



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 310 OF 2012

**REUBEN KIARIE MUNGAI (personal representative of
WALLACE KURIA KABERI).....1ST PLAINTIFF**
FRANCIS NJOROGE KURIA.....2ND PLAINTIFF
**PETER NJOROGE NDUATI (personal representative of
DAVID NDUATI WAINAINA).....3RD PLAINTIFF**
BENJAMIN KURIA NJOROGE.....4TH PLAINTIFF
DAVID KURIA NJOROGE.....5TH PLAINTIFF
MOSES MWAURA KURIA.....6TH PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL.....1ST DEFENDANT
THE DISTRICT LAND REGISTRAR, KIAMBU.....2ND DEFENDANT
**SAMUEL NJENGA KURIA (personal representative of
RUTH WANJIKU KURIA).....APPLICANT**

RULING

Introduction:

The plaintiffs brought this suit through a plaint dated 30th May, 2012 seeking the following reliefs:

- a) A declaration that the new title deeds for Dagoretti/Mutuini/706 and Dagoretti/Mutuini/707(hereinafter referred to as “the suit properties”) be cancelled and the properties reverted to the original owners.
- b) A declaration that all the restrictions placed on the titles for the said properties as a result of fraud be vacated.
- c) An order that the defendants be ordered to pay general and exemplary damages to the plaintiffs for conversion, fraudulent, illegal, arbitrary and unconstitutional dispossession of the plaintiffs of the suit properties.
- d) Costs of the suit
- e) Any other relief that the court deems just to grant.

In their plaint, the plaintiffs averred that at all material times the 1st to 5th plaintiffs were the registered owners of all that parcel of land known as Dagoretti/Mutuini/707(“Plot No. 707”) while the 6th plaintiff and one, Ruth Wanjiku Kuria (deceased) were the registered owners

of the parcel of land known as Dagoretti/Mutuini/706 ("Plot No. 706") in equal shares. The plaintiffs averred that on 16th October, 2003, the 2nd defendant registered a forged decree purported to have been issued in Kiambu Land Case No. 2 of 1998 against the titles of the suit properties whose effect was to dispossess them of the suit properties. The plaintiffs averred that following the registration of the forged decree, new titles in respect of the suit properties were issued by the 2nd defendant to the perpetrators of the fraud. The plaintiffs averred that the 2nd defendant refused to cancel the entries it had made pursuant to the said forged decree even after being asked to do so by various investigative agencies.

The defendants entered appearance on 19th March, 2013 but did not file a defence to the plaintiffs' claim. On 23rd April, 2013, the court directed that certified copies of the proceedings be obtained and furnished to the court from Kiambu Law Court where the decree said to have divested the plaintiffs of their interests in the suit properties was said to have been issued. On 11th June 2013, the defendants' advocates informed the court that they had obtained the proceedings from Kiambu Law Court which confirmed that no decree was issued by that court which could have enabled the registration of a change of ownership of the suit properties. Following that confirmation, the plaintiffs and the defendants compromised this suit by allowing the plaintiffs' claim by consent in terms of prayers (a) and (b) of the plaint. The effect of the consent was that all the entries that were made in the register pursuant to the purported decree said to have been issued in Kiambu Land Case No. 2 of 1998 were cancelled and the suit properties were reverted to the plaintiffs who were the owners thereof prior to the registration of the said decree in the register of the suit properties.

The application before the court:

What is now before the court is the Notice of Motion application dated 28th September, 2016 by Samuel Njenga Kuria (hereinafter referred to only as "the applicant") seeking the following substantive prayers:

1. That the court be pleased to set aside the consent judgment entered on 11th June, 2013 and the subsequent decree issued on 4th July 2013.
2. That the applicant be granted leave to join the suit as a defendant.
3. That the court be pleased to grant an interim injunction restraining the plaintiffs from disposing of, selling, leasing, charging or in any way dealing with the suit properties pending the hearing and determination of this suit.

The application was supported by the applicant's affidavit sworn on 28th September, 2016 in which the applicant averred that prior to the filing of this suit and the issuance of the orders sought to be set aside, his late mother Ruth Wanjiku Kuria (deceased) (hereinafter referred to only as "the deceased") in respect of whose estate he was the administrator was the registered proprietor of the suit properties on which she had lived with her family from 1968 until her death in 2010. The applicant stated that after the death of the deceased, the applicant and other members of the deceased's family continued in occupation of the suit properties. The applicant averred that none of the members of the deceased family was made a party to this suit yet they were necessary parties as they were in occupation of the suit properties and stood to be adversely affected by the orders made in the suit. The applicant averred that the plaintiffs were all along aware of the applicant's and other members of the deceased's family's occupation of the suit properties.

The applicant averred that the consent that was entered into between the plaintiffs and the defendants herein that returned the ownership of the suit properties to the plaintiffs was mischievous and amounted to an abuse of the process of the court because the said parties were aware that heirs of the deceased would be adversely affected by the consent.

The applicant contended that over 20 heirs of the deceased lived on the suit properties on which they had made developments and buried their kin. He stated that they had a defence to the plaintiffs' claim which raised triable issues. The applicant averred that following the consent judgment that was entered in favour of the plaintiffs, the plaintiffs had registered the suit properties in their names and filed a suit at Kikuyu Law Court namely, Kikuyu CMCC No. 303 of 2014 seeking their eviction from the suit properties. He stated that unless restrained by the court, the plaintiffs were likely to dispose of the suit properties thereby depriving them of the same an act which would cause them irreparable damage.

The plaintiffs opposed the application through a replying affidavit sworn on 8th October, 2018 by the 5th plaintiff where he stated that the deceased, Ruth Wanjiku Kuria fraudulently procured registration of the suit properties in her name by uttering and presenting a forged court order to the Land Registrar, Kiambu who is the 2nd defendant herein. He contended that upon discovery of the fraud, the plaintiffs approached the 2nd defendant who advised them to obtain a court order to enable him rectify the registers for the suit properties. The 5th plaintiff averred that it was reprehensible for a fraudster to seek to be heard before the cancellation of a registration that was procured by fraud.

The 5th plaintiff averred that the applicant had no defence to the plaintiffs' claim as the proposed defence was silent and evasive on the germane issue of fraud. The 5th plaintiff averred further that in his proposed defence, the applicant had alluded to a different cause of action based on occupation and adverse possession which could only be pursued in a separate suit or by way of counterclaim. The 5th plaintiff stated that the consent in question was entered into by the parties freely and that the applicant's recourse was in filing a fresh suit. He averred that the consent judgment had been implemented rendering this suit spent. Finally, the 5th plaintiff averred that the interlocutory orders sought were misconceived and bad in law as there was no suit in place to warrant the grant interlocutory orders.

The defendants opposed the application through grounds of opposition dated 5th April, 2016 and replying affidavit sworn by the State Counsel, Rose Nyawira Wanjohi on 23rd November 2017. In their grounds of opposition, the defendants contended that the applicant who was not a party to this suit when the consent judgment was made had no *locus standi* to challenge the same. The defendants contended that the court was *functus officio* and therefore lacked jurisdiction to set aside the consent judgment in question and the subsequent decree. The

defendants averred further that the applicant's application which was brought 3 years after the consent judgment was an afterthought. The defendants contended further that the applicant's recourse lay in filing a fresh suit as the decree arising from the said consent judgment had already been executed. The defendants contended also that the application did not meet the threshold for setting aside a consent judgment.

In her replying affidavit, Rose Nyawira Wanjohi stated that enquiry with the Executive Officer Kiambu Magistrate's Court on the purported decree on the strength of which the deceased was registered as the owner of the suit properties revealed that the decree was a forgery. She annexed to her affidavit correspondence between the 1st defendant and the Executive Officer, Kiambu Magistrate's court together with certified copy of the proceedings of Kiambu Land case No. 2 of 1998.

She stated that the effect of the consent judgment was to cancel entries that were made pursuant to the forged decree and revert the suit properties to the previous owners. Ms. Wanjohi urged the court to disallow the application because the deceased had acquired the suit property fraudulently and the applicant had on that account approached the court with unclean hands. She stated further that the consent decree had been implemented and that a prayer for joinder in a suit which had been determined cannot be granted. Lastly, she stated that the heirs of the deceased had a share in L.R No. Dagoretti/Mutuini/706 and could therefore not be rendered homeless as alleged.

The applicant filed a further affidavit sworn on 15th February, 2018 in which he contended that the contentious decree had been confirmed as having emanated from Kiambu Chief Magistrate's Court. He denied the allegation that the said decree was a forgery. He averred that if there was any forgery, the same was perpetuated by a court official who should be investigated and made to account instead of punishing his family. The applicant reiterated that the deceased's heirs' right to property and fair hearing was violated when a consent judgment was entered in the matter without their involvement.

The application was argued on 13th October, 2017 and 14th November, 2018. Mr. Karanja for the applicant submitted that the applicant was a legal representative of Ruth Wanjiku Kuria (deceased) who was the registered proprietor of the suit properties prior to the filing of this suit. He submitted that the applicant was not made a party to this suit which was compromised by the plaintiffs and defendants through a consent whose effect was to dispose the deceased of the suit properties. He argued that the beneficiaries of the deceased's estate who were in occupation of the suit properties were condemned unheard. He claimed that the applicant became aware of this suit when the plaintiffs attempted to evict him from the suit properties.

Mr. Karanja urged the court to set aside the consent judgment and give the applicant an opportunity to answer to the plaintiffs' claim and be heard before being evicted from the suit properties where they have lived since 1953. The applicant's advocate cited the case of R v. County Council of Narok Ex parte Wildlife Lodges Ltd. [2014] eKLR, in support of his submission that a consent order can be upset where it is obtained without involving all parties likely to be affected by the order

In his submissions in reply, Mr. Baiya for the plaintiffs submitted that the application did not meet the threshold for setting aside a consent judgment. He submitted that the prayer for joinder had come late in the day as there was nothing pending in the suit since the plaintiffs had been registered as owners of the suit properties. Counsel submitted that the plaintiffs' suit was against the Attorney General and the Land Registrar. He argued that the application was an attempt to benefit from fraud which had been cured by the court. Mr. Baiya cited the case of Kenya Pipeline Co. Ltd v Glencore Energy (UK) Ltd [2015] eKLR and submitted that the court had a duty to enquire into the applicant's fraud and not to allow him to benefit from the same. Counsel argued that the applicant had no defence to the plaintiffs' claim and had instead raised new causes of action.

Ms. Nyawira for the defendants submitted that they entered into a consent with the plaintiffs after confirmation that the decree used by the Land Registrar to transfer the suit properties to the deceased was a forgery. She contended that there were no proceedings in Kiambu Land Case No. 2 of 1998 after 16th May 2001 and that the purported decree dated 6th March 2003 could not have been issued by the court in that case.

Determination:

I have considered the application together with the affidavits filed in support thereof. I have also considered the grounds of opposition and the replying affidavits filed in opposition to the application. Finally, I have considered the submissions by the respective advocates for the parties. The following is my view on the matter. It was not disputed that the plaintiffs were at all material times registered as the proprietors of the suit properties. It was also not disputed that pursuant to a purported decree that was issued by the Senior Resident Magistrate's Court at Kiambu in Land Case No. 2 of 1998, the suit properties were transferred and registered in the name of the deceased by the 2nd defendant. There was no evidence placed before the court showing that the plaintiffs were consulted by the 2nd defendant before the suit properties which were owned by them were transferred and registered in the name of the deceased and title deeds in respect thereof issued to her.

The plaintiffs brought this suit against the defendants to challenge the action of the 2nd defendant of causing the suit properties to be transferred to the deceased through a forged court decree. It was not disputed that on 11th June, 2013, the plaintiffs and defendants entered into a consent pursuant to which judgment was entered for the plaintiffs against the defendants for part of the plaintiff's claim. The remaining part of the claim which related to damages was abandoned. The effect of the consent judgment was that the registration of the deceased as the proprietor of the suit properties and the issuance to her of the title deeds for the said properties which was undertaken on 16th October, 2003 pursuant to a purported court decree issued in Kiambu Land Case No. 2 of 1998 were cancelled. Following that cancellation, the ownership of the suit properties reverted to the plaintiffs who were the registered owners of the said properties prior to the registration of the deceased as the owner thereof as aforesaid. The applicant has challenged the said consent on the basis that it was recorded in the absence and without the knowledge of the deceased's heirs.

What the court has been called upon to determine is whether it should exercise its discretion in favour of setting aside the consent judgement that was entered herein on 11th June, 2013. In the case of Board of Trustees of National Social Security Fund v Michael Mwalu, Nairobi CA No. 293 of 2014 the court stated as follows:-

“The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. 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 order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

In the case of Flora Wasike v Destimo Wamboko (1982 -1988)1 KAR 625, the court stated at page 626 as follows:

“It is now settled law that a consent judgement 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 the case of Brooke Bond Liebig v Mallya (1975) E.A. 266 it was held that a consent judgment may only be set aside for fraud, collusion, or for any reason which would enable the court to set aside an agreement. In the case of Hirani v. Kassam (1952), 19EACA 131, the court cited a passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 where the author has stated as follows:

“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 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 applicant was not a party to this suit when the consent judgment in question was made. I have no doubt in my mind that in a propiarte cases, a consent judgment or order can be set aside even at the instance of a third party. The conditions to be met however remain the same. It was not disputed that when the consent judgment was made, the suit properties were registered in the name of the deceased. In the circumstances, the said judgment which had the effect of cancelling her titles was prejudicial to her. The rule of natural justice required that the deceased or her legal representative be made a party to the suit and be heard or given an opportunity to be heard before a judgment prejudicial to her was made. I am in agreement with the decision in the case of R v County Council of Narok Exparte Wildlife Lodges Ltd. (supra) where the court held that a consent order or judgment made without involving all the parties likely to be affected by it is liable to be set aside. I am in agreement with the submissions by the applicant that the consent judgment entered herein on 11th June, 2013 was contrary to the rules of justice in that the deceased was condemned unheard.

That said, the next question that I need to answer is whether in the circumstances of this case, I should set aside the said consent judgment. On the material before me, I am not satisfied that the plaintiffs and the defendants were actuated with malice or ill will in entering into the consent that was endorsed herein as the judgment of the court. There was no evidence placed before this court showing that that the plaintiffs and defendants colluded in entering into the said consent. I am satisfied that the parties entered into the said consent in good faith. The court record shows that before the parties entered into the said consent, the court on its own motion sought to be furnished with the proceedings in Kiambu Land Case No. 2 of 1998 in which a decree was purportedly issued conferring the titles for the suit properties on the deceased. The 1st defendant made enquiries and reported to the court that the purported decree was a forgery. It was upon confirmation that the purported decree was a forgery that the parties entered into the consent in question. In the present proceedings, the 1st defendant placed before the court certified copies of the proceedings in Kiambu Land Case No. 2 of 1998. From the proceedings, the deceased's application for the adoption of the elders' award that had given her the suit properties as a judgment of the court was dismissed by F.N.Muchemi SPM(as she then was) on 15th October, 1998. The last order in that case was made on 16th May, 2001 by L.W.Muhiu SRM as follows:

“ I have noted that the applicants application seeking for the elders award to be made judgment of the court was dismissed on 15/10/98. There is therefore no suit pending in the present file. The file is thefore returned to the registry.”

That order was made in the presence of the deceased. With that express order, one wonders where the deceased obtained the purported decree given on 4th March, 2003 in the same case conferring upon her the ownership of the suit properties. There is no such decree in the proceedings of Kiambu Land Case No. 2 of 1998. The decree was no doubt of the deceased's own making. It was a forgery and as such null and void. The applicant did not attempt at all to contest the invalidity of the decree in question. The much that was said by the applicant was that some court officials were involved in the forgery of the said decree and as such he should not be punished for it. A forged court decree is a nullity whether prepared by a court official or any other person. The applicant cannot therefore reap the benefit of a forged court decree because court officials were purportedly involved in the forgery of same. In any event, no evidence was placed before the court of the involvement of its officers in the forgery of the said decree. The evidence on record shows that the decree pursuant to which the suit properties were transfered to the deceased by the 2nd defendant was a forgery. This evidence was not rebutted by the applicant.

In the case of Contractors Ltd v Margaret Oparanya (2004)eKLR, the court stated that the power to interfere with consent judgments or orders is discretionary. In my view, this is not a case where the court should exercise its discretion in the applicant's favour. In the case of Kenya Pipeline Company Ltd. v Glencore Energy(UK)Ltd (supra), that was cited by the plaintiffs, the Court of Appeal cited with approval the statement that was made in the case of Holman vs. Johnsons(1775-1802)All ER 98 concerning a benefit devived from an illegal act as follows:

“The principle of public policy is this:

Ex dolo malo non oritur actio.No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is on that ground the court goes,not for the sake of the defendant, but because they will not lend their aid to such a plaintiff...There is a consistent line of decisions of this court where it has set its face firmly and resolutely against those who would breach, violate or defeat the law then turn to the courts to seek their aid.The court has refused to lend aid or succour and has refused to be an

instrument of validation for such persons. We still refuse...it must also follow that the respondent's plea that a rejection of its claim would be tantamount to an unconstitutional deprivation of property is also untenable. The Constitution cannot possibly protect rights supposedly acquired through violation of the law..."

The effect of the consent judgment sought to be set aside was to cancel the entries made in the register of the suit properties pursuant to the forged decree aforesaid and to revert the titles to the previous owners. The consent judgment returned the parties to the position in which they were prior to the fraudulent registration of the deceased as the owner of the suit properties. To set aside the consent judgment would be to confer upon the applicant an illegal benefit acquired through forgery and fraud. To the extent that the applicant bases his application on the rights acquired by the deceased through a forged court decree, this court must decline to lend its aid to the applicant to retain properties acquired fraudulently.

On the issue of joinder of the applicant as a party to the suit, this prayer must also fail. Having found that a case has not been made out to justify the setting aside of the consent judgment entered herein on 16th June, 2013, the suit is spent. There is no suit pending before the court in which the applicant can be joined as a party. The prayer for interlocutory injunction suffers the same fate.

The upshot of the foregoing is that the Notice of Motion application dated 28th September, 2016 has no merit. The same is dismissed with costs to the plaintiffs and the defendants.

Delivered and Dated at Nairobi this 21st day of February 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Baiya for the Plaintiffs

N/A for the Defendants

Ms. Nyakiana for the Applicant

Catherine-Court Assistant