



**Omabere & 16 others v Maluki & 3 others; Mutua & another (Interested Parties) (Environment & Land Case 27 of 2020) [2022] KEELC 14864 (KLR) (15 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14864 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 27 OF 2020  
CA OCHIENG, J  
NOVEMBER 15, 2022**

**BETWEEN**

**JOYCE MORAA OMABERE & 16 OTHERS ..... PLAINTIFF**

**AND**

**BENARD MASINGI MALUKI ..... 1<sup>ST</sup> DEFENDANT**

**ALPHONCE MBATHA KISYULA ..... 2<sup>ND</sup> DEFENDANT**

**JOSHUA MUTETI KILONZO ..... 3<sup>RD</sup> DEFENDANT**

**DAVID OSANO RAGIRA ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**JOHN KIOKO MUTUA ..... INTERESTED PARTY**

**SARAH NZEMBI MUTUA ..... INTERESTED PARTY**

**RULING**

1. What is before Court for determination is the Interested Parties' Notice of Motion Application dated the January 19, 2022 and amended on March 17, 2022, where they seek the following orders:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That the Consent order dated July 1, 2020 executed between the Plaintiff and the Defendants and recorded by the Deputy Registrar be set aside, reversed and expunged from the court's record.



- e. That this suit be consolidated together with ELC No. 62 of 2018, ELC No. 116 of 2019 (consolidated with ELC Petition 7 of 2019), and Machakos JR No. E007 of 2021, with Machakos JR No. E007 of 2021 being the test/select suit for the reason that all these suits involve the same parcel of land.
  - f. That pending the hearing and determination of the consolidated suits, and for purposes of preventing the wasting, damaging, alienation, sale, disposition of the land described as LR No. 29666 (formerly LR 13208/2), the Honourable Court be pleased to issue an order preventing the Plaintiffs and Defendants by themselves from, their employees, servant. Agents or otherwise entering into or retaining occupation, erecting structures, using, selling, placing beacons, charging or in any manner dealing with the said parcel of land.
  - g. That costs of this Application be provided for.
2. The Application is based on grounds on the face of it and supported by the Affidavit of one John Kioko Mutua, one of the Interested Parties. He deposes that LR Number 29666 (formerly LR No.13208/2) hereinafter referred to as the ‘suit property’, has always been the property of the family of James Kasyula Mutua and was registered for a term of 99 years under the five (5) administrators of the Estate of the deceased James Kasyula Mutua. He avers that the family also owns two other parcels of land in Kinanie, being LR Nos. 28056 and 28055 respectively. He contends that together with the 2<sup>nd</sup> Interested Party, they hold the Letters of Administration in respect to the Estate of Ruth Kalekye Mutua (deceased), Anne Nduku Mutua (deceased), and David Mutua Kasyula (deceased). He states that they recently learnt of the existence of this case on January 11, 2021 when the workers on the suit property informed them that some people had invaded the said suit property in a bid to take possession. Further, that upon reporting the incident to the Athi River Police Station, they were shown a Consent Order recorded by the Deputy Registrar on 1<sup>st</sup> July 2020. He claims they learnt that the four Defendants had forged title documents to the suit property, subdivided the same and sold to the Plaintiffs. Further, that the Plaintiffs later filed a suit against the Defendants and the parties recorded a consent, declaring the Plaintiffs as innocent purchasers for value and they were free to deal with the suit property without interference from any party. He explains that they then engaged an advocate who has since obtained the pleadings from court and advised that the same are wrought with fraud, misrepresentation, substantive and procedural irregularities rendering the said Consent Order null and void. He reiterates that the approval and adoption of the consent is a function bestowed exclusively on a Judge and that the Deputy Registrar’s exercise of the function was a nullity. Further, that the Defendants had failed to disclose that they already filed a suit against the Interested Parties, being Machakos ELC No. 116 of 2019 praying to be declared as the legal registered owners of the suit property. He reaffirms that the Interested Parties had also filed Machakos ELC Petition No. 7 of 2019 seeking to restrain the County Government of Machakos from approving an application lodged by the Defendants for the subdivision and Change of User with respect to the suit property and that the Defendants were also enjoined as parties to the said Petition. He argues that the failure to disclose the existence and consolidation of these suits on the part of the Defendants was an attempt to subvert justice. He confirms that the Defendants were arrested and charged with eight(8) counts of forgery and conspiracy to defraud *vide* Kiambu Criminal Case No. 121/21/2020 and that the case is still pending with the accused persons out on bond awaiting trial. He states that the Interested Parties had filed a suit and obtained Judgment in Machakos ELC 62 of 2018 wherein the Honourable Court declared them as the lawful registered proprietors of the suit property. Further, that the Defendants had filed an application seeking to set aside the Judgment and to be enjoined to the said suit.
3. The Application was opposed *vide* an Affidavit sworn by the 1<sup>st</sup> Plaintiff Joyce Moraa Omabere on March 7, 2022. She avers that the Plaintiffs are purchasers for value of the suit property and that they



have been in actual possession thereof, having been issued with Title Deeds of their respective land parcels. She contends that the alleged parcel number 29666 no longer exists hence injunctive orders cannot issue on a non-existent property. She denies knowledge of any criminal matter against anyone as alleged by the Applicants. She insists that the Consent judgement can only be set aside by the court under conditions that a contract can be set aside, if the parties participated in any vitiating factors. She avers that the Plaintiffs' were not parties to either Machakos ELC Petition No. 7 of 2019 or ELC No. 62 of 2018. She reaffirms that the Plaintiffs are in occupation of the suit property and that the Applicant's allegations of any fraud are baseless and not substantiated. She reiterates that each of the suits be heard and determined separately without consolidation.

4. The Applicants filed a Further Affidavit dated the February 24, 2022 where the Deponent deposes that he had conducted a search at the Land's Office and the Registrar confirmed that the suit property is legally owned by the Applicants' family He avers that the Applicants have always been on the suit property and not the Plaintiffs as alleged. He reiterates that the Plaintiffs had continued invading the suit property, harassing the Applicants' workers and offloading building materials on the site against existing court orders. He states that the Plaintiffs have been threatening his C0-Interested Party with text messages using an unknown mobile number.
5. The Respondents/Defendants on their part filed a Notice of Preliminary Objection dated the March 7, 2022, against the Application for being *res judicata*. The Objection was not argued by the parties. The Application was canvassed by way of written submissions.

#### **Analysis and determination**

6. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, annexures and submissions, the following are the issues for determination: Whether the Consent Order adopted by the Deputy Registrar ELC on July 1, 2020 should be set aside. Whether this suit should be consolidated with ELC Petition 7 of 2019 and ELC 116 of 2019. Whether the Interested Parties are entitled to orders of temporary injunction in respect to the suit property, pending the outcome of the suit.
7. The Interested Parties filed their submissions in support of their Application on May 30, 2022. The Plaintiffs and Defendants did not file any submissions.
8. As to whether the consent order adopted on July 1, 2020 by the Deputy Registrar, ELC should be set aside.
9. It is not in dispute that the Plaintiffs and the Defendants herein recorded a Consent dated the June 24, 2020 which was adopted as a Judgment of the Court by the Deputy Registrar ELC on July 1, 2020, declaring the Plaintiffs as purchasers for value of the suit property, which has been subdivided into 286 individual titles. I note the impugned Consent was entered into summarily between the Plaintiffs and Defendants herein on June 30, 2020, yet this suit was filed on March 30, 2020. The process leading to the filing of the consent is not clear and the record only shows the orders as recorded by the Deputy Registrar on July 1, 2020. Further, there is no indication on whether the Defendants filed a Defence or not.
10. Without going much into the details of the case, this court acknowledges the liberty of parties to a suit to record a consent and summarily have litigation brought to an end. However, this has to be done with clean hands and in consideration of the rights of any other party who may be affected by such orders and who is not a party to the consent. At the time of recording the consent, the Interested Parties were not parties to this suit. However, this Court takes judicial notice of the fact that Justice Angote



in ELC 62 of 2018 had declared the Interested Parties as owners of the suit property on February 15, 2019. Further, in Petition No. 7 of 2019 which was consolidated with ELC 116 of 2019, this Court on November 14, 2022 upheld the Interested Parties title after the Defendants failed to defend the Petition nor canvass their suit. In this instance, the same Defendants have not denied having been charged with a criminal offence in respect to forgery of documents of title in respect to the suit property. They further speedily entered into a Consent with the Plaintiffs herein without even filing a Defence. Which brings me to the question that if the suit was undefended, then was the consent necessary.

11. In the case of *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* [2015] eKLR, the Court of Appeal in laying down the basis for setting aside a consent Judgment stated as follow:

“The law on variation of a consent judgment is now settled. 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. Hancox JA (as he then was) in the case of *Flora Wasike v. Destimo Wamboko* (1982 -1988)1 KAR 625, said in his judgment at page 626 -"It is now settled law that a consent judgement 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.” See the decision of this Court in *J.M. Mwakio v. Kenya Commercial Bank Ltd* Civ. Apps 28 of 1982 and 69 of 1983, This Court in the case of *Brooke Bond Liebig v. Mallya* 1975 E.A. 266 held:- “A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”

12. See the decisions in *Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR and *Cheruiyot v Korir* (Civil Appeal 131 of 2017) [2021] KECA 222 (KLR) cited the case of *Kenya Commercial Bank Ltd vs. Specialised Engineering Co. Ltd* [1982] KLR 485.
13. Insofar as the plaintiffs claim they entered into consent with the defendants who declared them purchasers for value of the resultant subdivisions from the suit land but since the defendants were well aware that some parties were claiming the suit property, this was a clear case of failure to disclose material facts to court. Further, the manner in which the consent judgement was hurriedly entered into without a Defence is questionable. It has emerged that this Court had already upheld the Interested Parties title to the suit land on February 15, 2019. I note the Plaintiffs’ Sale Agreements with the Defendants were entered into from November to December, 2019 when the Interested Parties’ title had already been upheld by the court. Further, three of the matters touching on suit property have already been determined. From the annexures in the documents culminating in the entry of the consent, it is questionable that the Defendants, failed to disclose the existence of the other cases which touched on the suit property to the court. Even though the Plaintiffs are not parties to the other suits, the subject property is the same and it would have been prudent for the Defendants to disclose this information to the court.
14. Based on the facts as presented while relying on the decisions I have cited above, I find that this is a clear case where the consent was entered into where there was fraud, collusion and it was contrary to Public Policy. In this instance, the parties and their advocates consented to the compromise this suit yet the Defendants had not even filed a Defence, and certainly aware of the facts surrounding the suit property, which they failed to declare. Further, the Deputy Registrar did not have capacity to adopt the said consent. From the foregoing, I indeed concur with the Interested parties’ that the consent order adopted on July 1, 2020 should be set aside and will proceed to do so.



15. As to whether this suit should be consolidated with Petition 7 of 2019 and ELC 116 of 2019. I note the two suits have been concluded with ELC 116 of 2019 having been dismissed and judgement entered in favour of the Interested Parties in Petition 7 of 2019. In the circumstances, I find that this defeats the purpose of consolidation and will decline to grant that prayer but direct that the Machakos JR E007 of 2021 be heard simultaneously with this suit.
16. On the prayer for injunction, I note the Interested Parties' title to suit property has been upheld twice although the Plaintiffs' claim the said title is no longer in existence. Looking at the documents presented by the Interested Parties, I do not find them baseless. Based on the principles established in the case of *Giella vs Cassman Brown* (1973) EA - 358 as well as definition of a *prima facie* case as stated in the case of *Mrao Limited vs First American Bank of Kenya Limited & 2 others* (2003) eKLR, I find the Interested Parties having documents of title to LR No. 29666 which have been upheld twice by the Courts, have indeed established a *prima facie* case to warrant the orders of injunction. Further, they will suffer irreparable harm if the orders sought are not granted and the balance of convenience indeed tilts in their favour. I will hence allow the prayer for injunction pending outcome of this suit.
17. It is against the foregoing that I find that the Interested Parties amended Notice of Motion Application dated the March 17, 2022 merited and will allow it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15TH DAY OF NOVEMBER, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

