



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 557 OF 2017**

**(formerly NAIROBI ELC No. 742 of 2015)**

**MINTINA ENE KETON KOPONI**

**(Suing as a legal representative of the estate**

**of KETON OLE KOPONI PARSENA(DECEASED).....PLAINTIFF**

**VERSUS**

**FRANCIS NJAKWE GATHIARI.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR NGONG.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

The application for determination is the Plaintiff's Notice of Motion dated the 11<sup>th</sup> October, 2018 brought pursuant to Order 40 Rules 1(a) and 4(1); Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B (1) and 3A of the Civil Procedure Act and Section 68(1) of the Land Registration Act. In the said application, the Plaintiff seeks that the Consent dated 18<sup>th</sup> July, 2018 and filed in Court on 21<sup>st</sup> September, 2018 be arrested and not recorded or adopted as an Order/ Decree, or if already recorded or adopted as an Order/ Decree, the same should be set aside. The Plaintiff also seeks an inhibition order to issue in respect of land parcel number Ngong/ Ngong/ 13500 hereinafter referred to as the 'suit land' or any of its intended subdivisions.

The application is premised on the grounds that this suit was set down for hearing on 29<sup>th</sup> November, 2018. The 1<sup>st</sup> Defendant approached the Plaintiff and through messrs DW Muyundo & Co. Advocates caused documents to be drawn and executed by the Plaintiff purporting to terminate the services of her former Advocates on record and withdraw the suit wholly in return for the 1<sup>st</sup> Defendant to pay the full price of the land which discussion was to take place later. The Plaintiff is elderly, illiterate and indigent and did not understand the importance of the documents she executed nor was any effort made to sufficiently explain the same to her. The Plaintiff having now been informed of the import and effect of the documents she executed denies that she intended to terminate the services of messrs Itaya & Co. Advocates or intended to surrender her claim over the suit land. The Plaintiff is acting as Administrator *ad litem* in this suit and was not given a chance, by the 1<sup>st</sup> Defendant or D.W Muyundo & Co. Advocates to consult with all the dependants of the estate of the deceased. Further, she was not given an opportunity to consult with her then advocate Mr. Dismas Itaya on the documents. It was unethical, fraudulent and contrary to the Court's policy for the 1<sup>st</sup> Defendant and his Advocates to deal with the Plaintiff except through her Advocates. The consent dated the 18<sup>th</sup> July, 2018 is invalid as the Plaintiff was then incapable of entering into it.

The application is supported by the affidavit of the Plaintiff MINTINA ENE KETON KOPAI where she avers that she instituted the instant suit on behalf of the estate of KETON OLE KOPONI in respect of the suit land, which belonged to her late husband that was fraudulently transferred to the 1<sup>st</sup> Defendant. She confirms that the 1<sup>st</sup> Defendant approached her youngest son Benson Lemaiyan Keton and convinced him to talk her into having a meeting with his Advocate to resolve the dispute. She explains that on 17<sup>th</sup> July, 2018 she was taken by her son to the office of D. W Muyundo & Associates where she was presented with documents which she could not read and told that if she signed them, the 1<sup>st</sup> Defendant would compensate her for the suit land and they would have the discussions after signing the said document. She denies agreeing to terminate the services of her former lawyers, Messrs Itaya & Company Advocates and ceasing to claim for the suit land on the basis of the terms set out in the consent. She further denies having been paid the Kshs. 200,000/= as stated in the consent.

The Application is opposed by the 1<sup>st</sup> Defendant FRANCIS NJAKWE GITHIARI who filed a replying affidavit where he deposes that the application is incompetent and untenable in law. He confirms that the suit was set down for hearing on 29<sup>th</sup> November, 2018. Further, that the Plaintiff's youngest son Mr. Benson Nenayian Keton approached him for a discussion on how to resolve this matter amicably. He

contends that he informed the Plaintiff in the company of her sons of his willingness to pay a total sum of Kshs. 2 million in monthly instalments of Kshs. 200,000 for a period of 10 months to compensate their expenses. He claims the Plaintiff together with her sons informed him of their intention to withdraw the suit if he compensated them for their expenses. Further, that the Plaintiff and her sons expressed concern that their current lawyer was making unrealistic demands from them as fees and they agreed that the Plaintiff would file a Notice to Act in Person. He avers that they agreed to sign the deal before an independent advocate to prevent any future accusations on conflict of interest or influence. He explains that on 18<sup>th</sup> July, 2018, the Plaintiff with her son Mr. Benson Nenaiyan Keton met at the offices of D.W Muyundo Associates Advocates where they were explained to the contents of the consent after which she executed it. He insists the Plaintiff's son is literate and was able to understand the contents of the documents presented to them and therefore duly explained the same to his mother. He disputes the Plaintiff's claim that she did not intend to abandon the claim for the suit land despite agreeing to receive Kshs. 2 million in full and final settlement. He further insists that the Plaintiff's claim that she was not given an opportunity to consult the family before signing the consent is untrue as she did sign the same in the presence of her son. He reiterates that the Plaintiff terminated the services of her former Advocates messrs Itaya & Company Advocates because they were a stumbling block between the parties by insisting on legal fees which was unjustified. He further claims to have paid Kshs. 485,000/= to the Plaintiff out of which Kshs. 196,000 was paid in cash while the remaining Kshs. 289,000 was done through Mpesa. He reaffirms that this application is made in bad faith as its sole purpose is to extort money from him.

Both the Plaintiff and the 1<sup>st</sup> Defendant filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon consideration of the materials filed in respect of the application dated 11<sup>th</sup> October, 2018 the following are the issues for determination:

- Whether the Consent dated 18<sup>th</sup> July, 2018 and filed in Court on 21<sup>st</sup> September, 2018 should be arrested and not recorded or adopted as an Order/ Decree.
- Whether an inhibition order should issue in respect of land parcel number Ngong/ Ngong/ 13500 or any of its intended subdivisions.

As to whether the Consent dated 18<sup>th</sup> July, 2018 and filed in Court on 21<sup>st</sup> September, 2018 should be arrested and not recorded or adopted as an Order/ Decree. The Plaintiff seeks to arrest the said consent claiming she was not aware of the contents therein and neither was the same explained to her. The Plaintiff filed her submissions where she reiterated her claim above. The 1<sup>st</sup> Defendant opposed the application and insisted the Plaintiff was well aware of the terms of the consent. He relied on the case of **Flora Wasike v. Destimo Wamboko (1982 - 1988)1 KAR 625 to buttress his argument that the said consent was valid.**

From a perusal of the court records, I note on 18<sup>th</sup> July, 2018 the Plaintiff and the 1<sup>st</sup> Defendant's Counsel agreed to set the suit down for hearing and the Court proceeded to schedule the same for hearing on 29<sup>th</sup> November, 2018. The 1<sup>st</sup> Defendant's Counsel further sought for leave of 14 days to finalize complying with Order 11. During the said proceedings in court, there was no indication by the parties that they intended to enter into a consent to determine the suit. I note the consent letter is dated the 18<sup>th</sup> July, 2018 when Mr. Itaya was still on record for the Plaintiff. I note the Notice to Act in Person filed by the Plaintiff as well as the affidavit in support of the said consent are also dated 18<sup>th</sup> July, 2018. These documents were however filed in court on 21<sup>st</sup> September, 2018 after messrs Itaya & Company Advocates had even filed the Plaintiff's witness statement and list of documents on 10<sup>th</sup> August, 2018. From the Court records, it is evident that the consent dated the 18<sup>th</sup> July, 2018 is yet to be adopted as an order of the court.

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, and 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."*

The Plaintiff has denied knowledge of the terms of the consent dated the 18<sup>th</sup> July, 2018 which the 1<sup>st</sup> Defendant disputes. The 1<sup>st</sup> Defendant insists as a result of the said consent he has paid Kshs. 485, 000 to the Plaintiff. He has produced MPESA statements which confirm he has been paying the Plaintiff's son some money. The Plaintiff's son did not swear any affidavit confirming he received the said money on behalf of his mother. The 1<sup>st</sup> Defendant never furnished in court an affidavit sworn by a representative of messrs. Muyundo & Company Advocates to prove the validity of the consent. Based on the facts above, I find it baffling that all the documents were signed on the date Mr. Itaya represented the Plaintiff in court and there was no indication of the Plaintiff's intention to negotiate an out of court settlement with the 1<sup>st</sup> Defendant. Further, after the said documents were signed they were filed in court after two months. I note in the case cited above, one of parameters for setting aside a consent is ignorance of material facts. The Plaintiff has avered that she was not explained to the terms of the consent and she was not aware the same was going to compromise the suit. From the court record, the Plaintiff is an administrator of an estate of the deceased who owned the suit land. She claims she was not given enough time to consult the other beneficiaries to the deceased estate. In associating myself with the above mentioned case and facts at hand, I opine that not only was there an element of ignorance of material facts but an agreement being contrary to the policy of the court geared to defeat the ends of justice so as to interfere with the substratum of the suit herein. In the interest of justice and since the consent dated the 18<sup>th</sup> July 2018 is yet to be adopted as an order of the court, I will proceed to arrest it and direct that the suit be set down for hearing and determined on its merits.

As to whether an inhibition order should be registered against the suit land pending the outcome of the suit, I wish to make reference to

section 68 of the Land Registration Act which provides that:’ . ***(1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.. ‘***

Since both the Plaintiff and the 1st Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and relying on the legal provisions cited above, I hold that it would be pertinent to preserve the substratum of the suit until the case is determined. It is against the foregoing that I find the instant application merited and will proceed to make the following orders:

- i) An inhibition order be and hereby registered by the Land Registrar Kajiado North as against land parcel number Ngong/ Ngong/ 13500 or any of its intended subdivisions of any dealings, lease or charge pending the hearing and determination of the suit.
- ii) The consent dated the 18<sup>th</sup> July, 2018 and not recorded or adopted as an Order/ Decree be and is hereby arrested.
- iii) The costs of the application will be in the cause.

**Dated signed and delivered in open court at Kajiado this 29<sup>th</sup> day of July, 2019**

**CHRISTINE OCHIENG**

**JUDGE**