



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

E.L.C 105 OF 2017

NAFTALI NDUATI MWANGI.....1ST APPLICANT

PRISCILA WAMBUI MACHARIA.....2ND APPLICANT

VS

DUNCAN KIONGA.....RESPONDENT

RULING

1. The Applicants had initially sought to have the title deeds Nos. MAKUYU/MAKUYU/BLOCK 1/5475 and MAKUYU/MAKUYU/BLOCK 1/5476 (suit property) issued to the Respondent declared invalid and illegal and same be cancelled. They also prayed for a permanent injunction to restrain the Respondent from dealing with the suit property in any manner. The Respondent opposed the claim and the matter was set down for hearing. The suit was partly heard with the 1st Applicant testifying before Counsel for both parties recorded a consent for withdrawal of the suit on 20/3/2018.

2. It is the said consent that was adopted as a Court order that has prompted the instant application. The Applicants moved the Court vide an application dated 4/5/2021 expressed under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 9 Rule 9 & Order 12 Rule 7 of the Civil Procedure Rules seeking orders that; -

- a. Spent.
- b. Messrs Mugeria, Lempaa & Kariuki Advocates be granted leave to come on record for the Plaintiffs/Applicants herein.
- c. That pending the hearing and determination of this application, a temporary injunction do issue restraining the Respondent, his servant and/or agents from wasting, damaging or alienating and/or otherwise interfering with or evicting the Applicants from Land parcels known as Title Deed Number MAKUYU/MAKUYU/BLOCK 1/5475 and title deed number MAKUYU/MAKUYU/BLOCK 1/5476.
- d. The order made by the Court on the 20/3/2018 marking the Plaintiffs/Applicants' case as withdrawn with costs to Defendant be reviewed and set aside and the Plaintiffs suit be reinstated and heard on merit.
- e. That costs of this application be in the cause.

3. The application is based on grounds on the face of it and supported by the Affidavit of Naftali Nduati Mwangi, the 1st Applicant. Deposing on behalf of the 2nd Applicant as well, he averred that Title Dees Nos. MAKUYU/MAKUYU/BLOCK 1/5475 and MAKUYU/MAKUYU/BLOCK 1/5476 were issued to the Respondent fraudulently. That he had testified on 13/12/2017 and went home to await Judgement but at no given time did he issue instructions to have his suit withdrawn. That he was surprised when he received summons to appear before the Assistant County Commissioner Makuyu Division on 15/12/2020 on account of this Honourable Court's order made on 20/03/2018 allowing the Respondent to retain the suit property. That his attempts to contact his former Advocates Messrs. R.M Njiraini & Company Advocates have been futile hence his bid to have the firm of Messrs Mugeria, Lempaa & Kariuki Advocates to come on board. The Applicant avowed that his current Advocates wrote to his former Counsel to inquire about the circumstances leading to the recording of the consent and annexed the correspondence as annexure *NNW2a&b*. He urged the Court to allow his application as no prejudice will be occasioned to the Respondent.

4. The application is opposed vide the Respondent's Replying Affidavit sworn on 17/5/2021. He affirmed that he is the registered owner of the suit property having legally acquired it as a member of Pundamilia Farmer's Co-operative Society. That the Applicant's application is an abuse of the Court process as the Applicant had testified and failed to adduce any credible evidence to support his claim prompting his

Advocates to withdraw the suit on 20/3/2018. He faulted the Applicant's averments that he testified and went home awaiting judgment yet the defence hearing had not taken place.

5. Directions were taken on 2/6/2021 and parties agreed to canvass the application by way of written submissions. The Applicants and Respondent filed theirs dated 11/6/2021 and 14/6/2021 respectively.

6. On behalf of the Applicants, it was submitted that the Applicants' case is that the title deeds of the suit property were irregularly and illegally acquired and upon such discovery, the firm of R.M Njiraiini was instructed to act for the Applicants. Having testified on 13/12/2017, the Applicant went home and awaited the Court's determination. That on several occasions the 1st Applicant would meet with Mr. Njiraiini who would inform that the case is still pending in Court. That at no given time did the Applicant instruct his Advocates to withdraw the suit and attempts to reach the Advocate on phone to establish the circumstances leading to the impugned withdrawal have been in vain. That the 1st Applicant was not in Court on the said date and the 2nd Applicant is immobilized due to ill health and thus never attended Court as well.

7. In response to the Respondent's averments that the Applicant is dishonest, the Applicant maintained that it was natural for the 1st Applicant to testify and await the Court's determination as he was not under obligation to attend further Court sessions. The Applicants highlighted the principles for setting aside a consent order/judgment as held in the case of **Inter-Countries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others [2019] eKLR** that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure, of material facts or mistake or for a reason which would enable a Court set it aside.

8. In this case, they maintained that the action by the firm of Njiraiini Advocates was detrimental to their case and they have not given any reason for the disputed withdrawal. They questioned the alleged documentary evidence availed on the hearing date and faulted the Advocate for proceeding with the hearing and not bringing the same to the Court's attention. That the alleged 2nd Plaintiff's appearance in Court should not have been an issue as the 1st Applicant had authority to act on behalf of both Applicants.

9. Lastly, the Applicants argued that it was questionable why the Respondent had to seek the county administration's intervention over the suit property if indeed there was an agreement that the Respondent was the bona fide owner of the suit property. They beseeched the Court to allow the application for the case to be determined on its merits.

10. On the other hand, the Respondent reiterated that the Applicants had not placed any evidence before Court to show that they are the legal owners of the suit property. He maintained that the consent for withdrawal of suit was made in the 1st Applicant's presence who is now on a fishing expedition to have the order set aside. That the grounds of setting aside a consent order are well settled; on fraud or misrepresentation which the Applicant has not proved either and therefore the Court orders of 20/3/2018 is valid and lawful. The Respondent relied on the Court of Appeal case of **Ramsa Company Ltd vs. Manca Franceso & 2 others Nbi CA No. 216 of 2009** where the Court held that misrepresentation is a ground for setting aside a Court order.

11. On the prayer for injunction, the Respondent was emphatic that he's the lawful owner of the suit property and the Applicants have not tendered any documents in opposition. That the Applicants have not satisfied the criteria set out in the case of **Giella vs Cassman Brown & Co. Ltd (1973)** and urged the Court to dismiss the application with costs.

12. The issues for determination are; -

- a) Whether the law firm of Messrs Mugeria, Lempaa & Kariuki Advocates should be granted leave to come on record for the Applicants?
- b) Whether the consent order made on 20/3/2018 can be set aside?
- c) Whether a temporary injunction can be issued?
- d) Who will bear the costs for the application?

13. The Provisions of Order 9 Rule 9 of the Civil Procedure Rules provide as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the Court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be. [Order 9, rule 10.] Procedure. 10. An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

14. According to the application this prayer was not opposed by the Respondents. The Court noted that the Applicant rightly approached the Court under the said rules. Prayer 2 is hereby allowed as prayed.

15. Whether the consent order made on 20/3/2018 can be set aside? It is trite law 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. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court. See the Court of Appeal decision in **Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR**. The Court

cited with approval position is clearly set out in Setton on Judgments and Orders (7th Edn), Vol.1 pg 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... 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.”

16. The above threshold was well captured in the Applicants’ submissions and case of Inter-Countries Exporters supra. However, the facts of that case are distinguished from the present one as the Applicant therein demonstrated and the Court agreed that the consent was entered into on misrepresentation and non-disclosure of material facts whereas the Applicant’s argument herein as I understand it is that he did not authorize the withdrawal of the suit.

17. The Applicant’s case is that they never gave instructions to their erstwhile Advocate to withdraw the suit as he did on 20/3/2018. The 1st Applicant deposed that after testifying in Court, he went home to await the Court’s determination.

18. Under para 12 of the supporting affidavit the Applicant avers that the withdrawal of his suit was irregularly procured.

19. Similarly, under para 17 of the said supporting affidavit he states that he informed the assistant county commissioner that he did not give instructions to his Advocate for the withdrawal of the suit and that his then Advocate on record procured the consent fraudulently and without his consent and or knowledge.

20. The Applicant alleged numerous follow ups with his Counsel to know the progress of his case via phone to no avail. If indeed the Applicant was waiting for the judgment as he submits, there would be more follow ups than just ‘phone calls’. No evidence was tendered of his effort to follow up with the Court file if his argument is anything to go by since the date he testified until 15/12/2020, three years 2 months later when he was summoned by the Assistant county commissioner.

21. In shifting blame to the former Counsel, the Applicant referred the Court to annexure ‘*NNW2b*’ an email print out from Mr. Muchoki that surprisingly confirmed that the 1st Applicant was aware of the withdrawal as he was present in Court. Mr. Muchoki enumerated the circumstances leading to the withdrawal of the case to wit; the Applicant availed documentary evidence that could not be produced in Court as it was not part of the evidence, the Applicant was unable to procure evidence from Pundamilia earlier hence the withdrawal which was well explained to the client.

22. I have cautiously read the record and what transpired in this suit and it is important to reproduce it for this ruling. This suit was filed on the 29/11/2016. The Defendant filed his replying affidavit on the 2/3/2017. The parties took directions on the 4/10/2017 on the hearing of the suit and pretrial was set for the 9/11/17 whereupon on confirmation of both parties having complied with pretrial directions under Order 11, the Court certified the matter ready for hearing. By consent the hearing was fixed for the 13/12/17.

23. Come the hearing date the Plaintiffs Advocate confirmed that he was ready to proceed with one witness, who was the Applicant in this application. The Defendants Counsel too confirmed the hearing and time was allocated for 11.40 am.

24. At the allocated time, the Plaintiffs Advocate, Mr. Njirani sought an application for adjournment to enable him file some documents that he had just been given as they were crucial to his case. The Defendants Advocate opposed the application for adjournment and the Court delivered a ruling and declined the application for adjournment on the grounds that the suit had been certified ready for hearing. The hearing proceeded thereafter whereupon the Applicant testified.

25. The suit was fixed for further hearing on the 12/2/18. On this date the parties were duly represented by Counsels. The Applicants Counsel informed the Court that he had instructions to withdraw the suit under Order 25 Rule 2(2) of the Civil Procedure Rules. The Defendants Counsel had no objection and by consent sought a mention to record a consent. On the 20/3/2018 the parties recorded a consent to withdraw the suit with costs in favour of the Defendant. Further the cautions lodged on the suit lands were withdrawn as well.

26. The Applicants have adduced an email correspondence between their current Advocates and the former where the former sought to explain the reason for the withdrawal of the suit. Interalia, that one of the reasons for the withdrawal of the suit was because the Applicant availed important documentary evidence which could not be produced as it was not part of the pleadings. This seems to agree with the proceedings that took place on the 13/12/17 when the Applicants Counsel sought an adjournment to enable him file further documents. On this particular date the Applicant was present in Court as shown by the proceedings that followed and where he testified in open Court. The import of this is that the Applicants was aware of the documents that he sought to adduce but after the close of pleadings. Given that this documentary evidence informed the withdrawal of the suit, it is difficult to accept that the Applicant was unaware.

27. It is noted by the Court that the Applicant has not tendered evidence to support the grounds of fraud and of irregularity in respect to the consent of the Court as envisaged by the law and precedent in Board of Trustees National Social Security.

28. The submission that the former Counsel’s conduct of the suit was detrimental to the Applicants’ case cannot in my view be a ground for setting aside. In the Court of Appeal decision in **Pyramid Hauliers Limited v James Omingo Nyaanga & 3 others [2019] eKLR** the Court observed that although it has commonly been stated that the mistake of Counsel should not be visited upon an innocent litigant, this statement is not a blanket protection to clients who have failed to comply with procedural requirements; that clients will not always be protected merely by blaming their Counsel; that a client cannot continue to hide behind the failure of their Advocates to perform certain required actions on their part; that the mere citing of inadvertence or mistake on the part of the Advocate is not sufficient excuse for the failure; that, in appropriate situations, the litigants must bear the brunt for mistakes made by their Advocates; and that the clients would be at liberty to pursue their Advocates individually for such mistakes.

29. Additionally, Harris J stated in **Kenya Commercial Bank Ltd –vs- Specialized Engineering Company Ltd (1982) KLR 485** that:

“A duly instructed Advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his Advocate unless such limitation was brought to the notice of the other side.”

30. The Court of Appeal **Isaac Kinyanjui Njoroge v National Industrial Credit Bank Limited [2018] eKLR** dismissed an Appeal challenging the decision by the Court declining to set aside and review a consent order and held that there was no evidence that the consent was procured through any underhand dealings or by any misrepresentation.

31. The grounds upon which such a Judgment can be set aside do not obtain in this application as there is no proof of fraud or irregularity on the part of either party.

32. The totality of the above leads to answering the second issue in the negative.

33. Whether temporary injunction can be issued? The determination of this question is now moot. However, I wish to point out that the Applicants did not address this prayer in their written submissions. The Respondent vehemently opposed it and maintained he is the registered owner of the suit land. I see no reason to discuss it.

34. The application is bereft of merit and the same is dismissed with costs in favour of the Respondent.

35. **It is so ordered.**

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 28TH DAY OF JUNE 2021

J. G. KEMEI

JUDGE

Delivered in the presence of;

Ndegwa HB for Kariuki for the Plaintiffs/Applicants

Omwenga for the Defendant/Respondent

Court Assistant: Alex