



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 1 OF 2017**

**BERNARD MURIMI JOHN MUTUGI.....1<sup>ST</sup> PLAINTIFF**

**FLORENCE NYAMBURA MURIMI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FRANCIS MURAGE CUNGU.....1<sup>ST</sup> DEFENDANT**

**DAVID MURIITHI MURAGE.....2<sup>ND</sup> DEFENDANT**

**MICHAEL MWANGI MURAGE.....3<sup>RD</sup> DEFENDANT**

**EVANS IRUNGU MURAGE.....4<sup>TH</sup> DEFENDANT**

**RULING**

What is before me is the Notice of Motion dated 7<sup>th</sup> November 2018 in which the applicant is seeking the following orders:

***1. That the Honourable Court be pleased to review the orders of 15<sup>th</sup> day of May 2017 to the extent that the survey be conducted for the entire land parcel No. MWERUA/KAGIO/20 from which L.R No. MWERUA/KAGIO/4476 and 4477 are part thereof.***

***2. That costs be provided for.***

That application is supported by grounds shown in the body of the application and the affidavit of Francis Murage Cungu sworn the same date. The application is opposed with grounds of opposition dated 10<sup>th</sup> December 2018.

When the matter came up for hearing on 10<sup>th</sup> December 2018, the parties agreed to canvass the same by way of written submissions.

**APPLICANTS SUBMISSIONS**

The applicant submitted that the review is sought after they discovered that the surveyor would have great difficulty determining the two (2) portions in that the same would affect the other parcels of land emanating from L.R. No. MWERUA/KAGIO/20 which is the original number. It is further submitted that failure to conduct survey in all the portions affected would bring forth further litigation by the other parties which will keep re-opening this matter instead of resolving the dispute once and for all. The applicants stated that the respondents will not be prejudiced if the application is allowed. They submitted that they are ready and willing to pay for the extra costs for re-surveying the eight (8) extra portions.

**RESPONDENTS SUBMISSIONS**

The respondents submitted that the grounds for setting aside a consent order are well articulated in ***Section on judgments and orders (7<sup>th</sup> Edition) Vol. 1 at Page 124*** which states 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 arrangement contrary to the policy of the Court ..... or if consent was given without sufficient material facts or in misapprehension or ignorance of such material facts, or in general for a reason which would enable the Court to set aside an agreement”.***

The respondent cited the following cases:

- (1) *Isaac Kinyanjui Njoroge Vs National Industrial Credit Bank Ltd (2018) e K.L.R*
- (2) *Flora N. Wasike Vs Destimo Wamboka (1982 – 88) 1 K.L.R 625*
- (3) *Hirani Vs Kassam (1952) 19 E.A.C.A 131.*
- (4) *M & E Consulting Engineers Ltd Vs Lake Basin Development Authority & Another (2015) e K.L.R*
- (5) *Lenina Kemigisha Mbabazi Star Fish Ltd Vs Jing Jeng International Trading Ltd (H.C.T – OO – MA – 344 – 2012).*

The respondents submitted that the grounds for setting aside order is premised on its contractual obligation and binding effect on the concerned parties. The respondent urged that the applicants have failed to prove the grounds set out for setting aside a consent. It is further submitted that by granting the orders may result to further litigation by persons who are not parties to this suit. The respondents urged that the applicants have failed to demonstrate any special circumstances that would drive this Honourable Court to allow the application for review of the consent order dated 15<sup>th</sup> May 2017 which had a contractual and binding effect on the parties herein. It is submitted that the applicants have not proved fraud, collusion, mistake, misrepresentation or in general a reason which would enable this Honourable Court to set aside an agreement which are the only legally acceptable grounds for setting aside a consent order.

#### DECISION

The applicants are seeking an order to review the orders of 15<sup>th</sup> May 2017 by requesting that a re-survey be carried out on the entire land parcel No. Mwerua/Kagio/20 from which L.R No. Mwerua/Kagio/4476 and 4477 are part thereof. The said consent order arises from an application dated 26<sup>th</sup> April 2017 which had been filed under certificate of urgency. When that application came up for inter-parties hearing on 15<sup>th</sup> May 2017, the counsels for both the plaintiffs/applicants and the defendants/respondents agreed by consent to the issuance of the orders being sought in the said application. The consent dated 20<sup>th</sup> June 2017 and filed on 21<sup>st</sup> June 2017 was then adopted as an order of the Court on 29<sup>th</sup> August 2017. The said consent order was directed to the County Land Registrar and the County Surveyor to establish the boundary between L.R No. Mwerua/Kagio/4477 and 4476. It is trite law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract. The grounds for setting aside a contract are such reasons as fraud, mistake or misrepresentation. In the case of *Hirani Vs Kassam (1952) 19 E.A.C.A 131*, the Court held thus:

***“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 the consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement”.***

The applicant has not given any reasons why he wants the consent order varied and/or set aside. There are no reasons shown that counsel for the applicant has entered into it without instructions. In light of my analysis, I find the application dated 7<sup>th</sup> November 2018 lacking merit and the same is hereby dismissed with costs to the respondent.

*READ and SIGNED in open Court at Kerugoya this 22<sup>nd</sup> day of March 2019.*

**E.C. CHERONO**

**ELC JUDGE**

**22<sup>ND</sup> MARCH, 2019**

*In the presence of:*

1. Mr. Asimwe holding brief for Mr. Magee for Plaintiff/Respondent
2. Mr. Mwangi holding brief for Mr. Ngangah for the Defendant/Applicant