



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 166 OF 2016 (OS)

IN THE MATTER OF: Land Parcels Nos. 336/III/MN 336/III/MN

547/III/MN, 500/III/MN, 501/III/MN, 503/III/MN, 505/III/MN, 506/III/MN, 1035/III/MN, 1036/III/MN, 1090/III/MN, 1091/III/MN, 1092/III/MN, 1093/III/MN, 1094/III/MN, 1095/III/MN, 1096/III/MN, 1097/III/MN, 1098/III/MN, 1099/III/MN, 5318/III/MN-5375/III/MN

(And any other subdivisions created from 336/III/MN, the Mother Title).

IN THE MATTER OF: An application for Declaration that the Plaintiff has obtained ownership of Art of 700 Acres of the above parcels of land by way of Adverse Possession.

BETWEEN

RUKIA ATHMAN MWARANDU & 197 OTHERS.....PLAINTIFFS

VERSUS

- 1. JAMES GACHAU KIRATHE**
- 2. KARIM AFTABHUSSEIN CHAKERA**
- 3. VIRESH BACHUGBHAI KARA MANJI SHIKOTRA**
- 4. SHEILESH PREMCHARD DHANANI**
- 5. JYOTSNABEN BHIMJI LADHA DHANANI**
- 6. NIRAJ PRANHULAL SHAH**
- 7. BINDU NIRAJ PRAMBHULA SHAH**
- 8. JOHN SIMON KEN MUNGAI GAITHO**
- 9. DAVID MWERU alias JALUO**
- 10. MUBSHAFT LIMITED**
- 11. WAIRIMU KONCHELLA**
- 12. THE COUNTY COMMISIONER, KILIFI COUNTY**
- 13. THE CHAIRMAN, LAND COMMISSION OF KENYA**
- 14. THE ATTORNEY GENERAL.....DEFENDANTS**

RULING

1. By their Notice of Motion application dated 9th August 2019, the 198 Plaintiffs herein pray for orders: -

2. That the firm of Kithi & Company Advocates be granted leave to come on record for the Plaintiffs in place of O.M. Robinson & Company Advocates who recorded a consent without consulting the Plaintiffs.

3. That the consent Judgment adopted by this Honourable Court dated 10th October 2016 be set aside and the matter to proceed to full trial;

4.....

5. That an order of injunction do issue restraining the Defendants by themselves, their servants and/or agents from harassing, threatening, arresting, demolishing and destroying the Plaintiffs houses pending the hearing and determination of this suit;

6. That the OCS Mtwapa Police Station, the DCIO Mtwapa Criminal Investigation Department, the OCPD Kilifi Police Division and the Assistant County Commissioner, Kikambala Division to assist in confirming compliance with the said orders; and

7. That the cost of this application be provided for.

2. The application which is supported by an affidavit sworn by one Shahame Khamisi Ali is premised on the grounds: -

a) That the Plaintiffs had initially instructed the firm of O.M. Robinson to act on their behalf in the matter;

b) That on the 10th November 2016, the said firm entered into a consent with the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 10th Defendants to the effect that the Plaintiffs acknowledge and confirm that they have no claims whatsoever in respect of the suit properties;

c) That the Plaintiffs confirm that they did not instruct their advocates to enter into such consent and they were as a result aggrieved by the said consent as it sought to expose them rather than protect them;

d) That the said consent did not have the blessing of the Plaintiffs and they only came to know about it when the Defendants started to harass them and causing them to be arrested and their houses demolished;

e) The Plaintiffs have now instructed the firm of M/s Kithi & Company Advocates to act for them and protect their interests by setting aside the consent that was adopted as the order of the Court and to have the matter proceed to full trial; and

f) That the Plaintiffs are in distress as they continue to be arrested and harassed; their houses demolished and/or destroyed all because the firm of O.M Robinson entered into a consent without instructions and to their detriment.

3. The application is opposed. In a Replying Affidavit filed herein on 11th October 2019 by Robinson Onyango Malombo, the Advocate presently on record for the Plaintiffs, he avers that he has not been notified by his clients of their intention to change Advocates and that he has only been served with a letter from Kithi & Company Advocates which does not specify which Plaintiffs want new representation in the matter which he states stands settled between the Plaintiffs and the 1st, 2nd, 4th, 5th, 6th and 10th Defendants.

4. Counsel avers that the Advocates and representatives of the said Defendants met with himself and the Plaintiffs representatives on the suit property and it was noted that his clients were not in occupation of the plots belonging to the mentioned Defendants and as a result it was resolved that the matter be settled in terms of the consent dated 9th November 2016.

5. Counsel further asserts that as the Plaintiffs' Advocate, he had ostensible authority to consent for settlement of the matter in terms most beneficial to his clients and avers that he had actual express authority in this case to settle the matter in terms of the consent recorded in Court.

6. The application is also opposed by James Gacharu Kirathe (the 1st Defendant). In his Replying Affidavit as filed herein on 17th October 2019, he avers that the consent letter dated 9th November 2016 was signed by all the Advocates on behalf of their clients and the same is valid and binding. He further avers that he bought his parcel of land in the year 2009 and accuses the Plaintiffs of always attempting to encroach thereon.

7. Sheilesh Premchand Dhanani (the 4th Defendant) is similarly opposed to the application. In a Replying Affidavit sworn on behalf of himself, the 3rd, 5th, 6th and 7th Defendants and filed herein on 23rd October 2019, the Defendants assert that Advocates are in law authorized to execute consents on behalf of their clients and no valid reason has been raised by the Plaintiffs to warrant the setting aside of the consent Judgment.

8. The 3rd, 4th, 5th, 6th and 7th Defendants further assert that the parcels of land owned by themselves remain vacant as they were in 2016 and it is their case that the Plaintiffs' claim has nothing to do with themselves. They deny demolishing or destroying any houses belonging to the Plaintiffs as they reiterate no such houses have been on their parcels of land.

9. Karim Aftabhussein Chakera and Mubshaft Ltd (the 2nd and 10th Defendants) are similarly opposed to the Motion. In Grounds of

Opposition dated and filed herein on 22nd October 2019, the two state that:

- 1. The application is misconceived, frivolous and bad in law;**
- 2. The Plaintiffs are bound by the consent Judgment entered into by them through their Counsel on record; and**
- 3. The Court is functus officio and may not entertain the application for injunction and related orders.**

10. I have perused and considered the application together with the respective responses thereto. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

11. On 24th October 2019 when the application came up for hearing, it was agreed that Prayer No. 2 of the Motion be allowed and Messrs Kithi & Company Advocates were accordingly allowed to come on record for the Plaintiffs in place of Messrs O.M. Robinson & Company previously on record. What remains for determination is therefore prayers Nos. 3, 5, 6 and 7 of the Motion dated 9th August 2019.

12. By an Originating Summons dated 29th June 2016, the Plaintiffs herein sued the Defendants seeking vesting orders over several properties described therein. The Defendants thereafter filed their respective responses to the Originating Summons.

13. Thereafter and by a letter dated 9th November 2016 written on the letter-head of the Plaintiffs' then Advocates O.M Robinson & Company Advocates but also executed by A B Patel & Patel Advocates for the 3rd, 4th, 5th, 6th and 7th Defendants; Kamoti Omolo & Company Advocates for the 2nd Defendant and Muturi Gakuo & Kibara Advocates for the 1st Defendant in that order, the parties wrote to the Deputy Registrar of this Court in the relevant part as follows: -

“Your Honour, we will be grateful if you could record the following by consent:

1. The Plaintiffs hereby acknowledge and confirm that:

a) They have no claims of any nature whatsoever in respect of Plot Nos. 5353/III/MN and 5373/III/MN which are owned by the 3rd Defendant, Plot Nos 5370/III/MN and 5371/III/MN which are owned by the 5th Defendant, Plot No 5372/III/MN which is owned by the 3rd and 4th Defendants, Plot Nos. 5355/III/MN and 5369/III/MN which are owned by the 6th Defendants and 7th Defendants. Plot Nos. 5350/III/MN and 5351/III/MN which are owned by the 2nd Defendant, Plot No. 1092/III/MN owned by the 8th Defendant, Plot Nos 5318/III/MN, 5319/III/MN, 5326/III/MN, 5327/III/MN, 5328/III/MN, 5358/III/MN, 5362/III/MN, 5363/III/MN, 5364/III/MN, 5365/III/MN, 5366/III/MN, 5376/III/MN, and 5368/III/MN owned by the 1st Defendant and Plot No. 5352/III/MN owned by the 10th Defendant.

b) They are not entitled to be declared proprietors of the aforesaid plots, and

c) They are not entitled to be registered as owners of the aforesaid plots

d) The aforesaid Defendants are entitled to possession and enjoyment of the aforesaid respective plots of land and the Plaintiffs will not interfere or restrict the Defendants possession or enjoyment thereof. Moreover, the Plaintiffs will not in any way harass or intimidate the said Defendants.

2. The matter is hereby marked as settled accordingly with no order as to costs as between the Plaintiffs and the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th Defendants.

14. The said consent letter was received in Court on 10th November 2016. On that date the matter was coming up before the Honourable Justice Angote for highlighting of submissions in regard to an application filed by the Plaintiffs. Instead the parties recorded a consent in terms of the letter dated 9th November 2016 before the Learned Judge.

15. Some two years after the consent was adopted as an order of the Court, the Plaintiffs filed the present application seeking to have it set aside and to have the matter proceed to full trial on the account that their then Advocates on record never sought their instructions and/or did not consult them prior to the recording of the consent. It is further their case that they were not aware of the same and they only came to learn about the same when the Defendants started harassing them, demolishing their houses and causing a number of them to be arrested.

16. The principles guiding the circumstances under which a consent order may be set aside were long established in **Brooke Bond Liebig – vs- Mallya (1975) EA 2006** where Mustafa Ag V.P stated thus: -

“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, eg on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a 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 the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

17. In the matter before me, the Plaintiffs have told the Court that their former Advocate neither consulted nor sought their instructions prior to the said consent. That Advocate, Robinson Onyango Malombo has countered that argument with his own affidavit stating that the parties and their representatives visited the suit properties prior to the consent and that the same was informed by the prevailing situation on the ground where it was noted that none of the Plaintiffs occupied the parcels of land listed in the Letter of Consent of 9th November 2016.

18. While the Plaintiffs had an opportunity and indeed did file a Supplementary Affidavit herein on 18th October 2019, I did not hear them contest the position taken by their then Counsel. Instead in their submissions before me, the Plaintiffs now assert that they fostered trust in their former advocate to preserve their prescriptive rights of ownership over the suit properties and that being persons who are “not well-informed”, they could only be guided by directions and advice from the said Advocate who subsequently abdicated his responsibility to them.

19. As it were, it was not clear to this Court why it took the Plaintiffs two years before they realized that their matter had been compromised. While they claimed that their houses standing on the suit properties had subsequently been demolished and that some of them had been arrested, they did not provide me with anything to support that contention.

20. As Hancox JA stated in *Flora N. Wasike –vs- Destimo Wamboko (1988) EKLK*: -

“Any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action, and 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 the consent was given without sufficient material facts, or in general for a reason which would enable a Court set aside an agreement.”

21. In the instant matter, there was no evidence placed before me to the effect that the impugned consent order had been procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a Court to set aside an agreement.

22. That being the case, I did not find any merit in the Motion dated 9th August 2019. For that reason, I dismiss the same with costs to the Respondents.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE