



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

MISCELLANEOUS ELC APPLICATION NO. 42 OF 2018

WILSON KARANJA.....PLAINTIFF/1ST RESPONDENT

VERSUS

SUBUKIA FARMERS CO-OPERATIVE

SOCIETY LTD.....1ST DEFENDANT/APPLICANT

LAND REGISTRAR.....2ND DEFENDANT/2ND RESPONDENT

RULING

1. By a man made Notice of Motion dated 16th September 2019 filed **without the** provisions under which the same was brought, the Applicant herein sought for an array of orders to wit;

i. Spent

ii. That this honorable court be pleased to set aside the consent orders issued on the 5th February 2019 and reinstate the matter for hearing and determination.

iii. That the Memorandum of Appearance filed by Peter Githaiga Karuri, the society's secretary on behalf of the Subukia Co-operative society Limited be deemed as duly filed.

iv. Spent

v. Spent

vi. That pending the hearing and determination of this suit the OCS Subukia police station be ordered to provide security, restore order and normalcy to the residents of the affected area, and in enforcing any orders granted by this honorable court.

vii. That this honorable court be pleased to grant a permanent injunction restraining the Plaintiff/Respondent his servants and/or agents from interfering with the suit property L/P Kericho/Sorget Block 1/286 pending the hearing and determination of this suit.

viii. That the new officials of Subukia Co-operative society Limited Mr. Paul Macharia-Chairman, Mr. Peter Githaiga Karuri-Secretary be granted leave to file a defence out of time, counterclaim, witness statements, and documents to the suit on to defend the suit on behalf of the members of the aforementioned society.

ix. Any other orders this honorable court may deem fit to grant.

x. Cost of this application.

2. The said application is premised on the grounds on the face of it as well as the sworn affidavit of Mr. Peter Githaiga Karuri sworn on the 16th September 2019.

3. The Application was opposed by the Plaintiff/Respondent herein vide their Replying Affidavit dated the 3rd December 2019, to the effect that the same was bad in law, made in bad faith, lacked merit, was malicious and amounted to an abuse of the court process.

4. That the officials of the Applicant being the Chairman Mr. Mwangi Njoroge, the Secretary Mr. Fredrick Makumi and the treasurer Mr.

Peter Njoroge had sought that the matter be settled out of Court wherein on the 25th July 2018 parties filed a consent to the effect that the two title deeds be cancelled and the necessary rectifications be done to the map and thereafter fresh title deeds bearing the corrections be issued to the parties.

5. On 5th February 2019, the said consent was adopted as the order of the court in the presence of the Applicant's officials, to which both the title deeds and the map were rectified wherein the Respondent was issued with his rectified copy of the Title deed. That both he and the Applicants now have their rightfully allocated sizes of their respective parcels of land.

6. There had been no response by the 2nd Defendant/Respondent to the Application.

7. By consent, parties agreed to have the Application disposed of by way of written submissions.

The Applicants' submissions

8. Vide the Applicants' submissions dated the 9th November 2020 and filed on 8th February 2021, the Applicants submitted that the 1st Respondent who had been the longest serving secretary of the society (from 1972-1980) had been issued with a parcel of land known as Kericho/Sorget Block 1/76 measuring 4.5 Ha between the years of 1977 and 1978 wherein he had been issued with his title deed in 1988. That up until the year 2016 when he had been issued with the area map, he had neither raised the issue of the decrease in acreage of his portion of the land nor the increase in size of the water catchment land, to the society's committee.

9. That what had happened instead was the collusion of the 1st Respondent with three former officials of the society namely Chairman Mr. Mwangi Njoroge, the Secretary Mr. Fredrick Makumi and the treasurer Mr. Peter Njoroge, to defraud the society of its property through the filing of a purported consent letter in court and which consent was filed without following the Society's By Laws and/or adhering to the Co-operative Society Act No 12 of 1997.

10. That on the 15th February 2019, the Court had granted the 1st Respondent orders declaring him the legal owner of the subject matter herein being L/P Kericho/Sorget Block 1/286 irrespective of the fact that the parcel of land was a community water point under Subukia Co-operative Society Limited. That there had been no general meeting of members held to pass the said resolution and therefore the members of the society and all the four committee members were not involved in the decision making to enter the impugned consent for the rectification of boundaries and acreages of L/P Kericho/Sorget Block 1/76 and 286 (Subukia).

11. The Applicant faulted the court for adopting the consent on 5th February 2019 without interrogating important documents such as a notice of special general meeting that discussed and agreed for the consent to be written, Minutes of the day's meeting and its agenda, Resolution from members of the Society showing what they had agreed on and how they voted, documents which had not been attached to the consent.

12. The Applicant's submission was therefore that since none of the above documents had been availed, the purported consent was therefore just a casual agreement between the three officials and the Plaintiff/1st Respondent to defraud the Society of one of its properties. For this reason, the said consent ought to be set aside and the matter be reinstated for hearing and determination.

1st Respondent's submissions.

13. In opposition of the Applicant's application, the 1st Respondent in his submissions given a brief background of the matter in question to the effect that he had filed suit on 23rd May 2018 wherein all parties had been served and to which he had sought for a declaration that he was the legal owner of Kericho/Sorget Block 1/76 and that a portion of his land measuring 0.693 hectares had been unlawfully registered under the 1st Defendant/Applicant's land parcel No. Kericho/Sorget Block 1/ 286 (Subukia). He had therefore sought from the 2nd Defendant the rectification and/or an amendment of the title deeds of both parcels of lands so as to reflect the correct acreage and approximate area thereto.

14. The 1st Defendant did not oppose the prayers sought and upon negotiations initiated by the 1st Defendant's officials, a consent had been reached, filed in court and adopted as a judgment of the court to which orders had already been enforced by the 2nd Defendant whose suit had been withdrawn.

15. The 1st Respondent framed his issues for determination as follows

- i. Whether the consent judgment/Decree should be set aside.
- ii. Whether there is need for a second memorandum of appearance.
- iii. Whether a permanent injunction restraining the Plaintiff should be granted.
- iv. Whether the 1st Defendant should be granted (sic) to file their statements of defence and counterclaim out of time.
- v. Cost of the application

16. On the first issue for determination, it was the Respondent's submission that the Applicant had not met the threshold required to enable

the court to set aside the consent Decree. In so submitting, the 1st Respondent relied on the case of **East African Portland Cement Company Limited vs. Superior Homes Limited [2017] eKLR** to submit that a consent Decree could only be challenged on the ground that it was obtained through fraud, mistake, misrepresentation or any other reason which would persuade a court to vary or set it aside. In this case there had been no mistake, fraud or misrepresentation involved and no reasonable grounds had been advanced by the Applicants to warrant the court to set aside the consent Decree.

17. And although the Applicant had alluded fraud and/or collusion on the part of the Plaintiff/1st Respondent and the 1st Defendant's official's, these allegations had not been proved to the required standard and ought to be disregarded by the court. His contention was that a portion of his parcel of land had been unlawfully reduced by an acreage of 0.693 Ha during the allocation of the land to purchasers, who were members of the society, wherein it had subsequently been registered under the title deed issued to the 1st Defendant/Applicant.

18. That upon the realization of the error made, he had sought from the 1st and 2nd Defendants, the chiefs, the district officer's office as well as the Land Control Board, to have the mistake corrected. That in the year 2016, the Applicant's officials had acknowledged the error whereas vide a letter dated 17th October 2017, the Kericho District surveyor had found that the correct size of the 1st Respondent's land was 5.193 Ha as against the Applicant's land which was 0.207 Ha respectively. A mutation had been prepared and signed by the parties.

19. Thereafter the 1st Respondent filed suit to have his title deed rectified and/or an amended to reflect the correct size of this parcel of land. That upon the 1st Defendant being served with summons to enter appearance, they had indeed entered appearance through their officials who had then sought to have the matter settled out of court. A consent was recorded which subsequently gave rise to the present application. That with the adoption of the consent as the order of the court in the presence of the Applicant's officials, both the title deeds and the map had been rectified wherein both parties were issued with their respective rectified copies of the Title deeds and Maps. That no Notice of Appeal has been filed by the Applicant/1st Defendant to challenge the consent

20. That the 1st Defendant's officials acted within their mandate as the chair, secretary and treasurer and therefore the Management Committee of the 1st Defendant, who had the capacity to enter into contracts and litigate matters brought by the society or against the society as is stipulated under Section 28(3) of the Co-operative Societies Act and Clause 31 of the Society By Law. That the application lacked merit and the same ought to be dismissed.

Determination.

21. I have considered the Application herein as well as the replying affidavit and the written submission by both parties hereto. I find the issue herein arising for determination as being whether the consent order of 5th February 2019 should be set aside and the matter reinstated for hearing and determination.

22. In the case of **Brooke Bond Liebig (T) Limited vs Mallya (1975) E.A. 266, Law JA, stated the law at P. 269** in these terms:-

*The circumstances in which a consent judgment may be interfered with were considered by this court in **Hirani vs Kassam (1952), 19 EACA 131**, where the following passage from Seton on Judgment and order, 7th edition, Vol. 1 page 125 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.'

23. The Court of Appeal in the decision in **Munyiri –vs- Ndungunya (1985) KLR 370 held as follows:**

'...will exercise its jurisdiction to review, vary or set aside a consent order if it is shown that such an order has been obtained by fraud or collusion, by agreement contrary to the policy of the Court, or the consent was given without sufficient material fact, or misapprehension or ignorance of material facts or for a reason which would enable a court to set aside an agreement or by the consent of the parties themselves.'

24. In the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR** the court of Appeal held that:

The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.

25. The law on variation of a consent judgment is now settled to the effect that the variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.

26. **Hancox JA (as he then was)** in the case of **Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625**, held as follows:

"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."

27. The Court of Appeal in the case of **Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd (1982) KLR 485** held that:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.

28. Having given the background of the facts in issue, I find that the gist of the Application is that the officials of the Applicant being the Chairman Mr. Mwangi Njoroge, the Secretary Mr. Fredrick Makumi and the treasurer Mr. Peter Njoroge had no authority, in accordance to Society's By Laws and the Co-operative Society Act No 12 of 1997, to enter into a consent with the Respondent herein to have the Map and titles to parcels of land No, Kericho/Sorget Block 1/76 and land parcel No. Kericho/Sorget Block 1/ 286 (Subukia) be rectified thereafter fresh title deeds bearing the corrections be issued.

29. It is not in dispute that the Respondent herein filed suit against the 1st and 2nd Defendants on the 23rd May 2018 seeking orders as aforementioned at paragraph 11 above to which the Applicant's officials and/or committee members being the Chairman Mr. Mwangi Njoroge, the Secretary Mr. Fredrick Makumi and the treasurer Mr. Peter Njoroge sought for an out of court settlement which culminated into a consent dated the 16th July 2018. The said consent was adopted on 5th February 2019, as the order of the court in the presence of the Applicant's officials and executed thereafter to which both the title deeds and the map were rectified and parties issued with their respective rectified copies of their Title deeds.

30. I have considered the provisions of Section 28(3) of the Cooperative Societies Act which provides as follows:

The Committee shall be the governing body of the society and shall, subject to any direction from a general meeting or the by-laws of the co-operative society, direct the affairs of the co-operative society with powers to—

(a) enter into contracts;

(b) institute and defend suits and other legal proceedings brought in the name of or against the co-operative society; and

(c) do all other things necessary to achieve the objects of the co-operative society in accordance with its by-laws.

31. I have also considered Part VII of the Applicant's by laws on the Management Committee which provides as follows:

The office of the society shall be managed by a Management Committee which shall consist of five members over the age of 21 years and acted at the annual general meeting and shadow include chairman on energy secretary and owner of the treasurer

32. Claus 31 of the Applicant's by laws provides as follows:

Unless decided otherwise by the general meeting, all documents of contract and cheques shall be signed on behalf of the society by the holders of the following offices:

The chairman with

The honorary secretary and

The honorary treasurer.

33. The Co-operative Societies Act is in this regard a national legislation, and has the force of law throughout Kenya. Section 28 (3) of Cooperative Societies Act, is clear on the duties of the Management Committee in the governing authority of the society hence they are mandated to direct the affairs of the society with powers to 3(b) to institute and defend suits and other legal proceedings brought in the name of or against the society, and 3(c) do all other things necessary to achieve the society's objectives. Claus 31 of the societies By Laws mandated the holders of office of the Management Committee namely the Chairman, Secretary and treasurer to enter into contracts on behalf of the society.

34. In the circumstances therefore, having found that the Management Committee as per the provisions of Section 28 of Co-operative Society Act are the governing body of the Society with powers to institute and defend suits and other legal proceedings brought in the name of or against the Co-operative Society, it therefore goes without saying that the Chairman Mr. Mwangi Njoroge, the Secretary Mr. Fredrick Makumi and the treasurer Mr. Peter Njoroge to whom no evidence has been brought before court that they had no authority to act for the 1st Defendant/Applicant, had full mandate to compromise the suit as they did.

35. *Secondly, I find that there were no circumstances shown to exist that suggested that there was fraud or collusion in the consent entered into by the parties herein. Indeed all material facts were known to the parties, who consented to the compromise in terms as clear and unequivocal as to leave no room for any possibility of mistake or misapprehension.*

36. I am therefore not persuaded that valid grounds have been established to warrant setting aside of the consent judgment of 5th February 2019. That being the case, prayers iii, vi, vii and viii of the Applicant's application cannot issue as they would be in conflict with the consent judgment of 5th February 2019.

37. The Application before me dated the 16th September 2019 to set aside the consent decree is devoid of merit and the same is herein dismissed with costs.

It is so ordered

Dated and delivered via Microsoft Teams this 15th day of April 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE