REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 26 OF 2013

LAZARUS KIRECH...PLAINTIFF/APPLICANT

VERSUS

KISORIO ARAP BARNO..........................DEFENDANT/RESPONDENT

RULING

This matter came up before me on the 18.3.2016 in the presence of Mr. Birech for Assururiet Farm, Miss Rotich for the plaintiff, Mr. Mbugua for the defendant and Mr. Momanyi for the Interested Party, John Kurgat. It was agreed by consent that the report of the committee of Assururiet farm and the list attached thereto filed on 2.3.2016 be and was adopted as a judgment of the court. The committee was to proceed to have the land reference number 11218/1 subdivided and titles processed into names of the respective shareholders and beneficiaries. There was to be liberty to apply and that the matter was to be mentioned on 15.6.2016 to ascertain the progress in its finalization.

The plaintiff now seeks the court to review, vary, set aside and or discharge the orders issued on the 18.3.2016 and 6.3.2017 on the survey and filing of the surveyor’s report regarding L. R. 11218/1 otherwise known as Assururiet farm and the suit proceed to full trial. The application is based on grounds that the plaintiff has a fundamental right to be heard in this suit and that several efforts have been made to determine the matter. The gist of the grounds is that the court should hear the plaintiff to and determine the matter. The supporting affidavit reiterates the grounds relied upon, thus, the plaintiff’s right to be heard.

In the replying affidavit filed by Kisorio Arap Barno, it is stated that review or variation is not available as there is a process of appeal commenced by the Interested Parties and therefore, the application is an abuse of court process. Moreover, that the court should do justice and ensure that the old matter comes to a conclusion. John Kurgat on behalf of the Intended parties states that the matter was determined by consent order of all parties and therefore, the orders ought to remain. That there is no legal basis for seeking review, variation and/or setting aside the consent orders. Stopping the survey exercise will occasion great injustice to the beneficiaries of Assururiet farm. That by entering into consent, the party decided on how he was to be afforded a hearing. The instant application has been made after the lapse of more than one year after the consent and therefore, there is an inordinate delay and that there is nothing new to warrant a review or variation.

The Assururiet farm through Mr. Birech & Company do state in grounds of opposition that the application must fail due to the fact that there is no discovery of any new and important matter or evidence which were not there when the consent judgment was made. Moreover, that there is no mistake or error apparent on the face of record that entitles the court to review its orders and no sufficient reason has been given for review. Furthermore, that there is no evidence of fraud or any other principles for cancellation of a contract. That all applicants and their counsel were in court when the consent order was made.

The plaintiff submits that as is evident and abundantly clear from the grounds on the face of the application and in the affidavit of Lazarus Kerich sworn in support of the application it was crystal clear quite beyond a peradventure that the suit before the Honourable court was a land dispute litigation pitting Lazarus Kerich against one Kisorio Arap Barno. In the plaintiff’s suit, he has set out the narrative under which he lost his parcel of land to Kisorio Arap Barno and the circumstances under which the defendant forcefully entered in to his land and erected a house thereon. These among other issues are the germane in this Litigation and in their view the pivotal issues that must come for consideration in a full trial of land case. The other ground is whether the suit property should be sub-divided in accordance to the shares of the twenty (20) partners as per the original agreement. Indeed, in the orders of S. Munyao J. of the 21st day of October, 2014, the Judge had made the following orders;

> ***“……in my view, the names and shares of the original partners first needs to be determined. Thereafter the claims of the other persons, who are presumably purchasers can be determined. I therefore direct the officials of Assururiet Farm in consultation with all interested persons;***
>
> ***1) Determine the names and shares of the original partners.***
>
> ***2) Determine the names of other claimants and determine from which original partner they claim and how many acres they***

claim.

3) Ascertain from the original partners or their representatives whether these claims are agreed or disputed.

4) File a report in court within 45 days.

The matter will now be mentioned on 11.12.2014 for further directions.

S. MUNYAO

JUDGE

21.10.2014"

According to the plaintiff, the point to be gleaned from the foregoing is that without doubt there was in place a land dispute and the only way to effectually and completely determine and rest all the issues was to do a hearing of the case and all these risks being sidestepped from being heard if the issues herein are not heard and a hearing is a hearing of the main case. In their view, the plaintiff in the Litigation Lazarus Kerich risks being condemned unheard in a Litigation that he had commenced himself to seek a remedy in law and in a court of justice. The upshot is that no amount of Survey works however well intended will resolve a land dispute of the nature herein. At any rate whether or not Kisorio Arap Barno had purchased land or was a shareholder or whether he owns a piece of land at Assururiet Farm are matters of evidence which can only come out in the open court and not through a survey.

There is nothing to fetter the judge discretion in that regard once it is shown that there is a reason or reasons which would enable the court to set aside an agreement and to afford a Litigant an opportunity to be heard. Access to justice was the most guarded fundamental right and anyone seeking a remedy should be able to knock on the doors of justice and be heard and in this case in a substantive way so that this prolonged and **"unhappy Litigation"** can come to an end.

The point they are making is that it was contrary to the policy of the court to have two orders in place in the same matter at variance. One would have expected that the subsequent order should have modified, should have set aside or vary the earlier order but it did not. The consequence is that the orders of S. Munayo J. were on record and had not been vacated, set aside or discharged and therefore the orders therein were obtained by an agreement contrary to the policy of the court and ought to be set aside. The parties should not be seen to be approbating and reprobating at the same time today to say we will comply with orders of S. Munyao J. that is to approbate and tomorrow to say we shall not, to say ignore those orders and that is to reprobate. The law frowns upon the same.

He refers to the case of Makula ***International Ltd Vs His Eminence Cardinal Nsubuga & Another [1982]*** **HCB 11**, the Uganda Court of Appeal held that:

> ***a court of law cannot sanction what is illegal and illegality once brought to the attention of the Court, overrides all questions of pleadings including admissions made thereon***

In law, a consent can be challenged in a review within the suit itself and it does not matter that the judgement was by consent and not on merit after trial. That is what the instant application seeks to achieve. Indeed, the consent order entered in itself provided that " **there is liberty to apply"** meaning that any party or parties had the option to apply to have the consent order set aside or to have the matter revisited should circumstances warrant. The above consent order did not resolve the land dispute that had been brought in this court and as such shuts out the applicant from having his matter heard fully and fairly. The Court of Appeal in the Savings & Loan Kenya case stated as follows:

> ***the very foundation upon which any judicial system rests is that a party who comes to court shall be heard fairly and fully. The court is duty bound to hear all parties to the case and failure to do so is an error***

According to Mr Arusei, the applicant's counsel, the land dispute has remained hanging and he believes, respectfully so that it must be set aside or modified to provide the applicant with an opportunity to be heard in his own case. That would be in keeping with the right of hearing and in keeping with the rule of law. Furthermore, in ***Musiara Ltd, Savings Loan Kenya Ltd as well as the extract from Halsbury 's Laws of England*** in relation to the breach of natural justice and on need for court to act fairly and justly. The extract from paragraph 84 of the volume 1(1) reads as follows:

> ***"84. Natural justice and fairness. Implicit in the concept of fair and adjudication lie two cardinal principles, namely, that no man shall be a judge in his own cause (nemojudex in causasua), and that no man shall be condemned unheard (audialterampartem).***
>
> ***These two principles are rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, save where their application is excluded expressly or by necessary implication."***

Counsel submits that the consent orders and subsequent orders did not resolve the land dispute that was between the two parties, indeed that dispute still lies unheard and unresolved and to shut the plaintiff by the dint of this consent order is to drive him from the seat of justice and deny him his right to be heard. In other words, a denial of Natural Justice, something that the law will not countenance. It matters not whether the consent was freely negotiated or not or that the advocate involved had the ostensible authority or not to enter into consent orders on behalf of the clients.

The Interested Party through Mr. Momanyi submits that the plaintiff filed the instant suit in 1987 and instead of facilitating its expeditious hearing and disposal, placed every conceivable hurdle so as to prevent its hearing and determination. The honourable court found that the

matter involved several other parties and directed the plaintiff to amend the plaint and bring them on board. The plaintiff did not do so. According to Momanyi counsel for the 1st respondent, the core of the dispute is the plaintiff's entitlement at Assururiet Farm. It is agreed between the parties that the plaintiff's entitlement is 21 7 acres less whatever will statutorily go into addressing public utilities which must be catered for by the members and as per the list of members and their entitlement, the plaintiff has been given the 217 acres hence he has received what he claims. The land has not been subdivided and the plaintiff is yet to have land which he can term his. The land belongs to Assururiet Farm. The issue of anybody trespassing into the plaintiff's land does not therefore arise and is untenable. The core of the application before the honourable court is whether or not the consent reached by the parties ought to be set aside or renewed.

Mr Momanyi further submits that consent can only be set aside if certain parameters are met. There must be evidence of fraud, collusion mistake or illegality. My lord, the plaintiff has not produced any evidence of fraud, collusion, illegality or mistake to justify the reviewing and setting aside of the consent. All that he has held into is that he needs the case to be set down for hearing as he has not been allowed to tender evidence in support of his case. The law allows and encourages parties to resolve their disputes and where an agreement is reached file the agreement or record the same in court. In the instant case, the parties reached an agreement resolving the dispute so that each of the shareholders of Assururiet Farm including the plaintiff could get his rightful entitlement. The same cannot be faulted and it ought to stand. The other issue that the plaintiff has proffered is that his advocate then on record did not have instructions to enter into the consent. Nothing can be further from the truth. The plaintiff was in court when the consent was reached. He has always been present as the consent was being implemented. He even attempted through proxies to have the consent judgment set aside to no avail.

If really, he did not give his advocate instructions to compromise the suit, he ought to have raised the same immediately the consent was recorded Mr. Momanyi argues. The plaintiff is a retired teacher and he is fairly well informed. He all along knew what had taken place in court and opted to keep quiet or acquiesce to the same. He cannot be allowed to raise those issues at this stage. The advocate in the instant case had instructions to represent the plaintiff. She had ostensible authority to negotiate and compromise the suit. Her client has received his entitlement in the acreage he claims. The only issue which seems to be the basis of the complaint is that the plaintiff does not like the portion that he has been or is likely to be allocated. He wants the defendant and the interested party to move elsewhere so that he can take the portion they currently occupy. The dispute has been amicably resolved. Litigation ought to come to an end. The shareholders of the farm who are several needs to get their entitlement and move on. Surveyors have moved into the farm and started the survey exercise. The same ought to not be interfered with.

The defendant submits that the law on setting aside or reviewing an Order or Judgment or Decree of the court is well established under 0.45 of the Civil Procedure Rules, 2010 and there's only an array of well thought out and decided cases. He refers to the statement of the learned Judge in ***Flora Wasike vs Destimo Wamboka*** that "**It is now settled law that a consent Judgment or Order has a contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out."**

Further, in the case of ***Hiram vs Kassom (1952) 19 EACA 131***, the court pronounced itself as follows;

> ***"Prima Facie, any order made in the presence and with the consent of counsel in 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 consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement "***

According to the defendant, there is no reason at all given to warrant this court to review the consent order given by this court on 15th March, 2017. All there is, the Applicant's story which was told in his Plaint of 1987. The Plaintiff/Applicant herein has, at all material times since the commencement of his suit in 1987, been represented by an advocate. The consent order that he today seeks to have reviewed was entered into, by his counsel on record. No evidence has been tendered to show that the advocate had since been "relieved of her duties" by the Plaintiff prior to the recording of the consent order. Nothing has been advanced to show that for the reason of recording the contract without authority, the Plaintiff/Applicant took up the matter with the advocate for professional misconduct. The correct assumption would then be that the Advocate on record for the Plaintiff/Applicant had proper instructions from her client. In the case of ***Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Limited (2015) eKLR*** for review of a consent order, associated itself with the holding of the court in ***Kenya Commercial Bank Limited vs Specialized Engineering Co. Limited (1982) KLR P 485*** that;

> ***"An advocate has general authority to compromise on behalf of his client as long as he is acting fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding."***

No such proof of any express negative direction has been tendered. It is therefore their submission that the said advocate on record had full mandate to enter into and record the consent as she did, and the consent order is therefore binding on parties and must as such be performed and/or executed to its very conclusion. It cannot be accurate to say that it took the Plaintiff/Applicant a whole one year to know of the consent order and lodge the present application seeking to have it reviewed and/or set aside. The Plaintiff is not being honest to himself and the Defendant.

It has been held by courts before that, "when a litigant has obtained a Judgment in a court of justice, whether it be a county court of one of the High Courts, he is by law entitled not to be deprived of that Judgment without very solid grounds, and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed and if believed would be conclusive ***"Benjoh Amalgamated Limited & Another —versus- Kenya Commercial Bank Limited (2014) eKLR*.**

There hasn't been any allusion to a convincing and/or compelling new discovery to warrant a review and/or setting aside of the consent order of 15/3/2016. What has been presented is the same story of the plaint of 1987 which necessitated this suit. A story that has well been in the knowledge of all the parties and the court even at the point of entering into and recording of the consent order now complained about. The plaintiff/applicant has also not alluded to any fraud or collusion in obtaining the consent order

I have considered the submissions of all parties in this matter and do find that the consent was entered into on 18.3.2016. The orders made

on 6th March, 2017 were direction of the court that the consent be complied with. This application was made on 27.3.2017 more than one year after the consent order was made. No reason has been given for such delay. Variation of a court order under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules is a discretion of the court. For the court to exercise this discretion, it must be satisfied that there is no in-ordinate delay which is unreasonable and unexplained. The applicant is guilty of leaches of more than one year, he has not explained the delay which delay is unreasonable.

It is trite law that a consent order can be varied where it is proved that it has been obtained by fraud or collusion or by an agreement contrary to public policy of the court or the consent was given with sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.

Samuel Wambugu Mwangi Vs Othaya Boys High School Civil Appeal No. 7 of 2014 [2014] eKLR, the court observed that:

> ***"…Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited Vs Maliya (1975) E.A. 266. It was stated that 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 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 general for a reason which would enable the court to set aside an agreement."***

Kenya Commercial Bank Limited Vs Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997 [1998] eKLR, states 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….."***

Flora W. Wasike Vs Destimo Wamboko, the learned Judge observed that:

> ***"…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 these 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 ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement…."***

The consent entered into between the parties herein on 18.3.2016 was a final judgment of the court and therefore, the direction made by Judge Munyao on 21.10.2017 which were not final in nature were subsumed in the consent order of 18.7.2016 and therefore, the issue of public policy of the court does not arise. The consent judgment was entered into in the presence of all parties and all advocates and therefore, any attempt to set it aside one year down the lane is an afterthought. There is no evidence of fraud, collusion, agreement contrary to the policy of the court or absence of sufficient material facts, misapprehension or ignorance of material facts or any other reason which the court can set aside the consent. The plaintiff was not denied his rights to be heard and was given an opportunity to be heard and chose to record a consent. I have further considered the evidence on record and do find no new and important matter or evidence that was not available at the time of the consent is available to enable the court vary or set aside the consent judgment. There is no error appearing on record to enable the court set aside the consent. Ultimately, the application is dismissed with costs to the defendants, interested parties and Assururiet farm.

Dated and delivered at Eldoret this 20th day of April, 2018.

A. OMBWAYO

JUDGE