



**REPUBLIC OF KENYA**

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

**PETITION NO. 9B OF 2012**

ANDREW KALUMA.....1<sup>ST</sup> PETITIONER

NG'OLUA MWAINA.....2<sup>ND</sup> PETITIONER

TOM TUARUCHIU.....3<sup>RD</sup> PETITIONER

SAMMY MUTIA.....4<sup>TH</sup> PETITIONER

**VERSUS**

**THE DISTRICT LAND ADJ. & SETTLEMENT**

**OFFICER, ISEMBE SOUTH DISTRICT.....1<sup>ST</sup> RESPONDENT**

**PS MINISTRY OF LANDS.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**RIKIAU ADJUDICATION SECTION THRO IT'S OFFICIAL**

**ISIAH NTOMBURAM KAIRIAMA (CHAIRMAN)**

**ANDREW NKAYURA THAIMUTA (COMMITTEE MEMBER)**

**TIMOTHY MBAAABU GICHUNE (COMMITTEE MEMBER)**

**M'MWIRICHIA M'KAUMBUTHU (MEMBER)**

**THANGICHIA M'MUNYA (MEMBER).....INTERESTED PARTIES**

**AND**

**NTARANGUI ISAAC.....1<sup>ST</sup> APPLICANT**

**BRUNO LINTURA THITURA.....2<sup>ND</sup> APPLICANT**

**FRANCIS THURANIRA.....3<sup>RD</sup> APPLICANT**

**BENJAMIN KIMATHI MARANTINE.....4<sup>TH</sup> APPLICANT**

**RULING**

1. A consent Judgment was hereby delivered on **20.9.2018**, whereby, **the suit was marked as settled**. Thereafter an application dated 15/3/2019 was filed by five intended interested parties. The application is brought pursuant to Rules 7, 19 and 23 of the constitution of Kenya

(protection of rights and fundamental freedoms) practice and procedure rules and any other enabling provisions of the law, where the applicants are seeking for orders that the consent orders issued in this matter on 19/9/2018 be set aside, the matter herein be heard in the normal manner and they be enjoined as interested parties.

2. The application is based on the grounds on the face of it and in the supporting and supplementary affidavits of Ntarangwi Isaac who averred that he has the authority of his co-applicants to swear the said affidavits. He stated that the applicants are the residents of Antuanduru, Karama and Mula locations which are within Karama Division in Tigania East District. They and the residents of Karama Division are directly affected by Rikiau Adjudication Section Igembe South Districts which spills over, encroaches and crosses into Karama Division in Tigania East District. So far there has been no proper identification of the land adjudication areas along the Igembe/Tigania East Districts. The applicants contend that the issue of encroachment on their land has not been resolved, that the consent orders lacked public participation of the residents, and that the processes leading up to the consent orders issued on 19/9/2018 was of utmost secrecy.

3. Further the Adjudication Committee formed pursuant to the said consent order is skewed in favor of Igembe to the detriment of Tigania East District.

4. The petitioners opposed the application via the replying affidavit of Andrew Kaluma who swore the affidavit on behalf of himself and the other petitioners. He argued that should the court set aside the said consent order, the petitioners would stand to suffer prejudice and irreparable damage as the consent secured the rights of all the parties to the suit as they are not only acting for themselves, but also for the interests of other residents of Tigania East District and communities affected by Rikiau Adjudication Section. The applicants herein are among the people whose interest are represented by the petitioners.

5. In addition, the applicants have failed to show that the consent order was obtained by fraud, that applicants do not have authority of the residents of Tigania East District and have not demonstrated sufficient cause or grounds which the court can grant the orders sought.

6. The interested parties who came on board vide the application dated 11.11.2016 also opposed the present application via the replying affidavit of their advocate, one Mutegei Mugambi dated 23/4/2019. He stated that he participated in the negotiations which led to the court settlement and the term of reference was that the adjudication process would be carried out involving all the stake holders. He further stated that the court is now *Functus Officio* and the applicants have not shown any prejudice that they will suffer in respect of their land parcels.

7. On 17.7.2019, Mr. Kiongo, counsel for the respondents stated that they will not oppose the application.

8. I have perused through the application, affidavits submissions and the record in its entirety and the issue to be determined is ***“whether to set aside the Consent Judgment dated 20/9/2018 and proceed to hear the matter, and whether the applicants should be enjoined in this suit”***.

9. The applicant/intended interested parties in their submissions argued that the petitioners filed this public interest matter but failed to act in good faith as they entered into the consent secretly and without the knowledge and participation of the public. They contend that they have an identifiable stake in the matter or legal interest in the matter and they stand to be affected by the adjudication process. In support of their arguments, the applicants relied on the cases of **Jennifer Shamalla vs. Law Society of Kenya & 15 others (2017) eKLR, Kenya Medical Laboratory Technicians and Technologists board & 6 others vs. Attorney General & 4 Others (2017) eKLR.**

10. For the petitioners, it was submitted that the applicants have not disclosed how the consent was obtained through fraud and additionally they are not parties to the suit which was settled via a consent. Further, it is submitted that the applicants have not shown what prejudice they stand to suffer if the consent order is implemented. In support of their arguments, the petitioners relied on the case of **Edward Acholla v. Sogea Satom Kenya Branch & 2 others Cause No. 1518 of 2013; [2014] eKLR,** where the Industrial Court held that:

***“Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out.”***

11. Other cases cited by the petitioners include; **Flora N. Wasike vs. Destimo Wamboko (1988) eKLR, Brian Muchiri Waihenya vs. Jubilee Hauliers ltd & Another; Geminia Insurance Co. Ltd (Interested party) 2018 eKLR.**

12. For the interested party, it was submitted that the adjudication is a process of ascertaining ownership of rights in land before registration. The process has been done in adherence to the court order as it was clear it was to be done within 60 days (*this must be an error as the period was to last 90 days*) and the process is complete therefore the applicant ought to show how they have been prejudiced by the completed process. It is further submitted that the applicants are five in number and have not shown any authority in representing the rest of the Tigania people and that they have not demonstrated how they stand to be prejudiced by the adjudication process. The interested parties also stated that this court is *functus officio*, having fulfilled the task it undertook in having the matter finalized. In support of their arguments, the interested parties relied on the case of; **Samuel Mbugua Ikumbu vs. Brclays bank of Kenya Limited (2015) eKLR Nairobi Civil application no.11 of 2015.**

#### **Determination**

13. As far as the consent Judgment is concerned, I make reference to the case of **Flora Wasike vs Destimo Wamboko 1988 eKLR** where it was stated that;

***“Prima facie, any order made in the presence 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 misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement,"***

14. The applicants have not shown how the consent was done secretly or the nature and extent of the alleged fraud. As rightly captured in the case of **Flora N. Wasike vs Destimo Wamboko (1988) eKLR**, a consent order judgement can only be set aside on the grounds of fraud, mistake or misrepresentation. It is rather unfortunate that the respondent fully participated in the consent but are now supporting the setting aside of the same without giving any scintilla of explanation. The respondents are at the center of shepherding the adjudication process and therefore bear a great responsibility of shedding light on why they would want the consent to be set aside. They have abandoned this responsibility by staying mute.

15. My conclusion on the issue of the consent is that no plausible reasons have been advanced to have the consent set aside.

16. On whether the applicants should be enjoined in this suit, I have first interrogated the basis upon which the application is brought forth. The applicants have claimed that they have an identifiable stake in the matter since they are residents of Karama division. However, as rightly submitted by the petitioners and the interested parties, the applicants have no authority from the other residents. I note that even the petitioners too did not file the suit as a representative one. However, that is now water under the bridge as their case was finalized. A question which begs an answer is *"if this court was to allow the present application, what would prevent other residents in various groupings from also seeking to be enjoined in this suit?"*

17. In the case of **Leboo & 2 others vs Director of Kenya Forest services & another ELC No. 273/12 Eldoret**, the court held that; ***"There had to be a clear demonstration that the suit affected the person directly. If the test was too liberal, then the court's would be inundated by numerous applications for joinder...."***

***An applicant had to demonstrate a direct interest in the subject matter or show that the question in the suit could not be determined adequately without his input, even where he was not strictly plaintiff or defendant...***

***Since there was no defined rules as to how involved in the litigation an interested party could be, it fell upon the discretion of the court to define the parameters of involvement of the interested party. This depended on the circumstances of each case".***

18. The circumstances of this case are that the matter was marked as finalized more than a year ago. In the consent judgment dated 20.9.2018, it was stated that;

***"The joint committee shall endeavor to conclude the adjudication exercise of Riakau adjudication scheme within 90 days from the date of the consent".*** It can therefore be presumed that the exercise did kick off and was to be completed three months thereafter that is by December of 2018.

19. It was incumbent upon the applicants to shed light on how far the process has gone. What is the stage of the adjudication process and how have they been affected. On this point again I would have expected the respondents to shed light on the nature and extent of activities undertaken to comply with the consent order. After all, the 1<sup>st</sup> respondent is the entity directly involved in the adjudication process.

20. I must also add that adjudication process is a very important exercise. I do not tire in emphasizing this point. In the case of **Arithi Self-help grazing group through the chairman, secretary and treasurer vs the land adjudication officer Imenti North/South/Meru central & Buuri and the Attorney General Meru ELC No. 28 of 2015**, I made reference to an earlier case **Meru ELC petition No. 7/17 County Government of Meru vs District Land Adjudication and Settlement officer Tigania East Sub-County & others** where I quoted an article ***"Land Tenure Reform and changes in land use by Thomas Smucker"***, where it was stated as follows;

***"The objective of the individualization of tenure is to increase tenure security through the state-sponsored adjudication of rights, thereby creating incentives for improved land management and increased productivity... the current process of reform entails the adjudication of land rights to individuals .... And the registration and titling of adjudicated parcels. The implications of these reforms for individual household and for changes in land use systems continue to be of central importance to rural development in Kenya".*** Regarding this article, I had commented that; ***"this write up aptly captures the impact of the adjudication process. The individualization of land tenure is something held dear by Kenyans, where the ultimate goal is for one to hold on to a document known as a title deed. This certainly brings about social economic dynamics in terms of increased security, easier and greater land productivity, certainty in inheritance rights and it generally reduces land conflicts".***

21. I will say no more save to conclude that the application dated 15.3.2019 is unmeritorious. The same is hereby dismissed with costs to petitioners and the interested parties.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Thangicia holding brief for Kariuki for petitioners

Kirimi for interested parties

Maranya holding brief for Kimathi E for intended interested parties/applicants

2<sup>nd</sup> petitioner

2<sup>nd</sup> applicant/intended interested party

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**