



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT BUSIA

ELC CIVIL CASE NO 34 OF 2007 (O.S)

FRANCIS MAKIO OBALE PLAINTIFF/RESPONDENT

VERSUS

DISMAS OMUKUVBI ONG'ANGI DEFENDANT/APPLICANT

R U L I N G

1. The defendant has moved the court vide his notice of motion application dated 27th June 2019 seeking the following orders:

1) Spent

2) That this Honourable Court be pleased to review, vary and/or set aside the decree issued herein on 25th July 2012.

3) THAT this Honourable Court be pleased to issue another decree and/or Order as per terms of the Judgment of this Honourable Court delivered on 29th May 2012.

4) THAT costs of this application be provided.

2. The application is premised on the grounds that:

(a) That there is an error apparent on record.

(b) The decree herein was incorrectly issued.

(c) That the decree herein cannot be enforced.

3. The application is further supported by the applicant's affidavit dated 27/6/2019. The applicant deposed that the decree herein does not conform with the terms of the judgment delivered. That the decree is oppressive to him as it does not meet the requirements of the judgment and therefore should be reviewed and or varied. He urged that the application is brought in good faith and should be granted.

4. The application is opposed by the grounds dated 14th October 2019 which pleaded thus:

(a) The application lacks merits.

(b) That the decree was properly drawn in accordance with the consent order which had adjusted the judgment accordingly.

(c) That the Applicant is guilty of delay.

5. The parties submitted orally in support of and against the motion. The decree complained of was annexed as "DOO 2". The initial judgment was read on 29th May 2012 which judgment awarded the Plaintiff/Respondent 4 acres to be curved out of land parcel Bukhayo/Kisoko/918 pursuant to the agreement of sale that was exhibited before the trial court. The parties' advocates subsequently entered into a consent on 25th July 2012 by which consent the Plaintiff/Applicant was now awarded 2.30 hectares of the suit land.

6. The defendant is unhappy with the terms of this consent stating that he never gave his advocate such instructions. He is thus asking the court to review and or set aside the said consent and reinstate the judgement of 29/5/2012. That he only became aware of the consent when the auctioneers went to attach his cows.

7. In the Court record is a letter dated 31/5/2012 filed on 5th June 2012 which was executed by the advocates on record for the parties. The consent letter stated thus:

Kindly record the following consent order;

“By consent of advocates for the plaintiff/applicant and advocates for the defendant/respondent the judgement entered in this suit is hereby set aside and is substituted with judgement in favour of the plaintiff against the defendant in the following terms;

1. THAT the plaintiff be and is hereby declared to have acquired ownership and title to a portion of land measuring 2.30Hectares by virtue of adverse possession to be excised from land parcel No. BUKHAYO/KISOKO/918 as per the mutation form approved by the District Surveyor – Busia (K).

2. THAT the defendant is hereby ordered to sign all the necessary documents for subdivision and transfer of 2.30Hectares from parcel No. BUKHAYO/KISOKO/918 to the plaintiff within 30 days from the date hereof and in default the Deputy Registrar be empowered to sign the said documents on the defendant’s behalf without any further application.

3. THAT the defendant to pay costs of this suit to the plaintiff.

8. A consent order is held as equivalent to a contract. A consent judgment is binding on parties who execute it unless it is proved that the consent was obtained through fraud, misrepresentation or mistake as was held in the Case of *Flora Wasike Vs Destimo Wamboko (1982 – 88) 1 KAR 625*. The consent of 31/5/2012 set aside the judgment of the court and replaced it with a new consent order. The impugned consent was executed after parties had given evidence and the court rendered itself.

9. The consent letter does not make reference to any application filed by the plaintiff seeking to set aside the judgment of 29th May 2012. The defendant said he never gave his advocate then on record the instructions to enter into such a consent. The plaintiff’s advocate submitted that the defendant was duly represented thus his complaints against the consent cannot hold. There is no affidavit sworn by Mr Ouma – Okutta & Co. Associates to confirm or deny that he indeed had instructions to enter into such a consent.

10. The Court shall be guided by the record and the facts present for and against the application. The record shows that the defendant denied the plaintiff’s claim for 2.30ha as was pleaded in the originating summons and the court having rendered himself that the plaintiff had only proved that he had acquired 4 acres of the suit property as contained in the sale agreement executed between the two parties. For the judgment delivered to be set aside, there ought to have been an appeal and or an application for setting aside and or review of the said judgment. At least a basis should have been laid in the letter of consent why the parties decided to vary the original decree.

11. The judgment was delivered on 29th May 2012 while the letter of consent was executed on 31/5/2012; two days after the reading of the judgment. From the court record of 29/5/2012, there is no evidence that the parties were personally present when the judgement was read. The defendant’s absence in my view shifts the burden of proof on the plaintiff to show that indeed the defendant’s advocate had instruction to sign the consent which the plaintiff could have done by asking Mr. Okuta to swear an affidavit to that effect. In the absence of that evidence on the part of the Respondent, it is my opinion and I so hold that the consent was obtained through misrepresentation that Okuta-Ouma had authority to award the plaintiff more land.

12. The plaintiff pleaded that the application was brought after undue delay. The defendant has explained the reason for the delay. First that he was never served with the decree and he only discovered when the auctioneers came to collect his cows which prompted him to go to the lands office to check on the status of his land. The impugned decree itself did not provide for a show cause before the deputy registrar could execute the documents on behalf of the defendant and in favour of the plaintiff. The plaintiff also did not file a replying affidavit to this application to indicate that the defendant/applicant was served with the decree but defaulted in complying with its terms.

13. In view of the glaring omissions, I find that there is merit in the application. The decree adopted on 8th June 2012 and issued on 25/7/2012 pursuant to the consent letter dated 31/5/2012 be and is hereby set aside together with any and or all entries done at the lands office in execution of the same. Instead the judgment of the Court read on 29/5/2012 is hereby reinstated as the judgment and decree of this court. Each party to bear their respective costs of this application.

Dated, signed and delivered at BUSIA this 14th day of November 2019.

A. OMOLLO

JUDGE