



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE 169 OF 2009

VICTOR NABWERA WEKHOMBA 1ST PLAINTIFF

EVANS MULONGO WEKHOMBA 2ND PLAINTIFF

ROBERT MAKANYAGA WEKHOMBA 3RD PLAINTIFF

EFFIE MUYOKA WEKHOMBA 4TH PLAINTIFF &

EVA MUKHWANA WEKHOMBA 5TH PLAINTIFF

=VERSUS=

PETER SARAI WEKHOMBA RESPONDENT

RULING

This is a motion on notice for orders that (a) the consent order made on 4th July 2011, be varied and or be set aside and the suit be reinstated and (b) pending the determination of the suit, there be a temporary order of injunction restraining the defendants from leasing, disposing of, developing, fencing off, ploughing, cultivating or in any other manner, interfering with the plaintiffs' occupation, user, enjoyment or cultivation of a portion comprising 80 acres of parcel number, Kakamega/Kongoni/161 or until further orders of the court.

The motion is expressed to be brought under order 45, Rule 1, Order 40 Rules 1 & 2 of the Civil procedure Rules and sections 1A, 1B and 80 of the Civil Procedure Act. The motion is predicated on grounds set out on the face of the motion and is further supported by affidavits of Lois Muyoka Wekhomba, Evans Mulongo Wekhomba, Robert Wekhomba and John Walter Wanyonyi. Loice Muyoka Wekhomba has also filed a further affidavit.

The substance of the application is that the said consent order was entered into fraudulently as the 2nd plaintiff, who executed the consent, had no authority of the other plaintiffs to compromise the suit on their behalf and further that the defendants have taken advantage of the consent order to lease out and dispose of part of the suit land and should be restrained.

The application is opposed and in that regard, there is a replying affidavit sworn by Peter Sarai Wekhomba in which he has deponed, inter alia, that the application has been filed by a person without Locus Standi; that M/s Walter Wanyonyi ceased to act for the plaintiffs and have not been re-appointed; that the consent order was validly executed and properly adopted by the court and that the signature on the supporting affidavit is a forgery which event renders the application incompetent.

When the application came up before me for hearing on 14th March, 2012, counsel agreed to file written submissions which were duly filed by 4th July, 2012. I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The substance of the consent was to withdraw the suit in its entirety with each party bearing its own costs.

The consent was signed by Evans Mulongo Wekhomba on his own behalf and on behalf of the other plaintiffs and J.M. Wafula & Company Advocates signed the consent on behalf of the defendant. At the time the consent was executed on 4th July, 2011, the same Evans Mulongo Wekhomba filed a Notice of Intention to Act in Person. In *Flora Wasike vrs Wamboko* [1982 – 1988] 1 KAR 625, it was slated that a consent order may only be interfered with on the same grounds as would justify the setting aside of a contract such as fraud, mistake or misrepresentation. The learned Judges of Appeal cited with approval the case of *Hirani vrs Kassam* [1952] 19 EACA 13, in which it was stated as follows at page 134. “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 or 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 misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.”

The record of this case shows that this suit was filed by M/s Walter Wanyonyi & Co. Advocates on behalf of the plaintiffs who are five in number. The Notice of Intention to Act in Person was signed by only one plaintiff, Evans Mulongo Wekhomba. In the notice, he alleged that the defendants had withdrawn the services of M/s Walter Wanyonyi & Company Advocates. Two things flow from this notice.

First, the said advocates filed the suit on behalf of all the plaintiffs, Evans Mulongo Wekhomba, included. The advocates do not act for the defendants as the notice suggests. Secondly, not all the plaintiffs signed the notice to withdraw the services of the said advocates. Evans Mulongo Wekhomba did not exhibit any written authority from the other plaintiffs to act as he did. The notice would not therefore bind the rest of the plaintiffs. In the premises, M/s Walter Wanyonyi and Company Advocates are still the advocates on record for the other plaintiffs.

Turning now to the impugned consent, it cannot be gainsaid that the plaintiffs represented by M/s Walter Wanyonyi and Company Advocates did not sign the same. Evans Mulongo Wekhomba purported to sign the consent on behalf of all the plaintiffs. He did so without written authority with the result that he could not bind his coplaintiffs.

The document is therefore not a consent entered into with all the plaintiffs. It cannot have any binding force upon them. So, all the plaintiffs except Evans Mulongo Wekhomba, were entitled to seek a review or setting aside of the consent order entered pursuant to the alleged consent. Before concluding this matter, I will briefly comment on the defendant's argument that the submissions of the plaintiffs having been filed out of time without leave, should not be taken into account. With respect, that argument should have been raised before the parties took a ruling date. The defendant did not in any event suggest that he had been prejudiced in any way. If he had desired to respond to the same, he would have sought leave to do so but he did not. In the premises, in my view, the objection has not been well taken and is overruled. I also do not consider that this application has been made after inordinate delay and in any event, counsel for the plaintiffs has satisfactorily explained the delay.

In the end, I allow the application dated 8th March, 2012 and order that the consent order made on 4th July, 2011 and endorsed as an order of the court on 15th December, 2011 be and is hereby set aside – and the suit is reinstated. Having reinstated the suit, it is only fair that the suit property be preserved. To achieve that end, I order that the status quo obtaining as at the date hereof be maintained pending the hearing of the suit or until further orders of the court.

The parties are directed to prepare the suit for hearing with dispatch. Given the relationship between the parties, I further order that costs be in the cause.

Orders accordingly.

DATED AND DELIVERD AT ELDORET THIS 5TH DAY OF SEPTEMBER, 2012.

F. AZANGALALA

JUDGE

Read in the absence of the parties or their representatives as the date was taken in court.

F. AZANGALALA

JUDGE

5/9/2012.