



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 34 OF 2007 (O.S)

FRANCIS MAKIO OBALE PLAINTIFF

= VERSUS =

DISMUS OMUKUBI ONG'ANG'IDEFENDANT/APPLICANT

R U L I N G

1. The Applicant moved this Court vide his application dated the 27th of July, 2019 for orders THAT:

a) Spent

b) This Honourable Court be pleased to review, vary and or set aside the decree issued herein on the 25th of July, 2012;

c) This Honourable Court be pleased to issue another decree and/or Order as per the judgements of this Honourable Court delivered on 29th May, 2012; and

d) The costs of this application be provided for.

2. The Application was supported by the affidavit of **DISMAS OMUKUBI ONG'ANG'I** dated 27th June, 2019 and on the following grounds;

a) That, there is an error apparent on record;

b) That, decree herein was incorrectly issued;

c) That, the decree herein cannot be enforced;

3. In the Applicant's Supporting Affidavit deposing that the judgement entered on 29th May 2012 in favour of the Plaintiff/Respondent awarded him 4 acres out of L.R BUKHAYO/KISOKO/918. However, the Respondent extracted a decree dated 25th July, 2012 claiming approximately 2.30 Ha out of L.R BUKHAYO/KISOKO/918. It is apparent that the decree extracted does not conform with the terms of the judgement of 29th May 2012. The error on the record ought to be rectified, varied and or set aside.

4. The Respondent opposed the application based on the grounds dated 14th of October, 2019 which pleaded that:-

a) The Application lacks merit;

b) The decree was properly drawn in accordance with the consent order which had adjusted the judgement accordingly;

c) The Applicant is guilty of delay.

5. Parties agreed to submit orally with the Applicant choosing to rely on the pleadings as filed. The Plaintiff submitted that application is incompetent as that the Defendant did not comply with the provisions of order 9 of the Civil Procedure Rules. He submitted further that the complaint on the consent judgement is unmerited because according to the Plaintiff, the Applicant's advocate was seized to enter into the consent. That the consent was in line with the Plaintiff's pleadings, sale agreement and mutation form which confirmed that he was in occupation of 2.4Ha of the suit land. He concluded by urging this Court to decline the application as there was no fraud or misrepresentation.

6. The Defendant in rebuttal of the Respondent's submissions stated that when the survey was done in the year 1995 the land was in his

name. He refutes the additional piece given to the Plaintiff because the plaintiff brought the claim eight years after the Defendant has been registered as the owner. He concluded by submitting that the consent was done without his knowledge.

7. The impugned consent entered into on the 31st of May, 2012 and was executed by the parties' advocates and filed on the 5th of June 2012 stated thus:

“By consent of advocates for the Plaintiff/Applicant and the advocates for the Defendant/Respondent the judgement entered in this suit is hereby set aside and substituted with the judgement in favour of the Plaintiff against the Defendant in the following terms:

i) That the Plaintiff be and is hereby declared to have acquired ownership and title to a portion of land measuring 2.30ha by virtue of adverse possession to be excised from land parcel No. BUKHAYO/KISOKO/918 as per the mutation form approved by the District Surveyor-Busia (K).

ii) That the Defendant is hereby ordered to sign all the necessary documents for the subdivision and transfer of 2.30 hectares from parcel No. BUKHAYO/KISOKO/918 to the Plaintiff within 30 days from the date hereof and in default the Deputy Registrar be empowered to sign the said documents on the defendant's behalf without any further application; and

iii) That the Defendant to pay costs of this suit to the Plaintiff.

8. The Defendant pleaded and submitted he did not give his advocates instructions to enter into the said consent. In the case of **Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd (1980)** the Court held that: **“a consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance or such facts in general for a reason which would enable the court to set aside an agreement”.**

9. The present case varies from the **Kenya Commercial Bank case (supra)** as the consent herein purported to set aside a judgement of this Court delivered on the 29th of May, 2012. The question that arises therefore is: **can parties enter into a consent to vary or set aside the judgement of a court?** It noteworthy that the impugned consent was recorded after judgement of this Court with the consequence of amending the judgement.

10. Order 45 Rule 1 (1) of the Civil Procedure Rules provides that:

Any person considering himself aggrieved

a) by a decree or order from which an appeal is allowed but which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed;

and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order was made, or on account of some mistake or error apparent on the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may appeal for review of the judgement to the Court which passed the decree or made the order without unreasonable delay.

11. Once a judgement is passed after hearing parties, the trial court becomes *functus officio* unless formally moved under order 10 or 12 of the rules for setting aside orders; and section 80 of the Civil Procedure Act and Order 45 of the Rules for review. In either of the instances, the Applicant must give reasons why a judgement rendered or decree or order should be varied and or set aside. Before the counsels executed the impugned consent, there was no formal application filed that contained reasons for moving the Court to vary the judgement of 29th May 2012. The consent as filed and adopted by the deputy registrar went contrary to the *functus officio* doctrine and the policy of the court process.

12. Further, the judgement rendered on 29th May 2012 was after evaluation of the facts presented by the trial court. If the parties opted to agree to set it aside, the entire judgment ought to have been set aside so that the decree being extracted would be in tandem with the reasons for the decision as given by the judge. A reading of the judgement alleged varied at page 6 thereof stated thus, **“I note that the agreement for sale was for four (4) acres while the mutation forms and other documents give the acreage as 2.30ha. The later measurement is over five acres. The correct measurement and which the court will allow is four acres based on the agreement between the parties.”**

13. The consent did not indicate the mistake or error of the judge they were correcting. In any event, the exercise of discretion to vary orders/decrees on account of error; mistake and or any sufficient reason is a preserve of a judicial officer not delegable to parties or their advocates. The consent entered into by the parties after the judgement was delivered on the 29th of June, 2012 is therefore an agreement contrary to the policy of this court and it matters not that the Applicant's counsel consented. The Plaintiff's advocate should have applied for a review of the judgement or appealed if they were unhappy with the awarding of the four (4) acres instead of the 2.30 Ha. They had prayed for. Having expressed myself as above, it only follows that all the orders or decree made on the basis of the consent order dated 31st May 2012 cannot therefore stand.

14. The incompetence of the application for not complying with order 9 of the Civil Procedure Rules is a technical issue which does not go to the root of the application. Order 9 was meant to protect advocates from being shortchanged by their clients in terms of fee payments.

There is nothing barring the defendant's previous advocate from taxing his bill if any.

15. In view of the foregoing, I find merit in the application and allow it by issuing orders that:

a) The decree adopted on the 8th of June, 2012 and issued on the 25th of July, 2012 pursuant to the consent letter dated 31st May, 2012 is hereby set aside and consequentially so do all entries made at the lands office in execution of the said order.

b) The judgement of this Court delivered on the 29th of May, 2012 is hereby reinstated as the judgement and decree of this Court; and

c) The Applicant is awarded the costs of this application.

DATED, SIGNED & DELIVERED AT BUSIA THIS 14TH DAY OF JULY, 2021.

A. OMOLLO

JUDGE