



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 125 OF 2014**

**PAUL KIMISIK MUREI.....1<sup>ST</sup> PLAINTIFF**

**EMILY JEPTARUS MURGOR.....2<sup>ND</sup> PLAINTIFF**

**MARY NYABOKE ANCHINGA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ALICE JEMUTAI TOO.....1<sup>ST</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR, UASIN GISHU COUNTY.....2<sup>ND</sup> DEFENDANT**

**RULING**

**[MOTION DATED 16<sup>TH</sup> SEPTEMBER, 2020]**

1. The 1<sup>st</sup> Defendant filed the Motion under Certificate of Urgency dated the 16<sup>th</sup> September, 2020 seeking for temporary order suspending the exercise of placement of beacons by the Land Surveyor assisted by the Land Registrar scheduled on the 17<sup>th</sup> September, 2020 pending the hearing and determination of this application; varying of the order of 30<sup>th</sup> January, 2020 to the effect that beacons be placed in a manner that secures the 1<sup>st</sup> Defendant's house and costs. The application is based on the 17 grounds marked **(a)** to **(q)** on its face and supported by the affidavits sworn by **Alice Jemutai Too**, the 1<sup>st</sup> Defendant, on the 16<sup>th</sup> September, 2020 and 23<sup>rd</sup> September, 2020. That it is the 1<sup>st</sup> Defendant's case that she is not objecting to the execution of the order of 30<sup>th</sup> January, 2020 but is seeking for its variation to safeguard her house, which is likely to be affected by a metre. That her efforts to meet with the Plaintiffs and discuss the issue has not materialized due to the Covid-19 Pandemic, and the failure by the Plaintiffs to attend the scheduled meeting. That she is diabetic and elderly and it would be in the interest of justice to allow the application.

2. The Motion is opposed by the Plaintiffs through the replying affidavit sworn by **Paul Kimisik Murei**, the 1<sup>st</sup> Plaintiff, on the 18<sup>th</sup> September, 2020. That it is the Plaintiffs' position that the order the 1<sup>st</sup> Defendant seeks to have varied arises from a consent order entered and adopted on the 28<sup>th</sup> January, 2020 as the judgment of the Court. That a consent order can only be set aside if shown to have been procured through fraud, non-disclosure of material facts, or mistake and the 1<sup>st</sup> Defendant has not shown any of that. That the 1<sup>st</sup> Defendant had known she had encroached onto the Plaintiffs' land by almost half an acre. That when entering the consent, the 1<sup>st</sup> Defendant requested for 30 days to remove their structures but has not done so. That the 1<sup>st</sup> Defendant constructed her house while well aware she had encroached onto the Plaintiff's land, and cannot now claim to have just become aware of that fact. That the application is frivolous, vexatious, devoid of any merit and an abuse of the court process and should be dismissed with costs.

3. That upon the application being filed on the 16<sup>th</sup> September 2020, an order to maintain status quo pending further orders was issued on the same date and extended on the 21<sup>st</sup> September, 2020 to-today.

4. The following are issues for the determination by the Court;

**(a) Whether the 1<sup>st</sup> Defendant has made out a reasonable case for varying the order of 30<sup>th</sup> January, 2020.**

**(b) Who pays the costs of the application?**

5. The Court has carefully considered the grounds on the Motion, the supporting and further affidavit by the 1<sup>st</sup> Defendant, the replying affidavit by the 1<sup>st</sup> Plaintiff and come to the following conclusions;

(a) That the record confirms that when this matter came up for mention on the 28<sup>th</sup> January 2020, all the parties were represented by their respective Counsel. That the Plaintiffs and 1<sup>st</sup> Defendant were also in Court on that day and the suit was compromised through a consent order as below;

**“(a) That judgment be and is hereby entered in terms of the Land registrar, Uasin Gishu Report dated 9<sup>th</sup> October, 2019 and that of the Land Surveyor, Nandi filed on the 19<sup>th</sup> June, 2019 with the sketch plan and Minutes of 17<sup>th</sup> April, 2019.**

**(b) That the parties granted thirty (30) days to agree on the implementation of the said Reports.**

**(c) That in case the parties fail to agree on the implementation as in (b) above, the Land Surveyor, Nandi assisted by the Land registrar, Uasin Gishu do visit the said lands and place the beacons in accordance with the aforesaid Reports in thirty (30) days. That upon the beacons being placed as aforesaid, the 1<sup>st</sup> Defendant do remove any structures that fall on the Plaintiffs’ parcel in 30 days. [Emphasize mine].**

**(d) That the matter be mentioned on the 25<sup>th</sup> March, 2020 to confirm implementation of the order and directions on the costs of the suit.”**

That the 1<sup>st</sup> Defendant seeks to have that consent order of 28<sup>th</sup> January, 2020 that was extracted and issued on the 30<sup>th</sup> January 2020, varied to ensure her house is secured when the beacons are placed. That application is opposed by the Plaintiffs on the basis that the 1<sup>st</sup> Defendant has not satisfied the legal requirements for varying a consent order. That indeed, the 1<sup>st</sup> Defendant has in her deposition indicated that she does not seek to set aside the consent order and is not opposed to its implementation so long as her house is secured.

(b) That as can be discerned from Order (c) of the consent order of 28<sup>th</sup> January 2020, the 1<sup>st</sup> Defendant was to be given thirty (30) days to remove any structures that falls onto the Plaintiffs’ parcel of land after the beacons were placed. That order leaves no doubt that, at the time the consent order was agreed upon and entered as the judgment of the court, the 1<sup>st</sup> Defendant already knew that some of her structures would, upon placement of the beacons, most likely fall outside her land and onto the Plaintiffs’ parcel. That Order (c) was to come to play after the parties failed to agree on how the beacons were to be placed. The chance for negotiating the placement of the beacons had been provided for under Order (b). That there having been no agreement, the parties had agreed that the placement of the beacons would be guided by Order (c).

(c) That as the 1<sup>st</sup> Defendant has not denounced or challenged any element of the consent order of 28<sup>th</sup> January 2020 on the basis of fraud, non-disclosure, misrepresentation or mistake of facts in entering the same. The court finds she has failed to place before the Court any basis of varying the consent order she agrees with, without first obtaining the consent of the other parties.

(d) That the 1<sup>st</sup> Defendant may be elderly and diabetic as she claimed, but that would not be sufficient basis to excuse her from a consent order she voluntarily entered into. That in any case she was ably represented by Counsel, like the other parties, when negotiating and agreeing on the terms of the consent that was subsequently recorded and adopted by the Court.

(e) That as the 1<sup>st</sup> Defendant’s Motion has been found to be without merit, the Plaintiffs are entitled to costs of the application pursuant to **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya.**

6. That from the foregoing, the 1<sup>st</sup> Defendant’s Motion dated the 16<sup>th</sup> September, 2020 is without merit and is dismissed with costs.

Orders accordingly.

**Delivered virtually and dated at Eldoret this 28<sup>th</sup> day of October, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiffs: Absent.

Defendants: Absent.

Counsel: M/s Kibichy for the Plaintiff.

Mr. Songok for 1<sup>st</sup> Defendant and

Mr. Kuria for 2<sup>nd</sup> Defendant.

Court Assistant: Christine and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.