



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE NO. 34 OF 2012

MOSES WAMALWA MUKHAMARI.....1ST PLAINTIFF

CAROLYNE INJETE FEDHA.....2ND PLAINTIFF

JAYESH VALLADHDAS.....3RD PLAINTIFF

VERSUS

PAUL KARANJA WANYONYI.....1ST DEFENDANT

MICHAEL WANYONYI LUSUI.....2ND DEFENDANT

JOSEPH KWANUSU WANYONYI.....3RD DEFENDANT

JOTHAM WANYONYI SAKARI.....4TH DEFENDANT

R U L I N G

MOSES WAMALWA MUKHAMARI (the Applicant herein) was one of three (3) plaintiffs who filed this suit against the Respondent **PAUL KARANJA WANYONYI** and four (4) other defendants seeking, among other remedies, an order of permanent injunction and/or refund of the purchase price of Kshs. 590,000/= in respect to the land parcel **NO NDIVISI/MUCHI/3204**.

From the record herein, it would appear that only the 4th defendant and the Respondent herein (who was the 1st defendant) filed their defences and counter – claim.

However, the suit did not proceed to trial. Instead, by a consent dated 21st May 2012 and filed in Court on the same day, the parties agreed as follows: -

“By consent the 1st MOSES WAMALWA MUKHAMARI ID NO 0312398, 2nd CAROLINE INJETE FEDHA ID NO 21099012 and 3rd JAYESH VALLABHDAS ID NO 24472655 plaintiffs suit be and is hereby allowed against 1st PAUL KARANJA WANYONYI ID NO 267780562, 2nd MICHAEL WANYONYI LUSUI ID NO 26783727 and 3rd JOSEPH KWANUSU WANYONYI ID NO 14597411 defendants in the compromised terms as follows:-

1: Judgment be and is hereby entered for the 1st plaintiff sum of Kshs. 280,000/= all inclusive.

2: Judgment be and is hereby entered for the 2nd plaintiff sum of Kshs. 260,000/= all inclusive.

3: Judgment be and is hereby entered for the 3rd plaintiff sum of Kshs. 191,000/= all inclusive.

4: There be a stay of execution for 60 days from the date of filing this consent.

5: The 1st defendant is at liberty to proceed with his counter – claim against the 4th defendant.”

That consent was duly minuted by the Deputy Registrar but was not signed. However, upon noticing that lapse, I directed that it be signed. It is not disputed by any of the parties herein.

Armed with that consent order, the Applicant has now moved this Court by his Notice of Motion dated 8th August 2019 seeking the following orders: -

1. Spent

2. This Honourable Court be pleased to grant orders for adopting the consent reached by both parties on 21st May 2012.

3. That after granting such orders, this Honourable Court be pleased to grant proprietor order directing the County Government of Bungoma Land Registrar to transfer L.R NO NDIVISI MUCHI/5064 measuring approximately 0.4 Ha and register the same in the names of MOSES WAMALWA MUKHAMARI.

4. That after granting such orders, this Honourable Court be pleased and grant final orders making consent as finally settled without orders as to costs.

The application is premised on the grounds set out therein. The gist of the said application is that the 1st Respondent was paid the purchase price in full and signed the transfer forms in favour of the Applicant and also provided his Identity Card, passport and pin to facilitate such transfer. Further, the 1st Respondent who is serving a jail term has signed a Power of Attorney to be represented at the Webuye Land Control Board by one **MERCY WANJALA WANYONYI**. However, the Chairperson of the Webuye Land Control Board Webuye seems to have an interest in the parcel of land in dispute hence this application.

The application is not opposed as neither the Respondent nor the Attorney – General who is also named as a 2nd Respondent did not file any responses to the said application. However, the Respondent who is serving a jail term was produced in Court at the hearing of the said application and he supported it. The Attorney – General, and not surprisingly so, did not participate in the application as the Land Registrar was not a party in the suit or the consent dated 21st May 2012.

The application has been canvassed orally by the Applicant and Respondent and as I have already stated above, it is not opposed.

With regard to the prayer seeking that the consent order dated 21st May 2012 be adopted by this Court, that has already been done on my directions. The said consent order is therefore a Judgment of this Court. That prayer is allowed although it was not necessary because once a consent order is signed by the Deputy Registrar pursuant to the provisions of **Order 49 of the Civil Procedure Rules**, it becomes an order or Judgment of the Court.

What the Applicant is seeking to enforce by his application are the terms of the consent order dated 21st May 2012. The second prayer that he seeks is for this Court to direct the Land Registrar Bungoma County to register the transfer of the Land parcel **NO NDIVISI/MUCHI/5064** into his names. That prayer is not available to the Applicant for the following reasons: -

Firstly, the land parcel **NO NDIVISI/MUCHI/5064** was not a subject in the consent order dated 21st May 2012. Therefore, no orders can be made with regard to that property. Indeed, the said land parcel **NO NDIVISI/MUCHI/5064** was not the subject of this suit which was in fact a dispute with regard to a sale agreement in respect to the land parcel **NO NDIVISI/MUCHI/3204**. What the Applicant is seeking is to enforce an order with regard to a property that was not the subject of the dispute between him and the other parties. That is not permissible.

Secondly, and most importantly, it is clear from the consent order dated 21st May 2012 that the suit was compromised and the Applicant who was the 1st plaintiff was to be paid the sum of Kshs. 280,000/=. That is all that he is entitled to by that consent order. There is no mention therein that he is entitled to any portion of either the land parcel **NO NDIVISI/MUCHI/3204** which was the subject of the suit or a portion measuring 0.4 Ha out of the land parcel **NO NDIVISI/MUCHI/ 5064** which is the subject of his application. This Court cannot import into the consent order dated 21st May 2012 matters that were not captured therein. That would amount to varying the consent arrived at by the parties on their own volition. The parties, by their consent, compromised the suit between them with regard to the matters in dispute and that brought the litigation to an end and no new issues can be canvassed. The common law position is stated at paragraph 7565 of Vol 30 **HALSBURY S LAW OF ENGLAND** as adopted in **SPECIALISED ENGINEERING CO LTD .V. KENYA COMMERCIAL BANK LTD 1988 eKLR (C.A CIVIL APPEAL NO 131 OF 1984)** as follows: -

“All or any of the questions in dispute in an action may be settled between the parties by compromise without trial, and if such compromise is bona fide and validly entered into, the Court does not allow the question so settled to be again litigated between the parties to the settlement.”

Clearly, it would not be a proper exercise of this Court’s jurisdiction to grant orders that are alien to the consent recorded by the parties themselves.

Finally, there is pending before this Court an application by one **LABAN MASINDE NANGAKA** dated 1st November 2019 in which he seeks to be enjoined in this case as an interested party on the ground that the land parcel **NO NDIVISI/MUCHI/5064** is the subject of a pending **BUNGOMA HIGH COURT MISC APPLICATION NO 125 OF 2013**. That application is not before me and the less I say about it the better. What is important however is that the said application is opposed by the Applicant herein who does not appear to rebut that assertion. It would be a dangerous precedent for this Court to make orders affecting land that is subject of another litigation when that fact has been brought to the attention of the Court and is not disputed.

What is clear to me however is that the Respondent wishes to transfer the land parcel **NO NDIVISI/MUCHI/5064** to the Applicant. That transaction can only be pursued through another legitimate forum but not in this suit.

The up – shot of the above is that the Applicant’s Notice of Motion dated 8th August 2019 is devoid of merit. It is dismissed with no orders as to costs.

Boaz N. Olao.

J U D G E

23rd January 2020.

Ruling dated, delivered and signed in Open Court at Bungoma this 23rd day of January 2020.

Applicant present

Respondent present

Joy/Okwaro – Court Assistants

Right of Appeal explained.

Boaz N. Olao.

J U D G E

23rd January 2020.