



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. 1 OF 2019

EDITH OMAMO AND VICTOR OGUTU OMAMO (Suing as personal

Representatives of the estate of the late SETH NYAWARE OMAMO)...PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

AGRICULTURAL FINANCE CORPORATION (AFC).....2ND RESPONDENT

KITALE ELGON CO-OPERATIVE UNION LIMITED.....3RD RESPONDENT

MICHAEL F.C. KITIYO

JOHN K. CHEPSIGOR (BOTH T/A PKURES FARM)...4TH & 5TH RESPONDENT

RULING

IN SETON ON JUDGMENTS AND ORDERS 7TH EDITION VOL 1 PAGE 124, it is stated thus:-

“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 the 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.”

That is the route that the Courts in this country have followed. See **KENYA COMMERCIAL BANK LTD V SPECIALIZED ENGINEERING COMPANY LTD 1982 KLR 485, HIRANI V KASSAM 1952 19 EACA 31 and BROOKE BOND LIEBIG LTD V MALLYA 1975 EA 266** among others.

It is common ground that the subject of this petition is land parcel NO L.R 3024/6 situated in Kitale within Trans – Nzoia County. The petition was originally filed at the **NAIROBI HIGH COURT CONSTITUTIONAL AND HUMAN RIGHTS DIVISION** as Petition NO. **423 OF 2018**. On 30th January 2019 **HON. E.C MWITA J** made the following consent order:-

“By consent of all counsel in this matter, this Petition be and is hereby transferred to the ELC BUNGOMA for hearing and final determination.”

The record shows that the following counsel were present and even signed the said consent:-

- 1. Mr. Mutibwa for the Petitioner.**
- 2. Miss Mwangi for Mr. Kamanda for the 1st Respondent.**
- 3. Mr. Ingosi for the 4th and 5th Respondents.**
- 4. Mr. Rashid for the 2nd Respondent.**

The 3rd Respondent was not present.

When the matter was placed before me on 15th July 2019, **MS NGANIA** who is now on record for the 4th and 5th Respondents informed the Court that she did not know why this Petition had been transferred to this Court yet the subject matter is in Kitale. She added that the consent order referred to above was not binding on this Court. **MR. WAMALWA** who was holding brief for **MR. SIMIYU** for the Petitioner informed the Court that the Petition had been referred to this Court due to security concerns raised by the Petitioners.

I therefore directed that since the other counsel were not present, the issue be addressed on 3rd October 2019 in the presence of all counsel who should be served.

On 3rd October 2019 only **MR SIMIYU** for the Petitioner and **MR MURUNGA** holding brief for **MS NGANIA** for the 4th and 5th Respondents attended Court. **MR SIMIYU** informed the Court that this Petition was transferred to this Court because the Petitioners and their family have been threatened with physical violence and some have even had to relocate from Kitale and all this is because of the land in dispute.

MR MURUNGA's response was that there is no evidence to show that the 4th and 5th Respondents have been charged in Court for any violent conduct neither is there any evidence that the Petitioners have a problem with this petition being heard at the Environment and Land Court at Kitale. And with regard to the consent order, his instructions are that there was a mistake since the 4th and 5th Respondents were being represented at that time by another advocate. He urged the Court to have the Petition heard in Kitale where the suit property is situated.

When the parties recorded the consent before **HON. E. C. MWITA J** on 30th January 2019 transferring this Petition to this Court, no reasons were given or if there were any, they were perhaps alluded to off the record. **MR SIMIYU** has now told the Court that it was due to security concerns raised by the Petitioners. **MR WAMALWA** informed the Court as much on 15th July 2019.

Whatever reasons informed the consent order dated 30th January 2019 directing that the Petition be heard in this Court, no reasons have been advanced by the 4th and 5th Respondents, who appear to be the only parties seeking to review that order, to warrant setting it aside. **MR MURUNGA** holding brief for **MS NGANIA** has informed the Court that there was a mistake in recording the said consent. The Court has not been told what mistake was made by the counsel who had instructions in the matter on behalf of the 4th and 5th Respondents. No evidence has been placed before me to show that the said consent was recorded fraudulently, in collusion with the other parties, on misapprehension or ignorance of material facts or that it is contrary to any law. There is no doubt that **MR INGOSI** who was then seized of this matter on behalf of the 4th and 5th Respondents had the authority to record the said consent and although **MR MURUNGA** has submitted that there was a mistake, no evidence has been placed before me to that effect. **MR INGOSI** as a duly instructed Advocate had authority to record the said consent and there is nothing to suggest that he did not act bonafide or acted contrary to any express negative directions. There is nothing to suggest that **MR INGOSI**'s instructions had been terminated by the time the consent was recorded. He had full control over the Petition including compromising it. And if, as I have now heard, the purpose for the transfer of this Petition from Kitale to this Court is because the Petitioners have a genuine fear over their security in Kitale, that is a valid reason for the orders dated 30th January 2019.

It is therefore directed that this Petition be heard and determined at this Court as per the parties' own consent recorded herein on 30th January 2019.

Any party who may not have already filed their response to the Petition is hereby directed to do so within 14 days from to-day so that further orders can be Mention shall be on 12th November 2019 for further directions.

It is so ordered.

Boaz N. Olao.

J U D G E

9th October 2019.

Ruling dated, delivered and signed in Open Court this 9th day of October 2019 at Bungoma.

Mr Murunga for Ms Ngania for 4th and 5th Respondent present

No appearance by the other parties

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

9th October 2019.