



**Rikuru v M'Rikuru (Environment and Land Case Civil Suit
E008 of 2022) [2023] KEELC 19850 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19850 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE CIVIL SUIT E008 OF 2022
CK YANO, J
SEPTEMBER 20, 2023**

BETWEEN

CHARITY NTINYARI RIKURU PLAINTIFF

AND

FRANCIS MUGAMBI M'RIKURU DEFENDANT

RULING

1. On October 5, 2022, the parties herein recorded a consent which was adopted as an order of the court in the following terms:-

“By Consent-;

1. The defendant be and is hereby directed to obtain the consent of the land Control Board and transfer to the plaintiff 0.5 acres of land to be excised from Nyaki/kithoka/1462 within 90 days from today's date, in default the Deputy Registrar of this court shall execute all the requisite documents to effect the transfer.
2. All the expenses of the sub division and transfer to be borne by the plaintiff
3. The matter be and is hereby marked as settled.
4. Each party to bear their own costs”

2. What is now before me is a notice of motion dated January 26, 2023 seeking for orders-;

1. Spent



2. That the Honourable court be pleased to order the county surveyor to undertake sub-division and excise a portion measuring $\frac{1}{2}$ an acre from LR No Nyaki/kithoka/1462 taking into consideration the plaintiff's occupation and developments on the ground.
3. That the OCS Meru Police Station do provide security to ensure compliance with the order
4. Costs of this application be provided for.
3. The application is stated to be brought under Section 1A, 1B & 3A of the Civil Procedure Act and Articles 50 & 159 of the Constitution of Kenya and all other enabling provisions of law.
4. The application is premised on the grounds that-;
 - a. The applicant seeks to enforce the implementation of the consent order recorded by the parties herein
 - b. The applicant instructed a surveyor to sub divide the land but the surveyor's efforts to access and survey the land was frustrated by the respondent
 - c. The respondent has refused to co-operate to ensure subdivision is done fairly taking into consideration everyone's interest on the suit parcel and has threatened physical harm.
 - d. That the applicant is apprehensive that the respondent will only allow sub division to be carried out according to his wishes which act will result in demolishing applicant's permanent structures and removing the grave therein.
 - e. The applicant shall suffer substantial loss and damage if the process of subdivision is undertaken as intimated by the respondent.
 - f. That in the interests of justice and fairness the application be allowed as stayed.
5. The application is supported by the affidavit of Charity Ntinyari Rikura, the applicant sworn on January 26, 2023. The applicant depones that she has been in exclusive occupation and utilization of the portion measuring $\frac{1}{2}$ an acre on the suit parcel and has established permanent developments therein which facts has never been disputed by the respondent. That by consent the respondent agreed to hive off a portion measuring $\frac{1}{2}$ an acre from LR No Nyaki/kithoka/1462 and transfer the resultant portion to her culminating into the honourable court marking the matter as settled. That upon the private surveyor visiting the *locus in quo*, the respondent threatened her and intimidated the surveyor that the sub division will be done without factoring her occupation and developments therein.
6. The applicant averred that the respondent has vowed that no sub division shall be undertaken on the suit parcel without him taking the whole prime portion adjacent to the road. That she is apprehensive that the respondent is adamant to grant her a portion inauspicious to her occupation and inconsiderate to the developments therein which shall render her destitute.
7. The applicant prayed that the court intervenes and directs that the district surveyor visits the *locus in quo* and subdivide the land taking into consideration their occupation and permanent developments on the ground. That it is in the interests of justice and fairness that the application is allowed as prayed.
8. In opposing the application, the respondent filed a replying affidavit dated February 15, 2023 wherein he confirms that the applicant is his sister and that she is one among the many children that their late father Peter M'rikura had. That prior to the demise of their father, he wrote a will which he bequeathed different tract of land to his eight sons and the respondent has annexed a copy of the said will.



9. The respondent averred that the suit land was bequeathed to him and their elder sibling and stated that by the time, all his sisters, including the applicant, were married and therefore their father did not bequeath any share to them. That sometime in the year 1997, the applicant started having marital problems in which she complained that her late husband who was a police officer had been transferred and could not provide for his family and her children adequately.
10. The respondent stated that on humanitarian ground, he had a discussion with his late mother after which they concluded that the applicant be brought back to the family and he gave the portion of the suit land that she is currently in occupation. That later, the applicant's husband died and he allowed her to bury the remains of her husband on the portion she is in occupation. That later after the demise of their late mother, the applicant turned violent against him and started advancing her unorthodox means to have the portion that he gave to her be increased in size.
11. The respondent further stated that previously the land in question was held by their late mother in trust for his brother and the respondent but was later subdivided and transferred to two of them in which the respondent got 1.27 ha. The respondent averred that when he attained the age of majority, his late mother effected the transfer into his name and he has annexed a copy of the title deed. The respondent stated that he strongly felt that the application was engineered by the applicant to embarrass and tarnish his reputation since as the registered owner of the suit land he had subdivided and given portion to the applicant but she still wanted more.
12. The respondent contended that the application before court was unnecessary and uncalled for.
13. The court directed the application to be canvassed through written submissions. The applicant filed her submissions dated May 23, 2023 and the respondent filed his on June 19, 2023.

Analysis And Determination

14. I have considered the application, the response and the submissions made. The only issue for determination is whether the orders sought should be granted or not.
15. In this case, the matter was settled by consent of the parties made on October 5, 2022. The said consent was adopted as an order of the court. It has now emerged that the parties are yet to implement the said orders made on October 5, 2022.
16. In the application herein, besides an order for provisions of security to ensure compliance with the order of court, the applicant is seeking an order directing the County Surveyor to undertake subdivision and excise a portion measuring $\frac{1}{2}$ of an acre from LR NO. Nyaki/kithoka/1462 "taking into consideration the plaintiff's occupation and developments on the ground."

There is no doubt that the portion that reads "taking into consideration the plaintiff's occupation and developments on the ground" did not form part of the consent entered into by the parties in their own volition and which consent was merely adopted as an order of the court.
17. In the case of *Board of Trustees National Social Security Fund vs Michael Mwalo* (2015) eKLR, the Court of Appeal stated as follows:-

"A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, collusion or by an agreement contrary to the policy of court."



18. In the case of *Brooke Bond Liebig (T) Ltd Vs Lallya* (1995) EA 266 Law JA stated at P 269 as follows:-

“The circumstances in which a consent judgment may be interfered with were considered by this court in *Hiram Vs Kassam* (1952) 19 EACA 131, where the following passage from *Seton on Judgments and Orders*, 7th edition vol 1 P 124 was approved: “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 consent was given without sufficient material facts or in misrepresentation or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

19. Similarly, in the case of *Flora Wasike Vs Destimo Wamboko* (1988) KAR 625, Hancox, JA (as he then was) stated-;

“It is now 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”

20. The question to consider in this application is whether the applicant has met the threshold for review or setting aside or varying the consent order entered by the parties on October 5, 2022. The record shows that when the matter came before court on October 5, 2022, the plaintiff/ applicant was represented by J Muthomi advocate. Indeed Mr. Muthomi is the one who dictated the terms of the consent which were confirmed by the defendant/respondent herein. The applicant now wants the court to vary the said consent order to incorporate the words “taking into consideration the plaintiff’s occupation and developments on the ground.” The question that arises is why did the parties fail to incorporate those conditions in the consent they voluntarily entered into and which I believe was only entered into after some negotiations or discussions? In this case, the applicant has not alleged that there was misrepresentation, mistake or coercion. There is also no suggestion that there was fraud or collusion. All the material facts were known to the parties who willingly consented to compromise the matter in terms so clear and unequivocal as to leave no room for any possibility of mistake or misrepresentation. Further, the parties even incorporated a default clause whereby the Deputy Registrar of this court was empowered to execute all the requisite documents to effect transfer in the event the defendant failed to do so. Certainly, the court cannot re-write the contract for the parties so as to vary the consent that they themselves agreed upon. In the result, I decline to grant prayer (2) of the application.

21. The other prayer sought is for the OCS Meru Police station to provide security to ensure compliance with the orders of court. Clearly, this court’s orders issued on October 5, 2022 still remains in force and the same are enforceable in accordance with their terms. The respondent ought not frustrate the implementation of the said orders since court orders are not made in vain. I therefore find no difficulty in concluding that should it become necessary, the OCS Meru Police station shall provide security to the surveyor who shall carry out the survey to excise ½ of an acre of the suit property in terms of the consent order made on October 5, 2022.

22. Consequently, I make the following orders:-

1. Prayer (2) of the notice of motion dated January 26, 2023 is dismissed.
2. I direct the Officer Commanding Station (OCS) Meru Police Station to provide security to ensure compliance with the orders issued in October 5, 2022.



3. Considering the relationship of the parties who are siblings, I Order that parties bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF SEPTEMBER, 2022.

In the presence of

Court Assistant - Kiragu V/Lenah M

Mwirigi Batista for plaintiff – applicant

Defendant/Respondent – present in person

C.K YANO

JUDGE

