



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 180 OF 2013**

**BENJAMIN CHEPKIRWOK ROTICH.....PLAINTIFF**

**VERSUS**

**DAVID EWOL.....DEFENDANT**

**RULING**

1. The application dated 9/4/2019 and filed in court on the same date has been brought by the plaintiff. It seeks the following orders:-
  - (a) That this application be certified urgent and the same be heard forthwith.
  - (b) That there be a temporary stay of implementation of the order made on 5<sup>th</sup> March, 2019 and issued on 8<sup>th</sup> March, 2019 pending hearing interpartes and thereafter pending the hearing and determination of this application.
  - (c) That the order made on 15<sup>th</sup> March, 2017 and subsequently amended on 6<sup>th</sup> March, 2017 be reviewed, varied and or set aside.
  - (d) That this matter be fixed for hearing on priority and the parties be given an opportunity to present evidence
  - (e) That costs be in the cause.
2. The applicant has brought the application under *Section 1A, 1B* and *63(e)* of the *Civil Procedure Act* and *Order 45 Rule 1* of the *Civil Procedure Rules Section 3, 13, 18* and *19* of the *Environment and Law Court Act*.
3. The grounds upon which the application is made are contained at the foot of the application. Briefly those grounds are that the consent order made in court was not signed by the Advocates or their representatives; that the defendant's claim is in respect of LR. No. 7424 which is different from the number **Trans-Nzoia/Kaisagat Makhonge Block 7/Ainasit 14**; that at the time of making the consent the parties was mistaken as to parcel in issue; that in view of the error implementation of the order will result in demarcation of a different parcel of land and that the defendant's claim is not based on any counterclaim.
4. The application is supported by the affidavit of the applicant dated 9/4/2019 which lays emphasis on the above grounds.
5. In reply to the application the defendant filed a replying affidavit sworn on 30/4/2019. In that affidavit it is deponed that the application is res judicata by virtue of a decision having been made on applicant's earlier application dated 5/3/2018; that it is an attempt to frustrate the implementation of consent order; that conditions of setting aside or review of a consent order or judgment have not been satisfied; that the unreasonable, inordinate and unexplained delay of two years in filing the application amount to indolence and disentitles the applicant; that there is no requirement for parties or their advocates to sign a consent order recorded in open court; that information surrounding the land and its acquisition by the respondents was within the knowledge of the applicant by the time of consent order and that the land is correctly described. Further it is deponed that there has never been any difficulties in the implementation of the consent order save the absence of the applicant. Lastly its deponed that the consent order has been implemented and a report filed by the surveyor in court and the instant application has been overtaken by event.
6. I have considered the application and the response. In my view the issue that arises is whether first the application is res judicata and if not, the applicant has satisfied the conditions necessary for a grant of an order of review or setting aside of the consent order made on 15/3/2017 and subsequently amended on 6/3/2019.
7. I must revisit the record of those two dates for clarity.
8. On the 15/3/2017 Ms. Arunga for the plaintiff and Mr. Ingosi for the defendant were present. Ms. Arunga dictated the following consent:

**“By consent the County Surveyor Trans-nzoia to carve out one acre of land of land parcel Number Trans-Nzoia/Kaisagat/Magonge Block 7/Ainasit 4. The survey to be conducted in presence of both parties and the survey fees to be shared by both parties. The report of county surveyor to be filed within 30 days”.**

9. The court adopted that order and set the matter down for mention on 12/6/2017 to confirm progress. On 12/6/2017 it appears that the matter came up before the Deputy Registrar who gave a further mention date for 27/7/2017. On the latter date Mr. Ingosi for the defendant and Ms. Bett holding brief for Ms. Arunga appeared and Mr. Ingosi prayed that the surveyor be given one month from that date whereupon the court fixed the matter for a further mention on 25/9/2017 on which date again both principal counsel appeared on behalf of their respective clients and Mr. Ingosi indicated that more time was needed. The court granted a mention scheduled for 23/10/2017. On that date Ms. Arunga indicated that the plaintiff appears to be unwilling to have the survey done while Mr. Ingosi indicated that his client was willing to pay his share as well as plaintiff's share of survey fee to facilitate the survey. The court then ordered that the survey is to conclude and the defendant at liberty to make the payment and recover any monies he may expend on behalf of the plaintiff on the survey from the plaintiff.

10. This matter dragged until 27/2/2018 when Mr. Ingosi prayed for an order that the survey do proceed notwithstanding any absence of the part of the plaintiff. It is at that point that Mr. Magut for the plaintiff disclosed that the plaintiff was not comfortable with the consent order which he had, by then allegedly disowned. The court noted that only the appropriate proceedings could dislodge that consent order and the application dated 5/3/2018 was filed seeking that the consent orders issued on 15/3/2017 be vacated and or set aside forthwith *ex debito justitiae*. That application was dismissed on 31/5/2018.

11. I have reread the ruling dated 31/5/2018. The principle prayer in the application dated 5/3/2018 reads as follows:

**“That the consent orders issued herein on 15/3/2017 herein (sic) be and are hereby vacated and/or set aside forthwith *ex debito justitiae*.”**

12. In my view there is no difference between the orders sought in the application dated 5/3/2018 and the instant application.

13. Among the grounds to that application was the allegation that counsel who recorded the consent did not have the plaintiff's instructions to do so and the plaintiff was not agreeable to the terms of the said consent.

14. In the grounds in the instant application the plaintiff has changed tune to aver that the consent order was not signed by the advocates or their representatives. The court notes that it is not mandatory and indeed no authority has been cited that the parties or their counsel must sign against consent orders recorded in open court. **Kericho ELC No. 61 of 2014 Stanley Korir -vs- Walter Kipyegon Cheruiyot** cited by the applicant does not aid the applicant in this case.

15. In the **Stanley Korir Case** both parties and their advocates attended court and the advocates recorded a consent compromising the entire suit. The court while determining an application to set aside that consent judgment observed that the judge had satisfied himself that the parties were in agreement even though the defendant who was in court at the time of recording of the consent claimed that he had been kept in the dark by his advocate.

16. In my view the position of a defendant who is present at the consent proceedings and who claims to have been kept in the dark by his counsel is no different from that of any party who is not present at the recording of a consent and claims not to have been consulted or not to have given instructions regarding such a consent as the plaintiff in the instant application avers. Both are in effect disowning the consents entered into by their counsel, albeit on slightly varying grounds.

17. Regarding **Products International -vs- Eastern and Southern African Trade and Development Bank Nairobi Civil Appeal No. 253 of 2002** and **Amanya Raphael Anabaswa -vs- Mumias Sugar Co. Ltd** cited by the applicant no rules of common law or principles of equity can be invoked to aid the applicant in the present case as there was no mistake as perceived by the applicant.

18. Further, while examining the record outlined earlier in this ruling it would appear to this court that the plaintiff's representatives took inordinately long to voice the plaintiff's objection to the consent order.

19. Lastly, the defendant's explanation regarding the difference in title numbers, that is, the **LR No. 7424** and **Trans-Nzoia/Kaisagat/Makhonge Block 7/Ainasit 4** is that the latter number was obtained much later after the claim was instituted but the land occupied and focus of this dispute remained the same on the ground.

20. I have examined the surveyor's report and noted that the surveyor and his team positively used appropriate technology to decipher whether they were at the right position, that is, within the suit land, and having confirmed so noted that the defendant was already settled on the ground and the land was already demarcated and fenced and that they demarcated the appropriate acreage provided for by the consent order of 15/3/2017. In doing so they also aver that they took into consideration the powerline wayleave traversing the parcel. Consequently they prepared a mutation form for execution and submitted it for execution by the Deputy Registrar of this court.

21. In my assessment the defendant's counsel's argument that the applicant cannot be considered to be an aggrieved person under **Order 45 rule 1(1)** of the Civil Procedure Rules 2010 to warrant the orders sought is well supported by the case of **Ngure -vs- Gachoki Gathaga [1979] KLR 152**.

22. The upshot of the above is that there is no new matter or evidence that has been presented by the applicant that can convince this court to issue a review or setting aside order in the instant application. Secondly the application is already *res judicata* by virtue of the ruling delivered on 31/5/2018 in this matter. Consequently the application dated 9/4/2019 has no merit and the same is dismissed with costs to the defendant.

**Dated, signed and delivered at Kitale on this 8<sup>th</sup> day of July, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**8/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi for Defendant/Respondent

N/A for Applicant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**8/7/2019**