



Ondiek & others v Ominde ((Suing on his own behalf and on behalf of Joel Ominde Ondiek (Deceased))) (Environment & Land Case 360 of 2015) [2022] KEELC 3150 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3150 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 360 OF 2015**

**A OMBWAYO, J
JULY 7, 2022**

BETWEEN

CALEB OBIERO ONDIEK & OTHERS PLAINTIFF

AND

**CHARLES JUMA OMINDE DEFENDANT
(SUING ON HIS OWN BEHALF AND ON BEHALF OF JOEL OMINDE ONDIEK
(DECEASED))**

RULING

Brief Facts

1. The Defendant herein filed an Amended Notice of Motion on November 9, 2021 seeking for the following orders:
 1. This Application be heard on a priority basis and ex parte in the first instance.
 2. The firm of M/S S.O. Madiali & Co. Advocates be granted leave to come on record for the Defendants in place of Kimanga & Co. AdvocateS after Judgment.
 3. Pending the hearing and determination of this Application interparties, there be stay of execution of the orders of this Honourable court issued on December 5, 2018.
 4. Upon prayers 2 and 3 being granted, the Honourable court be pleased to review, set aside, alter and amend its orders issued on December 5, 2018 for purposes of re-executing the same in terms agreeable to both parties.
 5. Costs of this application be provided for.



2. The Application was based on grounds that the findings of the court based on the consent of the then contents on record were not followed to work and the court granted automatic leave for aggrieved party to revert back to court.
3. The Surveyors were biased at the time of executing the court's order by satisfying the needs of the Plaintiffs only and the Surveyors report is based on falsehood, overlooking or concealing the actual position on the ground. That despite several attempts and efforts by the Applicants to have the Respondents corporate, the same has fallen into deaf ears.
4. The Defendant stated that they will be prejudiced if the court fails to grant the orders sought and that it is in the interest of justice that the orders sought be granted.
5. The Application was supported by the Affidavit of Mirembe Edmond, an Advocate practicing in the firm of S.O. Madialo & Co. Advocates who had been given instructions to conduct this matter.
6. It was stated that during the subsistence of this matter, the firm of Kimanga & Co. Advocates were on record for the Defendants and upon being instructed to take up the matter, he addressed the firm of Kimanga & Co. Advocates over their intention to come on record in their place vide a letter which letter was not responded to.
7. That the Defendant informed him that the Plaintiffs are busy implementing the orders to the detriment of the Applicants and it is in the interest of justice that the Surveyor's report filed in court be set aside and a fresh survey be carried out.
8. He stated that it would be just and expedient to have this matter revisited and concluded at preliminary level and the court should not revisit its orders as agreed by consent as the Defendants will considerably lose their land. He further stated that the Application has been made without unreasonable delay or undue influence.
9. The Plaintiffs herein filed Grounds of Opposition on December 8, 2021 on grounds that the Application is incompetent, frivolous and vexatious and ought to be dismissed with costs. That the Application has failed to meet the criteria for grant of the orders sought and the Applicant has not demonstrated sufficient reason in law to interfere with the consent Judgment. The Plaintiffs further opposed the Application on ground that the Application is a clear abuse of the court process and a tactic which is intended to create legal morass, frustrate the Respondent and elevate expenses unnecessarily owing to the fact that the Supporting Affidavit in the Application is insufficient and incompetent and as such unsustainable in law.
10. On December 9, 2021, this court directed the Application to be canvassed by way of written submissions.

Defendant's /Applicant's Submissions

11. The Defendant filed his submissions on December 16, 2021 and submitted that the issue in question touches on family land as it involves boundaries and sharing of land and distribution of the same. It was stated that it is not in dispute that a survey was carried out and therefore what is in dispute is how it was carried out.
12. That the Defendant is willing to meet the expenses that relate to the resurvey exercise and that the exercise will not prejudice any party as the Defendant wants a second opinion which the court shall be able to see, assess and realize the injustice administered by the 1st report. It was submitted that a consent can be reviewed upon establishment of compelling reasons as was held in the case of Nairobi COA-Civil Appeal No. 158 of 2014 East African Portland Cement Company v Superior Homes Limited.



Plaintiffs/Respondents' Submissions

13. The Plaintiffs filed their submissions on March 14, 2022 where it was stated that the Consent was recorded on December 5, 2018 after the court heard the Counsels present as well as the litigants and the Surveyor's report was considered. The Consent was adopted as an order of the court that the Surveyors report dated June 12, 2017 be and is hereby adopted by the court and the suit land be shared as proposed therein, that upon the subdivision being completed any party found to be on another land do give vacant possession in 90 days and in default he/she be evicted, that parties have the right to apply to the court and the file be closed.
14. It was submitted that a Consent order cannot be set aside or varied unless the same was obtained through fraud, collusion or by an agreement contrary to the policy of a court. That the consent was entered freely by the litigants who actively participated in the process of settlement and the Defendants got the largest share of land parcel number Kisumu/Korando/1841.
15. It was further submitted that the Defendants are wrongly before the court owing to the fact that it is evident that it was a term of the consent order that any person whose land has been encroached on was to apply to court for eviction of the trespasser. That no proof has been brought by the Defendant that his portion has been interfered with.
16. The Plaintiffs submitted that the Application is frivolous and has been brought before court to vex the Plaintiffs and the same should be dismissed with costs as they have not demonstrated that they are worthy of the orders sought.
17. The Plaintiffs relied in the case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR.

Analysis and Determination

18. I have considered the pleadings, the evidence on record and the submissions filed by the parties and do find that the main issue for determination is whether the this court can review, set aside, alter and amend its orders issued on December 5, 2018. Pursuant to a consent recorded on December 5, 2018, it was ordered that the surveyors report dated June 12, 2017 be and is hereby adopted by the court and the suit land be shared as proposed therein, that upon the subdivision being completed any party found to be on another land do give vacant possession within 90 days and in default he/she be evicted, that parties have the right to apply to court and the file be closed.
19. The Defendant herein filed the instant application seeking for orders that this court be pleased to review, set aside, alter and amend its orders issued on 5th December 2018 for purposes of re-executing the same in terms agreeable to both parties. It was the Defendant's case that the findings of the court based on the consent were not followed and the court granted automatic leave for aggrieved party to revert back to court. The Defendant also alleged that the surveyors were biased at the time of executing the court's order by satisfying the needs of the Respondents only and the report was also based on falsehood.
20. The Plaintiffs on the other hand filed grounds of opposition where they alleged that the Application is a clear abuse of the court process and a tactic which is intended to create a legal morass, frustrate the Respondent and elevate expenses unnecessarily owing to the fact that the Supporting Affidavit is insufficient and incompetent.
21. It should be noted that for a consent order to be set aside, certain parameters need to be met as the Applicant has to demonstrate evidence of fraud, collusion mistake or illegality as was held in the following cases:



22. In *Samuel Wambugu Mwangi v Othaya Boys High School* Civil Appeal No. 7 of 2014 [2014] eKLR, the court observed that:

...Circumstances under which a consent judgment may be interfered with were considered in the case of *Brooke Bond Liebig (T) Limited v Maliya* [1975] EA 266. It was stated that 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 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.”

23. In *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited & another Civil Appeal No. 276 of 1997* [1998] eKLR, the court stated that:

.....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.....”

24. The Defendant in his supporting Affidavit has not demonstrated sufficient reason to enable this court set aside the consent order. The Defendant has only stated that the Plaintiffs are busy implementing the orders issued to his detriment. There is no element of illegality or evidence of fraud on the part of the Plaintiffs towards implementing the said orders as alleged by the Defendant. This court finds that the Application lacks merit and is hereby dismissed with costs to the Plaintiffs/Respondents.

DATED AT KISUMU THIS 7TH DAY OF JULY 2022.

ANTONY OMBWAYO

JUDGE

