



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

Civil Suit 59 of 1996

MOSES KIMUTAI CHERUIYOT PLAINTIFF

VERSUS

CHEPKWONY KIMUTAI CHERUIYOT DEFENDANT

RULING

By a notice of motion dated the 12th of April, 2005 purportedly made under **Order XLV rule 15, order XXI rule 22** and **order XLIX rule 5** of the **Civil Procedure Rules**, the defendant has sought the orders of this court to have the time upon which the defendant was required to lodge an objection to the award made on the 29th of June, 2004 to be enlarged. The defendant has further sought the orders of this court to have the order adopting the said award as the judgment of this court issued on the 29th of June, 2004 set aside and the suit herein be set down for hearing on its merits. Pending the hearing and determination of the application, the defendant has sought to have the execution of the decree issued pursuant to the said adoption of the award stayed. The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of Chepkwony Ngeny. The application is opposed. The Plaintiff has filed grounds of opposition and swore a replying affidavit in opposition to the application filed by the defendant. The Plaintiff further filed a notice of preliminary objection to the application filed herein.

At the hearing of the application, I heard the submission made by Mr. Kirui, Learned Counsel for the defendant and Mr. Karigo Thuo Learned Counsel for the Plaintiff. I concluded that the issue for determination by this court is whether or not the consent entered by the parties to refer the dispute in respect of the suit lands for determination by the District Land Registrar, Kericho and the District Surveyor, Kericho and the subsequent award made and adopted by this court as its judgment should be set aside. The thrust of the argument made by the defendant is that the said award was made without jurisdiction and further that the District Land Registrar had misconducted himself when he made the said award.

The law as regard the setting aside of consent judgments is now settled. The East African Court of Appeal, the predecessor of the Court of Appeal of Kenya held as far back as 1952 in **Hirani versus Kassam (1952)EACA 31** that:

“Prima facie, an order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court set aside an agreement.”

What is the consent orders that the defendant seek to have set aside?

On the 27th of November, 2003, the Counsel for the parties to this suit entered the following consent which was adopted as the order of this court:

“By consent, this matter be referred to the District Land Registrar, Kericho and the District Surveyor Kericho to determine whether the portion in dispute lies within KERICHO/SOSIOT/1242 or KERICHO/SOSIOT/804. The parties to share the Surveyors and the Registrar’s costs equally. The District Surveyor to file their reports within 60 days from the date hereof. The Plaintiff shall extract and serve this order forthwith.”

The sixty day period by which the District Land Registrar and the District Surveyor, Kericho were required to have filed their reports expired but was however extended by the court. The report filed by the District Land Registrar was read to the parties by the court in the presence of their respective counsels on the 27th of September, 2004. The court made an order that any aggrieved party was required to file any objection within thirty days of the said date that the award was read in court.

On the 7th of February, 2005, the counsels for the parties to this suit entered the following consent which was adopted as the order of this court:

“By consent, the award dated the 29th of June, 2004 which was read over on 27th September, 2004 be confirmed as the order of this court. The District Surveyor to fix beacons on the actual boundary of the suit land. The defendant to vacate the disputed land within 45 days.”

It is this last consent order that provoked this application by the defendant.

After carefully reading the pleadings filed in respect of this application and also considering the arguments made by the parties to this application it is not disputed that the parties in this suit opted to have the dispute, (*which appears essentially to be a boundary dispute*) referred to the District Land Registrar and the District Surveyor to make a determination on the actual boundary on the ground. From the perusal of the award filed by the District Land Registrar, it is evident that the Plaintiff and the defendant participated in the proceedings before the said District Land Registrar. The District Surveyor went to the ground, and using the duly registered index map of the area, determined that the defendant had encroached into the Plaintiff’s parcel of land. It was determined that the said boundary was to be moved to reflect the correct position on the map. The determination made by the District Land Registrar was read to the parties on the 27th of September, 2004. The defendant did not object to the said award. The said award was adopted as a judgment of this court on the 27th of February, 2005 **by consent** of the parties. The defendant agreed to vacate the suit portion of land within forty five days from the said date of the judgment.

Now the defendant complains that the said award was made without jurisdiction. He submits that the Plaintiff’s suit was filed after the limitation period had expired. He also argues that the land adjudication register having been closed in 1970, it was not open to the Plaintiff to question the boundaries of the suit land. Having carefully considered the arguments made by the defendant, I do find the same to have no merit. The issue that was put for resolution by the District Land Registrar with the assistance of the District Surveyor was to determine the boundary of the two parcels of land belonging to the plaintiff and the defendant respectively. The District Land Registrar with the assistance of the District Surveyor, determine that the suit land lay within the parcel of land owned by the Plaintiff and not by the defendant. The boundary on the ground was therefore to be moved to the side of the defendant’s parcel of land. The defendant participated in the proceedings. He did not object to the award when the same was read in court. Indeed he participated in the adoption of the said award as the judgment of this court.

The argument by the defendant that the issues in dispute were determined when the adjudication register was closed in 1970 is therefore misplaced. The issue in dispute was not the ownership of the respective parcels of land owned by the Plaintiff and the defendant but the determination of the boundary

between the two parcels of land on the ground. The registered index map of Sosit area clearly shows that the defendant had encroached on to the Plaintiff's parcel of land. The defendant had thus trespassed onto the Plaintiff's parcel of land. The issue of trespass is continuous and cannot be barred by the provisions of the **Limitation of Action Act**.

As stated earlier, the principles to be applied by this court when considering whether or not to set aside consent judgments are well settled. The defendant has not alleged that the said consent agreement was entered contrary to the policy of the court. Indeed, there is evidence that the defendant actively participated in the proceedings both before this court and before the District Land Registrar, Kericho. The defendant cannot complain that the said consent was entered into in the absence of sufficient facts or misapprehension or ignorance of material facts. The defendant has failed to convince this court that the said consent orders that he willingly and consciously entered into fell within the category of consent judgments that can be set aside. All along the defendant was represented by counsel, who presumably advised him on the proper course of action to take.

I therefore find no merit whatsoever in the application made by the defendant now before me. In my considered view, the said application is an afterthought. The defendant has realised that the day of reckoning has finally arrived. He wants to postpone the said day without sufficient legal reason. The application is therefore dismissed with costs to the plaintiff.

DATED at KERICHO this 5th day of October 2005

L. KIMARU

JUDGE