

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 51 OF 2012

EMILY MISOI.....PLAINTIFF

VERSUS

THE DIRECTOR, SAMBUL FARM, FREDRICK TABOI.....1ST DEFENDANT

KIPKETER ARAP SONGOL.....2ND DEFENDANT

THE DISTRICT SURVEYOR (UASIN GISHU COUNTY).....3RD DEFENDANT

PHILIP MWEI METTO.....4TH DEFENDANT

FLORENTINA MWEL.....5TH DEFENDANT

RULING

Kipketer Arap Songol (*hereinafter referred to as the 2nd defendant*) has filed an application dated 16.10.2017 seeking prayers that the order of 19.7.2016 to have the whole of Sambul farm surveyed be set aside. The application is based on grounds that on 19th July 2016, counsels representing the various parties in the suit recorded a “consent” order to have the whole of Sambul Farm surveyed and a report filed in court within 60 days. The said “consent” order was improper since neither the 2nd defendant nor his counsel agreed to it nor was involved and that the order is therefore a nullity since a consent requires all parties to it to agree. Further, that the parties present did not disclose that a survey had already been carried out and a report filed on 11th February, 2016 by the Uasin Gishu County Land Surveyor. Lastly, the 2nd defendant, not being opposed to the Survey Report of 11th February, 2016 should not be punished by way of costs to have a 2nd report done.

The application is supported by the affidavit of Omollo H. Aseso wherein he states that he is in conduct of this matter on behalf of the 2nd defendant/applicant and conversant with the facts surrounding this case hence competent to swear this affidavit and that he is aware that pursuant to court directions, Uasin Gishu County Lands Surveyor prepared a survey report on 10th February, 2016 which was filed on 11th February, 2016 and that the said report is fairly comprehensive. That he is aware that on or about 19th July, 2016, a further order was recorded by consent of all parties save the 2nd defendant. Mr Aseso further states that he is aware that the counsel for the 2nd defendant was not in court and that he was not represented on the material day the said consent was recorded. The recording of such a consent without all parties is a clear error apparent on face of the record. That further, the parties present did not disclose to court the existence of the surveyor report of 10th February, 2016.

Emily Misoi (*hereinafter referred to as the plaintiff*) filed a replying affidavit stating that various consents have been entered in this matter starting with the one entered on 28th October 2015 where all advocates were present followed with the one entered on 7th December 2016 between all parties and then the consent entered on 19th July 2016 between all the parties and confirmed on 19th December 2016 and 1st February 2017. She states that the consents have been entered into freely and without duress, fraud or coercion. The plaintiff further states that the consent order was properly obtained and that can only be set aside by another consent order. That the same can only be set aside if it is established that it was obtained fraudulently, through coercion or by misrepresentation of facts.

The 4th and 5th defendants, through Manani, Lilan & Company Advocates filed grounds whose import is that the application is devoid of merit as the consent was properly recorded. That the consent forms a contract amongst the parties and can only be set aside on grounds that will vitiate a contract.

I have considered the application, supporting affidavit, replying affidavit, grounds of opposition and rival submissions and do find that the consent order entered on 19.7.2016 was by the free will of all parties and their counsel. There is no evidence of fraud, coercion or misrepresentation of facts. When the consent was entered, Mr. Mathai was representing the 2nd defendant and freely consented to the order being made and therefore it is not right for Mr. Aseso to disown Mr. Maathai who represented him on the date of the consent. Moreover, neither the 2nd respondent nor Mr Maathai have deponed to the facts as deponed to by Mr Aseso despite the former being the instructing client and the latter being the advocate who entered into the consent.

Hancox JA (as he then was) in the *locus classicus* case of *Flora Wasike Vs Destimo Wamboko (1982-1988) 1KAR 625*, said in his judgment at page 626 that:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

The applicant has simply not met the test for setting aside a consent order due to the fact that he has not given any sufficient material or valid reason for setting aside the consent order of 19.7.2016 to have the whole of Sambul farm surveyed, in fact, Mr. Aseo is misleading the court that counsel for 2nd defendant was not in court when the record is clear that Mr. Mathai was in court. The applicant has not established that he entered the consent under any form of duress or pressure. I do find that the application is frivolous and is hereby dismissed with costs to the respondents.

Dated and delivered at Eldoret this 23rd Day of February, 2018.

A. OMBWAYO

JUDGE