



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 21 OF 2018**

**GILBERT KIOGORA MWIRICHIA.....PLAINTIFF**

**VERSUS**

**JUDSON MWENDA GITONGA .....RESPONDENT**

(Being an appeal from the Ruling of Hon. J. Irura (S.R.M.) delivered on 27<sup>th</sup> June, 2018, in Nkubu PMCC No. 59 of 2015)

**JUDGMENT**

1. By an appeal dated **16.7.2018**, the appellant seeks to overturn the lower court orders made on **27.6.2018** on the grounds that the court failed to find the consent subject matter of the application dated **19.9.2017** by the respondent was invalid, forged and or fraudulently signed, obtained and or procured; failing to set aside, vacate and or invalidate the consent and subsequent orders thereto; allowing the application whose effect was to freely allow the respondent to take over the appellant's land with no basis in law; finding the alleged sale agreement valid yet it was contrary to and void on account of the High Court Succession cause holding over its invalidity and against the rules of stare decisis failing to find the transaction was void by virtue of **Section 6** of the **Land Control Act**; being biased against the appellant and lastly arriving at a decision contrary to the facts and evidence.

2. This being a first appeal the court is required to re-assess rehear and re-appraise itself on the lower court record, come up with its own findings and conclusions. See *Selle & Another -vs- Associated Motor Boat Co. Ltd & Another (1968) EA 123.*

**STATEMENT OF FACTS**

3. The respondent's claim was regarding a sale agreement entered on 3.9.2010 by the appellant as a con-administrator of the estate of M'Mwirichia Mutuera for 3 acres (which was part of his entitlement) for **Kshs. 2,100,000/=**. The respondent had claimed he had vacant possession upon paying the whole amount.

4. It was averred the appellant and his sister Secinta Mukami had taken letters of administration in Meru High Court Succession Cause No. 630 of 2009. The grant had been confirmed on 28.4.2015 but the appellant had refused or neglected to transfer the land as agreed, despite a surveyor having undertaken subdivision in concurrence with the appellant and the other beneficiaries.

5. The respondent sought for declaratory orders of his entitlement to the purchased portion, an order of permanent injunction and that the appellant and his co-administrator to be compelled to excise and transfer the portion from **L.R No. Abogeta/U-Kithangari/123** in default the executive officer of the court to do so.

6. The respondent attached a copy of the sale agreement, certificate of grant, receipts of payments to the surveyor and acknowledgement of payments by the appellant.

7. Following service of summons, the respondent by an application dated 19.10.2012 sought for temporary injunction and inhibition orders of preservation of the suit land pending hearing of the suit. Interim orders were issued and an interpartes hearing given for 4.11.2015.

8. The appellant entered appearance in person by a notice dated 24.10.2015.

9. Parties entered into a consent dated 24.11.2015 and filed it before court on 26.10.2015 duly executed with signatures and thump prints. They eventually appeared before court on 4.11.2015 which adopted it hence becoming an order of the court. The record shows the appellant told the court he had freely signed the consent. The court entered a consent judgment and marked the matter as settled.

10. By an application dated 8.12.2016 filed through Wambugu & Muriuki Advocates it sought for one Nelson Mugambi Mwirichia to be

joined as an interested party to the proceedings and to set aside discharge or vacate the orders given on 4.11.2015.

11. The grounds upon which the application was brought were that the suit land was subject to a succession cause at the High Court, the order of the lower court had been invalidated and that given the Malindi Petition over magistrate's jurisdiction the orders of 19.10.2015 were unlawful. He attached copies of the order and a ruling from the High Court.

12. The respondent filed a replying affidavit sworn on 3.4.2017 stating the matter had been concluded on 4.11.2015, could not be re-opened and that the court was **functus officio**, besides being filed by a stranger who was not an administrator to the estate, the issue was res-judicata, distribution of the estate had not occurred within 60 days as ordered by the High Court on 15.11.2016, the High Court had not determined the issue to finality but had referred it to the trial court for action, Malindi Petition had been stayed, the plaint at paragraph 5 had made disclosure of the succession matter and the interested party could not possibly step in and arrogate himself the power to plead for the appellant and purport to set aside the consent order on his behalf.

13. The respondent filed a list of authorities dated 11.4.2017 relying on **Al Jalal Enterprises Ltd –vs- NIC Bank Ltd & Another [2010] eKLR, Board of Trustees Kenya Entrepreneurship Empowerment Foundation –vs- M.Y.C.A & Another [2016] eKLR, Dhanji Jadra Ramji –vs- Commissioner of Prisons & Another [2014] eKLR and Board of Trustees NSSF –vs- Michael Mwalo [2015] eKLR.**

14. The interested party filed a supplementary affidavit sworn on 11.4.2017 claiming he held a registrable interest as a beneficiary to the suit land.

15. In a purported move to regularize appearance, the firm of Wambugu & Muriuki formally came on record through a notice dated 11.4.2017 and filed the same date after which the interested party filed a supplementary affidavit to the respective replying affidavit and for the first time the appellant herein filed a replying affidavit sworn on 6.6.2017 supporting the application and claiming the court had no jurisdiction to hear the suit since there was already another suit being Meru ELC No. 84 of 2017. He claimed he had never denying ever participated in the subject proceedings and urged for investigations so as to set the record straight and for the DCI to cause investigations over the purported fraudulent documents. Further he stated he was not privy or party to the consent and alleged he had made an OB at Nkubu police station.

16. With leave of court parties filed written submissions dated 14.7.2017 for the interested party and 28.7.2017 for the respondent.

17. Through a ruling delivered on 13.9.2017, the application by the interested party was dismissed.

18. Meantime the respondent by a notice of motion dated 19.9.2017 sought for the court to order and directive he be registered as a co-proprietor of **Parcel No. Abogeta/U - Kithangari/2734 (a subdivision of Abogeta/U-Kithangari/123)** to the extent of the three acres alongside the appellant, inhibition orders over the land and the appellant do surrender the original title deed to the land registrar so as to effect the changes in default the Court's Executive Officer do so.

19. The application was supported by an affidavit of Judson Mwenda Gitonga sworn on 19.9.2017 attaching the mutation form duly signed by the appellant and her sister dated 10.2.2017 and a field diagram dated 7.4.2017 together with the green card extract.

20. The court issued inhibition orders and set the application for interpartes hearing on 27.9.2017.

21. The respondent filed a further supporting affidavit sworn on 4.9.2017 in which he stated an attempt to set aside the consent order had been declined on 13.9.2017, that he was only interested in the appellant's share of the estate to the extent of 3 acres only hence this was not a new cause of action, that the Meru High Court ELC case was filed after the consent and his application was severable from the Meru ELC case and failure to allow the same would jeopardize him yet he had paid Kshs. 2,100,000/= to the appellant and lastly that the alleged threats of CID investigations had not materialized.

22. The appellant opposed the application through a replying affidavit sworn on 26.9.2017, insisted he had not participated in the proceedings leading to the consent judgment; that the claim was a new cause of action requiring fresh proceedings; the court lacked jurisdiction; there was another pending suit at the High Court hence issue was subjudice; and that the applicant was forum shopping.

23. Parties once more filed written submissions dated 11.10./2017 for the applicant relying on case of **Al Jalal Enterprises Ltd –vs- NIC Bank Ltd & Another (supra)** and **Karuntimi Raiji –vs- M'Makinya M'Itunga [2013] eKLR.**

24. Come 19.10.2017, the appellant brought an application dated 18.10.2018 seeking for the suspension or stay of the hearing of the application dated 19.9.2017, review or setting aside discharge or vacating of orders made on 4.11.2015 and the consent dated 24.12.2015; declaration that the order and consent thereof was a forgery and invalid and all the consequential orders made to and upon so lifting the orders the appellant be allowed to enter appearance and defend the claim.

25. The application was supported by an affidavit sworn on 18.10.2017; the grounds that he had never executed the consent; got to know of it when his brother the interested party moved the court over it; was not aware of the lower court suit; orders and directives; the consent was binding on third parties and hence unenforceable; it was fraudulent or made through misrepresentation hence could be set aside; he intended to defend the suit and there would be no prejudice to the respondent.

26. Further the appellant stated consent judgment had not been determined; given the High Court ruling the consent judgment could not stand; the cause of action had lapsed; denied receiving **Kshs. 2,100,000/=** from the respondent; claimed the investigations were still on and denied ever having transacted with the respondent who he termed as a fraudster purporting to acquire his late father's land.

27. The application was also supported by a supplementary affidavit sworn on 23.10.2017 claiming the issue of setting aside.

28. The respondent opposed the motion dated 18.10.2017 through a preliminary objection dated 11.1.2018 and a replying affidavit sworn on 11.1.2018 on the grounds that the motion was raising issues already determined by the court through an earlier notice of motion dated 8.12.2016; claimed service of summons had been effected and both parties went to M/s Kiautha Arithi Advocates for the signing of a consent which was eventually filed in court and both parties appeared in court for the adoption and reiterated his earlier replying affidavit sworn on 3.4.2017 and that the same arguments by the appellant were contained in his supplementary affidavit sworn on 6.6.2017 hence he was attempting to re-litigate a closed matter.

29. Parties once again put in written submissions for the two applications dated 19.9.2017 and 18.10.2017 with the defendant/appellant's submissions dated 26.3.2018 and plaintiff/respondent's submissions filed and dated 6.3.2018 by Mwirigi Kaburu & Co. Advocates who had come on record for the respondent and who also raised a preliminary objection dated 11.1.2018 that the notice of motion dated 18.10.2017 was res judicata in view of the earlier motion dated 8.12.2016.

### **THE APPEAL**

30. With leave of court, parties agreed to compromise the appeal through written submission's dated 5.10.2021 for appellant and 21.10.2021 for the respondent.

31. The appellant submits the court did not look at the validity of the contract in terms of the **Law of Contract Act, Land Control Board Act** and the **Law of Succession Act** vis a vis on the earlier succession cause decision hence arrived at the wrong decision.

32. Secondly, it is submitted the appellant was denied fair hearing to defend the suit and more so allowing a consent which was binding a third party not party to the suit.

33. Thirdly, it is submitted the court failed to vacate the consent judgment when there was overwhelming evidence and grounds to vacate it. Reliance was based on *Simiyu –vs- Watambamala [1985] eKLR* on the proposition that an agricultural transaction without a land control consent is invalid, *Gitanga Mwanili & Another –vs- Annucianta Wathira Kibue [2013] eKLR* on the proposition that where there is failure to perform terms of contract the only option is for a refund of the sum.

34. On the other hand, the respondent submits a consent judgment has a contractual effect and can only be set aside on grounds which justify setting aside of a contract or if certain conditions remain unfulfilled. He relies on *Flora Wasike –vs- Desmond Wambeolla [1980] 1 KAR, Koko Limited –vs- Madison Insurance Co. Ltd [2011] eKLR*.

35. Secondly it is submitted the consent was arising out of a sale agreement between the respondent and a beneficial owner of a land which is enforceable as against that beneficiary hence the issue of the succession cause was merely being brought to hoodwink the court. He relies on *Re Estate of John Gakunga Njoroge (Deceased) [2015] eKLR*.

36. Thirdly, the respondent submits a consent acts as an estoppel and can only be set aside on grounds of misrepresentation, fraud or mistake which have to be specifically pleaded and proved as held in *Virjay Marjoria –vs- Nasingh Mudhusingh Darbar & Another [2000] eKLR, Kinyanjui Kamau –vs- George Kamau [2015] eKLR and Benson Wandera Okuku –vs- Israel Were Wakho [2020] eKLR*.

37. Lastly, the respondent submits the issue before Nkubu court was over **Parcel No. Abogeta/U/Kithangari/2734** which was totally different from the succession cause over **Parcel No. Abogeta/U Kithangari/123**.

38. Counsel submitted a consent order is binding on all parties unless proved to have been obtained fraudulently in collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts misrepresentation or ignorance of the fact in general or for a reason which would enable the court to set aside an agreement as held in *Kenya Commercial Bank Ltd –vs- Specialized Engineering Co. Ltd [1980] eKLR*.

39. Having gone through the pleadings, evidence, submissions and the grounds of appeal the issues for determination are:-

**a. Whether the appellant was entitled to the stay of proceedings, setting aside of the consent judgment and an opportunity to defend the suit.**

**b. Whether the respondent was entitled to the orders of inhibition and registration as a co-proprietorship to the suit land.**

**c. If the trial court applied the correct law to the twin issues based on the material facts and evidence before the court.**

40. As a starting point, **Order 42 rule 13** requires an appellant to ensure vital documents itemized therein form part of the record of appeal.

41. In the instant appeal, the appellant failed to include the memorandum of appearance dated 24.10.2015 duly signed, thumb printed and filed by the appellant in person on 26.10.2015. The signatures to that singular document are the same or similar or identical signatures throughout the suit and hence I have no reason whatsoever to doubt that the appellant was duly served with summons to enter appearance and the plaint together with the application dated 19.10.2015.

42. Secondly given my finding that the appellant was aware of the suit and voluntarily entered appearance it goes without saying that he cannot turn around and swear affidavits that he was never aware of the suit and or came to know about it when Nelson Mugambi Mwirichia

brought it to his attention.

43. Thirdly, turning to the issue of the consent judgment, there is no dispute that the sale agreement dated 3.9.2010 was signed by the appellant before the firm of Kiautha Arithi & Co. Advocates regarding a portion of the mother title **No. Parcel No. Abogeta/U Kithangari/123** which the appellant was a beneficial owner of four acres. The agreement was specific on his portion that is the one fronting Kanthuru road and run up to Rumuulu stream.

44. At the time the appellant executed the consent order, there was already a grant duly confirmed on 28.4.2015. The same gave the respondent equitable rights upon vacant possession which are enforceable in law. *See **Katende-vs- Harindar & Co. Ltd. [2008] 2 E.A 173.***

45. Further there were acknowledgment notes dated 26.4.2011 before the same law firm with signature of the appellant. It cannot therefore be true when the appellant swears an affidavit that the respondent was a fraudster and he had never transacted with him let alone enter into a sale agreement.

46. Fourthly, coming to the issue of the consent order, the confirmation of grant was issued on 28.4.2015. In the application dated 19.10.2015, the same is attached as **JMG "5"**. The beneficial interest of the appellant is indicated as 4 acres.

47. Once served with summons and the application, the appellant entered appearance and signed a consent order dated 24.10.2015 confirming he was entitled to a portion of 3 acres out of **L.R Abogeta/U/Kithangari/123**. He admitted his portion will be excised and transferred to the respondent in default the Executive Officer to sign the transfers. He also consented to an injunction to issue so that the respondent can have quiet occupation of the sold portion.

48. The consent order is not only signed but also thumb printed with the same or similar signatories appearing in over six affidavits in this file by the appellant. Over and above the signatures the appellant appeared before the court and confirmed he had voluntarily entered into the consent. The court had no option but to enter a final order as requested by the parties and marked the matter as settled.

49. Fourthly, once the consent order and the judgment was entered, the said judgment superseded all the other sale agreements signed by the parties previously.

50. As indicated above the succession cause had already been determined and the share for the appellant established. This was confirmed by the mutation form attached to the supporting affidavit to the application dated 19.9.2017, dated 10.2.2017 creating new **Parcel No's 2733, 2734 and 2735**. It was duly signed by the appellant and his sister co-administrator. Annexure marked **JMG "2"** is a copy of the green card showing that on 26.10.2015 the appellant and his sister were entered as owners of **Parcel No. Abogeta/U/Kithangari/123** after the **Meru High Court Succession Cause No. 630/2009**. So already the property had passed from the estate to appellant.

51. Similarly on 14.6.2017 the property was closed for subdivision and new numbers created namely **Parcel No's 2733 – 2735**. A certificate for official search dated 28.8.2017 confirms this position hence the reason the respondent was seeking for inhibition orders and for registration as a co-proprietor in order to safeguard his rights accruing from the consent judgment.

52. The appellant complaint is that there were enough grounds and reasons to vacate and or set aside the agreement of sale and the consent judgment given what the succession court had held.

53. Looking at the ruling from the High Court, the court directed the matter be referred to the trial court for the appropriate judicial action inter alia since there was no application for certiorari and or prohibition and mandamus or appeal.

54. The appellant did not appeal against the order made on 4.11.2015. Instead the appellant went to the High Court and mad an application dated 18.11.2015 in the succession cause seeking for inhibition and injunction over both inhibition and injunction orders given by the lower court and for the recall of the file for setting aside. He again reverted to the lower court for the setting aside of the consent after the High Court declined his request.

55. On 15.11.2016 the High Court in my view declined to grant any such orders and directed the land registrar to effect the subdivisions a per the grant confirmed. It also directed the trial court to make the appropriate orders.

56. Regarding the prayers for setting aside discharge and vacation of the consent judgment made on 19.10.2015, the court in a ruling delivered on 13.9.2017 pronounced itself over the issue. That decision or order has never been appealed against by the appellant yet he swore an affidavit pursuant to leave issued on 24.5.2017 and which affidavit is sworn on 6.6.2017.

57. At paragraph 24 of the affidavit the appellant states the application ought to be allowed and urged the court to take the appropriate judicial action as directed to facilitate the completion of the distribution of the estate.

58. The appellant also sworn a supplementary affidavit on 23.10.2017.

59. Consequently in my considered view, the appellant after the ruling was the rendered did not appeal yet he was a party to it by virtue of the leave granted to respond.

60. Fifthly, the appellant submits the court failed to find the agreement was void by virtue of **Section 6** of the **Land Control Act**, the **Law of Contract Act** and **Section 45** of the **Law of Succession Act**.

61. As indicated above the subject applications before the court were for the setting aside of a consent judgment, the enforcement of the said judgment through inhibition orders and the registration of the respondent as a co-proprietor over the new number out of the subdivisions of the mother title. The issue was no longer about the sale agreement made in 2010. The court had already entered a consent judgment and hence the application before it was post-judgment and on execution.

62. The court in my considered view could not be called upon to re-open issues already moot and in which it was **functus officio**.

63. The appellant had not sought for leave to defend the suit or attached a draft defence which perhaps one would say he had raised any triable issue. The appellant had already lost a similar argument through a proxy and appears to have brought up the same issues all over again.

**64. Order 45 Rule 1** provides any person aggrieved by an order and who upon discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at the time the decree was passed or on account of mistake or error apparent on the face of the record or for any other sufficient reason may apply for review without unreasonable delay.

65. In *Inter Countries Importers & Exporters Ltd. –vs- Teleposta Pension Scheme Registered Trustees & 5 Others [2019] eKLR* the court held a consent order can only be set aside if proceeded through fraud, non-disclosure of material facts, or mistake or for a reason a court can set aside a contract.

66. The 1<sup>st</sup> ground by the appellant is that the succession cause had not been concluded. As indicated above the confirmed grant was made on 28.4.2015 while the consent judgment was entered on 4.11.2015 hence the ground is untrue.

67. The second allegation is the consent was forged. There is no forensic report attached to authenticate assertion this and given my finding the appellant entered appearance, this ground is untenable.

68. Further the fourth ground is that a third party was involved and hence directed to be affected by the consent. Again as I have made a finding above, at the time, the consent was entered and the share for the appellant clearly been identified. He had already been registered as a owner of the new number and the file for L.R 123 and the file closed for subdivision. In any event the said third party has never complained in this proceedings and the appellant has not attached any authority from the co-administrator to raise any claim on her behalf. See *Cheruiyot –vs- Korir [2021] KECA 222 KLR*.

69. Fifthly, the appellant has not produced no material evidence of fraud, misrepresentation or mistake and or laid any basis for it. Further the appellant did not call for the summons against M/s Kiautha Arithi Advocates or who ever witnessed both the agreement and the consent order for examination by the court.

70. Similarly, the appellant did not seek for the judicial officer and the court assistant who attended him in the open court to say an imposter and not him appeared and confirmed the consent order.

71. Looking at the totality of the facts and affidavit evidence before the trial court, my findings are that the trial court did not err in fact and in law and hence applied the correct principles in law.

72. The appeal herein lacks merits. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**In presence of:**

Miss Mukanguru for interested party

Karanja for respondent

Kimaita for appellant

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**