



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 119 OF 2013 (OS)

TARCISIO NYAGA GICHUKI1ST PLAINTIFF
JAMES KING'ORI MWAI2ND PLAINTIFF
PAUL MURAGE NDIANG'UI3RD PLAINTIFF
JOSEPH MACHARIA MUIRURI 4TH PLAINTIFF
JOSEPHINE NJERI KANYI.....5TH PLAINTIFF
EUSEBIO WACHIRA WANJAU..... 6TH PLAINTIFF
(Suing on their behalf and as officials, on behalf of Mathari Villagers Self Help Project's membership)

-VERSUS-

THE REGISTERED TRUSTEES CATHOLIC ARCHDIOCESE OF NYERIDEFENDANTS

RULING

1. I have before me for determination two Notice of Motion applications. The first application dated 22nd January, 2019 has been filed by the Plaintiffs herein seeking orders:-

(b) That this Honourable court do authorize Messrs P.N. Gichoho Ngugi, licensed surveyor to excise 600 acres from parcels noted in the consent order dated 20th June, 2018 as follows:

L.R 11943/2 - 0.088 Ha.

L.R 1105/6 - 13.42 Ha.

L.R 1105/5 - 97.41 Ha.

L.R 9464/2 - 53.62 Ha; and a further

L.R 9464/2 - 69.21 Ha.

(c) That this Honourable court do allow the Executive officer and/or the Deputy Registrar to sign all the deeds required to effectuate the transfer of 600 acres to the Plaintiffs herein;

(d) That the Land Registrar/Registrar of Titles be ordered to dispense with both the production of the original titles/grants while transferring the 600 acres to the Plaintiffs;

(e) That this court do make such further or other orders and directions as it may deem fit to meet the ends of justice; and

(f) That the costs of the survey and this application be borne by the Respondent.

2. The first application which is supported by the Affidavit sworn by the Mathare Villagers Self-Help Group Secretary James King'ori Mwai is based on the grounds:-

(a) That the Defendants have failed/neglected and/or delayed to have the orders of this court executed with 600 acres being transferred to the Plaintiffs;

(b) That the Applicants are anxious to obtain their titles to enable them develop their land; and

(c) That it is meet that the orders sought be granted.

3. The Defendant is opposed to the said application. By a Replying Affidavit sworn by Fr. James Kihara, a trustee of the Diocese of Nyeri and filed herein on 14th March, 2019, the Defendant avers that it is aware of the consent recorded in court on 31st May, 2018 requiring the Defendant to excise 600 acres of land from parcels numbers L.R No. 1105/5, 1105/6, 11943/2 and 9462/2 to the entitled Plaintiffs.

4. The Defendant avers that according to their records, the actual number of the genuine resident labourers total to approximately 550 members as per a list attached to the affidavit showing the plot numbers given to each of them. The Defendant asserts that it was agreed in principle that the genuine resident labourers would each be sold a plot on the western side of the farm at a modest price of Kshs.650/- per plot which area was already well-demarcated by the Nyeri-Ihururu tarmac road and another section of Gathunuka area.

5. The Defendant further avers that the genuine resident labourers were to be settled out of these two areas which consisted of over 600 acres of land and as captured in a letter dated 24th September, 1986 from the late Archbishop Caesar M. Gatimu. The Defendant asserts that the land in question consisted of subdivisions of small plots approximately 0.8 acres in size and that the sub-division yielded 550 plots which were enough to cover all the Plaintiffs though others would get smaller portions depending on the position they had balloted and the terrain of the land.

6. The Defendant aver that they are now greatly puzzled by the Plaintiffs who now claim that they want another 171.3 acres of land belonging to the Defendant on the pretext, coercion and deceitful means that the land which they have now settled in is not enough or is not adding up to the 600 acres in the consent order.

7. The Defendant asserts that the spirit and intent of the consent order was to settle the genuine labourers who have for a long time not been able to get documents of ownership of their respective plots due to corruption, nepotism and greed which has rocked the committee members.

8. The Defendant accused the Plaintiffs of grossly misinterpreting the consent order and being mischievous in that they are aware they were to be settled out of the 600 acres comprised in the two areas which have social amenities such as water points, hydrums points, market place and primary school among others.

9. The Defendants further avers that by excising another 171.3 acres, it would mean the Plaintiffs would now invade and encroach on L.R No. 1105/5 and L.R No. 1105/6 which cuts across the eastern side of the Nyeri-Ihururu road thereby creating other myriads of litigation and anarchy as the land the Plaintiffs were given is well known.

10. By the second application dated 14th March, 2019, the Defendants pray for orders:-

3. That this Honourable Court be pleased to order a joint Survey Report (sic) to be carried out by licensed surveyors of both parties to determine precisely the actual plots and acreage occupied by the genuine Plaintiffs/Respondents;

4. That after the submissions of the joint report in 3 above, this Honourable court be pleased to review its consent order made on 31st May, 2018 to the extent that the Defendant/Applicant curves out the plots as currently settled/occupied by the genuine Plaintiffs;

5. That in case of any discrepancy or disagreement by the parties surveyors, this Honourable court be pleased to make a site visit with a view to solving the matter by narrowing down the issue(s) in contention;

6. That (the) Honourable Court be pleased to vary (the) consent order No. 1(i) to the extent that the sub-division process be undertaken by both parties' licensed surveyors with the Defendant being in charge of surrendering the mother titles to the Registrar of Titles and retrieving the remainder of its title.

7. That (the) Honourable court be pleased to vary the consent order No. 1 (iii) to the extent that the circulation of the proposed subdivision scheme plan to various Government offices and the costs associated with such an exercise be borne by the Plaintiff;

8. That such other and/or further order be made as this Honourable court might deem fit and just to grant in the unique circumstance of this matter; and

9. That the costs of this application be provided for.

11. The second application which is supported by an affidavit sworn by the same Fr. James Kihara as a trustee of the Diocese of Nyeri is

based on the grounds that:-

- (a) Order (vi) of the consent order allows parties to apply before this court for a review or for parties to seek further clarification;
- (b) The spirit and intent of the consent order is being defeated by the Plaintiffs who want to enrich themselves at the expense of the Defendant;
- (c) The consent order sought to be reviewed was made in misapprehension that all the genuine/entitled Plaintiffs have settled on and occupied 600 acres of land on the western side of the Nyeri-Ihururu road and Gathanuka area which fact is not the position obtaining on the ground;
- (d) The order sought to be reviewed herein ought to have been made on the understanding that all the genuine/entitled Plaintiffs were to be settled out of the 600 acres on the western side of the Nyeri-Ihururu road and Gathanuka area which fact is known to the Plaintiffs;
- (e) The fact that the actual acreage settled by the entitled Plaintiffs at the time of recording the consent was not known or within the knowledge of this court is a new and important matter which even after the exercise of due diligence would not be presented to this court before or at the time the present order was made. The same constitutes sufficient reason warranting the review of the orders herein;
- (f) The fact that the genuine/entitled Plaintiffs have not settled on the entire 600 acres of land belonging to the Defendant is a new and important matter that was not within the knowledge of the consenting Defendant and this court;
- (g) There was a mistake or error regarding the recording of consent Order 1(i) as one party cannot carry out a sub-division process of the entire Defendants' land single handedly without involving the registered owner as the sub-division scheme plan can be prone to manipulation;
- (h) There was a mistake or error on the face of the record to record the acreage of 600 acres without first obtaining a professional surveyors report on the extent of the acreage occupied by the genuine/entitled Plaintiffs; and
- (i) It is equally important that a joint survey report be undertaken by the parties' licensed surveyors to ascertain the actual plots and acreage occupied by the Plaintiffs to settle this matter once and for all.

12. The second application is opposed by the Plaintiffs. By their Grounds of Opposition dated 26th March, 2019 but filed herein on 27th March, 2019, the Plaintiffs object to the Application on the grounds:

- (a) That the application is an afterthought and nothing new is pleaded to warrant revision of consent orders;
- (b) That the application is meant to re-open litigation over a clear issue of 600 acres which are not denied that the Defendants sold (sic);
- (c) That the 600 acres is not owned by the Defendants but the Plaintiffs and its obligation was to survey the 600 acres;
- (d) That it is the Defendants who are attempting to steal a march on the Plaintiffs as the consent order was clear on all its interest and purposes; and
- (e) That the Applicants having been notified of the alleged "errors" way back in (the) year 2018, there is no explanation for the inordinate delay in filing this application. It is a knee jerk reaction to the application dated 22nd January, 2019 by the Respondents.

13. I have taken a careful consideration of both applications as filed by both the Plaintiffs and the Defendants. I have similarly considered the oral submissions as made before my Learned Sister the Honourable Lady Justice L. N. Waithaka on 28th March, 2019.

14. Given its ramifications on the orders sought by the Plaintiffs' application, I shall first consider the second Application as filed by the Defendant herein. By the said application, the Defendant has in the main urged this court to review and vary the consent order made herein on 31st May, 2018 between the two parties. By the said consent Order, the parties had agreed and it was ordered as follows:

"1. That the Defendant/Respondents being the registered owners of L.R No. 1105/5 1105/6, 11943/2 and 9462/2 does hereby agree to excise 600 acres from the said parcels of land to be transferred to the entitled Plaintiffs within 6 months from the date hereof on the following terms:-

- (i) That the sub-division be as per the survey works done by Messrs P. N. Gichoho Ngugi licenced surveyors with all public and church amenities be(ing) catered for;
- (ii) That the Plaintiffs do facilitate the one mission of the said survey works to the Defendant's appointed survey on verification and registration of the survey works;
- (iii) That the Plaintiffs do cater for the title registration and stamp duty thereof for their respective titles and the defendants

to facilitate the effectuation of registration;

(iv) That upon (ii) and (iii) above, the Defendants to forward to the Plaintiffs' Advocates all the registered titles thereof;

(v) That each party to bear its own costs of the suit; and

(vi) That the matter be mentioned for further orders and/or directions on 20th December, 2018 with the right to apply in the meantime."

15. It is apparent that more than 6 months after the consent was adopted as an order of the court, the parties were unable to make headway prompting the Plaintiffs to file the first Application herein dated 22nd January, 2019. By way of response to the said application, the Defendants by the Second Application dated 14th March, 2019 now urge the court to set aside the consent orders on the grounds *inter alia* that the same was made in misapprehension that all the genuine or entitled Plaintiffs have settled upon and occupied 600 acres of the Defendant's parcel of land which is however not the position obtaining on the ground.

16. The Principles for consideration in an application to set aside a consent judgment have been the subject of various judicial pronouncements and are indeed now settled. In **Brooke Bond Liebig -vs- Mallya (1975) EA 266**, Mustafa Ag V.P. observed as follows:

"The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside, or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed."

17. And in the case of **Flora N. Wasike -vs- Destimo Wamboko (1988) eKLR**, Hancox JA citing Setton on Judgments and Orders 7th Edition Vol. 1 page 124 reiterated that:

"Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them ... and 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."

18. My understanding of those authorities is 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.

19. In the matter before me, the Defendants who are the Registered Trustees of the Catholic Archdiocese of Nyeri aver that they entered into the consent with the Plaintiff members of the Mathari village Self Help Project in misapprehension that all the genuine Plaintiffs had settled on and were occupying 600 acres of land on the western side of the Nyeri-Ihururu road and Gathanuka area which is however not the position obtaining on the ground.

20. According to the Defendants, the fact that the genuine Plaintiffs have not settled on the entire 600 acres of land that they consented to be excised from their land is a new and important matter that was not within the knowledge of the consenting Defendant and the court. It is further their case that there was a mistake or error on the face of the record to record the acreage of 600 acres without first obtaining a professional surveyors report on the extent of the acreage occupied by the genuine Plaintiffs.

21. As it were, the jurisdiction of the court to review and/or vary a Judgment or order of the court is prescribed under **Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules**. Those provisions limit the scope of review to the following grounds:

(a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; or

(b) On account of some mistake or error apparent on the face of the record; or

(c) For any other sufficient reason.

22. The term "mistake or error apparent" by its very connotation signifies an error which is evident *per se* from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position (see **Republic -vs- Advocates Disciplinary Tribunal Exparte Paul Mboya (2019) eKLR**).

23. The mistake alluded to by the Defendants herein is the contention that they were unaware of the fact that the Plaintiffs had not occupied 600 acres of land and that a professional survey ought to have been conducted to establish the actual acreage of land settled on or occupied by the Plaintiffs.

24. That position is however difficult to believe. A perusal of the record herein reveals that ever since this suit was filed in the year 2013, the Plaintiffs' position was that they had bought from the Defendant and were entitled to 600 acres of land. In their Replying Affidavit to the Originating Summons sworn by Fr. David Mutahi and filed herein on 22nd August, 2012, the Defendants assert as follows at paragraphs 6,

15, 20 and 33 thereof:

“6. That the 536 allottees, were to be settled on a 600 acre piece of land after the land was sub-divided by the respondents appointed surveyor and property demarcations are carried out;

15. That within the 600 acres allocated by the respondent, there are other interest groups such as schools owned by the Government public utilities, churches, priest houses, water points, hospitals and other amenities which the respondent by and large has interest of its people at heart (sic);

20. That upon the respondent realizing that the Plaintiff/Applicant has some vested interest on the suit land and in reply to paragraph 15 of the supporting affidavit, the respondent did advise the Plaintiff to incorporate a public company;

33. That therefore, this shows that the Plaintiffs actions are far and large been (sic) actuated by fraud with vested interest on the 600 acres of land being given to the bonafide members/allocatees.”

25. That being the case, it was evident to me that the figure of 600 acres was not just plucked from the air but was something that the parties knew about and had deliberated upon prior to the recording of the consent. Indeed that figure was inserted in the Amended Originating Summons dated and filed herein on 13th September, 2013 and must have been core to the discussions leading to the consent order recorded herein some five (5) years later.

26. From the material placed before me, it is also apparent that the Plaintiffs had made some payments towards the acquisition of the land several decades back and that the only reason the land had not been transferred was the Defendant’s concern over the running of and the internal affairs of the Mathari Villagers Self Help Group.

27. As it were, both parties herein and their advocates consented to the compromise agreement recorded herein on 31st May, 2018 in very clear terms. Both sides were certainly aware of the material facts and there could not have been any mistake or misunderstanding. The Defendant itself had all the time to verify the acreage of the land if it wanted to as there was nothing to my knowledge that prohibited them from so doing.

28. In the premises, it follows that I did not find any basis to disturb the consent judgment and the Second Application as filed by the Defendant fails and is dismissed with costs.

29. In their application dated 22nd January, 2019, the Plaintiffs have urged the court to authorize Messrs P. N. Gichoho Ngugi, a licensed surveyor to excise 600 acres of land from the Defendant’s parcels of land as per the consent order. They also urge the court to direct the Executive Officer and/or the Deputy Registrar of this court to execute all the deeds required for the transfer of the said properties.

30. From the foregoing analysis, it is apparent that for some dubious reason the Defendants have failed or neglected to comply with the orders issued herein on 31st May, 2018 to have the 600 acres of land transferred to the Plaintiffs. That failure on the part of the Defendant is aimed at defeating the orders of this court.

31. Under **Section 98 of the Civil Procedure Act:**

“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”

32. In this respect and taking into account the facts pleaded in the supporting affidavit of James King’ori Mwai in an effort to have the Defendant execute the necessary documents, I am satisfied that this is a proper case in which the court should exercise its discretion under the said Section 98 of the Civil Procedure Act.

33. Accordingly I do hereby allow the Plaintiff’s application dated 22nd January, 2019 in its entirety with costs to be borne by the Defendant.

DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF NOVEMBER, 2021

In the presence of:

Mr. Karweru for the Plaintiff

Mr. Mwachofi holding brief for Mugambi for the Defendant

Court assistant - Wario

J. O. Olola

JUDGE