REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MOMBASA

ELC CASE NO. 190 OF 2010

LUKA KITUMBI & OTHERS.....PLAINTIFFS

VERSUS

COMMISSION OF MINES

& GEOLOGY & OTHERS.....DEFENDANTS

RULING

1. The 3rd defendant herein moved the court vide his application dated 22nd May 2018 and brought under the overriding objectives sections of the Civil Procedure Act and Article 50(1) of the Constitution. The 3rd defendant prayed for orders that;

(a) Spent;

(b) The court be pleased to set aside the consent judgment recorded on 6th December 2017 and the consequential decree issued by the court and the suit be re-instated for hearing inter partes;

(c) Thereafter directions be given as to the hearing and final determination of the suit.

2. The application is premised on the grounds on its face inter alia that the court exerted the pressure on the advocates to adopt the ruling of 26th November 2010 as a judgment of the court since the said ruling had determined with finality the issues in question. That the said consent was entered before instructions were given by the 3rd defendant/applicant. Thirdly, that the 3rd defendant has been condemned unheard and the settlement does not take into account the rights and interests of the applicant who invested heavily on the said mining claim.

3. The application is also supported by the affidavit deposed to by Charles P. Kiarie Mwangi on 22nd May 2018. He reiterated the facts stated on the face of the application. Mr Kiarie Mwangi deposes that the applicant wishes that this matter be determined by the court on merits in the interests of justice.

4. The application is opposed by the plaintiff vide a replying affidavit sworn by Onesmus Mwinzi advocate on 17th September 2018. Mr Mwinzi deposes that it is untrue to say that the trial court exerted pressure on parties to enter into the consent. That the consent was entered into after counsel for the 3rd defendant in consultation with the Attorney General for 1st defendant and Mr Mwinzi for plaintiff found that the observations made by Hon Justice J. B Ojwang (as he then was) in his ruling dated 26th November 2010 resolved the matter thus necessitating the recording of the consent.

5. Mr Mwinzi deposed further that there is no evidence of pressure advanced in the application. Further that the 3rd defendant came into the picture long after orders had been issued that the 2nd defendant be stopped from interfering and or dealing with the suit property. That by the time the 1st order was made, the 2nd defendant had only erected iron sheet structures on the ground as shown in the pictures annexed as "ONM 1(a), (b) & (c)"

6. The plaintiff maintains that the claim of heavily investing on the mining project by the 3rd defendant is unsupported by evidence. He proceeded to annex photos of the plaintiff's homestead which he deposes depicts the general status of the suit property. That if the 3rd defendant incurred any expenses then he did so because he failed to do his homework well to discover that there were no shares to buy. Lastly that the 3rd defendant's case cannot stand on its own given that the 2nd defendant is deceased, and there is no claim unless the estate of the 2nd defendant pursues the suit. Mr Mwinzi urged the court to dismiss the application.

7. The Attorney General on behalf of the 1st defendant filed grounds of opposition dated 27th September 2018. It is pleaded for the 1st defendant that the application is misconceived, frivolous and vexatious and abuse of the court process. That none of the parties have

challenged the ruling of 26th November 2010 and this suit could not have proceeded in any other way as it was compromised. That the orders sought are a nullity and that the applicant is the author of his own misfortunes.

8. The parties' advocates on 14th February 2019 informed the court that they entirely on the pleadings as filed; the facts of which are as summarised above. A consent judgment is deemed to be a contract between the parties. For a consent judgment to be set aside, the principles set out in the case of **Flora Wasike –versus- Destimo Wamboko (1988) eKLR** must be met.

9. In the case of **Chandless-Chandless –versus- Nicholas (1941) 2All E. R 315** cited in the Flora Wamboko case, Lord Greene MR stated that the universal practice is to record that a judgment or order is by consent unless it is demonstrably shown otherwise. Furthermore in the case of **Wangh –versus- H. B Clifford & Sons (1982) Ch 374** it was stated that a counsel would ordinarily have ostensive authority to compromise a suit in so far as the opponent is concerned.

10. The proceedings before this court on the 6th December 2017 showed there was representation on behalf of all the parties. The file after being called out was placed aside to 10:45am for hearing of the main case to commence. At 11:30am when the file was called out again, Mr Mwinzi asked for 5 minutes to consult. The 3rd defendant was represented by Mr Anaya advocate who also held a brief for the 2nd defendants counsel.

11. Mr Mwinzi then addressed the court that they had looked at the ruling by Justice J. B Ojwang (as he then was) of 26th November 2010 and they opted to adopt it as the judgment thus settling the matter. Both Mrs Waswa and Mr. Anaya for the defendants confirmed the agreement. All the advocates endorsed the consent by appending their signatures.

12. In the present application, there is no description of the nature of pressure that the trial court exerted on the 3rd defendant or his advocate. Mr Anaya is presumed in law to have had ostensive authority to act on behalf of the 3rd defendant. He (Mr. Anaya) has not sworn an affidavit to corroborate the assertions being made by the applicant. Since the record does show that the 3rd defendant had been previously accommodated by the court and the parties herein to put their documents and that on 6th December 2017 the matter was to proceed for hearing; the 3rd defendant had an obligation to demonstrate that there was indeed a change of events against him. This burden has not been discharged. Under the Evidecne Act Section 107, it provides that he who alleges existence of certain facts must prove their existence.

13. The 3rd defendant/applicant also pleaded that he will suffer loss unless the suit is re-opened since he has heavily invested on the mining licence. In rebutting this averment, the plaintiff stated that an order of injunction was issued against the 2nd defendant long before the 3rd defendant was joined in the proceedings. That the 3rd defendant could not do anything on the land when these orders were subsisting. The plaintiff supported this position by annexing photos showing on the suit land. The 3rd defendant did not file any reply to state what is the nature of his investment and or loss that he has suffered or his likely to suffer as a result of not being heard. The 3rd defendant joined this suit vide the application of 16th May 2016 with the joinder order issued on 17th May 2016. The 3rd defendant thus had one year to read and decipher the import of the ruling made on 26th November 2010. In spite having all the time the applicant has never applied to have those orders set aside or review. His averment of claim of loss is thus not explainied.

14. The foregoing circumstances having been explained, I come to the conclusion that the 3rd defendant/applicant has not proved the allegation of coercion on his advocate or himself to have recorded the consent. Neither has he proved fraud or misrepresentation or undue advantage placed on him by either of the parties or the court. I find his application to be brought with unclean hands, vexatious and frivolous. Accordingly, I hereby dismiss it with costs to the plaintiff and the 1st defendant

Dated, Signed and Delivered at Mombasa this 14th day of June 2019.

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A. OMOLLO

JUDGE.