



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & LC. NO.154 OF 2013

SILVANO KIPROTICH.....1ST PLAINTIFF/APPLICANT

NURIA ABDIRAHMAN SHEIKH.....2ND PLAINTIFF/APPLICANT

VERSUS

RUTH TUWEL.....1ST DEFENDANT/RESPONDENT

JONAH KOSGEL.....2ND DEFENDANT/RESPONDENT

LABAN KOSGEL.....3RD DEFENDANT/RESPONDENT

TIROP KOSGEL.....4TH DEFENDANT/RESPONDENT

RULING

1. The Applicants filed a Notice of Motion dated the 27th April, 2021 seeking for orders that the consent order of 9th November, 2018 be varied/reviewed to provide that;

- a. "The County Land Surveyor and the County Land Registrar Uasin Gishu County to visit the disputed parcels No. Eldoret Municipality Block 20 (Kapyemit)43, now subdivided into several parcels and Eldoret Municipality Block 20 (Kapyemit)/42 and conduct a survey using both the Registry Index Map (RIM) and the title deeds to ascertain the actual boundaries and the acreage of the parcels.
- b. Each party is at liberty to appoint a private surveyor to watch brief during the exercise.
- c. The County Land Registrar do give notices to all parties on the date of the exercise.
- d. The survey report to be filed within sixty (60) days or such time as the court may direct.
- e. The O.C.S. Baharini Police Station to give security during the exercise.
- f. The cost of the survey be shared equally between the parties.
- g. The costs of this application be in the cause."

The application is based on the seventeen (17) grounds on its face and supported by the two affidavits sworn by Silvano Kiprotich and Nuria Abdirahman Sheikh, the Applicants, on the 27th April, 2021, in which they among others deponed that the parties had entered a consent dated the 9th November 2018, agreeing to implement the Land Registrar's report dated the 19th May 2009; that they had entered into the said consent in ignorance of material facts contained in the private surveyor's report dated the 18th October, 2018; that their efforts to have the Respondents agree to a variation of the consent has not been successful and hence this application.

2. The application is opposed by the Respondents through their replying affidavit sworn by **Zakayo Tirop** on the 12th May, 2021, in which he detailed the various efforts to have the boundaries between the suit parcels settled through the private surveyors and County surveyor, whose reports he attached. He added that the application is meant to further delay the finalization of the suit and should be dismissed with

costs.

3. That following the directions of the 12th May 2021, the learned counsel for the Applicants and Respondents filed their written submissions dated the 5th October 2021 and 4th November, 2021 respectively.

4. The following are the issues for the court's determinations;

a. Whether the Applicants' application has met the threshold for the review or varying of the consent order.

b. Who pays the cost of the application.

5. The court has after considering the grounds on the motion, affidavit evidence by both parties, submissions by the learned counsel, and the superior courts decisions cited thereon come to the following findings;

a. That among the various provisions of the law cited at the heading of the notice of motion is Order 45 Rule 1 of the Civil Procedure Rules, which provides that;

“1. (1) Any person considering himself aggrieved-

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without delay.”

The primary duty of the court in the instant application is to examine the facts presented and determine whether the conditions under which a consent order may be set aside or reviewed have been established by the Applicants. That in the case of **SOPIA MOHAMED V RODAH SITIENEI [1992] eKLR** the Court of Appeal cited with approval the decision in **Hirani v Kassam (1952) 19 EACA 131** at page 134, as follows:

“Prima facie, any order made in the presence and with 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”

Further, in the case of **SNI v AOF [2020] eKLR**, the court made the following observations as relates to the varying and or setting aside of consent orders:

“Prudence, indeed will dictate that parties legal effect deprived from the consent orders should deliberately be bound unless there is evidence that every material fact in their possession was invariably mistaken or misrepresented to warrant a variation or complete setting aside the order. It is integral as the Court held in *Flora N. Wasike v Destinno Wamboko* {1988} eKLR that:

“It is now settled Law that a consent Judgment or order has a 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 in *J. M. Mwakio v Kenya Commercial Bank Ltd* CA No. 28 of 1982).”

And in the Ugandan case of **MIGADDE V. MUSOKE & 4 ORS (2020) UGHCFD 9** the court cited with approval the case of **Attorney General & Anor Vs James Mark Kamoga & another SC CA No. 8 of 2004** as follows:

“--- It is a well-settled principle, therefore, that consent decree has to be upheld unless it is violated by reason that would enable a Court to set aside an agreement such as fraud, mistake, misapprehension or contravention of court policy. This principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the consent judgment ----.”

b. That from the foregoing, the Applicants herein need to establish the existence of the following elements to warrant the review of the consent order entered into on 9th November, 2018:

a. Fraud or collusion;

b. An agreement contrary to the policy of the court; or

c. That consent was given without sufficient material facts or misapprehension or ignorance of such facts; or

d. Other sufficient reasons which would enable the court to set aside an agreement.

The Applicants main basis in their application and submissions is that the Land Registrar’s report dated the 19th May, 2009 that was to be implemented through their consent that they now seek to vary/review was prepared using only the Registry Index Map, without considering the contents of the title deeds and the actual measurements on the ground. They have relied on a survey report dated 18th October, 2018 prepared by a private surveyor who practises in the name and style of Opiyo and Associates, Licensed Land Surveyors, to buttress their position. The court has taken the liberty to peruse the private surveyor’s report and noted that it has not made any mention or reference to the Land Registrar’s report made earlier, dated the 19th May, 2009. There is also nothing in the private surveyor’s report to suggest that the contents of the Land Registrar’s report were erroneous.

c. That the court further takes note of the fact that the private surveyor’s report is dated 18th October, 2018 while the consent order sought to be set aside/reviewed through the instant application was entered into less than a month later, on the 9th November, 2018, definitely after receiving the surveyor’s report. The Applicants have not advanced any explanation why they proceeded to enter into the consent order if by then they knew that the Land Registrar’s report dated the 19th May 2009 was inaccurate in view of the subsequent private surveyor’s report. The Applicants have also not explained why it took them approximately two and a half years to file the application seeking to review and or vary the consent order herein, when it is clear all facts alleged now were within their knowledge, as far back as October/November 2018.

d. That the reasons advanced by the Applicants in their attempt to justify why their application should be granted cannot be rightly stated to be reasons that would justify the setting aside of contracts. The reasons that justify setting aside contracts include fraud, mistake or misrepresentation, and the Applicants have not established the existence of any of those grounds.

e. The Applicants have submitted that where the consent order is yet to be executed, the court has qualified and conditional discretion to interfere with such consent judgements. The Applicants cited the following paragraph in the case of **CONTRACTORS LTD vs MARGARET OPARANYA [2004] eKLR;**

“This court has qualified or conditional discretion when it comes to interfering with consent Judgments or orders. Moreover, where the consent order or Judgment is still executory, the court may refuse to enforce it if it would be in equitable to do so.”

That paragraph continues to state as follows;

“The mode of paying the debt, then is part of the consent Judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. It has been stated that the applicant’s failure to comply with the court order was not intentional or contumelious...”

That the foregoing goes to show that the courts will only consider to interfere with consent orders on grounds similar to that for which a contract may be varied or rescinded being established by the party or parties seeking the court’s discretion to do so. The Applicants have not established the existence of such grounds, or that they did not know the content of the private Surveyor report by the time they entered into the consent, and no error apparent on the face of the record has been pointed out.

f. The Applicants having failed to establish that their notice of motion is with merit should pay the Respondents costs in the application in accordance with section 27 of the Civil Procedure Rules.

6. That flowing from the above, the Applicants application dated the 27th April, 2021 is found to be without merit, and is dismissed with costs to the Respondents.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 2ND DAY OF MARCH, 2022

S.M.KIBUNJA,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PETITIONERS: ...Absent.....

RESPONDENTS: ...Absent.....

COUNSEL:Ms. Kiptoo for Ogengo for Plaintiffs/Applicants

COURT ASSISTANT: ONIALA

S.M.KIBUNJA,J.

