



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 82 OF 2010

MICHEAL MOWESLEY.....PLAINTIFF/RESPONDENT

VERSUS

KAZUNGU SANA SANA.....DEFENDANT/RESPONDENT

ABDULREHMAN MOHAMED BASHEIKH.....1ST INTERESTED PARTY

LANDS REGISTRAR MOMBASA.....2ND INTERESTED PARTY

STELLA NYAKIO NGUGI.....3RD INTERESTED PARTY

RULING

This ruling is in respect of a Notice of Motion dated 9th June 2021 by the 1st Interested Party seeking the following orders: -

1. Spent

2. That the court be pleased to grant a temporary injunction restraining the 2nd and 3rd Interested Parties whether by themselves, their agents, representatives and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the property being subdivision number 1642/II/MN pending the hearing and determination of this application.

3. That the court do set aside the consent order dated 12th October 2010 and the order dated 4th June 2014.

4. That the court do grant leave to the 1st, 2nd and 3rd Interested Parties to be joined in these proceedings as Defendants, allow them to file their defences to the Plaint and the matter to proceed for hearing thereafter de novo.

5. That costs of the application be provided for.

The application is supported by the affidavit of Abdulrahman Mohamed Basheikh who states that he is the proprietor of the suit property having bought the same from the Defendant vide a Sale Agreement dated 23rd January 1980 and at the time of sale the title deed had not been issued and the suit property was an 8-acre portion of land, part of the original Plot Number 427/III/MN also known as the ex-Norton farm which belonged to one Sheila Norton.

The Applicant deponed that before leaving Kenya in 1968, the said Sheila Norton had decided to give the land to her ex-employees to whom she had always given permission to grow their annual crops and that the Defendant was one of the ex-employees who benefited from her generosity.

He further averred that the title to the suit property was only obtained in early 1993 when the Defendant and the 1st Interested Party were able to execute a transfer to that effect. Subsequently, the Plaintiff obtained the suit property in his name in 2003.

The 1st Interested Party further deponed that he constructed his house on the suit property and has lived there with the family ever since. That further during a routine search on the property in 2013 records showed that he was still the proprietor of the suit property.

He further stated that sometime in May 2021 two police officers visited him on the suit property and informed him that they were responding to a complaint over ownership of the suit property and asked him to produce a copy of title and Sale Agreement in respect of the suit property.

That in light of the allegations, he conducted a search at the Land Registry Mombasa which revealed the following;

- a) That on 12th June 2014, an entry was registered against the title to the effect that a provisional title was issued under Court Order Number 82 of 2010 dated 12th June 2014 and the name under which the provisional title was issued was not indicated.*
- b) That on the same date, an entry was registered against the title to the effect that a transfer was effected to one Michael Mowsley through the same court order of the same date.*
- c) That on the same date, an entry was registered against the title to the effect that the said Michael Mowsley had transferred the suit property to the 1st Defendant/Respondent in consideration of love and affection.*

That upon careful inquiry of the suit property's file at the Lands Registry however revealed that there was no duplicate nor a copy of the said Order Number 82 of 2010 dated 12th June 2014 in the file to support the entries in the title transferring the property to the said Michael Mowsley neither were there duplicates and/or copies of an application for provisional title in the registry file.

The Applicant further stated that upon further searches before the Malindi Environment and Land Court registries for the alleged **ELC Case Number 82 of 2010** which revealed that the Plaintiff had allegedly sued the Defendant for fraudulently transferring the suit property to himself while he was the proprietor of the suit property and by a consent dated 24th July 2014 the Plaintiff and the Defendant agreed that the title deed of the suit property be cancelled against the Defendant and the Plaintiff be registered as the proprietor in his place.

That by a further order dated 4th June 2014, the Land Registrar Mombasa was ordered to issue title to the suit property in the Plaintiff's name without gazetting the same in the Kenya gazette.

The 1st Interested Party further stated that the Plaintiff's suit in itself was statutorily barred since he had alleged that the Sale Agreement was made in 1992 whereas he brought the suit in 2010 well beyond the statutory limitation of 12 years.

It was the 1st Interested Party's case that he is in possession of the original title without the entries registered after the order of 4th June 2014 but he is apprehensive that the 3rd Interested Party may claim ownership of the suit property and evict him.

The said application was not opposed by any of the parties despite having been served as evident by the Affidavit of Service dated 28th October 2021.

APPLICANT'S SUBMISSIONS.

Counsel for the Applicant reiterated the facts of the case as deposed by the Applicant and submitted on the conditions that the Applicant must meet for setting aside a consent order and cited the cases of **Brooke Bond Liebig Ltd V Mallya [1975] EA 266, Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd, Hirani V [1952] 19 EACA 131 and Samson Munikah Practicing as Munikah & Company Advocates V Wedube Estates limited.**

Mr. Mgupu submitted that the conditions/circumstances under which a consent judgment/order may be interfered with are if proved that the order was obtained by fraud or collusion, if the agreement culminating into the consent order was contrary to the policy of the court, if the consent was given without sufficient material facts and in general for any reason which would enable the court to set aside an agreement.

Counsel submitted that the consent was obtained by fraud or collusion without sufficient material facts and contrary to the policy of the court and urged the court to set aside the same.

ANALYSIS AND DETERMINATION

The issues for determination is whether the consent order was obtained with fraud or collusion and without disclosure of material facts, whether the Applicant has met the threshold for grant of temporary injunctions and whether the 2nd and 3rd Intended Interested Parties should be joined in the suit.

On the first issue whether the consent judgment should be set aside on grounds of fraud, collusion and obtained without disclosure of material facts, it is trite that where such is proved then the court can interfere with the contract and set aside the orders.

In the case of **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485**, Harris J correctly held inter alia, that –

“1. 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 collusion 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.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

There are two consent orders dated 12th October 2010 and 4th June 2014 which form substance of the instant application.

The principles that appertain to setting aside of consent orders are well established as was held in the case of **Brooke Bond Liebig vs Mallya (1975) EA 266 (supra)** where Mustafa Ag. VP 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, e.g 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.”

The Applicant gave a chronology of the transaction on the suit land and that he is still in possession of the original title to the suit land. He further deponed that he is in occupation of the suit land and that the Defendant entered recorded the consent without material disclosure of the fact that the Applicant was in occupation and was the registered owner of the suit land. Why was the Defendant readily agreeing to a consent to transfer the suit land? This action is questionable.

Parties in a dispute should present their claim by disclosing material facts in a case and where a party does not adhere to this then such non-disclosure may act against him or her.

The fundamental principles of non- disclosure of material facts are as follows:

- a) ***The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge.***
- b) ***The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.***
- c) ***The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the Applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the Defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.***
- d) ***Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application.***
- e) ***The question whether the non-disclosure was innocent, in the sense that the fact was not known to the Applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the Applicant to make all proper inquiries and to give careful consideration to the case being presented.***
- f) ***Finally, it is not every omission that the injunction will be automatically discharged***

It should be noted that non-disclosure of material facts to the court is indeed a serious issue which may warrant a court to set aside or vary an order. In this case there are two consent orders dated 12th October 2010 and 4th June 2014 which form substance of the instant application and which have serious ramifications as the same were used to transfer the suit property.

I find that there was concealment of material facts which led to the consent order and thus allow the application for setting aside the consent orders dated 12th October 2010 and 4th June 2014.

It follows from the supporting affidavit and the submissions by counsel that the suit property needs to be preserved to enable the court determine the ownership dispute between all the parties involved as per **Lord Diplock in Siskena 1977 ALL E.R at page 824** where he held;

“a right to obtain an interlocutory injunction is not a cause of action and cannot stand on its own. It is dependent on their being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the Plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court. The right to obtain interlocutory injunction is merely ancillary and incidental to the pre-existing course of action. It is granted to preserve the status quo pending the ascertained by the Court of the rights of the parties and the grant to the Plaintiff of the relief to which is his case of action entitles him which may or may not include a final injunction.”

The Applicant has also established that the suit land has since been registered in the name of the 3rd Intended Interested Party who should be joined as she has direct stake in the matter. The Land Registrar being the custodian of the title records is also hereby joined as the 2nd Interested Party.

The Applicant has met the threshold for joinder of the Interested Parties as per Rule 7 (1) of the Mutunga Rules which provides for guidelines for joining Interested Parties to proceedings as follows; -

A person may, with the leave of the court, make an oral or written application to be joined as an interested party

7 (2) provides that a party may on its own motion join an as Interested Party to the proceedings before it

I have considered the application, the supporting affidavit together with submission by counsel and find that the application has merit and is allowed as prayed. The consent orders dated 12th October 2010 and 4th June 2014 are hereby set aside and the matter to be heard de novo. The Interested Parties are hereby joined to the suit and should be served with the pleadings within 14 days from the date of this ruling. Any action arising from the impugned consent orders are hereby declared null and void. Order of injunction is hereby issued restraining the Plaintiff and the Defendants from interfering with the suit land in any way.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 2ND DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.