



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 307 OF 2014

RACHEL ONDIEKI OMARIBA

EVANS SIRO OMARIBA (Suing as the legal representatives of the estate of EDWIN OMARIBA

NYAKANGO.....PLAINTIFFS

Versus

TERESA ONWONGA.....1ST DEFENDANT/RESPONDENT

CHARLES ONWONGA.....2ND DEFENDANT/RESPONDENT

GISAINA NYAMBARIGA alias GISAINA OGETO.....3RD DEFENDANT/APPLICANT

LIVINGSTONE GISAINA OGETO.....4TH DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 22nd May 2019 the 3rd and 4th Defendants filed an application seeking the following orders:

i. Spent

ii. That this court be pleased to review, vary and/or set aside its orders made on 25th October 2018 in so far as it relates to excising portions of land from the Applicants' parcels Nos. CENTRAL KITUTU/MONYERERO/1294 and CENTRAL KITUTU/MONYERERO/1295

iii. That there be a stay of execution of the court's orders issued on 25th October, 2018 in so far as it relates to excising portions from the Applicants' parcels Nos. CENTRALKITUTU/MONYERERO/1294 and CENTRAL KITUTU/MONYERERO/1295

iv. That this honourable court be at liberty to make any such further orders as it thinks fit in the interest of justice.

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

2. The application is based on the grounds stated on the face of the Notice of Motion, key among them being that the Applicants have discovered that their late uncle had his own parcel of land known as EAST KASIPUL/KOJWACH/KAWERE/343 measuring 1.62 Hectares in which he had constructed a homestead for himself and the Respondents herein and that is why he did not want a share from his two brothers. The application is also based on the supporting affidavit of Gisaina Nyambariga alias Gisaina Ogeto sworn on the 22nd May 2019.

3. Despite being served with the application the 1st and 2nd Defendants/ Respondents did not file any Replying affidavits. In view of the far-reaching effects of the orders sought, the court directed that the application be disposed of by way of written submissions.

4. Before delving into the merits of the application, it is necessary to give a brief background of the case. The Plaintiffs filed suit against the 1st and 2nd Defendants seeking to restrain them from burying the remains of their deceased kinsman on the Plaintiff's land parcel No.

CENTRAL KITUTU/MONYERERO/1293. The court granted interim orders of injunction pending the hearing and determination of the suit. The Defendants filed their defence and the case was set down for hearing.

5. When the case came up for hearing on 15.3.2016 the 1st Plaintiff started testifying but the learned Judge stopped her midway as he appreciated that the matter involved family ancestral land where only 2 brothers were allocated land to the exclusion of the third brother. He noted that in the circumstances, the issue of whether the two brothers held the land in trust for the third brother arose. He directed that witness be stood down and that the parties supply the abstracts of title in respect of land parcel number CENTRAL KITUTU/MONYERERO/77 AND 78 (which was sub-divided to form land parcels Nos. 1293, 1294 and 1295). The pleadings were subsequently amended to enjoin the 3rd and 4th Defendants who are the Applicants herein.

6. While the case was pending for hearing the 1st Respondent lost another son and she was restrained from burying him on land parcel No. 1293. When the matter came up for hearing on 25.10.2018 the Judge encouraged the parties to pursue an amicable settlement in order to bury the two bodies that were lying at the mortuary. Since the 1st and 2nd Defendants were adamant that they did not have any other piece of land where they could bury their kin, the 3rd and 4th Defendants each agreed to surrender a portion to be hived out of their respective parcels of land for the benefit of the 1st and 3rd Defendants. A consent judgment was accordingly entered into and the suit was marked as settled.

7. The Applicants contend that after the consent judgment was entered they discovered that the Respondents had another parcel of land known as EAST KASIPUL/KAJWANG/343 measuring 1.6 hectares on which there is a homestead. The said parcel of land is on the boundary of Kisii and Luo Nyanza. This is what prompted the Applicants to file this application for review and/or setting aside of the consent judgment on the ground that the Respondents misrepresented the facts to the previous Judge and the consent was therefore obtained by means of fraud.

8. In his submissions counsel for the Applicant has argued that there was pressure to conclude the matter since there were two bodies lying at the mortuary and the Respondents lied to the court so they should not be allowed to benefit from their lies.

ISSUE FOR DETERMINATION

The singular issue for determination is whether the consent judgment entered on 25th October 2018 should be set aside.

ANALYSIS AND DETERMINATION

9. The law on setting aside of consent judgments or orders is now settled. The general principle of law is that a consent judgment or order has the effect of a contract and can only be set aside on grounds which justify setting aside of a contract. This principle was laid down in the case of **Brooke Bond Liebig Limited v Mallya 1975 E.A 266** when the court stated that:

“A consent order 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 apprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement”.

10. Similarly, in **Flora Wasike v Destimo Wamboka (1988)1KAR 266** the court stated that

It is now settled law that a consent judgment has contractual effect and can only be set aside on grounds which would justify setting a contract aside if certain conditions remain to be fulfilled which were not carried out. The above authorities were cited with approval by the Court of Appeal in **East Africa Portland Cement Ltd V Superior Homes Ltd (2017) eKLR**. I am duly guided by the said authorities.

11. In the instant case the Applicants contend that the 1st and 2nd Respondents failed to disclose that they had another parcel of land where they could have buried their kinsmen. The Applicants only discovered that there was a parcel of land registered in the name of Onwonga Mageto, the 1st Defendant's late husband and the father of the 2nd Defendant after the consent judgment had been entered. I note that the consent was recorded against the background that the Applicants acknowledged that the deceased who was their uncle was entitled to a share of land parcels No. CENTRAL KITUTU/MONYERERO/ 77 and 78 (which was sub-divided to form land parcels Nos. 1293, 1294 and 1295) as he had been excluded at the time the land was divided among the sons of Kerubo Nyambariga deceased. It is not in dispute that the respondents have been living on a small portion of land parcel no. 1293 and that the late Onwonga Mageto was buried on said parcel of land. There is nothing to suggest that the Respondents knew that the deceased had another parcel of land and even if they did, this would not have disentitled the deceased from inheriting a share of his ancestral land.

12. In view of the foregoing, I am not persuaded that sufficient grounds have been disclosed to warrant a review or setting aside of the consent judgment. I therefore find no merit in the application and I dismiss it. Since the Respondents did not defend the application I make no order as to costs.

Dated, signed and delivered via zoom this 20th day of May, 2020.

J.M ONYANGO

JUDGE