



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 53 OF 2006(OS)

ROBERT KAINGU MAITHA.....PLAINTIFF

VERSUS

MOHAMED AMIN

MOHAMED YUNIS

THE ESTATE OF MOHAMED ISHAQ.....DEFENDANTS

CONSOLIDATED WITH CIVIL SUIT NO. 15 OF 2015

PASSAGLIA GIUSEPPE.....PLAINTIFF

VERSUS

ATTORNEY GENERAL (Representing the Commissioner of Land.....1ST DEFENDANT

SAID ADAM KAZUNGU.....2ND DEFENDANT

HASFA MOHAMED.....3RD DEFENDANT

MOHAMEDAMIN.....4TH DEFENDANT

MOHAMED YUNIS.....5TH DEFENDANT

THE ESTATE OF MOHAMED ISHAQ.....6TH DEFENDANT

KARISA CHENGO.....7TH DEFENDANT

RULING

1. This matter was filed in the High Court in February 2005. It was transferred to this Court on 26th July 2018. Its transfer to this Court came about following an application by the 2nd Defendant dated and filed herein on 12th May 2016. When the said application came up for hearing before him and upon listening to the submissions made by the Counsels for the parties, the Honourable Justice Weldon Korir was convinced that the subject matter of the dispute did not belong to the High Court and hence the orders transferring the file to this Court.

2. Subsequently when they appeared before me, on 27th September 2018, the Learned Advocates for the parties agreed to adopt their pleadings, responses and submissions in regard to the said application as had been made before the Learned Judge. It then fell upon this Court to prepare a Ruling in regard thereto.

3. By the said application, the 2nd Defendant prays for an order that this Court be pleased to vary, and or set aside or discharge its orders dated 15th June 2010 in Judicial Review Misc Application No. 13 of 2009 and thereby to reinstate the orders dated 19th December 2008 and 24th September 2009.

4. The application is supported by the annexed affidavit of Said Adam Kazungu and is premised on the grounds:-

- a. That by a consent recorded on 23rd September 2009, High Court Civil Case No. 53 of 2006 (OS) was consolidated with High Court Civil Case No. 15 of 2005;
- b. That there is need to set aside a consent Judgment and decree issued in High Court No. 53 of 2006 as by the time the consent was entered into the firm of Maranga Maosa & Associates was not on record for the Defendants in the said matter;
- c. That after the consent was recorded an application was filed in Judicial Review Misc Application No. 13 of 2009 seeking to quash the consent. After hearing the matter, the Court ordered that the orders of 24th September 2009 be expunged from the Court record. The effect of those orders was to cancel the consent order of 24th September 2009 and to have the applicant investigated.
- d. That the applicant was subsequently charged in Malindi CMCR No. 301 of 2011 with four counts of forgery under the Penal Code. On 2nd July 2015, after hearing 16 witnesses the Court determined that the Applicant had no case to answer.

5. In response to the said application, the Respondents proceeded to Court on 21st July 2016 and filed "Grounds and Notice of Preliminary Objection" wherein they object to the application on the grounds that:-

1. The Applicant is not a party to HCCC 53 of 2016(OS) and the purported orders of 24/09/2009 sought to be reinstated do not exist having been expunged from the Record upon a full hearing by the orders of 15/06/2010 hence the Court is being asked to act in vain by reinstating non-existent orders.
2. The Court has no jurisdiction to grant or reinstate orders which are non-existent by a Non-Party to the suit (sic).
3. Malindi HCCC 15 of 2005 is also Non-existent having been struck- out on the Application by the 4th, 5th and 6th Defendants who are also the Defendants in HCCC 53 of 2006(OS) and consequently the 2nd Defendant/Applicant who did not have a Counterclaim therein has no Locus Standi to file an application therein.
4. Both HCCC 53 of 2006(OS) and HCCC 15 of 2005 had been determined, the first having been concluded by consent of both parties and the second having been struck out, the Court therefore has no jurisdiction to entertain an application on a non-existent suit where no order of consolidation had been made before their respective determination.
5. The Advocate who has filed the present application dated 12/5/2016 have no right of audience in Court and are not properly on record having not sought and/or obtained leave to come on record since the two files are fully determined and there was no order for consolidation and the Applicant is not a Party in HCCC 53 of 2006(OS) hence the entire application is a nullity and should be struck out with costs personally against the Advocate.
6. There is no proper application capable of being adjudicated by the Court and the Motion dated 12/5/2016, should be struck out/dismissed in limine.

6. I have considered the application and the response thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. The application before me is expressed to be brought pursuant to Sections 1A and 1B of the Civil Procedure Act. Those provisions of the law enjoin this Court to uphold the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes such as the one before me.

8. Variation of a Court order as provided under Section 80 of the Act and Order 45 of the Civil Procedure Rules is essentially a matter for the direction of the Court. The circumstances leading to the order sought to be varied and/or discharged herein make for some interesting reading.

9. From the record herein there were initially two suits filed in relation to a Parcel of land known as Chembe/Kibabamshe/404 (the Suit Property). The two were High Court Civil Case No. 15 of 2005 and High Court Civil Case No. 53 of 2006. The Applicant herein Said Adam Kazungu was the 2nd Defendant in Civil Suit No. 15 of 2005. On or about 19th December 2008 as the two suits were pending, a consent order purportedly executed by the Advocates for the parties was filed in Malindi HCCC No. 53 of 2006.

10. The tenor and purport of the said order was to consolidate the two matters, cancel the name of the then registered proprietor of the suit property Robert Kaingu Maitha (the Plaintiff) and to have the same registered in the name of the Applicant. That consent was subsequently adopted as an order of the Court almost a year down the line on 24th September 2009.

11. Subsequent to its adoption by the Court, the order was extracted and served upon the Land Registrar, Kilifi for implementation. The suit property was consequently registered in the name of the Applicant with a Certificate of Lease issued in his name.

12. Following suspicion that the orders used in registering the Applicant as the proprietor of the suit property were not genuine Court orders, an investigation was commenced which led to the Applicant herein being charged in Malindi Chief Magistrates Court **Criminal Case No. 301 of 2011; Republic –vs- Said Adam Kazungu**.

13. Prior to the apprehension and arraignment of the Applicant in Court on 17th August 2011, however, a party known as Kibokoni Properties Ltd moved to the High Court vide Judicial Review Miscellaneous Application No. 13 of 2009; ***Kibokoni Properties Ltd –vs- The Commissioner of Lands & Another*** seeking to have the Registration of the Applicant as the proprietor of the suit property cancelled. The Applicant was impleaded as the Interested Party in the said application.

14. On 15th June 2010, a number of concerned parties in the Judicial Review Application met in Court and recorded orders as follows before the Judge then seized of the matter:-

ORDER

This matter coming up for Ruling before Hon. Justice H.A. Omondi in open Court on the 15th June 2010 AND UPON HEARING all the submissions of all the Counsel involved in HCCC No. 53 of 2006 and HCCC 15 of 2005, Mr. Bryant, Mr. Kilonzo, Mr. K’opere, Mr. Maosa, Mr. Mouko, Mr. Matini and Mr. Mwadilo

IT IS HEREBY ORDERED THAT:

- 1. The Orders of 19th December 2008 and subsequent orders of 24th September 2009 are hereby expunged from the Court record immediately.**
- 2. The Court will not assume the role of the Police and Prosecution regarding the perpetrators of forgery.**
- 3. Parties be at liberty to institute private prosecution if they so wish.**
- 4. Under Section 99 of the Civil Procedure Act the Court Orders that the entry made in Kilifi Land Register in favour of the Interested Party relating to land Kilifi-Chembe Kibabamshe 404 be immediately cancelled.**
- 5. Hearing of the application be on 9th September 2010.**

15. As it were, the Criminal Case also proceeded to its conclusion. In that case, the Applicant was charged with Four Counts of offences under the Penal Code. In the first count, he was accused of making a false document contrary to Section 357(a) of the Penal Code. The particulars of the offence were that on or about 19th December 2008, at an unknown place in Malindi, he had, jointly with others not before the Court, and with intent to deceive, made a Court consent order in Malindi HCCC No. 53 of 2006 purporting to show that it was a genuine record of the Court as agreed by all the parties.

16. In the Second Count, he was accused of forgery of Judicial documents contrary to Section 351 of the Penal Code. Count Three accused him of uttering a false document while in Court Four he faced the offence of obtaining registration by false pretenses contrary to Section 320 of the Penal Code. Having heard a total of 16 witnesses the Court (Hon Y.A Shikanda-SRM) proceeded on 2nd July 2015 to find that the prosecution had failed to establish a prima facie case on all the Four Counts.

17. Obviously emboldened by the said acquittal, the Applicant filed the present application in which he seeks to have the orders recorded by the consent of the parties in the Judicial Review Application on 15th June 2010 varied, set aside and/or discharged.

18. As was stated in ***Samuel Wambugu Mwangi –vs- Othaya Boys High School, Civil Appeal No. 7 of (2014) eKLR:-***

“.....circumstances under which a consent Judgment may be interfered with were considered in the case of **Brooke Bond Liebig (T) Limited –vs- Maliya (1975) EA 266**. It was 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 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 general for a reason which would enable the Court to set aside an agreement.”

19. From the material placed before me, it is apparent that the Applicant who was enjoined as the Interested Party in the Judicial Review application was represented by two Advocates, namely Mr. Kilonzo and Mr. Mouko Advocates. The names of the two Advocates are indeed captured in the order as captured before the Honourable Lady Justice H.A. Omondi who dealt with the matter on 15th June 2010.

20. I did not hear the Applicant to be stating that those orders recorded many years back were obtained by fraud or collusion, or by an agreement contrary to the policy of the Court or that the same was arrived at without material facts. His beef appears to be that since the Criminal Case established that he had no case to answer on 2nd July 2015, there was no longer any ground to deny him registration as the proprietor of the Suit Property since the trial Court had found the consent by virtue of which he was so registered to be valid.

21. I am however not persuaded by the Applicant’s arguments. For a start, those orders which he seeks to vary and/or set aside were not arrived at and recorded on the basis that he was guilty of any offence. As at the time the consent order was recorded in Court, investigations were on-going and he was yet to be arraigned in Court.

22. Secondly, it was apparent from the record that all the Advocates who were said to have entered into the consent leading to the registration of the suit property denied being involved in the same. The Court that was then handling the matter ordered an investigation and proceeded to expunge the consent from the record.

23. I have perused the Ruling delivered by the Honourable Y.A Shikanda SRM as delivered on 2nd July 2015. Nowhere in that Ruling does the Court state that the consent order of 24th September 2008 was valid. On the contrary, the Learned Trial Magistrate clearly issued a disclaimer in his Ruling that “for the avoidance of any doubt he was not by his Ruling validating the impugned order.” Indeed at page 6 of his Ruling the Learned Magistrate made a finding as follows:-

“The evidence on record indicates that in the cases involving the parcel of land which is the subject of the questioned consent, the accused person was acting in person but was later represented by Counsel. In as much as there is prima facie evidence to show that the consent was made without authority of the purported signatories, there is absolutely no evidence to show that the accused made the consent. In these proceedings, the Court is not concerned with the question on how the accused person got registered on the parcel of land as far as Counts 1 and 2 are concerned but whether the accused person made the consent.”

24. Arising from the foregoing findings of the Learned Trial Magistrate, it is obvious to me that the Applicant cannot seek to rely on a purported consent which a Court has already found not to have been executed by those who are purported to have participated in the making thereof.

25. In any case, the orders sought to be varied and/or set aside were not made in this matter but in the Judicial Review Application. In my considered view, that ought to have been the forum where for any reason this application ought to have been canvassed. The Applicant was in fact not a party in the matter before me. He was the 2nd Defendant in High Court Civil Case No. 15 of 2005. That case was not consolidated with the matter before me as it is the very consent purporting to consolidate the two matters that was found to be irregular and was expunged from the record.

26. The upshot is that I did not find any merit in the application before me. The same is dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 31st day of January, 2019.

J.O. OLOLA

JUDGE