REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 121 OF 2014

JOSHUA KINYUA KIARIE ……..……..…….1st PLAINTIFF/RESPONDENT

SUSAN MUTHONI KIARIE ***(suing for and on behalf of the estate***

of **JOYCE WAMAITHA** (deceased) …….**2nd PLAINTIFF/RESPONDENTS**

VERSUS

MUIRURI WAINAINA……...…….1st DEFENDANT/APPLICANT

AGATHA WAMBUI WAINAINA ……...….2nd DEFENDANT/APPLICANT

RULING

1. What is coming before me for determination is the Notice of Motion dated the 5th July, 2019 brought under the provisions of Section 3 and 3A, Order 10 Rule 11, Rule 42 (sic) Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules where the Applicant herein seeks for orders;

i. Spent

ii. That pending the hearing and determination of this application, there be a stay of execution of the judgment dated 20th February 2019 or the same be set aside or varied in terms to be determined by this Court or in alternative agreed by the Plaintiffs and the Defendants beforehand.

iii. That the Plaintiffs be restrained from entering or trespassing on the Defendants parcel of land number Nyeri/Uaso Nyiro/205 and 206, or thereon demolishing houses, buildings or fences as occupied by the Defendants since 1984, pending the hearing and determination of this application.

iv. That costs of this application (sic).

2. The said application is premised on the grounds on the face of it as well as the sworn affidavits of Muiruri Wainaina sworn on the 5th July 2019 and 25th July 2019 respectively.

3. The present application was disposed of by way of oral submissions where the Applicant's Counsel , while relying on their application and further Affidavit filed on the 25th July 2019 submitted to the effect that the Defendants were not aware or advised on the consent filed by their Counsel and even if the consent was admitted, the same was not adhered to by the Land Registrar and no leave was sought from this Court by either Counsel or the Land Registrar to file the report dated 19th December, 2017 and filed on 9th January, 2018.

4. That in the year 2014, the Court had directed that the Land Registrar to visit the site and file his report not later than 90 days. That report was never filed for a period of 3 ½ years. It was filed on 9th January, 2018 without leave. Thus any report filed after 90 days was filed without leave and should be set aside. On the 10th November, 2015, by consent it had been agreed that the matter do proceed by way of viva voice evidence, this was after the Court gave directions that the report be filed. This meant that parties had discarded any consent agreed upon. This consent was also not executed by Counsel.

5. That the said consent did not lay terms on what was to happen after it had been filed. On 30th July, 2018, Counsel for the Defendant indicated that he had no instructions on that consent.

6. The Applicant's Counsel further submitted that much as the Court indicated that it had no jurisdiction of the matter pursuant to **Section 18(2)** of the Land Act, if any consent was recorded, the same be set aside and the Defendants be allowed to defend the suit. That the report filed by the Land Registrar to be purged as it was filed without leave. That any consent filed should have been agreed on what was to follow following the failure of the Land Registrar to file his report.

7. That the Judgment entered was therefore against the Defendant and should be set aside. That the Defendants never attended Court as they were not informed and therefore were not party to the proceedings.

8. The Application was opposed by Counsel for the Respondents who relied on their replying affidavit sworn on 2nd July, 2019 to submit that what the Applicants are trying to undo was a matter which had been finalized and a judgment delivered. That when a party had a problem with a judgment, the only avenue available for the party was to Appeal. The application therefore had no basis because the Applicants were represented by an Advocate in Court at all material times

9. Counsel submitted that the Applicant's problem was that they never attended Court sessions all through and were not in Court even at the hearing of the present application wherein his dilemma was whether they would file another application through another Advocate stating that they were not present. His second question was whether the Applicants' application was that they had not briefed their Advocate and what assurance he had that they had briefed the current Advocate.

10. Further submission was that after the Consent had been recorded on 10th November 2015, by both parties through their Advocates, they had come to Court on 11th February 2016 and orders had been extended. The Land Registrar was directed to file the report wherein the matter was mentioned on 7th March, 2018, on which date Mr. Kingori, Advocate for the Defendant was present when it was confirmed that the report by the Land Registrar had been filed and he sought to be supplied with a copy of the report.

11. That the parties had been called upon to study the report and thereafter record a Consent. On 28th June, 2018 parties appeared in Court when Advocate for the Defendant prompted for a written consent which was subsequently adopted on the 20th February, 2019 as the judgment of the Court. That at all material times, the Applicants were represented by an Advocate. The Applicants then waited until the Plaintiff had fenced off the land to run to Court claiming that they never instructed their Advocate.

12. That pursuant to the affidavit filed by the Applicants and submissions, no fraud had been proved to have been committed to warrant the consent judgment to be set aside. What the Court had been subjected to were mere allegations which had no basis.

13. That the application had no basis as their complaints had already been addressed as per paragraph 9 of the Applicants' supporting affidavit. Further, the photographs attached by the Applicants showed no fence running across the building.

14. The Respondents final submission was that the application was an afterthought and intended to waste the Court's time hence should be dismissed with costs as it did not meet the threshold for setting aside the consent judgment as was held in the case of **SMN vs ZMS & 3 Others [2017] eKLR.**

Analyses and Determination.

15. The present suit was filed on the 5th June 2014 wherein the Plaintiff/Respondent sought for an order that LR No. Nyeri/Uaso Nyiro/205 206 and 207 (formerly Nyeri Uaso Nyiro 127) be resurveyed and the boundaries on the ground be fixed by the District Land Registrar Nyeri giving the Plaintiff parcel of land LR No. Nyeri/Uaso Nyiro/207, the actual and physical acreage of 42.827 acres on the ground and not less. The Plaintiff also sought for costs and any better relief that the Court may deem fit and just to grant.

16. The Defendant/Applicants did not file their Defence on time and the suit was set down for formal proof. Thereafter, the Defendants filed their defence and sought that the same be admitted as part of the Court record. By consent, parties agreed to set aside the interlocutory judgment entered on the 10th July 2014 and the matter was slated for hearing on the 10th November 2015 on which day the Court was informed that parties were desirous of recording a consent which was recorded as herein under.

17. By consent:

i. LR No. Nyeri/Uaso Nyiro/205 206 and 207 (formerly Nyeri Uaso Nyiro 127) be resurveyed and the boundaries on the ground be fixed by the District Land Registrar Nyeri and the District Land surveyor Nyeri in accordance with the records held by the Land Registry Nyeri.

ii. The date and time for the said site visit to be agreed between the parties and the District Land Registrar and Surveyor but the said exercise to take place and a report to be filed in Court not later than 90 days from the issuance of the order.

iii. The parties in the matter to share the costs of the District Land Registrar and the District Land Surveyor.

iv. Mention date on the 11th of February 2015.

18. Following this Consent, the Registrar and Surveyor had not visited the scene as at the 23rd November 2017, wherein the Court extended time, by which the report was to be filed, by 30 days. The matter was slated for mention on the 7th March 2018 to confirm whether the report had been filed. From the court record, I note that the report dated the 19th December 2017, was filed in court on the 9th January 2018. On the 7th March 2018 when the matter came up for mention, it was confirmed that the report had been filed.

19. On the 30th July 2018, Counsel for the Plaintiff informed the Court that the Land Registrar's report was sufficient and the matter be concluded as boundaries had now been fixed. He prayed that the report by the Land Registrar be adopted as the judgment of the Court. Counsel for the defense on the other hand left the matter to the Court to render its judgment. The report by the Land Registrar having been unchallenged, the same was adopted as the judgment of the Court vide a judgment delivered on the 20th February 2019.

20. I have considered the Application herein as well as the replying affidavit and the oral submission by Counsel for the parties herein.

21. The Applicant has brought the present application pursuant to the provisions of Section 3 and 3A, Order 10 Rule 11, Rule 42 (sic) Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules

22. In the case of **Mumias Out growers Company (1998) Ltd –vs- Mumias Sugar Company Ltd NRB HCCC No. 414 of 2008** the Court held that when considering an application to set aside and/or vary a consent decree, that:

> *"The Applicant has invoked the inherent jurisdiction of this Court. I have always known the law to be that the inherent power of the Court cannot be invoked where the rules have provided for the procedure to be followed.*

23. Bosire J (as he then was) in the case of **Muchiri –vs- Attorney General & 3 others (1991) KLR 516** *stated at page 530 that:-*

> *"Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice."*

24. Also in **Halburys Laws of England 5th edition Vol. II, 2009 paragraph 15, it was observed that:-**

> *"… a claim should be dealt with in accordance with the rules of the Court and not by exercising the Court's inherent jurisdiction……..and has been defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary. Where it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexations or oppression to do justice between the parties and to secure a fair trial between them."*

25. It is trite law that once a consent order or judgment has been entered into by the parties, the procedure available to challenge or set aside or vary the same is by way of an application for review or by a different suit.

26. That notwithstanding, the matter for determination in the circumstance is whether the present consent Judgment which has been adopted as Judgment of the Court can be varied or set aside. *There is now dearth of authorities on the law governing the setting aside of consent Judgments or orders.*

27. In the case of **Brooke Bond Liebig (T) Limited vs Mallya (1975) E.A. 266, Law JA, stated the law at P. 269** in these terms:-

> *The circumstances in which a consent judgment may be interfered with were considered by this Court in **Hirani vs Kassam (1952), 19 EACA 131,** where the following passage from Seton on Judgment and order, 7th edition, Vol. 1 page 125 was approved;*
>
> *'Prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action, and on those claiming under them… and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court…. or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.'*

28. The Court of Appeal in the decision in **Munyiri –vs- Ndungunya (1985) KLR 370 held as follows:**

> *….. will exercise its jurisdiction to review, vary or set aside a consent order if it is shown that such an order has been obtained by fraud or collusion, by agreement contrary to the policy of the Court, or the consent was given without sufficient material fact, or misapprehension or ignorance of material facts or for a reason which would enable a Court to set aside an agreement or by the consent of the parties themselves.*

29. In the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR** the Court of Appeal held that:

> *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.*
>
> *30. I find in present case, that there is nothing to show that Counsel for the Applicant entered into the consent that was adopted by the Court without instructions. He had full instructions to defend the suit which instructions had not been terminated by the time the consent was entered into. I also find that Counsel had full control of the conduct of the trial and apparently the authority to compromise all maters connected with the action.*
>
> *31. Secondly, I find that there were no circumstances shown to exist that suggested that there was fraud or collusion in the consent entered into by the parties herein. Indeed all material facts were known to the parties, who consented to the compromise in terms as clear and unequivocal as to leave no room for any possibility of mistake or misapprehension.*

32. I am therefore not persuaded that valid grounds have been established to warrant setting aside the consent judgment of 20th February 2019. That being the case, prayer 3 of the said application where the Applicant seeks for restraining orders against the Respondents in regard to the suit land, cannot issue as it would be in conflict with the consent judgment of 20th February 2019.

33. In the end, the Application dated 5th July 2019 is herein dismissed with costs to the Respondents.

Dated and delivered at Nyeri this 23rd day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE