



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 108 OF 2018**

**JOHNSON KIMATHI KABURA.....1<sup>ST</sup> PLAINTIFF**

**PATRICK MUGAMBI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MAKOKOYO NCHOKE LESHANI.....1<sup>ST</sup> DEFENDANT**

**PHILIP RAKITA.....2<sup>ND</sup> DEFENDANT**

**JOHN RAKITA.....3<sup>RD</sup> DEFENDANT**

**KAJIADO DISTRICT LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**KAJIADO DISTRICT LAND SURVEYOR.....5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Notice of Motion dated the 7<sup>th</sup> May, 2015 filed by the Plaintiffs/ Applicants and it is brought pursuant to Section 3A, 63 including 80 of the Civil Procedure Act, Orders 40, 45 as well as 51 Rule 1 of the Civil Procedure Rules. The Applicants seek orders for injunction; setting aside or review of consent order as well as calling of three Surveyors to be examined on the veracity and authenticity of a Survey Report including Mutation.

It is premised on the grounds that the Survey Report and Mutation adopted by the Court as its Order in this suit is fraught with fraud, misrepresentation, corruption as well as professional malfeasance and thus fundamentally defective hence needs to be interrogated. The Mutation as adopted has caused encroachment into other persons' land and creates a massive 25 acres with no known owner. The Defendants are using the deficient Mutation to subdivide parcel number Kajiado/ Kaputiei North / 959 and intend to dispose of the resultant parcels before the suit is determined. The problem with regard to the Mutation is as a result of professional malfeasance by the Surveyors who were involved in preparing it and in turn misled the Plaintiffs, the Advocates including the court. The Plaintiffs have established a sufficient ground for review and injunction.

The application is supported by the affidavit of JOHNSON KABURIA KIMATHI who is the 1<sup>st</sup> Plaintiff herein where he avers that on 23<sup>rd</sup> May, 2014 the Court adopted the Survey report dated the 22<sup>nd</sup> May, 2014 and directed the 4<sup>th</sup> as well as 5<sup>th</sup> Defendants to harmonize the ground with the Mutation. Further, that each party to the suit appointed respective Surveyors to be party to the harmonization process. He explains that on the 23<sup>rd</sup> July, 2014, the respective Surveyors caused a Survey Report dated the 23<sup>rd</sup> July, 2014 with Mutation of the same date to be endorsed by the Plaintiffs as well as the 1<sup>st</sup> to 3<sup>rd</sup> Defendants and was adopted as an order of the Court. He contends that both Timothy Pello and the District Land Surveyor, Kajiado who were involved in the process have confessed that after completing the usual office survey work, they tasked a Mr. Nyariki to prepare the actual ground bearing which they all endorsed but they later received complaints from the 1<sup>st</sup> Plaintiff and realized they had been duped. He reiterates that the Plaintiffs' as laymen, who had full trust of the Surveyors accepted the Mutation that was subsequently endorsed by the Court.

The application is opposed by the 3<sup>rd</sup> Defendant PHILIP RAKITA where he deposes that apart from the generalized allegations of fraud, misrepresentation, corruption and professional malfeasance, the Applicants have not made any specific allegations, given any particulars and or pointed out such alleged incidences. He insists the Applicants are on a fishing expedition and have not attached any confessions of Timothy Pello in the supporting affidavit. He states that since there are no particulars nor incidences of fraud, corruption and malfeasance, the prayer for cross examination of the surveyors, setting aside of the consent orders including review of such orders is baseless as well as without merit. He reiterates that the consent orders were recorded over a year ago and therefore cannot be said to have been brought without

unreasonable delay. He claims he consulted the Surveyor who conducted the joint survey on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and he has denied all allegations of fraud, corruption, professional malfeasance including misrepresentation. Further, he confirmed the whole process was done above board and all the necessary agencies including the District Land Registrar as well as District Land Surveyor, parties herein with their lawyers plus surveyors were all involved from one stage to another.

The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants filed Grounds of Opposition where they stated that the Applicants consented to the orders sought to be aside and hence it is final judgement; application is frivolous, vexatious and an abuse of the Court process; is fatally defective and bad in law as well as a waste of the Court's judicious time. Further, that it lacks merit, is full of falsehood and that the Applicants have not shown a cause of action as against the Defendants.

The Applicants and the Respondents filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon consideration of the instant application herein including the parties' respective affidavits as well as the Grounds of Opposition and submissions, the following are the issues for determination:

- Whether the Consent Order should be reviewed and or set aside.
- Whether the Applicants are entitled to orders of temporary injunction.
- Whether the three Surveyors should be cross examined

As to whether the Consent Order should be review and or set aside. I note the Order sought to be set aside is dated 23<sup>rd</sup> May, 2014. I further note that the Applicants participated in the recording of the consent, which was adopted as an order of the court. They are seeking the consent order to be reviewed or set aside as they claim there was fraud, misrepresentation as well as professional malfeasance in the preparation of the Survey report and developing the mutations in respect of the suit lands, which were the subject of the consent. They explain that one Timothy Pello who was also a Surveyor during the process claims to have been misled to endorse the Survey Report and Mutation.

Section 80 of the Civil Procedure Act provides: -**"Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows: **' Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.'**

In the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR**, the Court of Appeal in laying down the basis for setting aside a consent judgement stated as follow: **' The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625, said in his judgment at page 626 -"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." See the decision of this Court in J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983, This Court in the case of Brooke Bond Liebig v. Mallya 1975 E.A. 266 held:- "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."**

Insofar as the Applicants claim they were informed by Timothy Pello that there was fraud, misrepresentation and malfeasance, they have not annexed an affidavit sworn by him to confirm his averments. Except for the general statement, they have failed to itemize the particulars of fraud or misrepresentation. I note the consent order was recorded almost 5 years ago and the Defendants commenced to undertake subdivisions, which the Plaintiff is uncomfortable, with. In the absence of an affidavit from Timothy Pello who claims there was fraud in the preparation of the report, I opine that mere allegations without proof is not a good ground to set aside or review a consent order. In the current scenario, I note the Applicants participated in the survey and also in the recording of the consent which adopted the Surveyors report. Except for Timothy Pello's averments, they have not indicated to court what error was apparent on the face of the consent; nor discovery of new and important facts to validate the review. The provisions of sections 80 of Civil Procedure Act and Order 45 of the Civil Procedure Rules are clear on when a party can seek a review of an order, which to me has not been proved. From the foregoing, I indeed concur with the Respondents that the allegations of fraud, malfeasance and misrepresentation are general and I am unable to proceed to set aside a consent order nor review the same on that ground. In the circumstances and relying on the abovementioned authority as well as the legal provisions cited above, I decline to set aside nor review the consent order dated the 23<sup>rd</sup> May, 2014. Further, since I have declined to set aside the Consent Order, I see no reason why the Surveyor's should be summoned in Court to be cross-examined on the authenticity of their report and will also decline to make an order to that effect.

As to whether the Applicants are entitled to orders of temporary injunction pending the outcome of the suit. The Applicants claim the Defendants are subdividing and disposing off land parcel number Kajiado/ Kaputiei North/ 959 and interfering with their ownership of

Kajiado/ Kaputiei North / 4101 through trespass, alienation, encroaching or disposal. The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**. For the Court to grant an order of temporary injunction, a party must establish a prima facie case with a probability of success at the trial. The Plaintiffs confirmed that on the 23<sup>rd</sup> July, 2014, the respective Surveyors caused a Survey Report dated the 23<sup>rd</sup> July, 2014 with Mutation of the same date to be endorsed by themselves as well as the 1<sup>st</sup> to 3<sup>rd</sup> Defendants which report was adopted as an order of the Court. I note the joint survey undertaken established the respective boundaries and exact acreages of Kajiado/ Kaputiei North /959 and Kajiado/ Kaputiei North /4101 respectively. Further, the order directed for the harmonization of the resultant mutations with the Registry Index Map to reflect the actual acreage on the ground. From the evidence presented herein, to my mind the Applicants have not demonstrated how the subdivision of Kajiado/ Kaputiei / 959 is to their detriment. In the circumstances, I am unable to grant an order of temporary injunction to stop the subdivision of Kajiado/ Kaputiei North /959 pending the outcome of the suit.

It is against the foregoing that I find the application dated the 7<sup>th</sup> May, 2015 unmerited and will proceed to dismiss it with costs.

**Dated signed and delivered in open court at Kajiado this 8<sup>th</sup> May, 2019**

**CHRISTINE OCHIENG**

**JUDGE**