



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 208 OF 2016

MARINA NCECE MOHAMMED.....PLAINTIFF

VERSUS

MICUBU KARUGUI.....1ST DEFENDANT

JACOB MUTIGA.....2ND DEFENDANT

RULING

1. The plaintiff instituted this suit on 10/07/2017 seeking this court to make an order of permanent injunction restraining the defendant, their agents, servants, assignees or anybody acting on their behalf from trespassing, encroaching and/or interfering with the plaintiff's peaceful occupation of L.R. No. 2098 Antuamburi Adjudication Section.
2. The hearing commenced whereby, plaintiff's case was closed on 3.10.2017. Thereafter, the defence made an application for scene to be visited of which the application was allowed by consent. The actual terms of reference appertaining to the scene visit were given by the court on 18.10.2018, whereby the Deputy Registrar or the Executive Officer of the court was directed to visit the locus in quo in the presence of the parties, compile and file a report indicating inter-alia whether, the road of access was created on plaintiff's land.
3. The site visit was conducted on 14/3/2019 in the presence of both the plaintiff and the Defendant and a report was duly filed by the Executive Officer of this Court on 22/03/2019, while **Kimathi.P. Kaberia** the Sub County Surveyor also filed a report on 26/07/2019. Both reports bear similar sentiments, that there is indeed a road of access passing through the land of the plaintiff.
4. On 23/9/2019 by consent of the parties i.e. **G. Anampiu advocate** for the plaintiff and **Murithi advocate h/b for C.P. Mbaabu** for the Defendant, the report dated 26.7.2019 was adopted as part of the evidence of the court. The Defendants have since filed an application seeking this court to substitute the Orders made on 23/9/2019 with an order that the surveyors report made on 26/7/2019 be expunged from the record and a fresh report be made and filed by the sub county surveyor in charge of the area where the suit-land is situated in conjunction with the executive officer of the Court.
5. The application is supported by the sworn affidavits of **Jamlick Murithi Mwenda and Micubu Karigui** and **Jacob Mutiga**. Defendants contend that they had not given instructions to their counsel regarding the subject surveyors report before making the order on 26/7/2019, adopting it as part of the record, as it had not been supplied to the defendants counsel or the defendants themselves, that the report is doctored to allege that the subject road of access is created on the plaintiff's/respondents land P/No. 2098, yet this is not true since the said road of access clearly exists in the annexed map, which also shows the location of the said land in P/No. 2098.
6. Counsel for the defendant stated that he innocently agreed to the consent but he was neither privy to the information in the report nor had he received instructions to adopt the same. That the defendants only received the report on 25/10/2019 to their utter dismay of its contents.
7. The plaintiff/respondent opposed the application through his affidavit dated 18th January 2020 stating that the visit to the scene was done in the presence of the defendants and they were therefore aware of the same. That the application is only meant to delay the hearing of this matter.
8. On 20/1/2020 the parties agreed to rely on the affidavit evidence on record.

Analysis and Determination

9. The main issue for determination is **whether or not this court should set aside the consent Order** entered on 26/7/2019.

10. In **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485**, cited in the case of **Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR**, it was held as follows;

“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 of such facts in general for a reason which would enable the court to set aside an agreement”.

11. In this case the application for a scene visit was initiated by the defendant’s way back in October 2017 after the closure of plaintiff’s case. The subsequent scene visit was conducted in the presence of both the plaintiff and the defendant. All this time, defendant did not raise any issue as to the correctness and authenticity of the process.

12. There is no evidence to show that the consent was obtained by fraud and/or collusion. The report by the sub county surveyor is in tandem with that of the executive officer and does not deviate from the terms of reference given to the parties by the court on 18.10.2018. The upshot of this courts determination therefore is that the application dated 28/11/2019 lacks merits and the same is hereby dismissed with costs to the plaintiff/Respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE