



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**ELC NO. 38 OF 2020**

**SIMON WARUINGI KAMAU.....1<sup>ST</sup> APPLICANT**

**JANE MUTHONI WARUINGI.....2<sup>ND</sup> APPLICANT**

**VS**

**JACKSON MARICHU KAMAU.....1<sup>ST</sup> RESPONDENT**

**KARUGA KAMAU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On the 24/11/2020 the Plaintiffs/Applicants filed suit against the Defendants/Respondents and in the main urged the Court to determine interalia whether the 1<sup>st</sup> Applicant is entitled to equal shares of the property known as LOC19/KIWAMBOGO/804 (later subdivided into parcels 2579 and 2580) hereinafter called the suit lands) which was held in trust by the 2<sup>nd</sup> Respondents on his behalf and that of his siblings the 1<sup>st</sup> Applicant included.

2. Contemporaneously with the suit, the Applicants filed a notice of motion dated the 18/11/202 seeking interalia orders of stay of proceedings in CMCC No 381 of 2015 and an application for taxation of the bill of costs in succession cause No 739 of 2015. Further that the Respondents be restrained from evicting the 1<sup>st</sup> Applicant from the suit land pending the hearing and determination of the suit.

3. By a consent of the parties recorded on 3/3/2021 the parties compromised the notice of motion aforesaid in terms of prayer 2 that is to say the suit CMCC No 381 of 2015 be stayed pending the hearing and determination of the current suit.

4. As a result, this consent was adopted as the orders of the Court.

5. Simultaneously and on even date the parties agreed to canvass the suit by way of written submissions. The Court directed them to file and exchange written submissions within 30 days, that is to say by the 4/4/2021.

6. On the 25/5/2021 the Applicants Counsel sought orders to vacate the orders of the Court issued on the 3/3/2021 ostensibly on the grounds that his clients now are desirous to be heard orally. The Court directed him to file a formal application.

7. The application filed on the 31/5/2021 is expressed to be made under Art 48 and 159 (2) (d) of the Constitution of Kenya, Sections 1A and 1B of the Civil Procedure Act. It seeks orders that;

a. That the Court to review, vary and set aside the directions obtained by consent on the 3/3/2021 specifically the one directing the parties to canvass the summons dated the 18/11/2020 by way of written submissions.

b. The Court to allow the parties to proceed by way of viva voce evidence for the hearing of the said suit.

c. Costs be in the cause.

8. The application is supported by the grounds annexed thereto and the supporting affidavit of Danson Njuguna Advocate, learned Counsel for the Applicants who deposed that he entered into a consent with the Respondents counsel to canvass the suit by way of originating summons and on briefing his clients they had reservations and after discussing as a family they were convinced that viva voce hearing was the best as it would give them the opportunity to place all their evidence before the Court as well as offer the chance to cross examine the

Respondents on pertinent evidence which in their view cannot be done through written submissions. That the Applicants intend to produce evidence in form of Court proceedings which cannot be reduced into submissions.

9. Further that the principles of justice enjoin the Court as well as counsels to ensure that citizens access justice which justice should not only be done but seen to be done. That the Respondents will not be prejudiced and that the application has been made without any delay. Finally, that the hearing of the suit should not be hindered by procedural technicalities

10. The application is opposed vide the grounds of opposition as well as the Replying Affidavit deponed by Kirubi, learned Counsel for the Respondents.

11. In opposing the application, the Respondents contend that the application is frivolous, vexatious and an abuse of the process of the Court: That the application being a review of consent orders does not meet the criteria set out in Order 45 Rule 1 of the Civil Procedure Rules or the setting aside/ review at all.

12. Further the Respondents contend that an advocate on record for a party is deemed to have full authority to deal with a matter on behalf of the said party unless that Advocate is withdrawn from the record. That neither the Applicants who were present in Court on the material date raised any objection when the consent was recorded nor have they denied their Advocates' authority in recording the said consent. That in the absence of any coercion on the part of the Applicant's counsel, the application becomes a mere afterthought with the aim of delaying the hearing of the suit. That the delay is in their favour given the stay orders pending in CMCC No 381 of 2015 where the Applicants were sued for eviction from the suit lands.

13. In addition, that in the event the counsel on record acted contrary to the instructions given to him by his clients, the clients remedy would lie in damages for professional misconduct, a scope that is outside the powers of this Court.

14. That the application has been made two months after the Court orders were recorded hence inordinately.

15. That the application does not meet the standards for review under Order 45 Rule 1 of the Civil Procedure Rules.

16. Lastly that the Respondents stand to be prejudiced as they have already filed their written submissions thus put forward their case before the Applicants in advance.

17. The application was canvassed orally before me in open Court on 28/6/2021.

18. The Applicants relied on their pleadings and the contents in the supporting affidavit aforesaid. In addition, they argued that if the matter proceeds by way of written submissions their evidence will be lost. That they will not have the opportunity to cross examine the Respondents to bring out their case given that it is anchored on customary trust that is best tried by way of oral testimony.

19. That fair hearing for the Applicants is when they are heard orally. That the right to be heard is a substantial right that should not be illusory. That no prejudice will be visited on the Respondents as they will have the opportunity to tender and challenge evidence and be heard viva voce as well.

20. That their application is brought under 'any other sufficient reasons' based on order 45 Rule 1 of the Civil Procedure Rules and lastly that it was made timeously.

21. The Respondents relied on the grounds of opposition, the Replying Affidavit and a list of 6 case law/ precedents in opposition to the application which I have read and considered.

22. The Learned counsel argued that upon the Court adopting the consent as the orders of the Court, pleadings closed and what remained was the filing and exchange of written submissions. That in the absence of any prayer to reopen the case the application remains a nullity. That for a prayer of review to succeed the grounds of review as set out in Order 45 Rule 1 of the Civil Procedure Rules must be met. That in this case it has not been exhibited that there are new or important matters discovered after the recording of the orders. The purported family meeting cannot be said to be such a matter to warrant review of the consent orders.

23. That a consent order is set aside on grounds such as fraud, collusion, misrepresentation and such other grounds as required to vitiate a contract. That none of the grounds were demonstrated to the Court and therefore the consent orders are valid and binding on the Applicants.

24. Lastly that the Respondents will be prejudiced because they already filed their written submissions thus disclosing their whole case to the Applicants. That in the remotest chance that the Court allows the application they urged the Court to order costs in the sum of 15,000/- in their favour.

25. The Applicant reiterated his earlier arguments and stated that they have not been served with the written submissions of the Respondents and therefore it is not true that they have had the advantage of reading them in advance. Lastly that costs be in the cause.

26. The issue before the Court is whether the application is for granting.

27. It is important to set the record straight that the parties on their own volition consented to the orders set out in para 3 above. Immediately thereafter agreed to canvass the matter by way of written submissions.

28. Be that as it may the Applicant's case is that though it agreed by consent to canvass the suit by way of written submissions, the Applicants have had a change of heart and now want the suit to proceed viva voce. That they have evidence including in form of Court proceedings which can best be presented to Court in an oral hearing. That they intend to cross examine the Respondents on their claim on customary trust something that will be lost if written submissions are adopted as the mode of hearing the suit.

29. The application is brought under Article 48 of the Constitution of Kenya which provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. It is also brought under Art 159(2)(d) of the Constitution of Kenya which enjoins the Court to determine disputes without undue regard to technicalities. There is nothing that has come to the attention of the Court to show that the right to access justice on the part of the Applicant has been violated. So much so that the Applicants elected the mode by which his case was to be heard through written submissions. Disputes belong to a party and when a party on his own motion determines the mode to be heard, the Court must respect the right to elect to proceed in the manner desired by the party.

30. It is noted that the Applicants did not comply with the terms of the consent that they freely entered into. The Applicants also defaulted on the directions given by the Court as to the period of filing their written submissions. Being in breach of Court orders is not a technical issue. It goes to the root of substantive justice and undermines the very core of access justice.

31. I have looked at the Provisions of Order 45 Rule 1 of the Civil Procedure Rules. The Applicants have interalia anchored their application on 'any other sufficient reason'. That any other sufficient reason is the access to justice and the right to be heard. In my considered view the provisions of Order 45 Rule of the Civil Procedure Rules do not apply to the circumstances of this application.

32. From the circumstances of this case none of the matters set out under Order 45 Rule 1 of the Civil Procedure Rules apply to this application, that is to say discovery of new and important matter, mistake or error on the face of the record have been demonstrated.

33. The Court finds it mischievous for the Applicants to move this Court to set aside the orders when they are in default of compliance of the said orders. The written submissions were to be filed by the 4/4/2021. The application was filed on 28/5/2021 about two months later thus inordinately.

34. I shall make the appropriate orders in respect to paras 30 and 33 above.

35. It is trite that a consent order can only be challenged on grounds of fraud, collusion, misrepresentation and such other grounds available to impugn a contract. None of such grounds have been demonstrated to this Court. I see none.

36. Is there any prejudice to be suffered by the Respondents? Following the consent to file written submissions, it is on record that the Respondents did file the submissions but outside the set agreed time. It was not demonstrated to the Court that the written submissions of the Respondents though filed on record had been served upon the Applicants. Both parties therefore did not comply with the directions/order of the Court timeously.

37. The claim having been based on customary trust, it is the view of the Court that justice shall be served if the parties are allowed to proceed viva voce. In that way each party shall have their day in Court. The consent, the subject of the application is procedural in nature and this Court is guided by Art 159(2) (d) of the Constitution of Kenya to deliver substantive justice. I therefore see no prejudice that can be visited on the Respondents which cannot be remedied by way of costs.

38. In the end and in the interest of justice, I allow the application on condition that the Applicants pays throw away costs in the sum of Kshs 15,000/- payable to the Respondents. This is payable before the next hearing date.

**39. It is so ordered.**

**DATED, SIGNED & DELIVERED AT MURANGA THIS 15<sup>TH</sup> JULY 2021.**

**J G KEMEI**

**JUDGE**

Delivered in the presence of:

Njuguna for the 1<sup>st</sup> & 2<sup>nd</sup> Applicants

Kirubi for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Court Assitant; Kuyiki