



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 59 OF 2014

NOO.....PLAINTIFF

VERSUS

FMO.....1ST DEFENDANT

BENARD OSORE.....2ND DEFENDANT

BENJAMIN OSENGO.....3RD DEFENDANT

PHILIP OPIYO.....4TH DEFENDANT

AND

JOHN THUO GAKURU.....INTERESTED PARTY

RULING

1. By an application dated 11/12/2017 the defendants/applicants seek orders of injunction to restrain the plaintiff from disposing of parcel of land title No. **IR** [Particulars Withheld] being Land Reference No. [Particulars Withheld] or any resultant subdivision therefrom pending the hearing and determination of this suit.
2. The grounds for the application are that the 1st defendant is the plaintiff's wife; that the parcel of land was jointly acquired by the couple during the subsistence of their marriage; that the 1st defendant has beneficial interest in it; that the defendants would suffer loss in that event and the 1st defendant would be deprived of her life investment thereon, yet the marriage between the two has not been dissolved. The application is supported by the affidavit of the 1st applicant dated 11/12/2017.
3. The plaintiff/respondent filed grounds of opposition dated 12/1/2018 and a replying affidavit sworn by the plaintiff on 22/1/2018. The gist of that affidavit is that the land was never jointly acquired with the 1st defendant, who he describes as his third wife. He states they had a matrimonial home in Cherangany before the 1st defendant moved to the suit land.
4. The plaintiff also recalls a consent filed in *Kitale ELC Case No. 31 of 2014* allowing for subdivision of the land and avers that the said consent extinguished any claims of an equal share, hence the counterclaim in this suit was rendered of little probability of success. This is the consent that the plaintiff avers has settled the issues involved in this suit. The consent, the plaintiff states, was binding on both sides in that suit and it also resolves this suit in that the parties' respective rights are addressed by it.
5. The orders sought by the plaintiff in the main suit herein are of injunctive nature; to restrain the defendants by confining them in their respective portions which they have been allocated by the plaintiff. This court issued orders of temporary injunction against the defendants in this suit on 3/4/2014.
6. The defendant filed a defence and counterclaim on 29/5/2014. In the defence the 1st defendant avers that she has rights over the suit land as the same is matrimonial property. She claims to have been involved in the acquisition of the suit land in 1975 but the same was registered in the plaintiff's name in 1976. She however admits that the plaintiff had two wives before her marriage to him and one wife thereafter. She states that the first two wives never lived on the land prior to their demise and the fourth wife came to reside thereon in the year 2006.
7. Regarding the consent in *Kitale HCCC No. 31 of 2009*, she states that the allocation or subdivision of the land does not conform to the consent. She avers that by the consent she was to be allocated "seven (7) acres" and her share as a wife and not only the seven acres. The defendant further avers that she wants her home on the land which she refers to as her "matrimonial home", to form part of the land to be allocated to her.

8. In the counterclaim, the defendant avers that the suit land was acquired during the subsistence of her marriage to the plaintiff and she materially and financially contributed to its acquisition hence it is matrimonial property. She argues that the suit land should be shared equally between her and the plaintiff only and the other wives have no interest therein. Singling out the 4th wife, she states expressly that the latter has not contributed toward the improvement of the land and she has not acquired any beneficial interest in the land to entitle her to a share thereof. The 1st defendant will have nothing but half a share in the property and that is her prayer in the counterclaim.

9. It is instantly clear that the fate of the defendants defence and counterclaim in this matter lies in the hands of the consent entered into by the parties on 25/11/2013 which consent the defendants herein do not dispute. The terms of that consent were as follows:-

(1) “That by consent the plaintiff’s suit is hereby marked as withdrawn with no orders as to costs.

(2) That the plaintiff do have land known as LR 13623 surveyed and subdivided amongst his children and wives.

(3) That the plaintiff do allocate seven (7) acres forming part of the land to the 1st defendant F M O.

(4) The parties to be allocated the land to enjoy it without any interference”.

10. The said consent differs drastically from the contents of the defence and counterclaim filed by the 1st defendant in this matter. Nowhere in the said consent is a provision for half of the land to the 1st defendant to be found. The land subject matter of the suit in which that consent was recorded is the same land in this suit.

11. Even without delving into subsequent proceedings that followed the said consent, it is quite plain to see that the provision stipulated by that consent as reserved for the 1st defendant is seven acres and no more. Of course it would have made more sense to have such a consent delve deeper into the issue of which party should take what portion on the ground, but that discretion regarding the subdivision of the land appears to have been left the terms of by that consent to the plaintiff, who subsequently obtained subdivision of the land and allocated the various houses in his large family such parcels as he deemed fit.

12. That consent referred to above was entered into one year and two months after the Court of Appeal in *Eldoret Civil Appeal No. 125 of 2009* ruled as follows in an appeal against the injunction obtained by the plaintiff:-

“On the issue of the interlocutory injunction I agree with Mr. Wanjala that the same was improper in so far as it restrained the appellants from using the suit land to grow subsistence crops. The appellants being the wife and children of the respondent are in the position of licencees and are therefore entitled to use the suit land for their own subsistence. They have, however, no right to lease or in any other way dispose of the suit land without the express consent of the respondent”.

13. The Court of Appeal then instructively set aside the injunction and substituted therefore an order permitting the appellants to continue residing and using the suit land only for growing their subsistence crops until the suit in the High Court is determined. That suit was determined by the consent of 25/11/2013.

14. The matters that the 1st defendant raises in the defence and counterclaim in this suit should have been raised in that suit as it was an earlier suit and it was the first of these two suits in which the rights of the parties regarding the suit land were at issue.

15. In that suit the plaintiff had sought injunctive orders to restrain the defendants herein from interfering with his utilization of the suit land. With the settlement of that suit through the consent, the question arises as to whether those issues became *res judicata* and cannot be tried in this suit notwithstanding that both suits were filed by the same plaintiff.

16. Further, reverting back to the issue of the consent in the earlier case, the law relating to consents of the parties is now well settled. In the case of *Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR [Civil Appeal No. 293 Of 2014]* the court stated as follows:

“29. The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

17. Later on in the judgement the court stated as follows regarding the case before it:

“36. The appellant did not place any evidence to show illegality in the consent giving rise to the judgment, and the allegations of collusion and connivance had not even a scintilla of evidence to support them. They remained mere allegations without more and coming as they did after the appellant’s decision to challenge the consent, they were hardly credible.

“37. The upshot of what we have stated above is that the appeal is bereft of merit in that the appellant has failed to show that the learned Judge of the Industrial Court (Linnet Ndolo, J) erred in her decision of 18th March 2013 in which she refused to review the consent judgment entered on 20th November 2012 in Industrial Court Case No.1093 of 2012. In the result, we dismiss the appeal with costs.”

18. Evidently, the torrential floods from the final consent of the parties in the case *Kitale HCCC No. 31 of 2009* scoured bare every hillside, valley and plain of this litigation, the entire terrain, and the defendants are now bereft of any cogent argument that they could prop up to support their application dated **11/12/2017**.

19. As long as the subject matter of the suit herein and *Kitale HCCC No. 31 of 2009* are the same, and the prayers sought are similar in nature, and that consent in the earlier suit still stands, the orders sought by the defendants herein cannot be granted.

20. Those are the reasons why I find the defendants' application dated 11/12/2017 to be devoid of any merit. The application is for dismissal. I therefore dismiss the same with costs to the plaintiff.

Dated, signed and delivered at Kitale on this 26th day of April, 2018.

MWANGI NJOROGI

JUDGE

26/4/2018

Coram:

Before: Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Ingosi for Defendant

Atudo for the plaintiff (absent)

COURT

Ruling read in open court.

MWANGI NJOROGI

JUDGE

26/4/2018