



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case No. 130 Of 2011

ASTRID DORIS PETRA BWAZA PLAINTIFF/RESPONDENT

- V E R S U S -

SALESIAN OF DON BOSCO DEFENDANT/APPLICANT

RULING

The plaintiff filed this suit on 17th May, 2011 as a boundary dispute. He later filed an application under Certificate of urgency on 17th May, 2011 for a temporary injunction against the defendant from defacing, injuring or otherwise impairing the boundary features of the suit lands. vide his application dated 17th May, 2011.

The defendant filed his statesmen of defence and counterclaim on 6th July, 2011. He also filed his reply to the motion dated 17th May, 2011 vide a replying affidavit sworn on 14th June 2011. A consent order by the parties was entered on 1st November 2011. Which state as follows:

"1. That there be no further development on the disputed portion of the suit properties.

2. That status quo prevailing be maintained.

3. That on a date to be fixed by both parties and within 90 days the District Land Registrar, Provincial Surveyor and two other independent surveyors appointed each by the parties and in the presence of both parties do ascertain, fix and mark the correct boundaries between the original Plot No. Kwale/Galu/Kinondo 372 and Galu/Kinondo 373.

4. That consequently a comprehensive report be prepared by the the District Land Registrar and the Provincial Surveyor and the same be filed in court within 21 days of the completion of the exercise herein stated.

5. The application dated 17th May, 2011 thereafter be fixed for directions."

From the above consent order it can be seen that the boundary was to be fixed and marked by the District Land Registrar, Provincial Surveyor and two other independent surveyors appointed by each party within 90 days. They were to fix the boundary between Kwale/Galu/Kinondo 372 and 373. The time set was to expire on January 30th 2012. A comprehensive report was to be made by the District Land Registrar and

the Provincial Surveyor within 21 days. The 21 days were expiring on 20th of February 2012. Thereafter the application of 17th May 2011 was to be fixed for directions.

None of these conditions were complied with. The respondent therefore filed an application on 2nd of March 2013 praying for the interim orders made by consent on 1st November 2011 be vacated and that the suit be dismissed for want of prosecution.

On 13th March 2013 the applicant filed a notice of preliminary objection claiming that the application for 2nd March 2013 by the respondent is not founded on any known provisions of law and that a consent order cannot be set aside pursuant to Rule 2 Rule 15 and Sec 3A of the Civil Procedure Act. The application came before me on 14th March 2013 and it was stood over to 25th May, 2013. On this date, Mr. Achoki appeared for the applicant and Mr. Maosa appeared for Mr. Opolu for the respondent. It was agreed by consent that the matter would be disposed by way of written submissions and 24th June 2013 was set as the date to find out whether the submissions had been filed. Come 24th June, 2013 Mr. Asike appeared for Mr. Opolu and Mr. Achoki appeared for the applicant. Mr. Achoki had filed his submissions while Mr. Opolu had not. The case was then fixed for ruling on 21st August, 2013.

It would appear Mr. Opolu had waived his Preliminary Objection when he consented the matter to proceed by way of written submissions. If he did not he had full opportunity to argue the same in his written submissions. He did not do so.

From the history of this case one can see that there was a conditional consent. The said consent was adopted as the order of the Court. The consent which was now a court order was not complied with by either of the parties. It was supposed to be complied with by 20th February 2012. It is now two years later and it is not complied with.

Order 1A rule 3 mandates the parties to participate in the process of the court and to comply with the directions and orders of the Court. The parties hereto have not complied with this rule. A consent order can be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out. See *Wasike v Wamboko Civil Appeal no. 81 of 1984 Kisumu* (underlining mine)

It is quite apparent that the plaintiff in this case wants to use the consent order as a shield to prevent any further step to be moved in this case. The Preliminary Objection he raised has no merits in view of what I have stated above. The consent order of 1st November 2011 is hereby set aside. This suit shall be fixed for hearing within 30 days failing which the respondent shall be at liberty to apply for it to be struck out for want of prosecution. The applicant in this application shall have costs of his application of 3rd March, 2013.

Dated and delivered in open Court at Mombasa this 12th day of February, 2014.

S.N. MUKUNYA

JUDGE

12.2.2014

In the presence of:

Mr. Opolu for the plaintiff/respondent