

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

IN NAIROBI

ELC SUIT NO.125 OF 2009(O.S)

RICHMOND MWANGI & 259 OTHERS.....PLAINTIFFS

VERSUS

LEE MWATHI KIMANI.....DEFENDANT

RULING

This suit was commenced by the Plaintiffs through the Originating Summons dated 24/03/2009 claiming ownership of land reference number 209/12837 (the Suit Property) through adverse possession. The matter was resolved through a consent which the parties adopted dated 05/06/2014. The Defendant's application dated 26/05/2016 seeks to set aside, review, vary, alter or rescind the terms of the consent judgement entered on 26/06/2014, and directions as to the final disposal of the suit and costs. The application was supported by the Defendant's affidavit sworn on 26/05/2019. The Defendant deponed that the parties in the suit agreed to dispose of the suit through the consent letter dated 05/06/2014. That it was a term of the consent that the Plaintiffs would be compensated in the sum of Kshs. 10,000,000/= which was to be paid after the land was sold, then the Plaintiff would give the Defendant vacant possession. He deponed that enforcing the judgement has become difficult because the Plaintiffs have denied him access to the Suit Property. He further deponed that at the time of swearing the affidavit, the Plaintiffs had erected a huge billboard on the Suit Property advising the public that the suit land was not for sale which effectively and practically frustrates the consent judgement and has thwarted attempts by the Defendant to dispose of the Suit Property. He prays that the consent judgement be set aside and the suit be revived for determination.

The Plaintiffs opposed the Defendant's application through the grounds of opposition dated 27/02/2019. The Plaintiffs argued that the Defendant's application does not meet the threshold or conditions for setting aside a consent judgment; that the Defendant is guilty of laches, and that the application is inimical to the principle of law that litigation must come to an end.

The Defendant submitted that the consent judgment of 26/4/2014 has become oppressive and cannot be implemented because potential purchasers have faced hostility from the 250 Plaintiffs who are in occupation of the suit land. He submitted that the grounds for setting aside a consent judgement are similar to those for setting aside a contract, and that the consent judgement has been tainted with illegality because the Plaintiffs are acting unlawfully.

The court has considered the application, grounds of opposition as well as submissions made by counsel for the parties. The parties herein filed the consent dated 05/06/2014, which was adopted as a judgement of this court. The courts have established a threshold to be met before a consent judgement is set aside. The threshold was set out in the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR**, where **Hirani v Kassam (1952), 19 EACA 131**, was cited with approval, and which quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 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 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."

The Defendant voluntarily entered into the consent agreement. There is no proof that potential buyers have failed to buy or view the suit property due to frustrations from the Plaintiff. The frustration complained of would not be sufficient to vitiate the consent order. The consent set out the manner in which the suit land was to be disposed, the manner in which the Plaintiffs were to vacate the suit land, and remedies in case of any breach. The consent judgement was adopted as an order of the court. The Defendant should have pursued execution of the court decree arising from the consent.

The court finds that the application dated 26/05/2016 does not meet the threshold for setting aside a consent. It is dismissed with no orders as to costs.

Dated and delivered at Nairobi this 9th day of July 2019

K.BOR

JUDGE

In the presence of: -

Mr. M. Tumu holding brief for Ms. Magu for the Plaintiffs

Mr. K. Gichuhi holding brief for Mr. Muli for the Defendant

Mr. V. Owuor- Court Assistant