



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO.228 OF 2014 (O.S)**

**PIUS KAZUNGU MWENI & 12 OTHERS.....PLAINTIFFS**

**VERSUS**

**JEFWA NYALE .....1<sup>ST</sup> DEFENDANT**

**ABDULRAHMAN ABDALLA SALIM.....2<sup>ND</sup> DEFENDANT**

**RULING**

(Application seeking orders to have an order of dismissal of suit set aside; suit dismissed after a notice to show cause was issued; no appearance on the date of the notice to show cause by counsel for the plaintiffs; no explanation why counsel did not appear; argument of applicants that there had been a consent which settled the suit and thus there was nothing to dismiss; the purported consent filed but not endorsed or adopted by the court; all consents needing to be approved and adopted by the court before they can be taken to be orders of the court; no settlement therefore recorded in the suit and the suit was alive and could be dismissed; in any event consent did not touch on the 2<sup>nd</sup> respondent who was awarded the costs of the suit; no reason to disturb the order of dismissal; application dismissed with costs)

1. The application before me is that dated 10 February 2020 filed by the plaintiffs. It seeks the following substantive prayer which is prayer (3) in the application :-

*That the court do set aside the dismissal or action stopping this suit from being finalized as per the consent dated 8<sup>th</sup> May 2018.*

2. To put matters into context, this suit was commenced by 13 persons through an Originating Summons which was filed on 4 September 2014 by the law firm of M/s Ambwere T.S Associates Advocates. The 1<sup>st</sup> respondent in the suit is Jefwa Nyale (Mr. Nyale) whereas the 2<sup>nd</sup> respondent is Abdulrahman Abdalla Salim (Mr. Abdulrahman). The applicants/plaintiffs sought orders that they have acquired, through the doctrine of adverse possession, title to land that was described as "Parcel No. 255/II/MN (with various subplots) 6198, 6204,6200, 6199, 6181, 6187, 6201, 6191, and 6188 (Original 255/34) Section II Mainland North Mombasa." The Originating Summons was supported by the affidavit of Pius Kazungu Mweni, the 1<sup>st</sup> applicant. He deposed that all applicants were on the suit land before the year 1988 and had built houses on the same. He deposed that on 1 August 2014, they received a letter from M/s A.O Hamza & Company Advocates, acting for Mr. Abdulrahman, demanding that they vacate the land or their structures be demolished. It is apparent that it is this action which prompted them to file suit. To the affidavit was annexed a copy of a certificate of title to the land parcel 255 Section II, and a search and the demand notice.

3. From the title I can see that the original land parcel was registered as Plot No. 255 Section II under the Land Titles Act (repealed) around the year 1916. There were subsequent transfers with the last owner being Mr. Nyale, who obtained registration on 26 June 1969. In the year 1998, he applied for subdivision of this land into the plots No. 6166 to 6204 and 6210, which subdivision was approved. Indeed the search annexed does indicate that the original parcel of land Plot No. 255/II/MN has been subdivided into various subplots. I have also looked at the notice to vacate that was issued by Mr. Abdulrahman and that notice indicates that it is in respect of the plot No. 6198.

4. A Memorandum of appearance was filed by M/s A.O Hamza & Company Advocates "for the 1<sup>st</sup> defendant" (sic). The same firm filed a replying affidavit sworn by Mr. Abdulrahman to oppose the suit. In his reply, he averred that he is the owner of the Plot No. 6198 and he annexed a transfer instrument from Mr. Nyale, registered on 24 July 2014. He contended that the 1<sup>st</sup> applicant is a tenant who has been asked to vacate. He denied that the applicants have built structures on the land as alleged.

5. I have gone through the file and I have not seen any appearance entered in respect of the Mr. Nyale (the correct 1<sup>st</sup> respondent). Nevertheless, a written consent dated 8 May 2018 written on the letterhead of M/s Kamoti Omollo & Company Advocates, was filed on 13 May 2018. It is apparent that the consent was in respect of the applicants and the 1<sup>st</sup> respondent (Mr.Nyange). That consent states as follows :-

“The Deputy Registrar,

Land & Environment Court

Civil Registry

MOMBASA.

Dear Sir,

RE: MSA ELC CASE NO. 228 OF 2014, PIUS KAZUNGU MWENI & 11 OTHERS VERSUS ABDULRAHMAN ABADALLA SALIM & ANOTHER

Kindly record the following order,

“By consent

1. THAT each and every Plaintiff to purchase their respective plot or parcel of land from the 1<sup>st</sup> Defendant for Kshs. 450,000/= per plot save for subdivision number 6198 (original number 255/34) section II Mainland North which has already been sold to the 2<sup>nd</sup> defendant herein.
2. THAT the payment to be made by 5 annual instalments of Kshs. 90,000/= each commencing on 1<sup>st</sup> October 2018 and thereafter on the 1<sup>st</sup> October of each succeeding year till payment in full.
3. THAT upon payment of the 1<sup>st</sup> instalment the 1<sup>st</sup> Defendant’s Advocate shall prepare for execution by the respective plaintiffs and the 1<sup>st</sup> Defendant an agreement for sale in respect of each of the Plaintiffs respective plot of land which agreement shall substantially comply with the terms of this consent.
4. THAT each party shall bear his own cost of this suit but the respective Plaintiffs shall bear the cost of conveyance in respect of their respective plots of land including the 2<sup>nd</sup> Defendant’s Advocates costs thereof.
5. THAT in default of payment of any instalment on its due date as stipulated herein above, the 2<sup>nd</sup> defendant shall be at liberty to sell the respective Plaintiffs (sic) portion or subdivision, without any reference to such Plaintiff and the respective Plaintiff shall be evicted from his respective portion of land”

Yours Faithfully,

(signed)

Ambwere T.S Associates

Advocates for the Plaintiffs.

(signed)

Kamoti Omollo & Company

Advocates for the 2<sup>nd</sup> defendant.

6. Now, before I go too far, it will be seen that in his appearance, M/s A.O Hamza & Company Advocates, stated that they act for the 1<sup>st</sup> respondent. However, it is apparent that they act for Mr. Abdulrahman who is the 2<sup>nd</sup> respondent. Despite M/s Kamoti Omollo & Company signing the above consent as acting for the 2<sup>nd</sup> respondent, clearly, if at all they act in the matter, for I have already said above that I have not seen any appearance filed by the said law firm, they could only be acting for the 1<sup>st</sup> respondent (Mr. Nyale). I will proceed within the above assumption on the issue of representation.

7. That consent, though filed, was never endorsed by the court. In fact, from the record, I have seen that the matter was in court on 17 January 2018 when parties appeared for the hearing of an application for injunction which was filed alongside the Originating Summons, but on the day, they agreed to dispense with the application and instead proceed to full hearing of the Originating Summons by way of viva voce evidence. That is the last time the matter was in court.

8. On 12 October 2018, the court, on its own motion, issued a Notice to the parties, to show cause why the suit should not be dismissed for want of prosecution. The notice was listed for hearing on 6 November 2018 before Waithaka J, who was visiting the station for the “Judicial Service Week”, a programme aimed at the clearance of case backlog. On that day, only Mr. Hamza, learned counsel, appeared for the 2<sup>nd</sup> respondent. He supported the dismissal of the suit and the suit was duly dismissed for want of prosecution with costs to Mr. Abdulrahman.

Nothing happened in the matter until a party and party bill of costs was filed by Mr. Hamza on 28 November 2019. It is upon being served with the bill of costs that this application was filed. As I pointed out at the beginning of this ruling, the application seeks orders to set aside the order of dismissal or any action aimed at stopping the suit from being finalized via the consent dated 8 May 2018.

9. The supporting affidavit to the application has been filed by Pius Kazungu Mweni. He has deposed inter alia that parties entered into negotiations culminating in the consent dated 8 May 2018. He is surprised that a party and party bill of costs was filed yet it was not part of the consent. He has averred that the dismissal was done without notice and in ignorance of the filed consent. He has stated that the consent settled the matter and any purported dismissal is illegal and of no consequence.

10. A replying affidavit was filed, sworn by Mr. Abdulrahman. He has deposed inter alia that he was not party to the consent. He has pointed out that the order of dismissal awarded him costs.

11. At the hearing of the application, Mr. Ambwere, learned counsel for the applicants, was of opinion that the case was subject to a "mass dismissal without going through the file." He stated that the 1<sup>st</sup> respondent was the owner of the whole land and he decided to settle the matter and it is thus not fair to have the applicants pay costs.

12. I have considered the matter. First, it is the contention of the applicants that the consent filed settled the matter and that there was nothing to dismiss. I beg to differ. The mere filing of a written consent does not mean that the consent has been accepted or has automatically become an order of the court. A consent that has been filed must go through the process of verification and adoption by the court before it can be considered to be a court order. That is indeed what is provided for in The Practice Directions on Proceedings in the Environment and Land Court, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts, Gazette Notice No. 5178 of 25 July 2014. Rule 35 provides as follows :-

35. Where parties at any stage compromise a matter or intimate a settlement outside court, they shall file consent signed by all parties in the matter settling the same. If no settlement is reached, the matter shall be set down for hearing. In all cases, the filed consent shall require the approval and adoption by the court (emphasis mine).

13. It will be seen from the above, that it is a requirement that every consent be approved and adopted by the court before it can be considered to be a court order. It is therefore not enough for counsel, or parties, to file a written consent and forget all about it. It is the duty of counsel, or parties, to follow up on the approval and adoption of the consent usually through the request of a mention before the Court or the Deputy Registrar. All consents need to undergo a verification and adoption process and this is so as to ensure that the consent is legal and capable of being allowed to operate as an order of court. If that was not the case, parties could file any sort of consent in court, even those that prejudice other persons not involved in the consent, and purport the same to be an order of court.

14. The consent in issue in our case was never approved and was never adopted as an order of the court. It cannot therefore be considered that the said consent can operate as an order of the court or that the said consent settled the matter herein. If the parties therein are proceeding to act in accordance with the terms of that consent, that is not in obedience to any order of the court, but is out of their own volition and outside the supervision of court. Since the consent was never adopted it follows that the suit continued and was capable of being dismissed. It was indeed dismissed by Waithaka J.

15. Mr. Ambwere seemed to suggest that this was a "mass dismissal" without the Judge having gone through the file, because in his view, if the Judge went through the file, she would have found the consent. Those are not kind words to any judicial officer or Judge. Why would counsel make an assumption that the Judge never went through the file? But then, isn't it the duty of counsel acting in a case to appear before a Judge so as to explain his client's position on a matter and guide the Judge? One cannot simply assume that the Judge will appreciate everything on record. If that were the case, then there would be no need for any advocate to appear in court. It is not in all cases that the record speaks for itself. For example, in this case, I still fail to understand, by a mere perusal of the record, how M/s Kamoti Omollo & Company Advocates were parties to the consent, for I have not seen their appearance on record. Some of these things need explanation by counsel, or production of documents which for one reason or another, may not be in the file. If counsel does not appear to explain the position of his case, he must live with the consequences. Where was Mr. Ambwere when the matter came up for hearing of the NTSC? Why didn't he attend at the NTSC? That, Mr. Ambwere has kept to himself. Mr. Ambwere should have appeared so that he informs the court that there is a consent and the court would have guided him accordingly. Failing to appear certainly did not help him, or his clients, one little bit. The Judge must have gone through the file herein, and found that there was nothing that had settled or finalized the case, and in the absence of any explanation, found nothing to stop her from dismissing the suit.

16. Even assuming that there was a properly endorsed consent, of which there is none, that consent could only bind the 1<sup>st</sup> respondent. It never bound the 2<sup>nd</sup> respondent who was not a party to it. It follows that there would be nothing to prevent the dismissal of the suit at least as against the 2<sup>nd</sup> respondent.

17. From the foregoing, I am unable to disturb the order of dismissal of the suit. The suit stands dismissed with costs to the 2<sup>nd</sup> respondent.

18. The 2<sup>nd</sup> respondent is thus at liberty to proceed to tax its bill of costs.

Orders accordingly.

**DATED this 7<sup>TH</sup> DAY OF MAY, 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

AT MOMBASA