



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 238 OF 2013

PETER NJUGUNA NJONGE..... PLAINTIFF

VERSUS

JULIUS NARANKAIK OLOGOLLIMOT.....DEFENDANT

RULING

1. The record herein shows that the plaintiff commenced proceedings in this matter through Originating Summons filed on 4th December 2009 as HCC No. 338 of 2009 (O.S) (Nakuru). The matter was later transferred to this court, hence the change in case number. The plaintiff sought among others an order in the O.S that he be declared the owner of thirty (30) acres of land in Narok/Cis-Mara/Enabelbel/Enenetia/279 by adverse possession having occupied, cultivated and tilled the said portion continuously and uninterrupted for over 28 years since 1981. The defendant entered appearance and replying affidavit through the firm of Aming'a, Opiyo, Masese & Co Advocates in January 2010.

2. When the O.S came up for hearing on 16th October 2018, counsel for the plaintiff informed the court that parties had negotiated and as a result the defendant had sworn an affidavit on 11th September 2018 in which he conceded to the plaintiff's claim. The said affidavit was filed on 15th October 2018. Counsel for the defendant however told the court that he was not aware of any settlement. As a result, the matter was set for mention on 30th October 2018 to record settlement. Come 30th October 2018 counsel for the defendant did not attend court. Consequently, the O.S was set down for hearing on 14th May 2019. On the same 30th October 2018, the defendant filed Notice of Intention to Act in Person.

3. The next day on 31st October 2018, counsel for the plaintiff filed a consent duly signed by the plaintiff, the defendant and the said advocate as well as a Certificate of Urgency in which he prayed that the file be placed before the court for adoption of the consent. The consent was expressed as follows:

THAT the plaintiff's suit against the defendant be and is hereby settled in the following terms:

1) Judgment be and is hereby entered in favour of the plaintiff against the defendant to the extent that the plaintiff be and is hereby entitled to and shall forthwith take possession, use and occupation of thirty acres of land comprised in and to be excised from all that parcel of land known as Narok/Cis Mara/Enabelbel/Enenetia/279.

2) That in order to realize the aforesaid thirty acres of land which should be excised from Narok/Cis Mara/Enabelbel/Enenetia/279, the plaintiff and the defendant shall equally share the fees, costs, disbursements and charges for the appropriate survey, sub-division and duties for procurement of a title deed in the plaintiff's names, the said thirty acres with the remainder of the area being in the defendant's names.

3) That costs of this suit shall be to the plaintiff.

4. On the strength of the aforesaid Certificate of Urgency, Mr Karanja Mbugua advocate acting for the plaintiff and the defendant in person jointly appeared before me on 31st October 2018 in open court. The defendant identified himself using his national identification card. They both told the court that they had signed and filed the aforesaid consent. They urged the court to adopt it and issue orders accordingly. The plaintiff was also present. The court duly entered judgment in terms of the consent.

5. The record further shows that on 12th November 2018, the law firm of Aminga, Opiyo, Masese & Co Advocates filed Notice of Appointment of Advocates on behalf of the defendant. They also filed Notice of Motion dated 12th November 2018, which is the subject of this ruling. In the application the defendant sought setting aside of the aforesaid consent judgment on the ground that it had been obtained illegally.

6. The application is supported by an affidavit sworn by the defendant and in which he deposed that on 9th September 2018, he was arrested in his home in Narok by unknown persons in the company of the plaintiff. They locked him at Central Police Station in Nakuru for 2 days with a view to getting him to swear a certain affidavit. That he was taken to the plaintiff's advocate's office on 11th September 2018 where he was forced to sign a typed document at gun point without being given a chance to read it. That he was again picked up by the same people together with the plaintiff on 29th October 2018 and locked up again at Central Police Station in Nakuru for the night. That on 30th October 2018 he was given strict instructions to accept whatever he would be asked in court. He was then escorted to court where he in deed accepted what the plaintiff wanted before the judge. He added that everything was done under duress and that he reported the matter at Central Police Station in Nakuru under OB number 32 of 5th November 2018.

7. The plaintiff opposed the application through a replying affidavit in which he denied the defendant's allegations of duress and deposed that the consent was a culmination of meetings that were held on 1st May 2018 at the plaintiff's home in Narok between the plaintiff and his wife on one side and the defendant and his wife on the other; on 25th July 2018 at the plaintiff's house between the plaintiff and the defendant and his wife and on 8th August 2018 at the plaintiff's house between the plaintiff and the defendant and his wife. That ultimately both the plaintiff and the defendant travelled to Nakuru on 11th September 2018 and proceeded to the plaintiff's advocate's office where upon narrating to the advocate that they needed the defendant to swear an affidavit the said advocate prepared an affidavit which the defendant signed. That they agreed that the contents of the affidavit would be reduced to a consent. That the defendant went to the plaintiff's advocates office on 30th October 2018 in the company of his wife. He opted to represent himself and the aforesaid consent was prepared. The plaintiff and the defendant both read it carefully after which they signed it. That the consent was entered into voluntarily in open court without threat, intimidation, coercion, inducement or any form of fraud. He thus urged the court to dismiss the application.

8. The application was canvassed by way of written submissions. Both parties duly filed submissions. I have considered the application, the affidavits filed and the submissions.

9. The defendant seeks setting aside of a consent judgment. The principles applicable when considering such an application were restated by the Court of Appeal in S M N v Z M S & 3 others [2017] eKLR as follows:

... Generally a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High Court that he was involved in fraud or colluded with another advocate or person to subvert the cause of justice in a matter pending in Court is certainly one of utmost gravity. It destroys the advocate's honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charges.

10. In the earlier case of Flora N. Wasike vs Destimo Wamboko [1988] eKLR the said court stated:

It is now settled law that a consent judgment 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 vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.

11. The circumstances adverted to in S M N v Z M S & 3 others [2017] eKLR are somewhat akin to those obtaining in the present case. The consent herein was drafted by an advocate and executed by the advocate and all the parties to this case. The defendant now claims that the execution of the consent as well as all the documents that preceded it such as his affidavit sworn on 11th September 2018 and the notice of intention to act in person, the filing of those documents and his attendance in court to record the consent were all obtained illegally through coercion and at gun point. Those are very serious allegations considering that an advocate who is an officer of the court is alleged to have been involved. The matter is made even graver since the suggestion made is that when the defendant appeared before the court and personally confirmed the terms of the settlement, he did so while facing threat to his life. The allegations claim the existence of conduct on the part of the plaintiff and his advocate that is potentially criminal in nature. They must therefore be proven on a standard higher than on a balance of probability.

12. I have great difficulty accepting the defendant's allegations of coercion and consequent illegality. I say so because the plaintiff filed an affidavit detailing meetings that were held on 1st May 2018, on 25th July 2018 and on 8th August 2018 between the plaintiff and the defendant and at which the settlement was discussed. The parties' spouses are said to have been in some of those meetings. The defendant did not file any affidavit to counter those statements by the plaintiff. Further, the timelines as revealed by the various documents and statements made on oath by the defendant show that he had ample time to report any threat or coercion to relevant authorities or to the court prior to the adoption of the consent but he did not do so. Even on the day the consent was adopted by the court all the defendant needed to do if the allegations are true, was to indicate to the court that the consent was not acceptable to him. The consent was adopted in open court and it is inconceivable that he was under threat even as he appeared before the court. He has certainly not given any valid evidence of a threat while within the court room.

13. Coming back to the issue of timelines, I note that the defendant's affidavit in which he indicated conceding to the plaintiff's claim was sworn on 11th September 2018, more than 45 days before the consent was recorded. Further, by the defendant's own account, he claims that he was arrested that on 9th September 2018 in his home in Narok by unknown persons in the company of the plaintiff and locked him at Central Police Station in Nakuru for 2 days and again on 29th October 2018. Again, a period of over 45 days passed between the two alleged arrests and detention. If there was any coercion, the defendant had more than enough time to take action to protect himself both from the coercion and from the consequences of such coercion. That he allegedly only reported the threats on 5th November 2018 after the consent was recorded is telling. Given the sequence of events, I find it highly unlikely that the defendant's allegations are true. I am therefore not

persuaded that the consent herein was obtained through coercion or illegality. I see the consent as a binding agreement lawfully entered into and the present application as an afterthought.

14. In view of the foregoing, Notice of Motion dated 12th November 2018 is dismissed with costs to the plaintiff.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 12th day of June 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the defendant/applicant

Mr Karanja Mbugua for the plaintiff/respondent

Court Assistants: Beatrice & Lotkomoi