



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1234 OF 2016(FORMERLY HCCC NO. 956 OF 1997)

DAVID MUTHAMI MUTHEE.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

CHARLES KIMELI MUGE.....INTERESTED PARTY/APPLICANT

RULING

The plaintiff brought this suit against the defendant by way of a plaint dated 10th April, 1997 seeking the following reliefs:

- a) A declaration that the plaintiff is the owner of Plot No. 36/275/VII (hereinafter referred to as “the suit property”).
- b) In the alternative and without prejudice to (a) above, a declaration that the plaintiff has acquired the suit property by adverse possession.
- c) Rectification of the register/records in the land registry in respect of the suit property so that the property is registered in the name of the plaintiff.
- d) Costs.
- e) Any other relief the court deems fit to grant.

The plaintiff averred that in 1985, he entered into an agreement for sale with one, Titus Wambua in respect of the suit property under which the said Titus Wambua agreed to sell to him the suit property at a consideration of Kshs. 700,000/-. The plaintiff averred that Titus Wambua (hereinafter referred to as “the deceased”) died in 1989 before the suit property could be transferred to the plaintiff. The plaintiff averred that he took possession of the suit property after purchasing the same in 1985 and that his application to the Commissioner of Lands to have the suit property registered in his name was not successful. The defendant entered appearance and filed a statement of defence on 24th October, 1997 denying the plaintiff’s claim in its entirety.

On 11th December, 1997, the plaintiff and the defendant filed in court a consent dated 9th December, 1997 signed by the plaintiff’s advocates and the defendant. The said consent was adopted as an order of the court on 18th December, 1997. The order that was extracted from the said consent was on the following terms:

- 1. That the plaintiff, David Muthami Muthee is the owner of Plot No. 36/275/VII (the suit property) acquired by way of adverse possession.*
- 2. That the Registrar of lands at Nairobi to execute the transfer documents in favour of the plaintiff.*
- 3. That there be no orders as to costs.*

On 19th April, 2002, the said consent order was amended through a consent letter dated 26th February, 2002 signed by the parties. The amended order which was issued on 28th May, 2002 was on the following terms:

- 1. THAT the consent orders made on 18th December, 1997 be and are hereby amended by substituting the words “Registrar of Lands at Nairobi” in clause No.2 with the words “The Deputy Registrar High Court Nairobi.”*

2. THAT the Deputy Registrar High Court Nairobi do execute the Transfer documents in respect of L.R No. 36/275/VII (the suit property) in favour of the plaintiff.

3. THAT costs be in the cause.

Pursuant to the said amended consent order, the Deputy Registrar of the High Court executed an instrument an indenture dated 31st May, 2002 conveying the suit property to the plaintiff. The plaintiff presented the said indenture to the land registry for registration on or about 17th July, 2003. The land registrar refused to register the said indenture on the ground that the registered owner of the suit property was not a party to the suit in which the plaintiff had obtained an order conferring the title of the suit property upon him. This development prompted the plaintiff to file an application for judicial review in the High Court namely, High Court Judicial Review Case No. 88 of 2016 to compel the Chief Land Registrar to register him as the owner of the suit property. The said judicial review application is still pending.

What is now before the court is a Notice of Motion application dated 6th January, 2017 by the interested party seeking to set aside the said consent orders that were made herein on 18th December, 1997 and 28th May, 2002. The grounds upon which the application is premised are set out in the interested party's affidavit and further affidavit sworn on 6th January, 2017 and on 5th May, 2017 respectively. In summary, the interested party who is the executor of the estate of one, Elphas Kimuge Kimnyango, deceased (hereinafter referred to as "the deceased") contended that the deceased was at all material times the owner of the suit property. The interested party averred that the deceased purchased the suit property from one, Titus Wambua at a consideration of Kshs. 700,000/- in the year 1985. The interested party averred that through the consent orders aforesaid, the Registrar of Lands was directed to transfer the suit property to the plaintiff. The interested party averred that the deceased who was the registered owner of the suit property when the said consent orders were made was not a party to the suit. The interested party averred that both the plaintiff and the Attorney General who was sued as the defendant had no interest in the suit property and as such could not purport to enter into a consent conferring the title of the property upon the plaintiff without involving the registered owner of the property.

The application was opposed by the plaintiff through a replying affidavit sworn on 29th March, 2017. The plaintiff conceded that consent orders requiring the registrar of lands to transfer the suit property to him were issued by the court but contended that the land registrar had refused without any valid reason to comply with the said orders. The plaintiff contended that the land registrar had made several suspicious entries in the register of the suit property which included the registration of the late Elphas Kimuge Kimnyango (hereinafter referred to as "the deceased") as the owner of the suit property. The plaintiff averred that he could not have joined the deceased as a party to this suit since he was not the registered owner of the suit property when the suit was filed. The plaintiff contended that the interested party's rights, if any, in the suit property were extinguished by limitation. The plaintiff accused the interested party of engaging in fraud and averred that the provisional certificate of title that was issued to the interested party without a certificate of confirmed grant was suspect.

The parties filed written submissions which they highlighted on 20th September, 2018. The interested party filed submissions and supplementary submissions on 19th July, 2017 and 28th September, 2018 while the plaintiff filed his submissions on 22nd February, 2018. During the highlighting of submissions, Mr. Isiji for the interested party submitted that the interested party's application was based on material non-disclosure. He argued that a suit for adverse possession should have been filed against the registered owner of the suit property rather than the Attorney General. He submitted that the Attorney General had no authority to enter into the consents which he entered into with the plaintiff that gave rise to the orders sought to be set aside.

In response, Mr. Ongegu for the plaintiff submitted that before the plaintiff filed this suit, he conducted a search which revealed that one, James Titus Wambua (deceased) (hereinafter referred to as "James") was the registered proprietor of the suit property. He submitted that although the interested party was claiming the suit property through his late father, Elphas Kimuge Kimnyango (the deceased), the suit property did not form part of the deceased's properties listed in the certificate of confirmation of grant issued to the plaintiff in respect of the deceased's estate. Mr. Ongegu submitted that the suit property was also not among the properties listed in the deceased's will.

Determination:

I have considered the interested party's application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the plaintiff in opposition to the application and the submissions of counsel both written and oral. The only issue that the court has been called upon to determine in the present application is whether sufficient grounds have been put forward to warrant the setting aside of the consent orders made herein on 18th December, 1997 and 19th April, 2002. The law on setting aside consent orders or decrees is now settled. A consent judgment or order has the same effect as a contract and can only be set aside on grounds which would justify the setting aside of a contract. See, Brooke Bond Liebig Ltd v Mallya (1975) EA 266 and Flora Wasike v Destimo Wamboka (1988) 1 KAR 625. In Board of Trustees National Social Security Fund v Micheal Mwalo (2015) eKLR, the Court of Appeal cited Setton on Judgments and Orders (7th Edition), Vol.1 page 124 where the authors have 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...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."

I have at the beginning of this ruling set out the plaintiff's claim against the defendant. The plaintiff had sought a declaration that he was the owner of the suit property and in the alternative a declaration that he had acquired title to the suit property by adverse possession. The plaintiff also sought the rectification of the register of the suit property so that he could be registered as the proprietor of the suit property. There is no doubt that the reliefs that were sought by the plaintiff would affect whoever was registered as the owner of the suit property at the material time and in fact the reliefs could only be sought as against the registered owner. According to the interested party, as at the time the plaintiff filed this suit and obtained the orders in contention, the registered owner of the suit property was the deceased. This has been contested by the plaintiff who has contended that before the filing of the suit the registered owner of the suit property was James Titus Wambua, deceased (James). There is no explanation as to why the plaintiff sued the Attorney General with respect to an agreement for sale

which he allegedly entered into with James. Whether or not the registered owner of the suit property was the deceased or James, that was the right party to be made a defendant in this suit.

The Attorney General who was sued on behalf of the Commissioner of Lands was not the registered owner of the suit property. As correctly submitted by the interested party, the Attorney General had no interest in the suit property. The Attorney General could not therefore enter into an agreement with the plaintiff which had the effect of altering the title of the suit property. I am of the view that if it had been brought to the attention of the court that the Attorney General had no proprietary interest in the suit property, the court would not have adopted the consent that was entered into between the plaintiff and the defendant. I am of the view that the consent orders made herein were made in error without the court having been given sufficient facts on the interest that the two parties, the plaintiff and the Attorney General had on the suit property. I am in agreement with the interested party's submission that the plaintiff and the defendant concealed material facts to the court. A consent order made in the circumstances such as this is a candidate for setting aside. Unless the same is set aside, the registered owner of the suit property would be condemned unheard. As I have mentioned above, the interested party has claimed that the deceased was the registered owner of the suit property when the plaintiff came to court. The plaintiff on the other hand has claimed that the property was registered in the name of James and that the deceased and the interested party were registered as owners of the suit property fraudulently. Both parties have placed material before the court in support of their respective positions. The allegations of fraud raised by the plaintiff cannot be determined in the present application. It would serve the interest of justice in my view if the consent orders made herein are set aside to give the parties an opportunity to put forward their respective cases.

In conclusion, it is my finding that the interested party's Notice of Motion application dated 6th January, 2017 has merit. The application is allowed in terms of prayer 2 thereof. The costs of the application shall be in the course.

Delivered and Dated at Nairobi this 7th day of March 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Ongegu for the Plaintiff

Mr. Kamau for the Defendant

Mr. Isiji for the Interested Party

Catherine-Court Assistant