REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Suit 60 of 2004

BETWEEN

JAMES M.N. KABUURU …….. PLAINTIFF

AND

JEREMY M'KANGA M'KURIUNGA (Being sued For and

on behalf of MOSES MUNENE KAURA AND MICHAEL MBAE NJUE)……DEFENDANT

RULING OF THE COURT

The application before me is the Notice of Motion dated 25.4.2005 brought under sections 128 of the Registered Land Act (Cap 300), Order IXA rules 10 and 11 of the Civil Procedure Rules and all other enabling provisions of the law. The application was filed under certificate of urgency and was duly certified as such as prayed in prayer (1) of the application. In the main the application seeks other orders as follows:-

> 2. That this honourable court be pleased to issue orders of inhibition against LR NO. KARINGANI/NDAGANI/4653, 5966 and 5967 to preserve the same pending the hearing of this suit.
>
> 3. That this honourable court be pleased to stay the implementation of the consent order dated 20.7.2004 pending the hearing and determination of this application.
>
> 4. That this honourable court be pleased to review and set aside the consent order dated 20.7.2004 and all subsequent orders on such terms as the honourable court may deem fit to grant.
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> 5. That this honourable court be pleased to make an order that the plaintiff do serve the defendants with the summons to enter appearance and plaint. 6. That this honourable court be pleased to grant leave to the defendants to file their defence out of time and the draft defence annexed hereto be declared as duly filed.
>
> 7. That this honourable court be pleased to make such further orders as it may deem fit to grant.
>
> 8. That the costs of this application be provided for.

The application is premised on five grounds on the face thereof, the gist of which is that the suit before court has been prematurely and unprocedurally concluded before trial and before summons were served

upon the applicants, that unless the orders sought are granted, the applicants herein will suffer irreparable loss and damage.

A supporting affidavit to the application was made and sworn by Moses Munene Kaura the first applicant. In the said affidavit, the deponent avers that he and Michael Mbae Njue only became aware of the existence of the suit on 19.4.2005 when they made a visit to the lands office at Chuka. That they were never served with the summons to enter appearance despite the fact that the plaintiff, who is their step brother filed the case on 13.7.2004. That a purported consent between the plaintiff and Jeremy M'Kauga M'Kuriunga, the father of both the plaintiff and the applciants herein was filed in court on 20.7.2004. In effect, the said consent removed the cautions registered on L.R. NO. KARINGANI/NDAGANI/4653, 5965, 5966 and 5967 by the applicants. The removal of the cautions was to facilitate the sub-division and transfer of the plaintiff's rightful entitlement from the suit land. The consent was drawn by the plaintiff and executed by both the plaintiff and his father, Jeremy M'Kanga M'Kuriunga through whom the two applicants were sued. That is why the applicants want the said consent order set aside which they allege a was fraudulent arrangement between the plaintiff and their father since they were not party to it.

The application is opposed. The plaintiff filed his Replying Affidavit dated 4.5.2005. The plaintiff avers that the suit land are registered in the name of their father, the defendant herein absolutely. That the applicants have their only parcels of land being L.R. NO. KARINGANI/NDAGANI/4651 and 4652 respectively and that the sole reason why the applicants cautioned the suit land was to frustrate their father in his effort to transfer the suit land to other family members, including the plaintiff. The plaintiff also deponed that any issues touching on the suit land have been fully settled by members of the family and that there is no outstanding issue yet to be determined on the same. The plaintiff asks the court to dismiss the applicant's application.

Briefly, the facts of this case are that the plaintiff filed this suit on 13.7.2004, suing his father, Jeremy M'Kauga M'Kariunga on behalf of the two applicants herein. At paragraph 4 of the plaint, the plaintiff avers as follows:-

> **"4. That on 18.5.2004, Moses Munene Kaura and Michael Mbae Njue who are my brothers and who have got their own land parcels elsewhere given by the defendant registered cautions on LR KARINGANI/NDAGANI/4653, 5965, 5966 and 5967 purposely with intent to deprive the plaintiff and other family members from getting their rightful entitlements from the suit lands."**

The plaintiff prayed for an order lifting the cautions registered on the suit lands so as to facilitate the subdivisions and transfer of the plaintiff's rightful entitlement from the suit land to himself. The plaintiff also prayed for costs of the suit and interest thereon and for any other and better relief that the court would deem fit to grant.

Though summons were apparently issued on 13.7.2004, the plaintiff admitted that the applicants were not served with summons to enter appearance together with copy of plaint. On 20.7.2004, the plaintiff filed a consent drawn by himself and signed by both himself and the defendant. The cautions were accordingly removed.

Against that background, the issues that are for determination by this court are whether the applicants are entitled to the orders of inhibition and the setting aside of the consent order filed in court on 20.7.2005. If the consent order is to be set aside what are the applicable principles? The court has also to determine whether the applicants are entitled to be served with the summons to enter appearance together with copy of the plaint.

At the outset, I must observe that this is an interesting case. The plaintiff and the two applicants are admittedly sons to the defendant, Jeremy M'Kanga M'Kariunga. It is also not in dispute that the plaintiff and the two applicants are all adults, sons of the said defendant, and in the absence of evidence to the contrary, both applicants are of sound mind. This being the case, there is no explanation as to why the plaintiff should have sued the two applicants though their father. According to Order 1 Rule 3 of the Civil

procedure Rules, the best that the plaintiff should have done was to join the defendant and the two applicants as defendants in the suit; the reason being that the plaintiff's right to relief in this case arises out of the same act namely placing of the cautions on the suit lands by the applicants.

Because of the misjoinder of the defendants in this case, the applicants ended up not being served with the summons to enter appearance together with copy of the plaint. If the applicants had been properly joined in the suit, they would no doubt, have been served with summons to enter appearance together with copy of plaint with the option to answer to the claim. Section 20 of the Civil Procedure Act provides as follows:-

> **"20. Where a suit has been duly instituted the defendant shall be served in a manner prescribed to enter an appearance and answer to the claim."**

In the present suit, the plaintiff cleverly denied the applicants the opportunity to enter an appearance and to answer to the claim by not serving them with summons to enter appearance as prescribed by law. In his submissions to the court, the plaintiff contended that he filed the suit on the instructions of the defendant and agreed that he did not serve the applicants with summons on the pretext that the two applicants were to be served by the court. From both the plaint and the replying affidavit, the plaintiff had an agenda to fulfill, and in my view he was ready to use any means available to remove the cautions registered against the suit land so that he could get portions of the suit land from the defendant without the knowledge of the two applicants. As rightly submitted by Mr. Kiogora for the applicants, the applicants were entitled to be sued in their own right and to be served with summons to enter appearance and copy of plaint to enable them enter appearance and answer to the claim against them. In this regard therefore, I do agree that the applicants are entitled to be served so that they get a chance to answer to the claim against them.

I have looked at the draft defence of the applicants which clearly raises triable issues which issues the applicants must be given an opportunity to defend. The Court of Appeal dealt with the inalienable right of a defendant to defend in the case of **SOUZA FIGUERIDO & CO. LTD V. MOORINGS HOTEL CO. LTD (1959) EA 425.** Quoting from their earlier judgment in **KUNDANLAL RESTAURANT V DEVSHI & CO. (1952) 19 EACA 77** the Court Appeal expressed itself in the following words, being an extract from the **ANNUAL PRACTICE OF 1951**.

> **"The principle on which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition (See Jacobs v. Booth's Distillery Co. (1901) 85 LT 262 (H.L.)……..."**

As I have stated earlier, a look at the draft defence raises issues that are definitely triable, and I cannot say that the same have been put forward malafides.

The final issue for determination is whether or not the consent filed in court on 20.7.2004 should be set aside. Having found as I have that the applicants are entitled to defend this suit, it follows therefore that the consent of 20.7.2004, which consent purported to determine this suit must of necessity be set aside. The allegations of fraud by the applicants against the plaintiff and his father the defendant are not unfounded. For example, the plaintiff has not explained why he sued the two applicants through their father when the two applicants are adults and are not shown to be incapacitated in any way. The plaintiff's explanation as to why he did not serve the applicants with summons to enter appearance and copy of plaint cannot be believed, not to mention the hurry with which the purported consent was filed when the time for entering appearance and filing of defence had not even expired. All these are issues that point to fraud and malafides on the part of the plaintiff in entering into the consent dated 20.7.2004. Applying the principles set out in the Court of Appeal decision in **FLORA WASIKE V. DESTIMO WAMBOKO (1988) KLR 429**, I am persuaded that the consent judgment entered into between the plaintiff and the defendant is one that should be set aside. In the Flora Wasike case (supra) the Court of Appeal stated that it is now trite law that a consent judgment or order has a 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 **JM Mwakio v. Kenya Commercial Bank LTD – Civil**

Appeals 28 of 1982 and 69 of 1983). The learned judges of appeal quoted from the judgment of Winn LJ in the case of **Purcell V. F.C. Trigell LTD (1970) 2 ALL ER 671** at page 676, a passage that succinctly sets out the principles for the setting aside of a consent judgment/order:-

> **"It seems to me that if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."**

In the present case, the plaintiff and the defendant through whom the applicants were sued purported to conclude the case between them without the involvement of the applicants. That consent is binding upon the applicants when in fact they had no idea that they were being bound in the manner adopted by the plaintiff and the defendant. The consent was both fraudulent and incompetent in the sense that the defendant who entered into it was not authorized to do so by the applicants on whose behalf he was allegedly sued.

For the reasons that I have given above, the applicant's application dated 25.4.2005 succeeds. I allow the same in terms of prayers 2, 4, 5 and 6 thereof. Since the consent order of 20.7.2004 has been set aside, and in view of prayer (2) of the application which has been allowed the court finds that an order in terms of prayer (3) of the application would be superfluous.

Costs of this application shall be paid by the plaintiff to the applicants.

It is so ordered.

Dated and delivered at Meru this 12th day of May 2005.

RUTH N. SITATI

JUDGE

12.5.2005