REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ENVIRONMENT AND LAND CASE NO. 291 OF 2016.

BKT.....PLAINTIFF

VERSUS

JOHN KIMELI BIRECH.....DEFENDANT

AND

KKKT.....APPLICANT

RULING

This ruling is in respect of an application dated 5th May 2020 by the applicant seeking for the following orders:

a) Spent

b) Spent

c) The Honourable court be pleased to grant leave to the applicant herein KKKT the son of the plaintiff to herein who due to his mental infirmity and indisposition, is unable to defend and/or prosecute his rights over the suit land Nandi/Kaboi/[...] the suit property herein.

d) The Honourable court be pleased to call an inquiry into soundness of mind and ability of the plaintiff to defend, prosecute and/or make any sound decision in so far as the suit herein and his interests over the suit property Nandi/Kaboi/[...] is concerned.

e) The Honourable court be pleased to review, vary and/or set aside the orders dated 30/4/2019 and be pleased to reopen the plaintiff's case to decide on merit.

This application was brought under certificate of urgency whereby the court ordered that the application be served and status quo be maintained pending the hearing of this application inter partes. Counsel agreed to canvass the application by way of written submissions which were dully filed.

APPLICANT'S SUBMISSIONS

Counsel for the applicant relied on the grounds on the face of the application together with the supporting affidavit of the applicant. Counsel submitted that the applicant recently found out that this suit was withdrawn with no orders as to costs on 30th April 2019 based on the plaintiff's letter dated 21st February 2019 seeking to have the matter withdrawn with no order as to costs.

It was counsel's further submission that upon investigation, the applicant realized that at the time the letter was written by the plaintiff, he was in a mental disposition and thus did not have the capacity to warrant such decision to write such a letter. That the plaintiff was under various medications and that the health had deteriorated making him unable to defend his rights over the suit land.

Mr. Langat submitted that the applicant seeks to substitute the plaintiff so as to enable him proceed and seek reopening of the plaintiff's case to be determined on merit. Further that the application will not in any way prejudice the respondent's herein whose case was pending at the time of such withdrawal.

On the issue of setting aside a consent order, counsel submitted that courts have set the circumstances under which a consent order can be set aside and relied on the Court of Appeal case of **The Board of Trustee National Social Security Fund Vs Michael Mwalo (2015) eKLR** at paragraph 29 which stated as follows;

"A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent judgment, it must be shown that it was obtained by fraud, or collision or by an agreement contrary to the policy of court."

Counsel further relied on the case of **Flora N. Wasike v Destimo Wamboko[1988] eKLR** where the court held that:

"It is now settled law that a consent judgment or order has contractual effect and can only be set side on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out:"

Counsel also cited the case of **Purcell vs F C Trige11Ltd (1970) 2 ALL ER 671, where Winn LJ** stated thus;

"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons..

Counsel therefore urged the court to allow the application as prayed.

RESPONDENT'S CASE

Counsel for the respondent opposed the application and relied on the respondent's replying affidavit and on the grounds that the application offends the provisions of the Mental Health Act Cap 248 Laws of Kenya as only the High Court is mandated with the jurisdiction to determine an application of that nature Counsel further submitted that the applicant has not attached any proof of appointment issued by the High Court as the plaintiff's guardian on the ground of mental incapacity.

Mr. Langat further submitted that the application was not filed timeously and as a result the respondent will be greatly prejudiced should the court allow the application as it will not be in a position to determine the plaintiff's mental state at the time of withdrawal of the suit. Further, that no coercion, mistake, fraud, undue influence or illegality has been cited by the applicant in regard to the plaintiff's authorship of the letter dated 21st February 2020 on withdrawal of the suit hence the application for review.

Counsel submitted that the respondent is now in possession of a valid legal title deed over the suit property Nandi/Kaboi/[...]and that a few months prior to the plaintiff's withdrawal of the suit, the plaintiff testified on oath to his soundness of mind which situation had not changed at the time of negotiations and out of court settlement.

Counsel also submitted that none of the medical documents relied on by the applicant in his supporting affidavit relate to the plaintiff's mental incapacity and at the time of transfer of the suit land to the respondent, the plaintiff was the sole registered owner of the suit property and possessed the sole right to deal with the property as he deemed fit.

Mr. Langat submitted that the orders for review sought by the applicant are discretionary in nature and only meant to avoid injustice or hardship resulting from accident, inadvertence of excusable mistake or error and cannot be granted to a party who comes in court in breach of the principles. That the applicant has failed to disclose all material facts and in particular that he has always been aware of all the developments and that he has not That the current application seeks to set aside a consent order which by an implied reason, shows that it was obtained through the letter dated 21st February, 2019.

Counsel for the respondent submitted that the law and principles applicable to substitution of parties to a suit, who are unable to pursue civil proceedings further, due to mental illness is provided for under the Mental Health Act, Cap 248 Laws of Kenya and Order 32 Rule 15 of the Civil Procedure Rules while the law on review of court orders on the other hand is provided for under Order 45 of the Civil Procedure Rules.

Counsel submitted that section 26 of the Land Registration Act will be applicable with regard to the fate of the Certificate of Title held by the defendant over the suit parcel of land after the same was transferred to him by the Plaintiff.

Mr. Langat submitted that the allegations of mental incapacity are serious in nature and must be proved once alleged and cited the case of **Joseph Njuguna Mwai & 2 others (All Suing for and as Legal Representatives of the Estate of Itibi Ngotho Chege) v Samuel Itibi Kimani & another [2019 eKLR** where the court stated that

"It behoves the person who alleges that another is of unsound mind to prove such allegations. "

Further, that under the Mental Health Act, only the High court is empowered to make a determination as to the management of an estate of a mentally ill person hence prior to filing an application for substitution, appropriate proceedings ought to have been filed before the High Court for a guardian ad litem of a mentally ill person's estate to be appointed.

ANALYSIS AND DETERMINATION

This is a matter that had proceeded for hearing where the plaintiff and the defendant had testified together with their witnesses including the Nandi County Land Registrar who gave a history of the suit land as per the green card.

When the matter came up for further hearing on 25th March 2019, the parties informed the court that they had settled the matter out of court and requested for a mention date to file a formal consent. A mention date was granted on 30th April 2019 and the courts attention was drawn to a letter dated 21st February 2019 by the plaintiff withdrawing the case with no orders as to costs as they had settled the matter. The letter

was copied to the plaintiff's Advocate and urged counsel to expedite the signing by the defendant's counsel which was done. This was done more than a year ago.

The applicant who is not a party to this suit seeks to be substituted in the place of the plaintiff on the grounds of mental illness and a review of the consent order and an inquiry into the soundness of mind of the plaintiff.

The issues for determination in this application are as to whether the plaintiff had capacity to enter into the consent order withdrawing the suit and whether the application as filed is proper and finally whether the court can review, vary and/or set aside the orders dated 30th April 2019.

On the issue as to whether the plaintiff had the capacity to enter into the consent order withdrawing the suit, there is a presumption that every person is of sound mind until the contrary is proved, and the onus of proof lies with the person who alleges the contrary.

In the case of **Wiltshire v Cain [1958 – 60] 2 Barb. L. R149**, the Supreme Court of Barbados stated that

> *'the contention made by the defendants in that case, was that an 83-year-old seller of land was incapacitated by mental infirmity from entering into a binding contract. The allegation was that the seller "for at least one year prior to the signing of the contract was suffering from loss of memory, mental debility and senile decay and was incapable of understanding the meaning and effect of the agreement as (the buyer) knew at the time*."

It was further held:

> *"....for the defence to succeed it must show the incapacity of the defendant due to mental illness in one form or another, and (b) that the plaintiff knew of the condition of the defendant. The burden in respect of both of these matters rests on the defence – see* ***Imperial Loan Co. v. Stone Lord Eastern [1892] IQB 599****. The fact that the plaintiff had knowledge of the defendant's condition must be brought home to entitle the defendant to succeed. In that case Lord Justice Lopes stated that:*

> *"a defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."*

The person who alleges that another is of unsound mind must prove such allegations. In the case of **Patrick Muchiri Vs Patrick Kahiaru HCCC 113 of 1999,** where it was held that: -

> *"It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved mentally disordered. And, even where one person is shown to be of unsound mind always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one's own interests, must not be inferred from a mere name assigned to the malady from which a person may be suffering"*.

No evidence of compliance with the provisions of Section 26 of the Mental Health Act has been availed by the Applicant for the court to be called upon by the applicant to conduct an inquiry as to the Plaintiffs mental infirmity or deposition.

Prior to the withdrawal of the suit, the Plaintiff appeared personally in court and prosecuted his case after taking an oath confirming his soundness of mind. This was only four months prior to the Plaintiff authoring the letter withdrawing the suit and transferring the parcel to the Defendant.

It should also be noted that none of the medical records attached to the application have any relation to the plaintiffs alleged mental infirmity. No medical report has been availed to show that as at the time of withdrawal of the suit and transfer of the property, the plaintiff was of unsound mind and totally incapacitated to the effect of making decisions that he did not understand. The discharge summary from St. Luke's Hospital does not state that plaintiff is of unsound mind and that is totally incapacitated.

As regards to the orders for review, the provisions of order 45 (1) of the Civil Procedure Rules provides circumstances for seeking review.

That the aforesaid rule is based on section 80 of the Civil Procedure Act which states as follows:

> "Any person who considers himself aggrieved-
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

From the Court record, the Plaintiff was in his good mental state prior to the withdrawal of the suit and even attended his case wherein he testified on oath on 18th October 2018. The plaintiff was the sole registered owner of the suit property and thus under Section 26 of the Land Registration Act, he did not have to consult the applicant in his decision to withdraw the suit. The applicant has never had any proprietary interest in the proceedings.

The argument by the Applicant that he is aggrieved by the Plaintiffs decision to withdraw the suit without involving the applicant and the family who are not shown to be in support of the current application is therefore without any legal foundation. In the event of discovery of new and important evidence, the Applicant is mandated to demonstrate that the new evidence he seeks to introduce was not available to him at the time of the hearing.

In an application for the review the court ought to consider whether there was a mistake or error apparent on the face of the record which from the application the applicant has not established. There are no allegations of fraud, misrepresentation, coercion or mistake in respect of the letter dated 21st February, 2019 which was authored by the Plaintiff.

The principles upon which an application for review is considered are well settled. In the case of **Flora N Wasike vs Destimo Wamboko [1982-88] 1 KAR 625** the court held that "*a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation."*

In the case of **Hirani v Kassam (1952) 19 EACA 131** the court stated that:

> "*Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."*

The respondent is now the registered owner of the suit property having received proprietorship from a transaction that has not been challenged hence protected under the law as he enjoys absolute indefeasible title.

On the issue as to whether the application is proper before the court, in the case of **Isaac Kipkemboi Chesire & 4 others v Joseph Kimitei Kwambai & 7 others [2016] eKLR** the court held that:

> "*the import of this section is that the order for guardianship ad litem is to be made by "the court" which is defined at Section 2, as the High Court. It follows that orders for the management of any property of a mentally disabled person can only be made by the High Court. This court finds that it has not been established that Matilda Rose Sawe is the guardian ad litem of the estate of John Malan Sawe hence the application* for *substitution is not well founded."*

The import of Section 26 of the Mental Health Act is that the High Court is the right court to deal with the issue of guardian ad litem of the plaintiff's esate. I have considered the application, the submission by counsel and the relevant authorities and find that the application lacks merit and is therefore dismissed with costs.

DATED and ***DELIVERED*** at ***ELDORET*** this ***14TH DAY*** OF ***October, 2020***

DR. M. A. ODENY

JUDGE