



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC MISC. APPL. NO. 7 OF 2010

REPUBLIC.....APPLICANT

VERSUS

DISMUS SIFUNA WAFULA.....1ST RESPONDENT

RICHARD KHAEMBA WAFULA.....2ND RESPONDENT

JOHN CERONI.....3RD RESPONDENT

FREDRICK BARASA.....4TH RESPONDENT

LENGOLESH TUDO.....5TH RESPONDENT

RAPHAEL MAKORI.....6TH RESPONDENT

ALBERT A.A. EKIRAPA.....EX-PARTE

RULING

1. The Ex-parte applicant filed an application dated **23/7/2018** and filed on **24/7/2018** seeking the following orders:-

(1) That the application be certified urgent and the same be heard on priority.

(2) That this honourable court be pleased to set aside/or review the consent order filed on 13th July, 2017 and all its consequential orders.

(3) That costs of the application be provided for.

2. This application is premised on several grounds which appear at the foot of the application and in the supporting affidavit sworn on **23/7/2018**. Briefly they are that the consent order was at variance with what was agreed between the parties; that the consent order that was adopted by the Registrar of the Court is not the one that was signed by the parties; that the consent order is not dated and one of the advocates who was to execute the consent order had his firm name deleted from the original consent and that the advocate on record for the respondents acted illegally in presenting a consent order that was at variance with what the parties agreed and signed.

3. The ex-parte applicant filed further supporting affidavit on **4/12/2018**.

4. The sworn replying affidavit sworn by **Dismus Sifuna Wafula**, the 1st respondent was filed 11/9/2018 in opposition to the application. In that affidavit the deponent avers that the applicant merely wants to run away from consent as he does not wish to execute transfer documents to enable the respondents to obtain title deeds as per the terms of the consent; that the sale of 95 acres to the respondents is not disputed; that the applicant sold to the respondents 13.3 acres in excess of what he is entitled to on the ground; that the loss of 13.3 acres was equitably distributed amongst the respondents so that they may obtain titles and put the matter to a final rest; that the consent dated 8/3/2017 and filed in court on 13/4/2017 is a true reflection of the agreement between the applicant and the respondents; that the delay of one year in bringing the application is demonstrative of lack of sincerity on the part of the applicant; that the applicant's advocate has deponed on matters of fact which should have been deponed to by his client the applicant; that the consent order has not been shown to affect the applicant and it that it meets the end of justice and is accepted by all the respondents and that a party cannot be aggrieved by an order they urged the court to make.

5. I have examined the consent attached to the replying affidavit it appears to have been signed by Bungei and Murgor, Advocates for the ex-parte applicant and S. Nyakundi Advocate for the interested parties; in that consent the name of Tigogo & Co, Advocate for the “defendant” has been excluded. On the other hand the consent attached to the application is signed only by Bungei & Murgor Advocates while S. Nyakundi & Co, Advocates for the interested parties and Tigogo & Co., Advocates for the “defendant” have not signed against the names of their Firms which appear on the consent.

6. The consent that appears in the record is of the same date as those two consents and is signed by Bungei & Murgor Advocates of the applicant, Nyakundi for the interested parties while the name of Tigogo & Co., Advocates for the “defendant” is whited out.

7. In these proceedings, the substantive parties to the dispute are the interested parties and the ex-parte applicant. They are the ones interested in the suit land. There is no defendant named in the proceedings as it is not a civil suit. Only two respondents that is Kwanza Land Disputes Tribunal and the Chief Magistrates Court Kitale exist. They are not parties to the consent. However I find that their absence in this proceedings to be of little significance as they have no personal interest in the land but they handled a dispute that involved the other parties. For these reasons, the deliberate exclusion of Tigogo & Co. Advocates from the consent appears to be of no consequence to the fate of this application.

8. I have noted that the ex-parte applicant personally signed on the consent filed in court on 8/3/2017. He could not have done this unless he was in agreement with his counsel that the terms of the consent were suitable to him. On the other hand I have considered that there is an advocate who has signed the said consent on behalf of all the interested parties and that none of them has raised any demur to the consent.

9. Parties are bound by the consents they execute during the cause of proceedings. A consent order cannot be set aside so casually. Certain conditions must be fulfilled by an applicant who was a party to the consent. The main point that the court notes in this case is that even in the consent that the applicant confesses to have executed it is admitted that there was a loss of 13.3 acres occasioned to the interested parties by the act of the applicant selling land in excess of his entitlement on the ground. The interested parties have explained that they agreed to share the loss occasioned by the applicant’s misdeed and put this litigation behind them. This court is inclined to find that there is nothing in that consent that prejudices the applicant. The application dated **23/7/2018** therefore has no merit and the same is dismissed with costs to the interested parties.

Dated, signed and delivered at Kitale on this 8th day of July, 2019.

MWANGI NJOROGE

JUDGE

8/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Ifedha holding brief for Bungei for Defendant

Mr. Ambutsi holding brief for Nyakundi for Respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

8/7/2019