



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 95 OF 2017

(FORMELY KISII ELCC NO. 172 OF 1993)

JOANES ODHIAMBO MIGWALA.....PLAINTIFF

VERSUS

ISAAC OWUOCHA.....1ST DEFENDANT

SAMWEL OJUANG OWUOCHA.....2ND DEFENDANT

AND

CHARLES OTIENO OWUOCHA.....1ST APPLICANT

ELSA ACHIENG AJWANG.....2ND APPLICANT

RULING

1. This ruling is in respect of an application dated 27th June 2018 and a preliminary objection filed on 14th January 2019 by the applicants and the plaintiff respectively.

2. The applicants are represented by learned counsel, Mr. Sam Onyango. The plaintiff appears in person.

3. In the application brought under **Order 12 Rule 7, Order 24 Rule 4, order 51 of the Civil Procedure Rules, 2010 and Sections 1A,1B and 3A of the Civil Procedure Act (Cap 21)**, the applicants are seeking the following orders;-

a) Spent

b) Spent

c) That this court be pleased to cause the 1st applicant being the legal representative of the 1st defendant to be made a party to this suit as a defendant in the place of the 1st defendant herein.

d) That this court be pleased to cause the 2nd applicant, being the legal representative of the 2nd defendant to be made a party to this suit as a defendant in the place of the 2nd defendant herein.

e) That this honourable court be pleased to set aside its proceedings taken herein between the 5/8/2002 and the date hereof as against the 2nd defendant and between the 1/11/2016 and the date hereof as against the 1st defendant specifically proceedings of the 15/7/2015 and the subsequent order of this court made on the 16/10/2017 together with all such subsequent orders and/or proceedings.

f) That upon being made parties to this suit and upon setting aside the aforesaid orders and/or proceedings, this court be pleased to grant leave to the applicants to make such defences as may be appropriate to their characters as legal representatives of the deceased defendants.

g) That costs of this application be provided for.

4. The application is anchored on seven (7) grounds on its face, as well as the supporting affidavits of the respective applicants sworn on even date and the annexed documents marked "CUO1 to "COO4" and "EAAL" to "EAA4" which include copies of orders, letter, certificate of death and grant of letters of administration in respect of the estate of the defendants. The applicants stated, inter alia, that they are the legal representatives of the 1st and 2nd defendants who died on 15th November 2016 and 5th August 2002 respectively. That the plaintiff was aware that the defendants were deceased but wilfully misled the court to proceed with the ex-parte hearing of this matter which led to the order dated 16th October 2017. That the plaintiff has engaged a surveyor and commenced the process of executing the said order hence they face imminent eviction from their homes and demolition of their property on the suit parcels of land, LR Nos. Kanyamkago/Kawere 1/1010 and 1152.

5. The plaintiff's preliminary objection is based on the seven (7) grounds that:-

i. The said application is defective in law

ii. That the said application is frivolous, scandalous and is aimed at abusing the due process of law.

iii. That the proceeding in this matter (HCC 172 of 1993 at Kisii High Court) was defended by the Advocates for the defendants herein to the conclusion of the said suit.

iv. The said suit had already been dispensed with and ruled in favour of the plaintiff/ applicant herein where the orders granted to the plaintiff/applicant were implemented as was directed by the honourable court where the Land Registrar and County Surveyor visited the disputed parcel to implement the court orders.

v. The application filed by the respondents herein was done with an intention to commence a fresh trial on a matter that was already determined by a competent court of law.

vi. That the respondents herein had close relation with the defendants of the said suit and were very well aware of the proceedings of the suit and the existence of their advocates who represented the said suit to its full conclusion.

vii. This notice of motion dated 27th June 2018 be dismissed with costs.

6. The plaintiff also relied on his replying affidavit sworn on 10th August 2018 and filed on 16th August 2018. He averred, inter alia, that the proceedings herein reveal that on 27th June 1996, the court (Mbaluto J) referred the matter for arbitration before the District Officer, Uriri to be assisted by the Land Registrar and Surveyor, Migori by consent of the parties who were represented by their respective counsel. That the parties to the suit participated in the arbitration exercise and a report was duly filed in court and adopted accordingly. He opposed the application and sought its dismissal with costs.

7. On 17th January 2019, this court directed that the application and the preliminary objection be argued by written submissions. The applicant's counsel filed submissions dated 21st February 2019 while the plaintiff filed submissions dated 11th March 2019.

8. In his submissions, learned counsel for the applicants referred to the orders sought in the application and urged that the only issue for determination is whether this court should exercise its discretion to set aside the proceedings and judgment entered and any consequential orders herein. He submitted that the deceased defendants were incapable of being served to attend court.

9. Counsel submitted that the proceedings were procured by fraud and misrepresentation hence irregular and need to be set aside ex-dibito justitiae. That the court has the discretion to even suo motto set aside the ex-parte judgment and order. That the applicants have the right to be heard. He relied on the case of **James Kanyiita Nderitu and another –v- Marios Philotas Ghikas and another (2016) eKLR**.

10. The plaintiff submitted by reference to the grounds of the preliminary objection. He identified and analysed issues for determination including whether the orders that were granted on 16th October 2017 should be set aside or not.

11. The plaintiff cited **Order 24 Rule 4 (1) of the Civil Procedure, 2010** and relied on the case of **Eunice Wangui Muturi –v- Francis Kamande and another (2017) eKLR**. He termed the application incompetent, bad in law and an abuse of the process of the law and that it is brought in bad faith. That the suit had lasted for several years and it came to an end in the interest of justice. He urged this court to dismiss the application with costs.

12. I have considered the entire application, the preliminary objection together with the replying affidavit and the submissions in this matter. The issue for determination is whether the orders sought in the application and the grounds of the preliminary objection are merited in favour of the respective parties.

13. The proceedings and the orders sought to be set aside have their genesis on 27th June 1996 when the court (Mbaluto J) herein ordered thus :-

“By consent matter in dispute referred to arbitration by the District Officer Uriri assisted by the District Land Registrar and District surveyor Migori. Award in 90 days. Mention 30/9/96.”

14. On 30th September 1996 the parties were absent in court. The suit was stood over generally. The defendants' counsel reactivated the suit on 2nd October 1996 when a hearing of the same was fixed for 23rd January 1997.

15. It is important to note that the defendants prompted the orders of 27th June 1996. They were represented by counsel on various subsequent dates including 22nd January 1997, 24th March 1997, 7th December 2013, 22nd July, 2013 and 19th May 2014. The court (Okongo J) restated the orders of the court made on 27th June 1996.

16. Pursuant to the orders of 27th June 1996, the surveyor filed report in court. On 16th October 2017. So the court (Mutungi J) directed and ordered that :-

“The surveyor has filed his report following a site visit on 14/6/2017. The report makes findings that there is variance of what is on the ground as relates to parcel 1152 as the confirmed area is 2.00ha (4.94 acres) as opposed to the registered area of 0.70 ha (1.73acres). The court hereby adopts the report by the surveyor and directs that the same be implemented and rectifications be made to the RIM if need be. The defendants to vacate from portions of parcels 1010 that they have occupied.” (Emphasis added)

17. The orders of 16th October 2017 were made further to the consent order of 27th June 1996. Can the parties set aside the surveyor report further to the said consent order which was adopted by the court on 16th October 2017?

18. It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract: see **Brook Bond Liebeg (T) Ltd –v- Mallya (1975) EA 268 and Flora Wasike –v- Destino Wamboko (1988) KLR 429.**

19. The applicants have not advanced sound grounds before the court for the setting aside of the said order as envisaged in **Brook Bond and Wasike case (Ibid)**. The orders of 27th June 1996 and the subsequent surveyor's report which was adopted by court remain binding on the plaintiff and the defendants.

20. This court is guided by the overriding objective under **section 3 of the Environment and land Court Act, 2015 (2015) as read with section 19 of the same Act and sections 1A and 1B of the Civil Procedure Act (Cap 21)**. I bear in mind that this court has inherent jurisdiction to set aside its own order as noted by the Court of Appeal in **Kanyiita Nderitu case (supra)**. However, this case is distinguishable as the orders adopted for implementation arose out of consent of the parties on 27th June 1996 and the same has not been questioned by the parties for a long period of time.

21. Notably, this suit was filed in 1993. It is aged 26 years. I concur with Obaga J in **Eunice Muturi case (supra)** that Public policy demands that litigation has to come to an end; see also **Halsbury's Laws of England (4th Edition) volume 22 at page 273.**

22. In the case of **Films Role International Ltd –v- Cannon Film Sales Ltd (1986) ALL ER 772**, Justice **Hoffman** held that it is a fundamental principle that the court should take the lower risk of injustice which I embrace herein accordingly. The applicants are legal representatives of the estate of the defendants in the suit. Nonetheless, the deceased defendants were aware of the consent order of 27th June 1996 and that this suit was alive from the date of the consent until 16th October 2017. All along the said defendants did not contest the existence of the order. Thus, the applicants can not be allowed to enter in this determined case. Their application is without merits.

23. Accordingly, I uphold the plaintiff's preliminary objection dated 14th January 2019 and dismiss the application dated 27th June 2018.

24. In view of the nature and circumstances of the instant matter, the parties to bear their own costs.

DELIVERED, DATED and SIGNED at MIGORI this 17th day of July 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Applicants - Present

Tom Maurice – Court Assistant.