



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC NO. 160 OF 2013

WILLIAM MUIRURI GETATA.....PLAINTIFF

VERSUS

DAVID KIPLAGAT KAINO.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

DISTRICT LANDS REGISTRAR.....3RD DEFENDANT

TOWN CLERK, NAKURU MUNICIPALITY.....4TH DEFENDANT

ETON HOLDINGS LIMITED.....5TH DEFENDANT

R U L I N G

1.The plaintiff moved the court by way of Notice of Motion dated 23rd November, 2020 seeking the following orders:

1. [Spent].

2. [Spent].

3. THAT the court be pleased to set aside and or vary the orders issued on 7th November, 2019 and allow this suit to proceed to full hearing.

4. That in the alternative, the court be pleased to order the 3rd defendant to disregard and or cancel the parallel register in favour of the 1st and 5th defendants herein in order to bring this matter to closure.

5. That the costs of this application be provided for.

2. The application is supported by an affidavit sworn by plaintiff/applicant where he deposed that on 18th September, 2019 when the matter came up for hearing, the court was informed that the 3rd defendant (Land Registrar) had rectified the register and his late mother Hellen Getata's names were restored. That on 7th November, 2019 based on the documents supplied by the 3rd defendant, the suit was withdrawn and soon thereafter he submitted the transfer documents to the 3rd defendant to effect the said transfer by transmission but there was delay and or refusal by the 3rd defendant. He annexed documents confirming the same.

3.The plaintiff further deposed that the Land Registrar had explained that he was unable to register the transfer in favour of the plaintiff/applicant due to the 2nd register still in their records and that the 3rd defendant advised him to obtain an order directing cancellation of the register. The applicant averred that it was impossible to mark the matter closed as long as there was no order directing closure of the parallel register hence requested the court to allow this application or in the alternative order the 3rd defendant to cancel the parallel register.

4. The 5th defendant/respondent opposed the application on grounds of opposition dated 23rd January, 2020 stating that the court is functus officio having already made a determination and that since the suit was marked withdrawn by an order of the court, the instant application has no suit to which it can be predicated upon. Further, that the application disclosed no explanation as to why the consent order should be set aside.

5. The application was canvassed by way of written submissions filed by the plaintiff/applicant and the 5th defendant.
6. The plaintiff/applicant submitted that the objection by the 5th defendant that this court is functus officio is unmerited. He placed reliance on section 3A of the Civil Procedure Act which gives the court inherent jurisdiction to make any such orders as would be necessary in the interest of justice. He went on to argue that despite the court having entered judgment in the matter, it does not mean that it does not have jurisdiction to deal with any subsequent actions and or questions that may arise thereafter.
7. The plaintiff further submitted that the facts of this case were peculiar in that the instant suit was never heard and fully determined but was withdrawn by the plaintiff after obtaining documents from the 3rd defendant which he verily believed to be correct. The applicant placed reliance on the case of *Silvanus Kizito v Edith Nkirote Mwiti [2021] eKLR* where the court held that a trial court can handle all incidental proceedings even after final judgment is delivered provided that such proceedings do not amount to retrying the cause but geared towards bringing the litigation to an end.
8. Though the suit was withdrawn by apparent consent of parties, the plaintiff placed reliance on the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1982] eKLR 485* where the court held that a consent order entered into is binding and cannot be set aside unless it was proved the consent was given without sufficient material facts or in ignorance of material facts to urge the court to set the consent aside. In the instant matter the plaintiff submitted that there was evidence of misrepresentation by the 3rd defendant as the plaintiff relied on the documents supplied by the Land Registrar in consenting to the withdrawal of the suit and that this justified the setting aside of the consent.
9. The plaintiff submitted that the 3rd defendant supplied him with documents showing that the register had been rectified thus giving him the false impression that this suit was not necessary only for the 3rd defendant to later refuse to process the transfer by transmission. The 3rd defendant contends that there exists two registers over the suit land. The plaintiff/applicant argued that he cannot be faulted for the actions of the 3rd defendant and that there was need for this court to make a proper finding with respect to the ownership of the suit land and more particularly the two registers allegedly in the custody of the 3rd defendant.
10. The plaintiff/applicant concluded by submitting that the prayers sought are discretionary and it was the role of the court to deliver justice without undue regard to technicalities and urged the court to allow the application with costs.
11. The 5th defendant/respondent in their submission reiterated their grounds of opposition. The 5th defendant submitted that the suit having been withdrawn by consent could not be reinstated and nor could the consent be set aside. The 5th defendant/respondent cited Order 25 rule 1 of the Civil Procedure Rules which states, *'At any time before the setting down of the suit for hearing the plaintiff may by notice in writing which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim and such discontinuance or withdrawal shall not be a defence to any subsequent action'* The 5th defendant relied on the case of *Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR Court of Appeal* which held that 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 and it must be shown that it was obtained by fraud. The 5th defendant submitted that the consent order made on 9th December, 2019 is contractually binding and there were no valid grounds for setting aside the consent order.
12. The 5th defendant submitted further that the court rendered itself functus officio once the consent was made and relied on the *Supreme Court case in Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR* where the court held that once a decision has been given, it is final and conclusive and such decision cannot be revoked or varied by the decision maker. The 5th defendant submitted that upon the court issuing the order on 9th December, 2019 the file was finalized and marked as settled and the court became functus officio and the only remedy available to the plaintiff/applicant was to institute a fresh action, appeal and/or seek review.
13. The 5th defendant further submitted the application was defective and an abuse of the court process. The 5th defendant/respondent submitted that the plaintiff/applicant was misleading the court by asking for an order to cancel the parallel register when the court withdrew the matter owing to the plaintiff/applicant demonstrating to the court that the 3rd defendant/respondent records showed that they had rectified their register dissipating the substratum of the case. The 5th defendant argued that the plaintiff/applicant was purporting to reopen the matter and that constituted abuse of the court process.
14. The 5th defendant further submitted that the plaintiff/applicant filed the instant application after a period of almost 1 year after the court recorded the consent withdrawing the suit unreasonable and not been explained.
15. The 1st defendant did not file any response to the application as their advocate ceased acting for him for what of instructions. The other defendants equally did not participate in the hearing of the application and filed no responses.
16. To contextualize the basis of the instant application it is necessary to recap the proceedings of 18th September 2019 and 7th November 2019. On 18th September 2019 the suit had been fixed for hearing. Mr. Kounah advocate appeared for the plaintiff and Mr. Kahiga advocate appeared for the 5th defendant. The plaintiff was present in court and ready to testify. Mr. Kounah advocate however indicated he had learnt the Land Registrar had rectified the land register and that in essence settled the matter. Mr. Kahiga advocate for his part indicated he was not aware of any rectification of the register. That prompted the court to observe as follows:-

“ It appears the substratum of this case may have disappeared and it would be needless to proceed with the hearing without ascertaining the current status of the suit property. In the premises I grant leave to the plaintiff to file further documents which must include a current search and an abstract of title for the suit property---”.

17. A mention of the matter was fixed on 7th November 2019 and on the date Mr. Kounah advocate had filed the documents as directed which documents showed the Land Registrar had indeed rectified the register and that it was the plaintiff's deceased mother, Hellen Gitata, who appeared in the register as the registered owner. On that account the plaintiff saw no reason to proceed with the suit and opted to abandon and/or withdraw the same. The withdrawal/or abandonment" The court proceeded and made a ruling and interalia stated as follows:-

“—The current abstract of title on the suit property Nakuru Municipality/Block 13/87 issued on 1st October 2019 shows Hellen Gitata (deceased) was registered on 7th February 1991 and is still the registered owner. The implication is that there was a separate register for the land depicting the 1st defendant as owner who then sold the land to the 5th defendant. The plaintiff's position is that to the extent that the register now shows his deceased mother is still the owner of the suit property he has no wish of proceeding further with the suit as what he was seeking was rectification of the register and the Land Registrar has affirmed the status of the register is that the plaintiff's mother is the owner of the property”.

18. The court in those circumstances deemed the suit as withdrawn and awarded costs to the 1st and 5th defendants as against the 3rd and 4th defendants since as the custodians of the land records they bore responsibility for any anomalies in regard to the same.

19. The applicant has averred that following the withdrawal of the suit he has tried to have the title registered in his deceased mother's name transferred through transmission but the land registrar has declined to do so stating there exists another register on the same property. That is what has provoked the present application seeking to have the court order dated 7th November 2019 set aside and/or varied to allow the suit to proceed to full hearing on merits.

20. The Court of Appeal in the case of *East African Portland Cement Co. Ltd -Vs- Superior Homes Limited (2017) eKLR* considered the principles applicable in varying or setting aside orders made by consent of the parties and reviewed various cases where the principles had been applied. The common thread in all the cases cited is that a court would only set aside or vary a consent order/judgment on grounds which would justify setting aside of a contract. The cases of *Brooke Bond Liebig Ltd -vs- Mallya (1975) EA266*, *Flora Wasike -vs- Destino Wamboka (1988) I KAR 625* and *Samson Munikah t/a Munikah & Co. Advocates -vs- Wedu Estates Ltd (2007) eKLR* all reiterated the principles. In the case of *Hiran -vs- Kassan (1952) 19 EACA 131* the Court of Appeal held the court could not interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between parties. The court quoted with approval Setton on judgments and orders (7th Edn) Vol, P124 where the author stated as follows:-

“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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement”.

21. In the case of Brooke *Boudliebig Ltd* (supra) the court stated:

“a consent order charged 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 misimpressions or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement”

22. The court in the case of *Flora Wasike* (supra) followed the same principle when it 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—”

23. In the instant matter the order marking the suit withdrawn was essentially not a consent order but rather an order flowing from the facts and information relayed to the court. The information was to the effect that the plaintiff's deceased mother was the person whose name appeared in the land register as per the abstract of title issued by the Land Registrar on 1st October 2019. Ordinarily a Green card (abstract of title) is *prima facie* evidence who the registered owner of the property is at the particular point in time (see section 26 (2) of the Land Registration Act, 2012). As it was the Land Registrar who is the custodian of the land records who had issued the search and abstract of title, the plaintiff and indeed the court was entitled to accept that the abstract of title produced represented the true position and acting on that position proceeded to have the suit terminated by way of withdrawal.

24. The Land Registrar (3rd defendant) did not participate during the hearing of the present application. The plaintiff applicant indicated that the Land Registrar declined to process the transfer by way of transmission in favour of the plaintiff on the basis that there was another register on the same property. The record shows on 4th January 2011 the 1st defendant was issued with a certificate of lease for land parcel Nakuru/Municipality Block 13/87 and the same parcel of land was transferred and registered in the name of the 5th defendant on 15th July, 2011. This was the same property registered in the name of Hellen Gitata (deceased) on 7th February 1991. The abstract of title for the property issued by the Land Registration on 1st October 2019 showed the parcel of land was registered in the name of the deceased on 7th February 1991 and a certificate of title issued and there were no other transactions. How did the 1st defendant get to be registered as the owner of the same property in January 2011? That is a mystery that calls for explanation and/or investigation by way of taking evidence.

25. On the basis of the facts and material presented at the time the order of withdrawal of the suit was made, I am satisfied there was a misapprehension on the part of the plaintiff and indeed the court that either the Land Registrar had rectified his records and/or that there was only one register held by the Lands office in regard to the suit property that showed the plaintiff's deceased mother, Hellen Gitata was the registered owner of the suit property. That in my view would justify the setting aside of the court order of 7th November 2019 marking the suit as withdrawn and finalized and consequently to have the suit restored and reinstated so that it can be heard on merits.

26. It is so ordered.

27. The parties to bear their own costs of the application.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 4TH DAY OF NOVEMBER, 2021

J M MUTUNGI

JUDGE