



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT BUSIA
ELC. NO. 133 OF 2015
IN THE MATTER OF LIMITATIONS OF ACTION ACT
AND
IN THE MATTER OF L.R. BUNYALA/BULEMIA/157
AND
IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION
BETWEEN
LEONIDA AJIAMBO MUDIBO.....APPLICANT
VERSUS
FRANCIS OKUMU OLAKA
WILLIAM OJIAMBO OLAKA.....RESPONDENTS

R U L I N G

1. The Plaintiff/Applicant approached this court via an application dated 5th November 2020 and filed in court on 7th December 2020 seeking for the following orders;

- a) That this Honourable Court be pleased to review the orders made on 12th March 2020.
- b) That this Honourable Court be pleased to set aside the Consent recorded on 12th March 2020.
- c) That costs of this application be provided for.

2. The application was based on the following grounds;

- i) *That the terms of the Consent are in dispute between the Plaintiff and the Defendants.*
- ii) *That the parties have resurveyed the disputed area of suit property and it is clear that there was misrepresentation based on insufficient material facts before the Consent of 12th March 2020 was recorded.*
- iii) *That it is the interest of justice that the said orders be set aside and the Applicant be allowed to pursue her full rights in the suit property.*
- iv) *That there has been no delay in making this application and no prejudice will be suffered by the Defendant/Respondent.*

3. The 2nd Respondent filed a Replying Affidavit on his own behalf and the 3rd Respondent's behalf. He stated that on or about 12/3/2020, the plaintiff, 3rd defendant and himself, together with their advocates on record made attempts to settle this case out of court and they

recorded an oral consent/agreement in court. The consent was clear that the plaintiff be awarded 1¼ acres out of L.R No. BUNYALA/BULEMIA/157 and all parties who attended the negotiation agreed on that. The plaintiff had initially wanted 1½ acres during negotiations but after push and pull and putting into consideration the issue of access road and the needs of the entire Olaka family and in the spirit of give and take that the plaintiff accepted the 1¼ acres. The Respondent deposed that it is not true that the consent was entered into through misrepresentation of material facts as alleged. He affirmed that the consent was regular and is properly on record and it cannot be set aside and ought only to be implemented/executed. He deposed that the application does not meet the threshold laid down by the law for setting aside the consent orders and the only recourse is to dismiss it with costs. He further deposed that he is not aware of any survey report which has said that the suit land measures 0.8 Ha/1.977 acres and none has been filed alongside the application. He termed the application as otherwise vexatious, frivolous and an abuse of court process.

4. The Defendants/Respondents advocate, Mr. Newton Enos Shihemi deposed an affidavit dated 8th February 2020 and filed in court on 9th February 2020. He deposed that he knows of his own knowledge that on or about 12/3/2020, an out of court negotiations took place within the High Court Library Busia between the plaintiff and the 2nd and 3rd defendants in the presence of the plaintiff's advocate and himself. At the end of the negotiations, the parties accepted that the matter be settled out of court and that the plaintiff be awarded a portion of land measuring 1¼ acres out of LR. No. BUNYALA/BULEMIA/157. They proceeded to court to record the consent and it is the plaintiff's advocate Mr. Wesonga who dictated to the court the terms of the consent to which he concurred and the same was adopted as a court order. He deposed that the impugned consent was arrived at after both parties considered several factors among them the issue of the access road. It is untrue that they settled on 1½ acres in favour of the plaintiff and that there was misrepresentation of material facts. He termed the application an abuse of court process as it does not meet the threshold necessary to set aside the consent orders.

5. The parties agreed to canvass the application by way of written submissions which the court has looked at and considered. The Plaintiff/Applicant filed their submissions on 3rd March 2021 and the Defendant/Respondents filed their submissions on 17th March 2021. The Plaintiff/Applicant submitted that they had two reasons for seeking to set aside the consent recorded in court on 3/3/2020. The first reason was there was a mistake made by the Applicant's advocate in pronouncing the acreage by stating 1¼ acres instead of 1½ acres. The second reason was that there was misrepresentation of the total acreage of the suit property by the Respondents. They relied on the following authorities;

a) Protus Hamisi Wambada & another v. Eldoret Hospital (2020) eKLR

b) Esther Targok Ayabei & another v. Kihengo Njuguna & another (2019) eKLR

6. The Defendant/Respondents submitted that the negotiations leading to the recording of the impugned consent were done overboard and there was no misrepresentation of material facts as alleged and that the applicant has neither pleaded fraud nor collusion against the defendants. They submitted that there were no vitiating factors that would lead the court to set aside the consent order. They relied on the following authorities;

i) Flora Wasike v. Destino Wamboko (1982-1988) KAR 625.

ii) Brooke Bond Liebig (T) Ltd v. Mallya (1975) E.A 266.

iii) Patel v. E.A Cargo Handling Services Ltd (1975) EA.

7. From the above, I believe the sole issue for determination is whether the plaintiff/applicant has satisfied the conditions for setting aside the consent or reviewing the order dated 12/3/2020. The Plaintiff has stated they discovered that material facts were misrepresented when they re-surveyed the disputed area of the suit property. The plaintiff/applicant deposed that their advocate on 29/9/2020 discovered that there was an error in the court record as to the agreed acreage and what was recorded in court as the consent. The consent recorded 1¼ acres and the alleged agreed acreage was 1½ acres. The disputed area was surveyed on 6/10/2020 and found to be measuring 1.977 acres which is exclusive of the area reserved for the road and water stream. The plaintiff/applicant has unfortunately not attached the surveyor's report to their application to show the disparity in acreage as alleged in the application. The defendant/respondent has stated that they are not aware of the survey report the applicant had mentioned and noted that the plaintiff/applicant failed to attach a copy of the report to the application.

8. Order 45 of the Civil Procedure Rules deals with review and gives the reasons why a court may review an order. In **Board of Trustees National Social Security Fund v. Micheal Mwalo [2015] eKLR**, the Court of Appeal stated as follows:

“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.”

9. The plaintiff's claim of misrepresentation of material facts has been strongly condemned by the defendant who has stated that they never agreed on giving the applicant 1½ acres during the negotiations. The applicant's allegations cannot be verified without the court being privy to the survey report that states the actual acreage of the suit land. The plaintiff/applicant has not presented any evidence in court to show that the consent was arrived at through misrepresentation of material facts.

10. In light of the above, I find that the plaintiff/applicant has not satisfied the criteria for setting aside the consent or reviewing the order made on 12th March 2020. As demonstration of misrepresentation of material facts or any of the grounds for setting aside a consent order or reviewing the court order has not been placed before the court, I find the orders sought at prayer 1 and 2 of the application dated 5th November 2020 to be without merit. Accordingly, the application is dismissed with costs to the defendant.

Dated, signed and delivered at BUSIA this 14th day of July, 2021.

A. OMOLLO

JUDGE