costs.

Analysis

8. I have looked at the application, the response made by the 4th respondent, and the rival submissions by the respective parties. The suit at hand was filed by the applicants seeking orders to restrain the land adjudication officer, Mbeere, from dealing with the land in the Embu Mwea region and for cancellation or rectification of the adjudication records in Wachoro, Riakanau, Makima and Karaba. Further orders were sought for revocation of the Kenya Gazette no 577 relating to Embu Mwea Ranching Scheme LN 26461. The suit was never determined on merit as the parties entered into a consent dated December 22, 2015. The same was adopted as a consent judgment by the court. The applicants have now brought this application seeking for the court to amend the consent on the terms stated in the application. In other words, what the applicants are seeking is varying of the terms of the consent.

9. The applicants contend that the county executive committee member of Embu County Ministry of Land misled them by drawing the consent dated December 22, 2015. They have submitted that the National Lands Commission has no mandate to demarcate land according to article 67(2)(a)(b)(c) of the *Constitution* and that this mandate is only for the Ministry of Lands, Housing and Physical Planning.

10. The 4th respondent was the only one who opposed the application by filing grounds of opposition. Among the issues raised, it was said that there is no existing suit upon which the applicant's application could be based. The court was further said to lack jurisdiction to entertain the application on grounds

that there was no pending suit. Further according to the 4th respondent, a court cannot amend a consent that has already been adopted.

11. Before I deal with the merits of the application I find it necessary to first determine whether this court has jurisdiction to determine the application under consideration. The 4th respondent is of the view that the court lacks jurisdiction to entertain the application for reason that there is no pending suit upon which the application can be based. I have looked at the nature of the application filed. In my view, though the court has discharged its duty having already rendered it's judgment, it is not called upon to determine an application based on the merits of the suit. That would essentially render it functus officio. But it is called upon to vary the terms of the consent order. I therefore find that the court has the requisite jurisdiction to determine the application before it.

12. The issue at hand is about varying on the consent order. The legal threshold for varying of a consent judgment or order was well stated in the case of *Paul Kiplangat Keter v John Koech [2021] eKLR* where the court stated thus: 'The law on variation of a consent judgment is now settled to the effect that the variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. The court went ahead to rely on the decision by Hancox JA (as he then was) in the case of *Flora Wasike v Destimo Wamboko (1982 -1988)1 KAR 625*, where it was held as follows: 'It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.'

13. Accordingly, a consent judgment can only be set aside or varied on grounds of fraud, collusion, illegality, mistake or basically on the very same grounds that can be used to vitiate a contract. The applicants' contention is that the county executive committee minister misled them while drawing the consent and that the court should therefore vary the said terms. The manner of the alleged misleading has not been elaborated. Is it that the applicants were misled into executing the consent order? or were they misled as regards the terms of the consent order? Either way, no evidence has been led to prove the said allegations. As rightly pointed out, a consent order can only be varied in exceptional circumstances such as I have duly mentioned. The said circumstances have not been proven in the instant case.

14. Looking at the impugned consent judgment, the same was entered between Andrew Ireri Njeru on behalf of the applicants and counsel for the rest of the respective respondents. It is worth noting that the said Andrew Ireri Njeru has consistently represented the applicants throughout the suit including even in the present application. He has sworn the affidavit on their behalf. The court in the case of *Protus Hamisi Wambada & another v Eldoret Hospital [2020] eKLR*, while determining the circumstances in which a consent judgment may be interfered with relied on the case of *Hirani v Kassam [1952] 19 EACA 131* where the following passage from *Seton on Judgments and Orders, 7th Edn, Vol 1, P 124* was relied upon: 'The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all material facts and there could have been no mistake or misunderstanding'.

15. The same circumstances as cited in the above case apply herein. The parties were all aware of the material facts and I find that there was no misrepresentation, fraud or mistake and none has been proven. I find that the consent judgement entered by one Andrew Njeru on behalf of the applicants was binding upon the parties and if the applicants wish to have it varied then this can only be done within the specific thresholds as stated herein. The applicants should take keen note of the fact that

a consent order is a valid court order which is enforceable. Varying such an order can only be within the set conditions under the law and none has been met or demonstrated in this case. I find in the circumstances that the application lacks merit and the same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 22ND DAY OF NOVEMBER, 2022.

AK KANIARU

JUDGE

In the presence of 1st Applicant; Koome for Kiongo (AG's office) for 1st, 2nd, and 3rd respondents and in the absence of the rest of the parties.

Court assistant: Leadys