



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. 6 OF 2017

IN THE MATTER OF THE CONTEMPT OF COURT ACT NO. 46 OF 2016

AND

IN THE MATTER OF S.148 OF THE PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

AND IN THE MATTER OF ISSUANCE OF A SHOW CAUSE NOTICE BY THE COURT UNDER S. 30(1) OF THE CONTEMPT OF COURT ACT NO. 46 OF 2016

AND

IN THE MATTER OF ARTICLE 179 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTEMPT OF COURT BY THE COUNTY GOVERNMENT OF KISII

BETWEEN

1. DR J.A.S KUMENDA

2. FLORENCE GATUNE.....APPLICANTS

VERSUS

1. THE GOVERNOR COUNTY GOVERNMENT OF KISII

2. THE EXECUTIVE COMMITTEE MEMBER FINANCE

**3. THE EXECUTIVE COMMITTEE MEMBER LANDS, HOUSING,
PHYSICAL PLANNING AND URBAN DEVELOPMENT**

**4. THE EXECUTIVE COMMITTEE MEMBER ENEREGY, WATER,
ENVIRONMENT AND NATURAL RESOURCES**

**5. THE EXECUTIVE COMMITTTEE MEMBER
HEALTH SERVICES**

6. THE COUNTY GOVERNMENT OF KISII.....RESPONDENTS

RULING

INTRODUCTION

1. This ruling is in respect of the application dated 24th August 2020 seeking to review, vary or set aside the consent order recorded in court on 20th July 2020 by amending the same so as to direct the Deputy Registrar of the Environment and Land Court to visit land parcel number KISII MUNICIPALITY/BLOCK/III/301 while accompanied by the County Land Registrar, County Surveyor, Kisii County and ascertain whether the Respondents are in disobedience of the court orders dated 13th December 2016 and issued on the 17th day of January 2017. The application also seeks to extend the time within which the said order should be effected.

BRIEF BACKGROUND

2. On 3rd June 2016 the Applicants obtained judgment against the 6th Respondent in Kisii ELC Miscellaneous Application No.3 of 2013 (J.R), whereby this Honourable court issued an order of Certiorari quashing the decision of the 6th Respondent and other parties purporting to stop the Applicants from continuing with developing their land and authorizing the 6th Respondent to utilize parcel number KISII MUNICIPALITY/BLOCK/III/301 as a garbage dumpsite. The court further prohibited the 6th Respondent from interfering, encroaching and/or intermeddling with the Applicants' developments on land parcel number KISII MUNICIPALITY/BLOCK/III/301. Lastly, the court issued an order of prohibition prohibiting the 6th Respondent from contaminating and/or polluting the environment by converting parcel number KISII MUNICIPALITY/BLOCK/III/301 into a garbage dumping site in contravention with the mandatory provisions of article 70 of the Constitution, 2010 which acts would violate the applicant's constitutional right to a clean environment and property.

3. Owing to logistical challenges, the Respondents were unable to immediately implement the limb of the judgment that required them to stop utilizing parcel number KISII MUNICIPALITY/BLOCK/III/301 as a garbage dumpsite. They therefore negotiated with the Applicants for an extension of time. By consent a order dated the 13th December 2016 the Applicant and Respondent agreed as follows:

1. *"The County Government of Kisii has approached and amicably requested the Applicant herein to allow the County Government of Kisii amnesty to gradually and fully comply with the Court Judgment and decree dated the 3rd day of June 2016, by moving out of the said disputed area and undertakes to fully and completely wind up its dumping activities on the said disputed parcel and move out of the said area by close of business on the 31st December 2016.*

That in the meantime the County Government of Kisii shall be permitted to continue using the dumping site in dispute and the subject of the dispute herein that is KISII MUNICIPALITY/BLOCK III/301 and in return and as a sign of good faith, the County Government shall gradually take the following measures to mitigate the injury and nuisance that may be experienced by the Applicant by taking the following measures:

a) To open access to the main road after removing the garbage at the site, plant flowers and trees, plant grass where appropriate as beautification and mitigation of the environmental degradation. That it is mutually agreed that the County Government shall have fully wound up and completed its withdrawal from the said area, on or before the 31st December 2016".

4. The Respondents did not obey the consent order thus prompting the Applicant to file contempt proceedings under section 30 of the Contempt of Court Act 2016. Despite the said contempt proceedings, the Respondents have not complied with the judgment dated 3rd June 2016. Instead, the Respondents raised a Preliminary Objection dated 19th May 2019 that the Application for Contempt of Court, which is anchored on the Contempt of Court Act is incompetent as the said Act was declared unconstitutional in the case of **Kenya National Human Rights Commission v Attorney General & Another (2018) eKLR**. The Preliminary Objection was argued and in its ruling delivered on 23rd October 2019 the Court held that the proceedings were proper and they would be dealt with as if they had been initiated under section 5 of the Judicature Act Cap 8 of the Laws of Kenya. The court ordered that the Respondents be called upon to show cause why they should not be held to be in contempt as per the Notice to Show Cause served upon them.

5. In response to the Notice to Show Cause, John Billy Momanyi, the Executive Committee Member Energy, Water, Environment and & Natural Resources swore a Replying Affidavit in which he deposed that the main issue in respect of the proceedings herein was that he Applicant complained of dumping of garbage by the Respondent on Land Parcel No. KISII MUNICIPALITY/BLOCK III/301. He added that on 2nd July 2020 he sent a team led by the County Surveyor to ascertain the exact position of KISII MUNICIPALITY/BLOCK III/301 and find out whether there is any dumping of waste on the said plot. It is his averment that the County Surveyor and his team found that the Applicant had erected a massive building which occupies the entire KISII MUNICIPALITY/BLOCK III/301 and that it is well fenced and there is no garbage being dumped in the said plot. He also sent a professional photographer for the Directorate of Communication to take photographs of the suit property which clearly show that the land is occupied by a massive building with no dumping of garbage in or around it. He annexed the said photographs to his affidavit.

6. He deposed that he took the said steps after realizing that the Applicant was bent on having the Respondents punished based on false allegations. He further contended that the Applicant had filed the instant application with full knowledge of the fact that the court had in Kisii ELC Misc Civil Application No. 3 of 2013 (J.R) issued a ruling that the 6th Respondent was not dumping garbage on the suit property.

7. He proposed that before the court proceeds with the Notice to Show Cause, the Deputy Registrar of the Court be directed to visit the *locus in quo* in the presence of the parties and their advocates and to establish if the Respondent are in contempt of the court order issued on 3rd June 2016 and file a report to enable the Court make a final decision in this matter.

8. When the Notice to Show Cause came up for hearing on 20th July 2020 the parties agreed that the Deputy Registrar should visit the *locus in quo* in the presence of the parties and their advocates as well as the County Surveyor and Land Registrar to ascertain the situation on the ground and file a report. The Applicant also sought leave to file a Further Affidavit. The order that was extracted is as follows:

1. *"The Applicant is granted leave file a Further Affidavit within 10 days with concurrent leave to the respondents to file a response*

to the same within 10 days after service

2. The Deputy Registrar to visit Land Parcel No. KISII MUNICIPALITY/BLOCK/III/301 in the presence of the parties and their advocates as well as the County Surveyor and Land Registrar Kisii County for purposes of establishing whether the 6th Respondent is dumping garbage on the said parcel of land
3. The parties are at liberty to engage their private surveyors to be present during the visit.
4. The Deputy Registrar shall file her report in court within 60 days.
5. The matter shall be mentioned on the 22nd October 2020”

9. It is the wording of the above order that has given rise to the instant application for review. The Applicant states that the said order does not reflect what the parties agreed upon and that there is an error apparent on the face of the record. He is of the view that the court order encompassed various limbs which required compliance including the cessation of dumping garbage on the Applicant’s land and the surrounding environs but the court inadvertently only captured that the visit was to return a report on whether there was dumping on the Applicant’s land parcel number KISII MUNICIPALITY/BLOCK/III/301. The Applicant’s position is that the court order as framed is restrictive and it will not assist the court in resolving the dispute. It is the Applicant’s contention that the purpose of the visit was to ascertain if the Respondents have failed to comply with the court order and file a report in court within 60 days.

10. The application was canvassed by way of written submissions which both parties duly filed.

ISSUES, ANALYSIS AND DETERMINATION

11. The central issue for determination is whether the consent order dated 20.7. 20 ought to be reviewed.

The principles upon which a consent judgment or order can be set aside were set out in the case of **Brooke Bond Liebig Ltd v Mallya 1975 EA 266** where court held 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 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."

12. And in **Flora Wasikev Destimo Wamboko (1988) 1 KAR 625** the court observed that:

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.... In Purcell vs F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;

“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, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

13. In his submissions, counsel for the Applicant has contended that there is an error apparent on the face of the record as the court order under interrogation, encompassed various limbs which required compliance including the cessation of dumping on the Applicant’s land and the surrounding environs and the manner in which the court order is couched is restrictive and would not unravel the issues under interrogation by the court. He alluded to the consent order dated 13th December 2016 which adopted the consent letter dated 1st December 2016 as an order of the court. It was his submission that the said consent was premised on the order dated 3rd June 2016 and therefore the two orders must be read together to discern their obedience or otherwise. He submitted that according to the two orders the Respondents were commanded to do the following activities:

1. “The Respondents are prohibited from contaminating and/or polluting the environment by converting parcel number KISII MUNICIPALITY/BLOCK/III/301, its surrounding area into a dumping site, in contravention of mandatory article 70 of the Constitution 2010 which conduct was in violation of the Applicant’s right to a clean environment and property.

2. With a view to fortify and accord the Respondents amnesty to comply with (1) above, the parties recorded a consent and the Respondents bound themselves to do the following:

- a) The Respondents were to gradually and fully move out and relocate their dumpsite and acts of pollution elsewhere far from the area and vicinity of the suit property and its environs, not later than the 31st day of December 2016.

- b) The Respondents were equally to undertake various mitigating steps which will pacify and obviate the suffering which was experienced by the Applicants”.

14. It was counsel’s contention that visiting the ground and checking whether there is dumping without the court addressing its mind to other limbs of the pronouncement of the court, would yield absurd results and the consent as recorded did not meet the threshold of *consensus ad idem* as there was an inadvertent mistake on the exact purpose of the visit. He referred to the case of **Isaac Kinyanjui Noroge v National**

Industrial Credit Bank Limited (2018) eKLR which re-affirmed the principles in **Flora N. Wasike v Destimo Wamboko** (supra). He urged the court to exercise its discretion while bearing in mind the provisions of Article 159 of the Constitution as well as sections 1A, 1B and 3A of the Civil Procedure Act.

15. On his part, counsel for the Respondents submitted that the proceedings dated 20th July 2020 were proper as they made reference to the consent order dated 13th December 2011. He submitted that the orders of 13.12.2016 were in respect of KISII MUNICIPALITY/BLOCK/III/301 and not other parcels of land or surrounding environs. It was his contention that the Applicant had introduced strange terms such as **“surrounding environ”** to the consent order dated 12.12.2016 in HC Misc Civ App No. 3 of 2013 (J.R) which is now the judgment to be implemented. He submitted that the court ordered at paragraph 2 as follows:

“That in the meantime the County Government of Kisii shall be permitted to continue using the dumping site in dispute and the subject of the dispute herein, that the County Government shall gradually take the following measures to mitigate the injury and nuisance that may be experienced by the Applicants by taking the following measures:

a) To open access to the main road after removing the garbage at the site, plant flowers and trees, plant grass where appropriate as beautification and mitigation of environmental degradation.

16. He maintained that nowhere in the order of 13.12.2016 did the court talk of **“surrounding environs or areas”**. He was of the view that this was carefully crafted to avoid encroaching on the rights of other property owners who are not parties to these proceedings but are neighbours of parcel No. 301. He restated the prayers in the Notice of Motion application dated 11.3.2013 in Kisii HC Misc Civ Application No. 3 of 2013 (J.R) which were as follows:

1. **“The honourable court be pleased to grant an order of judicial review in the nature of writ and/or order of certiorari, removing into the High Court and quashing the decision of the respondents herein conveyed vide the letter dated the 19th day of February, 2013 purporting to stop the ex parte applicants from continuing with developing their land and authorizing the 1st and 2nd respondents to utilize parcel number Kisii Municipality/Block III/301 as a garbage dumping site.**

2. **The honourable court be pleased to grant an order of judicial review in the nature of writ and/or orders of prohibition against the respondents, prohibiting the same from interfering, encroaching and/or intermeddling with the ex parte applicants developments on parcel number Kisii Municipality/Block III/301, other than any other lawful cause and/or enforcing the unilateral decision conveyed vide the letter dated the 19th February 2013.**

3. **The honourable court be pleased to grant an order of judicial review in the nature of prohibition, prohibiting the respondents from contaminating and/or polluting the environment by converting the parcel number Kisii Municipality/Block III/301 into a garbage dumping site, in contravention with the mandatory provisions of Article 70 of the Constitution, 2010 which act shall violate the ex parte applicants constitutional rights to clean environment and property”.**

17. He submitted that both in the judgment at paragraph 25 and the Notice of Motion reproduced above, the terms **“surrounding environs or surrounding area”** have not been used. He submitted that in the Notice of Motion dated 11.5.2016 which gave rise to these proceedings, the Applicant has attached an exhibit to the supporting affidavit marked JSK 1(a) and 1(b) purporting it to be the judgment and decree in Kisii HC Misc Civ Application No. 3 of 2013. He contended that a closer look at the purported judgment shows that at page 2 thereof where prayer 3 of the application dated 11.3.2013 is quoted, there is hand-written addition of the words **“and its surrounding area”** which words are not in the original judgment in his possession or in the one uploaded on Kenya Law Reports. Furthermore, the decree attached as exhibit 1, immediately after the number 301, the words **“and surrounding area”** have been introduced which words are not in the Notice of Motion application dated 11th March 2013 and the judgment of the court dated 3rd June 2016. He submitted that the Applicant has all along attempted to enforce a doctored judgment and decree and the same ought to be investigated.

18. Counsel argued that it is common knowledge that the suit property does not exist in isolation but the Respondents cannot be held liable for what happens to the Applicant’s neighbouring plots over which it has no control. He submitted that the Applicant had not met the principles for setting aside a consent order and urged the court to dismiss the application. He submitted further the Applicant had not come to court with clean hands and was intent on punishing the Respondents using a doctored judgment and decree.

19. Having closely scrutinized the order and judgment annexed to the Applicant’s Supporting Affidavit and compared them with the prayers in the Notice of Motion dated 11th March 2013 and the original judgment of the court dated 13.6.2016, I am constrained to agree with counsel for the Respondents that the words **“surrounding environs and surrounding areas”** are conspicuously absent from the Notice of Motion dated 11th March 2013 and the original judgment of Justice Mutungi dated 3rd June 2016. Their introduction into the consent order and decree sought to be enforced, which unfortunately was endorsed as decree of this court is a serious infraction which this court cannot countenance. Under the provisions of section 47 of the Evidence Act, such decree or order is liable to be impeached. The said section provides as follows:

Section 47. “Any party to a suit or other proceeding may show that any judgment, order or decree which is admissible under the provisions of this Act and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion”

20. In view of the foregoing, I am disinclined to review the consent order in the manner proposed by the Applicant, as doing so would amount to sanctioning an illegality. The application for review is therefore dismissed with costs to the Respondents.

Dated, signed and delivered at Kisii this 30th day of November, 2020.

J.M ONYANGO

JUDGE