



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 255 OF 2016

GEORGE KARIUKI.....1ST APPLICANT/RESPONDENT

JOHN GITHIRWA MAINA.....2ND APPLICANT/RESPONDENT

PADDY KAMAU NG'ANG'A.....3RD APPLICANT/RESPONDENT

VERSUS

SUSAN NDUNGE MAINGI.....APPLICANT

RULING

1. In the Notice of Motion dated 22nd November, 2017, the Applicant is seeking for an order of review/setting aside of the consent order of 29th September, 2016 with all the other consequential orders.
2. The Application is premised on the grounds that the consent order was procured through fraudulent misrepresentation; that there was material non-disclosure by the advocates involved in the signing of the consent and that the Applicant has never instructed her counsel to enter into any consent for the removal of the caution registered over parcel of land known as Mavoko Town Block 3/2117.
3. In her Affidavit, the Applicant, Susan Ndunge Maingi, deponed that she filed ELC. No. 414 of 2017 against the Respondents; that in response to her Affidavit in that suit, the Respondents purported that there was a consent between herself and the Respondents dated 29th September, 2016 in Miscellaneous Application No. 255 of 2016 and that she never authorized her advocate to enter into the said consent.
4. According to the Applicant, it beats logic why she would consent to lifting of the caution whereas there is an active file being Machakos HCCC No. 169 of 2009 in which the court had issued an injunction in respect of the suit land; that it is also curious why her estranged husband would also at the same time file ELC. Miscellaneous No. 15 of 2017 seeking removal of the caution over the same land notwithstanding the consent order and that the consent was procured fraudulently.
5. In response, the Respondents filed Grounds of Opposition in which they averred that the Application does not meet the legal threshold for review as provided for under the Civil Procedure Rules.
6. The Applicant's counsel submitted that under Section 80 of the Civil Procedure Act, the court is clothed with the powers to review its orders and Judgment and that the consent order issued on 29th September, 2016 is saddled with vitiating factors.
7. Counsel submitted that the Application dated 20th September, 2016 should have been placed before a Judge; that the same should have been filed as a Plaint and not a Miscellaneous Application and that the consent order of 26th September, 2016 was not validly entered into.
8. The Respondents' counsel submitted that the variation of a consent Judgment at the instance of the counsel's conduct can only succeed due to the general factors that would vary an Agreement and that there is no evidence that the Applicant's counsel entered into the consent without his client's consent. Both the Applicant's and the Respondents' counsel filed their respective authorities which I have considered.
9. This suit was commenced by way of a Miscellaneous Application dated 20th September, 2016. The Application sought for the following orders:

“That the caution and/or other encumbrances lodged and/or registered by the Respondent [Applicant herein] against the parcel of land known as Mavoko Town Block 3/2117 be lifted and/or removed, upon the balance of Kshs. 1.8 million being deposited with the Applicant's Advocates.”

10. A week after the filing of the said Application, a consent order was recorded, between the Applicant's and the Respondents' advocate in the following terms:

“a. The Application dated 20th September, 2016 be and is hereby allowed.

b. The caution or any other encumbrances lodged and/or registered against the parcel of land known as Mavoko Town Block 3/2117 be and are hereby lifted and/or removed.

c. The matter is marked as settled with no order as to costs.”

11. The above consent was adopted as an order of the court by the Deputy Registrar. The original file where the said consent was recorded has since disappeared from the court registry.

12. The law relating to setting aside of a consent order was laid down in the case of *Kenya Commercial Bank Limited vs. Specialized Engineering Co. Ltd (1982) KLR 485* as follows:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an Agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an Agreement.”

13. The Applicant deponed that she could not have given instructions to her former advocate to enter into the said consent considering that there is in existence Machakos HCCC No. 169 of 2009 in respect of the suit land in which an injunctive order was given. Indeed, the Respondents have not told this court why they would file a Miscellaneous Application for the sole purpose of lifting a caution instead of joining in the already existing suit which has not been heard and determined.

14. It would appear that other than this matter, another matter being Miscellaneous Application No. 15 of 2017 was filed by a Mr. Maingi in which he also sought to lift the caution in respect to the suit land. This is despite the existence of HCCC No. 169 of 2009.

15. The evidence before me shows a concerted effort to have the suit land alienated to the detriment of the Applicant, and before the issue of ownership of the said land is determined. Considering the existence of HCCC No. 169 of 2009, I find that the consent of 29th September, 2016 was entered into without sufficient material facts being placed before the Deputy Registrar.

16. For those reasons, I allow the Application dated 22nd November, 2017 as follows:

a. The consent order of 29th September, 2016 alongside all other consequential orders be and is hereby set aside.

b. The Respondents to pay the costs of this Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE