



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MERU

MISC. JUDICIAL REVIEW NO. 29 OF 2014

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

ADJUDICATION OFFICER URINGU II

ADJUDICATION.....2ND RESPONDENT

DERMACATION OFFICER TIGANIA...3RD RESPONDENT

LISTON MUTUMA KIUNGA.....4TH RESPONDENT

AND

JOSPHAT DAVID MWILARIA.....INTERESTED PARTY

RULING

1. On 16th February 2016 the interested party, JOSPHAT DAVID MWILARIA filed a Notice of Motion seeking the following orders:

1. Spent

2. Spent

3. Spent

4. Spent

5. That the Judgement dated and delivered herein on 6th November 2014 be set aside and the interested party be granted leave to respond to the main judicial review notice of motion application and participate in the hearing of the same.

6. That costs of the application be provided for.

2. The grounds in support thereof were stated on the face of the motion. Applicant/Interested party also filed two supporting affidavits, the one of 16.2.2016 and the other one of 7.6.2018. Briefly he averred that the suit land herein belongs to his late father Zakayo M'Marimba Ibaya who died on 25th January 2003. He avers that the Exparte Applicant and the respondents fraudulently and secretly colluded to grab the suit land through the consent dated 3rd November 2014. He further avers that Liston Mutuma, the Exparte Applicant herein has never utilized or stepped onto the suit land and is hurriedly moving to acquire a title deed over the suit land so he can take possession of the same.

3. The application was not opposed by the respondents, consequently Mr. Mbaabu counsel for the interested party indicated that since one party to the consent is not opposed to the application the consent cannot stand.

4. The exparte applicant filed two affidavits in opposition to this application, one on 24.2.2016 and another on 25. 1.2017. The gist of his response is that during objection proceedings, the late Zakayo M'Marimba Ibaya was represented by Moses Thuranira Akwalo who was representing the entire family. Thus Ex-parte applicant avers that he did not collude with the respondents in the consent Judgment.

5. The application of 16.2.2016 was dismissed on 18.6.2018 but was reinstated thereafter vide the court's ruling of 29.8.2018. The application was then scheduled for hearing on 25.3.2019 when the Respondents through their counsel conceded to the application.

6. I have carefully perused through the application, affidavits and the record in its entirety and the issue for determination is **whether to set aside the Judgement made by this court on 6th November 2014 and grant leave to the interested party to participate in the prosecution of the suit.** The other prayers including a stay of execution of the judgment had been allowed on 24.2.2016.

7. The law on setting aside/review of orders is well established under Order 45 of the Civil Procedure Code. In the case of **Samuel Wambugu Mwangi Vs Othaya Boys High School Civil Appeal No. 7 of 2014 [2014] eKLR**, the court observed that:

“...Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited Vs Maliya (1975) E.A. 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.”

8. In the present case, the parties to the suit as at the time of the consent judgment were the Ex-parte Applicant, Liston Mutuma and the Attorney General (representing the office of the DLASO and that of demarcation officer). One wonders how a consent was entered into for the Exparte applicant to take over land parcel no 819 belonging to the deceased Zakayo in these Judicial Review proceedings yet the family of Zakayo were not parties in the said proceedings. **It follows that the consent was entered into without sufficient material facts concerning the owner of the land.**

9. Therefore, considering all the circumstances of this matter especially the fact that this is a Judicial Review matter where the main concern of the court is the decision making process, I am inclined to find that the said consent judgement cannot stand. **Consequently, the Judgment delivered on 6th November 2014 is hereby set aside and the interested party is given leave to respond to the main judicial review notice of motion application. The costs of this application shall abide the outcome of the suit.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 22ND MAY, 2019

IN THE PRESENCE OF:-

C/A: Kananu

Applicant (interested party)

Exparte Applicant

Mwirigi holding brief for Mutunga for 4th respondent

Nyamu Nyaga holding brief for C.P Mbaabu for interested party

Kiongo for 1st – 3rd respondent

HON. LUCY. N. MBUGUA

ELC JUDGE