



**Kandie & 2 others (All Suing in their Capacity as the Administrators of the Estate of Edward Peter Kipyator –Deceased) v Chepyator & another (Environment & Land Case E005 of 2023) [2023] KEELC 18884 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18884 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E005 OF 2023**

**JM ONYANGO, J  
JULY 12, 2023**

**BETWEEN**

**ANTONINA JEROTICH KANDIE ..... 1<sup>ST</sup> PLAINTIFF  
COLLINS KEMBOI AYABEI ..... 2<sup>ND</sup> PLAINTIFF  
CLAIRE JEBET AYABEI ..... 3<sup>RD</sup> PLAINTIFF  
ALL SUING IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE  
ESTATE OF EDWARD PETER KIPYATOR –DECEASED**

**AND**

**FRED KIPTARUS CHEPYATOR ..... 1<sup>ST</sup> DEFENDANT  
ALBERT KIRUTO CHEPYATOR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs is the widow while the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are the children of Edward Peter Kipyator – Deceased respectively and they have filed this suit in their capacity as the administrators of the estate of the deceased. The Plaintiffs filed an application dated February 8, 2023 seeking an order of temporary injunction to restrain the defendants from interfering with land parcel number Karuna/ Sosiani Block 2 (Progressive)/91 registered in the name of the deceased.
2. The 2<sup>nd</sup> Defendant filed a Replying Affidavit dated February 20, 2023. However, when the matter came up for inter partes hearing on February 22, 2023, the advocates agreed to compromise the application by extending the interim orders of injunction pending the hearing of the main suit after which they would fast track the main hearing. The parties were directed to comply with Order 11 of the *Civil Procedure Rules* within 30 days and the matter was fixed for mention on April 24, 2023 for purposes of confirming compliance with Order 11 of the *Civil Procedure Rules*.



3. On February 28, 2023, the Defendants filed an application under Certificate of Urgency seeking to have the consent order entered on February 22, 2023 vacated, varied, reviewed and/or set aside and for reinstatement of the application dated February 28, 2023. It is the said application that is the subject of this ruling.
4. The application is based on the main ground that Ms Kosgei, Advocate who held brief for Mr Omboto Advocate who is seized with the matter on behalf of the plaintiffs was misled by Mr R M Wafula, counsel for the Defendants. In her Supporting affidavit sworn on February 28, 2023 Ms Kosgei deposed that Mr Wafula indicated to court that the application could be compromised so that the hearing of the main suit is fast tracked. He further indicated that the interim orders of injunction issued on February 13, 2023 should be extended in respect of the whole of land parcel number Karuma/Sosiani Block 2 (Progressive)/91 as his client was in possession of the entire parcel. The court then recorded the consent based on the facts provided by counsel for the plaintiff.
5. She deposes that she later learnt that the defendants were in possession and use of 7.5 acres curved out of the suit property which measures 30 acres and that they had been using it since 2010 with the knowledge of the 1<sup>st</sup> Plaintiff. She also learnt that the 2<sup>nd</sup> defendant had personally contributed to the purchase of 7.5 acres out of the suit property. She further deposed that the consent order has been used against the defendants as they are unable to utilize their portion and this has occasioned the defendants loss and damage and created acrimony and bad blood between them and the plaintiffs. She avers that it was deceitful of the plaintiff's counsel to take advantage of the fact that she was not conversant with all the facts of the matter to get orders that were detrimental to the defendants. She is of the view that a counsel's mistake should not be visited on their client.
6. Mr Omboto Advocate swore an additional Supporting Affidavit in which he deposes that he is personally seized with the matter. He further avers that on February 22, 2023 when the matter came up for *inter partes* hearing he requested Miss Kosgei to hold his brief and have the matter placed aside so that he could address the court as he was engaged in another court. He reiterates the averments by Ms Kosgei and urges the court to set aside the orders issued on February 22, 2023.
7. In response to the application, Mr R M Wafula, Advocate affidavit filed a Replying Affidavit sworn on March 20, 2023 in which he denies the averments in paragraphs 7 and 11 of Miss Kosgei's affidavit and prays that the same be expunged from the record as they are scandalous, irrelevant and oppressive.
8. He admits that he proposed that the application be compromised for purposes of fast-tracking the hearing of the main suit but denies that he stated that the defendants had no problem with the utilization of 7.5 acres.
9. He avers that that since Miss Kosgei appeared in court on February 22, 2023, she ought to have had the full brief and she cannot be heard to complain. He avers that he did nothing to deserve being blamed or vilified. He deposes that he was informed that the plaintiffs have been in possession of the whole of the suit property since 2001 until January 2023 when the defendants attempted to grab 7.5 acres thereof.
10. It is his averment that the court recorded the consent as agreed by the advocates and not of the facts given by him.
11. In response to the allegation that the defendants have been in use of 7.5 acres of the suit property he refers to the 1<sup>st</sup> plaintiff's supporting affidavit in which she deposes that she has been in exclusive use of the suit property both before and after her late husband's death until January 8, 2023 when the defendants unlawfully entered the suit property in the company of surveyor and hived off 7.5 acres. He denies the defendants' claim that they have been utilizing 7.5 acres of the suit property since 2010 and states that he has been informed by the 1<sup>st</sup> plaintiff that the defendants have no legitimate claim



over the suit property or any part thereof. He avers that in light of the plaintiff's case as presented, the defendants do not stand to suffer any loss or damage nor have they demonstrated the loss they will suffer if the orders of February 22, 2023 are not set aside.

12. Mr Wafula has refuted the averments in Mr Omboto's supporting affidavit. He takes exception to the allegations in paragraphs 4, 6 and 7 of the Mr Omboto's affidavit and terms them careless, irresponsible and unprofessional and denies ever having engaged in sharp practice, been deceitful or taken advantage of anyone. He similarly prays that the allegations in paragraphs 4, 6 and 7 of Mr Omboto's affidavit be expunged from the record and that paragraph (b) of the Certificate of Urgency be struck out for being offensive.
13. He avers that he was informed by the 1<sup>st</sup> Plaintiff that when the defendants were summoned to the police station on January 8, 2023, they told the police that they had been advised by their advocate to enter the suit property so that they could claim that they have been in possession thereof. He is of the view that the application does not meet the requirements for granting the orders sought.
14. The application was canvassed by way of written submissions and both parties duly complied.

### **Analysis and Determination**

15. Having considered the application, affidavits filed by both sides, the rival submissions and the relevant authorities, the issues for determination are whether the consent orders entered on February 22, 22 should be vacated, varied, reviewed or set aside and whether the application dated February 8, 2023 should be set down for hearing.
16. The principles pertaining to setting aside of consent orders or judgments are fairly clear.

In *Hirani V Kassam* [1952] 19 EACA 131 the Court of Appeal held;

“It is now well settled law that a consent judgment 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 Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“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 the 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.”

17. In the case of *Flora N Wasike v Destimo Wamboko* (1982-1988) 1 KAR 625 wherein Hancox J A quoted a section from *Judgments and Orders* (7th edition) volume 1 page 124 which was quoted in *HIRAN VS KASSAM* (1952) 19 EACA 131, as follows;

“*Prima facie*, any 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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

18. What I have to determine is whether any of the conditions for setting aside of a consent order of judgment exist in this case.



19. What is in contention is the consent recorded in court on February 22, 2023 by Mr R M Wafula and Miss Kosgei to the effect that the order of injunction issued on February 9, 2023 remains in force pending the hearing of the main suit and that the parties comply with order 11 of the Civil Procedure Rules within 30 days.
20. The said consent was recorded with a view to fast tracking the hearing. Miss Kosgey has sworn an affidavit in which she avers that she was not the one seized with the matter and she did not have sufficient instructions from their clients regarding their use and occupation of a portion of the suit property measuring 7.5 acres. Her affidavit is buttressed by the affidavit of Mr Rioba Omboto in which he avers that he was the one who was seized with the matter and that Mr Wafula took advantage of Miss Kosgei who had limited instructions to obtain orders that were detrimental to his client.
21. It is unfortunate that both counsel for the defendants have sworn affidavits casting aspersions on Mr Wafula and accusing him of taking advantage of Miss Kosgei who apparently had limited instructions in the matter yet there is no indication that he was made aware that Miss Kosgei did not have full instructions. Advocates owe a duty to each other to be courteous and not to make unwarranted and unsubstantiated allegations imputing bad motives on their colleagues.
22. Be that as it may, it has been demonstrated that the counsel who appeared for the defendants when the consent was recorded did not have sufficient material facts regarding the defendants' claim to the suit property. In the circumstances, I am persuaded that this is one of the instances where the consent order has to be set aside. Accordingly, I set aside the consent order dated February 22, 2023 and direct that the application dated February 8, 2023 shall be reinstated for hearing.
23. The costs of the application shall be in the cause.

**Dated signed and delivered this 12<sup>th</sup> day of July, 2023.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of;**

Miss Kosgei for the Defendants/Applicants

Mr. R.M Wafula for the Plaintiffs/Respondents

Court Assistant: A. Oniala

