Rutto v Maritim (Environment & Land Case 19 of 2016)
[2023] KEELC 15958 (KLR) (1 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15958 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 19 OF 2016

FO NYAGAKA, J

MARCH 1, 2023

BETWEEN

SAUL KIPKENY RUTTO ..... PLAINTIFF

AND

KIPSEREM ARUSEI MARITIM ..... DEFENDANT

RULING

1. The Plaintiff and the Defendant jointly moved this court in Kitale ELC Judicial Review No 1 of 2021 as *Ex Parte* Applicants to determine a number of prayers. In it, they are both represented by the same Advocate acting for the Plaintiff herein, with a common goal.

2. As the Court retired to write its decision in Judicial Review No 1 of 2021, initially reserved for February 2, 2023, it observed that some of the contents captured in the Statement of Facts, the depositions for and against the Notice of Motion, two (2) Annexures in the Supporting Affidavit, and the substantive submissions therein made reference to some facts and orders issued herein.

3. However, the information in the content referred to was sketchy and unreliable such that it could not avail much in the decision to emanate from the merits of the Judicial Review. Moreover, the facts stated by the *Ex Parte* Applicants suggested that this suit was concluded contrary to the 3rd Respondent's depositions indicating otherwise. This court took great exception with the suit land and Letter of Consent from the Cherangany Land Control Board herein all forming a basis of the suit in the Judicial Review proceedings. Thus the court of necessity intended to satisfy itself that the Judicial Review proceedings were neither *res judicata* nor res sub judice.

4. The rival positions taken therein necessitated an interrogation into this suit. By order, the matter was placed before this Court to establish the correct of the positions taken by the contending parties before it could pronounce itself in the aforementioned Kitale ELC Judicial Review No 1 of 2021. Consequently, on February 2, 2023 the *Ex Parte* Applicants submitted that this suit had since been

determined. However, a close analysis of the 'final' order emanating indicated otherwise. In fact, Learned State Counsel appearing for the 1st, 2nd, 4th and 5th Respondents therein submitted that the issues herein could otherwise be sub-judice or *res judicata* in relation to the Judicial Review matter.

5. Consequently, I directed that the matter be mentioned before me virtually on February 8, 2023 at 2.15 pm, with specificity that all parties appear in court and address me on two issues; whether or not this suit was concluded? If the answer is in the negative, what was the validity of the order contested by the other parties?

6. The Plaintiff and his Counsel were present online together with the pro se Defendant in the same chambers on February 8, 2023. The Plaintiff who elected to address the Court though represented, informed the Court that the suit was settled on June 21, 2016 (sic). He however failed to broadly explain how that transpired against the orders of March 1, 2016 where the suit was withdrawn by filed consent. Be that as it may, the Plaintiff continued that parties filed on June 20, 2016 an Application seeking to rectify the consent. It was this Application that led to the resultant orders of July 21, 2016.

7. In the same breath, the Plaintiff's Advocate adopted his submissions but sought for leave to revert and comprehensively respond to the submissions made by Learned State Counsel. Since the Judicial Review matter was reserved to be mentioned on February 13, 2023 to confirm compliance by parties as to filing further Affidavits, parties were invited to revert on February 13, 2023 and answer the following pertinent questions: was this suit concluded? If so, what was the validity of the orders issued after March 1, 2016?

Submissions

8. Parties submitted orally. Learned Counsel, Mr Murgor, appearing for the Plaintiff synopsized the matter. He submitted that this suit was filed on January 20, 2016 after the subdivision of parcel No Chepsiro/ Kibuswa Block 1/Kaplcheplanget/52 (herein referred to as "parcel No 52") which prior to subdivision measured approximately 20 acres. He continued, that the consent for subdivision was obtained from the Cheranganyi Land Control Board on August 19, 2015. Indeed, the record bears that the copy of the consent formed part of the Plaintiff's bundle of documents at the time of fling suit. The consent was later presented to the Lands Office. He went on to say that upon conclusion of this matter, the register of the suit land was closed on November 10, 2015. The consequential effect rendered that parcel No 52 ceased to exist.

9. Continuing, it was submitted that on March 1, 2016, the Plaintiff and Defendant entered into a consent compromising the suit. However, it failed to take account of that subdivision creating LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/140 (herein referred to as "parcel No 140") and LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/141 (herein referred to as "parcel No 141"). He justified that the consent of March 1, 2016 was premised upon the parties' sale agreement dated March 28, 2011 selling parcel No 52. It is instructive to note that this agreement was drawn by the Plaintiff's Advocates herein. However, at the time, the firm was practicing in the nature and style of Ms Lel and Bungei Advocates later changed to Ms Bungei & Murgor Advocates as captured in the Notice of Change of Firm Name dated June 15, 2016 and filed on June 20, 2016.

10. By the consent dated March 1, 2016, it was inter alia agreed that the suit be marked as withdrawn. Learned Counsel submitted that was a mistake because the consent ought to have marked the suit as settled. This court observed that the suit was marked as withdrawn the very same day the Defendant entered Appearance.

11. Facilitated by the need to "regularize the record," parties filed an Application on June 20, 2016. He clarified that Application was not intended to revive suit. Thus the parties did not bring the

suit 'back to life'. He further submitted that nevertheless, the application was allowed on July 21, 2016 as unopposed as in fact, it was supported by the Respondent. This Court carefully perused the Application dated June 15, 2016 and filed on June 20, 2016. It noted that it was drawn by the firm of Ms Bungei & Murgor Advocates. The Application was supported by the Affidavits of the Plaintiff and the Defendant but drawn and filed by the same law firm. In my humble view, glaring collusion between the parties remained prevalent to defeat a lawful purpose, that is to say, obtaining consent from a Land Control Board as a controlled transaction. The parties conspired to obtain court orders to bully their way into getting orders unlawfully.

12. From the facts herein, upon service of summons, the parties 'negotiated' the matter before a Memorandum of Appearance was filed on March 1, 2016, the same date the consent was filed. That consent purported to settle the suit to the extent that the five (5) acres purportedly sold be transferred to the Plaintiff within sixty (60) days. This order was served upon the relevant Land Registrar. It was purported that it was only after the service that parties discovered that parcel No 52 ceased exist prompting the Application for review replacing parcel No 52 with parcel No 141.

13. The rhetorical question this Court posed to the parties was whether the parties herein entered into a sale agreement over land parcel No 141 or parcel No 52.

14. He continued that problems commenced when orders were served upon the Land Registrar, Trans Nzoia County. It became apparent parcel No 52 did not exist since it was subdivided into LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/140 and LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/141. Those titles were subsequently placed in the custody of Vivian Jepkemboi Arusei, the Defendant's daughter and the 3rd Respondent in the Judicial Review.

15. The orders consequentially were rendered otiose as they were incapable of execution. Learned Counsel accused the said Vivian Jepkemboi Arusei of illegally possessing those titles as they lawfully belonged to the Defendant. Finally, he left it to the Court to determine the question posed to the parties.

16. The Defendant appeared pro se. He submitted that his land was subdivided into two portions. Upon subdivision, it was intended that parcel No 141 was to be sold to the Plaintiff. He urged this court to favor the Plaintiff as the proprietor of the said parcel.

17. Concerning disposition of the present suit, he submitted that the suit was concluded on March 1, 2016. Thereafter, the suit land was divided. However, it must be pointed out and as rightly submitted by the Plaintiff's Counsel, subdivision took place before the suit was filed. He opined that rectification by Application for review was necessitated by the Plaintiff's desire to obtain parcel No 141.

18. The Defendant reiterated that the Plaintiff's daughter illegally took possession of the title. He urged this court to favorable prayers to the Plaintiff since he had no debt with him.

Analysis and Disposition

19. The Court is forever called upon to uphold the aphorism that justice shall shield and defender in line with the dictates of the *Constitution* and the law. The fundament and most paramount duty and obligation of this Court is to do justice to all without fear or favour. Bearing in mind the scriptures from the Holy Book - the Bible, the Final Judgment that shall separate and distinguish the just from the unjust, good from evil as some merit eternal life and/or eternal damnation. It is the singular duty of this and all courts, immolating the apex Supreme Court of the universe, to do nothing but justice to all irrespective of status.

20. In that regard, this Court shall not stand aloof and turn a blind eye where the facts denote glaring injustice being perpetrated. Worse off is when the Court's process is exploited to foster the injustice.

All reason and clarity of mind including the law itself, Section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya forbid. This is also juxtaposed with the findings of the Supreme Court of India in the case of *Raj Bahadur Ras Raja vs Seth Hiralal*, AIR {1962} AC where Sir Dinshah Mulla said and which sentiments this wholly adopts:

> " .... The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act *ex debito justiciae*, and to do real and substantial justice for the administration, for which alone, it exists..."

21. Similarly so, Mativo J as he then was, in the case of *Karaya Mwangi vs John Gitahi Kabue* [2016] eKLR while quoting Lord Cairns in In *Roger v Comptoir D' Escompts De Paris* held:

> " One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

22. It is this administrative principle that led this Court to invite parties to submit on the validity of the orders issued herein after March 1, 2016. To this end, this Court has considered the parties submissions and the chronology leading up to the orders issued by this Court after March 1, 2016. This Court has also considered the law in place in making its final determination.

23. My analysis begins with the commencement of the present suit. This suit was instituted by the filing of a Plaint. Accompanying it and in line with the provisions set out in our *Civil Procedure Rules*, 2010 was a Verifying Affidavit, whose purpose, as delineated explicitly by the Plaintiff in paragraph four (4), was to verify the correctness of the facts as stated in the Plaint. He was purposive that what was pleaded in the Plaint was verifiable and truthful as to the facts laid out by him unless challenged, and otherwise proved by the Defendant.

24. Going by that verification, the Plaintiff averred that the Defendant took out a loan from AFC and subsequently defaulted. Thereafter, misfortune befell the Defendant who lost his wife due to an illness. But as clearly noted from the Defendant's facts and pleadings, his said wife passed away in 2008.

25. Be that as it may, following the illness and subsequent funeral arrangements, coupled with the outstanding loan, the Defendant's coffers were in need of financial reboot. As such, he approached the Plaintiff to purchase part of his portion of land measuring five (5) acres over LR No Chepsiro/ Kibuswa Block 1/Kapcheplanget/52 at a considerable sum of Kshs 1,200,000.00.

26. Following successful sale, the Plaintiff took ownership by fencing and cultivating the said portion to date. In spite of issuance of a letter of consent from the Land Control Board on August 19, 2015 to redeem the property, the Defendant failed to honor his obligations hence the suit. He thus prayed that the Court declares that he was entitled to the five (5) acres in terms of the sale agreement, an order of specific performance for the Defendant to execute the necessary transfer forms as well as costs and interest of the suit.

27. The Plaintiff filed a witness statement and a list and bundle of documents that he intended to rely on. Evidently, the Defendant had charged the said property to the favor of AFC on July 19, 2007 as seen from the Notification of Charge. There is also exhibited a sale agreement confirming the property to be sold was part of LR No Chepsiro/Kibuswa Block 1/Kapcheplanget/52. Furthermore, the letter of consent seeking to subdivide the portions of land by the Defendant approved subdivision of the land measuring 8.053 Ha into two (2) portions measuring 2.0 Ha and 6.53 Ha.

28. Before I delve into this Ruling further, I make the following observations; firstly, part of parcel No 52 was sold to the Plaintiff on March 28, 2011 as seen from document No 3 of the Plaintiff's List of Documents. While it is disclosed that the Defendant sold a portion of that land, which is five (5) acres, it is apparent from the consent dated August 19, 2015 that the entire parcel, that is parcel No 52, was to be divided into two portions measuring 2.0 Ha and 6.53 Ha. It appears to me from the above transaction that the sale took place before consent to subdivide the land was granted. Though this was illegal, it is not before me to decide at this stage hence I proceed with the issue at hand. It is also noteworthy that though subdivision took place, the same was not done in line with the parties' sale agreement. This can be discerned from the acreage subdivided. Thus, the subdivision was not in pursuance of the sale agreement but on the strength of the Defendant's own volition to the exclusion of the sale agreement.

29. The Defendant's application to the Land Control Board, whose copy was also annexed to his list of documents, does not disclose the fact that he sold five (5) acres to the Plaintiff. By this, the Court wonders what was the Defendant's intended plan was since that would have indisputably affected the Plaintiff's acreage given the fact that it wasn't excised from the original portion.

30. Secondly, the said consent sought to subdivide parcel No 52 and not transfer five (5) acres of that parcel to the Plaintiff. Its reliance therefore to seek the reliefs sought by the Plaintiff created an awkward and fatal fact to the instant suit. Should the matter have proceeded to hearing, the consent relied upon was not to subdivide but to transfer five (5) acres or at all. In fact, from those particulars, the parties herein never sought consent to transfer the land to the favor of the Plaintiff.

31. Be that as it may, the Defendant entered appearance on March 1, 2016. He did not file any Statement of Defence. Extrapolating and by deduction, the Plaintiff's averments were uncontested as verifiable since he swore an Affidavit in that line. On the very day of entry of appearance, parties signed and filed a consent which would later be adopted before the Deputy Registrar, marking the suit as withdrawn. Under the terms of the consent, the Defendant was to meet the cost of survey and transfer fees of five (5) acres from the Defendant's parcel of land known as LR No Chepsiro/Kibuswa Block 1/ Kapcheplanget/52.

32. It is instructive to note that from the pleadings before me that LR No Chepsiro/Kibuswa Block 1/140 and LR No Chepsiro/Kibuswa Block 1/141 were neither pleaded nor formally brought to the Court's attention then. Yet, the Plaintiff's Counsel submitted that parcel No 52 had already been subdivided before the suit had been filed.

33. Of critical importance is the submission that the suit was withdrawn on March 1, 2016. What was the effect of those adopted orders withdrawing the suit?

34. I must firstly state that under the law, withdrawal of a suit is within any party's unfettered right that cannot be curtailed. However, it must be done within the parameters of the law. The Plaintiff is at liberty to withdraw suit without prior permission or concurrence from anyone. The Plaintiff can also exercise the option to withdraw suit with leave of the court. These scenarios are provided in Order 25, Rules 1 and 2 of the *Civil Procedure Rules*. The Court of Appeal succinctly and elaborately dissected this provision in the case of *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* [2015] eKLR laying out circumstances under which a Notice of Withdrawal takes effect as follows:

> "The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the plaintiff is at liberty, at any time, to discontinue the suit

or to withdraw the claim or any part thereof. All that is required of the plaintiff is to give notice in writing to that effect and serve it upon the all the parties. In that scenario, the plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case, the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent. In this scenario, the right of the plaintiff is circumscribed by the requirement that he must obtain the written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality."

35. It is not gainsaid that the suit was by order of this Court withdrawn on March 1, 2016 in accordance with the terms embedded in the consent of the parties. It should be abundantly clear that the withdrawal was effected on the strength of the parties' own accord determining the issues raised herein as between themselves on merit. The Plaintiff withdrew the case with consent from the Defendant since they opined that the issues were meritoriously capable of an amicable settlement. This would save the Court's precious judicial time. In that spirit, a consent was framed, signed, filed and adopted and an order extracted therefrom determining the dispute on its merits. Flowing from the above, this suit cannot be relitigated upon.

36. A pertinent question that arises is, what became of, or is the effect of that withdrawal order as adopted by this Court. In my view, once the consent was adopted, it formed the judgment of this Court creating a valid decree. Since the judgment of the court marked the suit as withdrawn, it ceased to exist.

37. Withdrawal of a suit is the only step that any court must as of necessity caution the parties that once done, that decision cannot be reneged. And if it is done by the consent of the parties, whatever the consequences that arise therefore they are the only ones to bear. A suit once withdrawn ceases to have a Plaintiff or Claimant and Defendant or Defendant respectively. The parties cannot in the future arrogate themselves the same capacities and purport to move the Court in any manner except for costs. The withdrawal cannot be withdrawn or revoked.

38. In holding so, I borrow my further analysis from pronouncements by courts within our jurisdiction. The superior Court of Appeal in *PIL Kenya Limited vs Joseph Oppong* [2009] eKLR held that "the effect of a notice of withdrawal is to terminate the suit of course subject to costs to the opposite party". In fact, if parties agree on costs as was the case here, the suit is terminated on those terms.

39. The High Court in *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR had this to say on the effect of withdrawal:

> "Withdrawal of a suit is itself its end. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the

rule and not by the courts. In the same vein, the rules do not confer the court with power to reinstate a suit once withdrawn."

40. From the above cited authorities, the effect of a withdrawal is to terminate the proceedings. In that same vein, any reinstatement or further action within the same course can only be allowed expressly by law but as it is, there is none. The parties herein should be contented with their own decision. By the same token that they wished to and did steal a match on other unsuspecting parties to craftily circumvent the law. Unfortunately, they sealed their own fate that could not be undone as they had purported to do so.

41. In my view, sufficiently advised (by virtue of having been 'represented' by the same counsel to date!), the parties deliberately set out on a trajectory of using the Court to effectuate an illegality. They obtained an order chicanery knowing that it would not be set aside, reviewed or appealed against. By agreeing on the 'merits' of the case herein through settlement capturing their wishes, they completely sealing the orders by withdrawal the suit. The orders having proved to be naught, the parties cannot now cry foul. The Bible warns people to do unto others what you would like to receive. They dug their own hole and buried themselves in it. By this they, and all the world should know that tricks and crookedness never helps anyone.

42. This Court makes such a finding for the reason that the import of a withdrawal of a suit as contemplated under Order 25 of the *Civil Procedure Rules* is that a party may terminate a suit subject to payment of costs. However, a clear reading of the order is that this can only occur where the withdrawal was made without the parties' rights under the suit having been determined. Under those circumstances a subsequent suit may be brought, but subjected to limitation of time under the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya, the *Public Authorities Limitation Act*, and Chapter 39 of the Laws of Kenya or any other statutory provision governing the cause of action.

43. The present withdrawal does not enjoy the exceptions doctrine the parties entered into herein on March 1, 2016. Their rights were determined by consent hence on merits. That is why they extracted the order on 01/04/016 and served it on the relevant offices for further action. Their rights were settled by way of suit. Therefore, the parties herein they can never re-litigate over the same in future, without falling squarely on the path of the subsequent suit being *res judicata*.

44. This Court's mandate is donated from the provisions set out in Article 162 (2) (b) of the *Constitution* of Kenya. Deriving its jurisdiction and functions of the Court as contemplated in Article 162 (3) was the enactment of the *Environment and Land Court Act*. Section 13 (1) of the statute provides:

> " The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

45. My interpretation of the provision is that this Court is only vested with jurisdiction in accordance with the *Constitution* or any law applicable relating to environment and land. This Court cannot purport to arrogate itself jurisdiction or divest itself of the same. To this extent, this Court can only function within the parameters of law set out or the *Constitution* and cannot act outside its scope.

46. The decision in *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* (*Supra*) lays emphasis that once a notice of withdrawal has been adopted as an order of the court, it cannot be revoked by way of reinstatement of suit or any other way except as allowed by legislation.

47. A general interpretation of Order 25, Rule 1 and 2 of the *Civil Procedure Rules* is that once a party exercises its unfettered right to withdraw the suit, the proceedings are wholly terminated and cannot

be reignited. That is the interpretation I adopt in the present case. So that, after March 1, 2016, it was apparent that no party had any right to move this court in this suit.For these reasons, I find that the Plaintiff's Application seeking to review the consent was not only illegal but flatly incompetent. Be that as it may, I observed several illegalities following the consent of 1/03/2016.

48. Firstly, I declare that actions and Application filed on June 20, 2016 violated the provisions set out in Order 9, Rule 9 of the *Civil Procedure Rules* since by the consent of March 1, 2016 a judgment was already in force. As such, they were improperly instituted. This is because the suit was instituted by the Plaintiff who instructed the firm of Lel & Murgor & Co Advocates to act on his behest. When he purported to move the Court post consent, which was an illegality anyway, he filed a Notice of Change of Firm Name in the name of Bungei & Murgor Advocates. The said law firm neither filed an Application for leave come on record for the Decree Holder nor filed a consent by dint of Order 9 Rule 9 of the *Civil Procedure Rules*. It follows that the Notice filed on June 15, 2016 was improperly filed and the new firm of Advocates remain improperly on record.

49. Lastly, the Application sought to review a consent by placing new matters without any leave of the court.A cursory perusal of that Application purported to state that following subdivision of parcel No 52,two (2) parcels that is parcel Nos 140 and 141 morphed from it thus changing the character of the suit.It organically follows that if at all there was subdivision, which I cast doubt, this Court ought to have been placedwith evidence to show that it took place.Suffice to add that initial subdivision was to take place after consent from the Land Control Board was granted to subdivide parcel No 52 into two subdivisions measuring 6.53 Ha and 2.0 Ha. It is for these reasons that the Court invited the parties to appear in person and paint a clear picture from its genesis.

50. In that regard, wouldn't the purported application go against the very intention of the parties to excise five (5) acres of land to the Plaintiff? This question brings to remembrance the submission by the Plaintiff's Counsel that subdivision took place before the suit had been instituted. Thus, in regard to the purported Application for review, the unanswered questions this Court was left to grapple with were whether even assuming that the suit were properly revived and the Application brought properly, this Court had the capacity to grant an application of that nature whose import was to grant orders at total variance with the pleadings. The pleadings herein were never amended to reflect the averment that the title in contention was of parcel No 141 and not 52.

51. Again, and appalling to this Court, which was a clear demonstration and the highest yet height of collusion between the parties herein, was that in the purported Application dated June 15, 2016 that gave rise to the final orders as claimed by the parties herein, Learned Counsel or the same law firm purported to act for the both the Plaintiff and the Defendant. In the said application which was, in my view, defective in form the law firm acting for the Plaintiff not only drew the said Application but also the parties' supporting Affidavits. I have not seen application of this nature in my life of practice and the Bench. At the same time the Defendant's Affidavit in support of the said Application was "drawn and filed by" the said Plaintiff's Advocates' law firm. Really? Is it not absolutely unethical for a lawyer to act for adverse parties in the same matter? It is, unless practice has gone off tangent!

52. Moreover, a jurisprudential question that arises regarding the Application dated June 20, 2016 is whether a consent order or judgment can be reviewed by way of an Application. To the simple mind the question that this Court grappled with was whether, even if the parties had been back to Court rightly, their application could have seen the light of day. In the Application the Applicant moved the Court to review the consent dated March 1, 2016 and substitute parcel No 52 with parcel No 141, and no more. Meaning that the rest of the content remained intact. This Court is of the view that had the application been argued on merit it could have been dismissed either way. A consent order or judgment is an agreement between the parties. It can only be set aside along the reasons an agreement is

set aside, for instance, for illegality, fraud, misrepresentation and coercion. Thus, parties cannot review a consent order by consent. They can only apply to set it aside on those lines above so that the court considers the same on merits.

53. Finally, I find that the Plaintiff, his Counsel and the Defendant were either not candid with this court thus misrepresenting the facts or perversely colluded with one another to obtain the orders sought fraudulently. Why do I say so? In his opening remarks, Learned Counsel for the Plaintiff submitted that the suit was instituted after the subdivision of the parcel of land in issue took place. However, there is no evidence of the reasons for the Plaintiff instituting this suit while knowing such subdivision had taken place. In the same vein, the Defendant informed this Court that subdivision took place after the suit had been filed. This is not true because the reasons the parties gave for the Application for review of the orders were at total variance with this assertion. Could it be that it is based on the Defendant's submissions that subdivision took place after the suit was filed thattheir Application dated June 20, 2016? So much so that, in my view, the other question outstanding from the above is, was the suit premised on falsities and irregularities that could not sustain a valid order *ab initio*? I must hasten to remind myself that since these issues were not canvassed before me, I cannot make a determination for the same but I am within my duty to give my *obiter dicta* on these salient issues. But since the suit was withdrawn, these questions shall forever remain unanswered.

54. A lot has been deciphered above that ultimately leads this court come to the undeniable conclusion that all actions succeeding the orders made pursuant to the signing, filing and adoption of the consent of March 1, 2016, to the extent that by the consent this suit was wholly withdrawn were null and void, arising from misrepresentation to this court by the parties concocting to defeat justice. No person, entity or body, including the Land Control Board of the Cheranganyi Section and the Trans Nzoia Land Registry where they were directed to, was bound to and should obey them.

55. The Plaintiff lacked capacity to file the Application dated June 21, 2021 and subsequently obtain the orders therefore as evinced from the actions of the parties herein. What else could explain my brother Judge's orders of September 4, 2019 found on the overleaf of the orders of March 1, 2016 (on the same paper, yet there are other separate pages having the orders herein impugned) than that there was intent to misuse this Court process?

56. I am continually guided by the inherent powers of this Court couched in Section 3A of the *Civil Procedure Act* to avoid the abuse of the process of this court by parties as was done herein. This is because the parties herein obtained the orders subsequent to March 1, 2016 for purposes of perpetrating an injustice by using them to compel the Land Control Board and the Land Registrar to do acts which they were not supposed to, and this Court is enjoined to stop it. The suit was determined on merits by the consent of the parties herein and ended that way by the withdrawal thereof. I agree with both the Plaintiff and the Defendant that the suit herein was concluded by the consent of March 1, 2016. It cannot be reignited. Any cause of action brought on similar issues between the same parties litigating under the same title will be *res judicata*. The upshot of the above analysis is that I find and declare that the orders given after March 1, 2016 are null, void and of no legal effect. They should never be relied on by anyone to bestow a right or privilege on them or any other person.

57. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE ON THIS 1ST DAY OF MARCH 2023

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE