



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 725 OF 2017 (OS)

(Formerly CIVIL CASE NO. 688 OF 2013(OS))

RAPHAEL MUKURUMA MUKURIA.....PLAINTIFF

VERSUS

YIAMPOYO EME KUYU OGUTU &

SILOLE ENE KUYA (Widow/Legal Representatives

of the estate of Kuya Ole Ogoto Liapay – Deceased).....1ST DEFENDANT

COUNTY GOVERNMENT OF KAJIADO.....2ND DEFENDANT

RULING

The application for determination is the 1st Defendant's Notice of Motion dated the 1st December, 2016 brought pursuant to order 51 rule 1, 40 rules , 2 & 4 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all the other enabling provisions of the law. The application is made on the following grounds which in summary is that the Plaintiff's Originating Summons dated the 4th June, 2013 and the consents dated the 11th July, 2013 and 12th March, 2014 respectively are a sham, full of mere falsehoods and are intended to irregularly and fraudulently deprive off the 1st Defendant that which rightfully as well as legally belongs to him including his beneficiaries claiming under him. The applicants herein have never given consent to any sale and/or subdivision of KAJIADO/KAPUTIEI – SOUTH/2199 in their capacity as spouses of the deceased and any such transactions are therefore null and void ab initio. The Applicants herein have never attended the Land Control Board to give their consent. Further, the Applicants herein procured the Registration of Restrictions over the land on 9th July, 2014 long before the deceased's death. The Plaintiff and his agents are guilty of forgery, perjury and non disclosure of material facts and they are trying to deceive the Court so as to obtain orders in his favour. The Plaintiff's advocate purported to act for both the Plaintiff and the 1st Defendant (deceased) in the same matter and as such the pleadings and the Consent Orders arising therefrom should be declared null and void and be vacated forthwith. The 1st Defendant's consent (if any) was obtained through coercion and/or undue influence and the deceased's beneficiaries stand to be disinherited. Further that there is no privity of contract between the Plaintiff and the 1st Defendant concerning KAJIADO/KAPUTIEI – SOUTH/2200.

The application is supported by the affidavit of YIAMPOYO EME KUYU OGUTU who is one of the 1st Defendant's widow/legal representative who deposes that the Consents dated the 11th July, 2013 and 12th March, 2014 respectively are a sham, full of mere falsehoods and are intended to irregularly and fraudulently deprive them of their late husband's estate. She avers that the consent dated the 11th July, 2013 was in respect of a non – existent parcel of land namely KAJIADO/KAPUTIEI – SOUTH/2200, the same having ceased to exist on 3rd May, 2012 after subdivision was done and new titles issued. She insists the consent dated the 12th March, 2014 is consequently null and void as it purported to amend the earlier irregular consent of 11th July, 2013. Further that the two consents were prepared by the Plaintiff's advocates and the orders therein adopted ex parte. She reiterates that the Plaintiff's advocates purported to act for both the Plaintiff and the 1st Defendant in the same matter and as such the consent orders arising therefrom should be declared null and void. She claims the 1st Defendant's signature differs in various documents adduced by the Plaintiff clearly indicating that some must have been forged and as such the authenticity of the signatures on the consents is disputed. She contends that the Plaintiff has perjured himself by claiming he is the brother to their late husband whereas the names are very distinct and clearly depict that they are not from the same community and only knew the Plaintiff as a friend to their husband. She affirms that the 1st Defendant was never accorded legal counsel at the time of executing the consent, and they never gave their consent as spouses for selling of the suit lands. She avers that the purported sale of KAJIADO/KAPUTIEI – SOUTH/2199 was done over 23 years prior to the filing of the suit and no consent of the land control board was obtained within the stipulated time. She states that the sale (if any) of land parcel number of KAJIADO/KAPUTIEI – SOUTH/2199 automatically abated and is null as well as void since the consent of the land control board was never obtained within six (6) months as required by law. Further that their deceased husband was not privy to the purported agreement in relation to KAJIADO/KAPUTIEI – SOUTH/2200 between the Plaintiff and OLOGUTU TUTUMA (deceased) and as such no liability can attach to him or his estate. Further, that OLOGUTU TUTUMA has never been the registered owner of KAJIADO/KAPUTIEI – SOUTH /2200. She further contends that it is

strange how their father in law would gift a total stranger (the Plaintiff) a whopping 20 acres in the suit premises due to his love and affection. Further, that it is apparent from the purported consent dated the 12th March, 2014 that the Plaintiff is not interested in land parcel number KAJIADO/KAPUTIEI – SOUTH /2200 because it is ‘rocky and mountainous’ yet the Plaintiff’s advocates continue to hold on to title number KAJIADO/KAPUTIEI – SOUTH /3177 which is a subdivision from it. She further reiterates that the Plaintiff’s advocates should release title deeds for land parcel number KAJIADO/KAPUTIEI – SOUTH/3117 and KAJIADO/KAPUTIEI – SOUTH/2199 that is in their custody.

The application is opposed by the Plaintiff who filed Grounds of Opposition dated the 21st July, 2017 where he stated that the application, its grounds as well as the supporting affidavit have not raised any, or any sufficient grounds, on the basis of which the court would exercise its discretion to grant the orders sought. He states that the Application has not demonstrated sufficient grounds/principles to set aside the consent regularly recorded in court in the presence of the parties. It is an afterthought and is defeated by laches and/or inexplicable delay as the Consent Orders which the Applicants are challenging were recorded more than 2 ½ years before the Application was filed. The Application is based on falsehoods and misrepresentation of facts and if granted would prejudice the Plaintiff. The Applicants were fully aware of the transaction between the Plaintiff and their deceased husband and did participate in the process of hiving off the parcel to which the Plaintiff was entitled from the subject matter herein. The affidavit in support of the application is incurably defective. The application is incompetent and/or incurably defective for want of form and substance, is an abuse of the court process, frivolous and merely intended to vex the Respondent and the same ought to be dismissed.

The Plaintiff also filed a replying affidavit sworn by RAPHAEL MUKURUMA MUKURIA where he deposes that the application is devoid of merit, vexatious, dishonest, deceitful, brought in bad faith and ought to be dismissed with costs. He avers that the Applicants are taking advantage of his medical condition, which has been deteriorating for the past few years since he was diagnosed with Parkinson’s disease. He contends that the Applicants are taking advantage of the fact that Kuya died on 5th May, 2015 before the terms of the impugned consent could be effected, but were well aware of the process of subdivision. He verily believes that the Application is an attempt by Mr. Ogotu’s widows to re – start and prolong the conclusion of this case, which concluded with the Consents duly executed and adopted by the Court.

Both the Applicants and the Plaintiff/Respondent filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 1st December, 2016 including the supporting and replying affidavits as well as the annexures thereon, the following are the issues for determination are:

- Whether the consents dated the 11th July, 2013 and 12th March, 2014 respectively should be set aside and the Applicants allowed to defend suit.
- Whether the Applicants are entitled to the temporary injunction sought over land parcels number KAJIADO/ KAPUTIEI SOUTH/ 2199 and KAJIADO/ KAPUTIEI SOUTH? 3117

As to whether the consent orders dated the 11th July, 2013 and 12th March, 2014 respectively should be set aside and the 1st Defendant’s allowed to defend suit. I note the Consent orders were entered into when the deceased was alive and he was present in Court on 11th July, 2013 when the same was recorded a consent. Further, on 12th March, 2014 the deceased was present in Court and confirmed that the 80 acres of the land was to be excised from Kajiado/Kaputiei South/ 2199. While in Court on 15th May, 2014 the deceased was present where they recorded a Consent amending the previous one, culminating in the issuance of an order stating that the Consent order dated the 12th March, 2014 and filed in Court on 7th May, 2014 was adopted as an order of the Court. The deceased acknowledged that he was to facilitate the subdivision of his land parcel numbers KAJIADO/KAPUTIEI - SOUTH/2199 and transfer 60 acres to the Plaintiff and further subdivide KAJIADO / KAPUTIEI – SOUTH /2200 which was owned by their late father but the title registered in his name, and transfer 20 acres to the Plaintiff as per their late father’s express wishes. They even agreed that the process was to be completed on 15th May, 2014. On 16th September, 2014 the deceased stated in court that he was ready to honour the terms of the consent and sought for more time. All these facts point to the fact that the deceased participated in the court process and willfully recorded the consents and the same was not done ex parte as claimed by the Applicants.

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

"It is now settled law that a consent judgement 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."

Further in the case of **Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd (1982) KLR P. 485 Harris J. R** and held that:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

Further in the case of Isaac Kamau Ndirangu vs Commercial Bank of Africa [2002] eKLR, it was held that. **'it is now settled law that a consent judgement can only be set aside on the same grounds as would justify the setting aside of a contract for example, fraud, mistake, or misrepresentation.'**

In relying on the facts of the case and the judicial authorities above, I find that the deceased willingly entered into the two consents stated above as is indicative in the proceedings herein and at no point did he raise any objection. I hence find that there was no fraud, collusion or coercion in entering the two consents as this is not demonstrated by the Applicants. It is in the circumstances that I decline to set aside the two consents dated the 11th July, 2013 and 12th March, 2014 respectively.

As to whether the Applicants are entitled to the injunctive orders sought, I note they want the Plaintiff restrained from interfering with land parcels number KAJIADO/ KAPUTIEI – SOUTH/ 2199 and KAJIADO/ KAPUTIEI – SOUTH/ 3117 pending the outcome of the suit. The principles of establishing an injunction are settled on the case of **Giella V Cassman Brown**. As to whether they have established a prima facie case, I note the deceased had agreed to transfer a portion of land parcel number KAJIADO/ KAPUTIEI – SOUTH/2199 to the Plaintiff, which is yet to be done. I however note that no consent of the land control board was obtained by the Plaintiff and it is trite law that for in controlled transaction for sale of agricultural land, the purchaser has to obtain the consent of the Land Control Board within 6 months of the transaction or else the transaction will be void.

Since the suit did not touch on land parcel number KAJIADO/ KAPUTIEI – SOUTH/3177. I will grant an injunction and direct the Plaintiff to desist from interfering with the said parcel but as for KAJIADO/ KAPUTIEI SOUTH/2199 the deceased had already accepted to transfer a portion of it to the Plaintiff, and I will not make any orders to interfere with the prevailing status quo.

As to whether the suit should proceed to full trial, I note the consent orders compromised the suit. The Court however cannot stop a party who is seeking an opportunity to be heard on how he/she intends to proceed with their case to enable it make a final determination on the same. It is hence upon the parties to decide on whether they intend to set the suit down for hearing or not.

On the issue of the return of the title deeds, the Counsel for the Plaintiff stated that the deceased collected the title deeds. It seems the widows were not aware of the actions of their late husband but since the widows are the representatives of his estate, I will direct that the Counsel to hand over any title deed they are holding on behalf of the deceased estate to them within 30 days from the date hereof.

It is against the foregoing that I will only allow prayer No.5 only of the Notice of Motion dated 1st December, 2016 but decline to grant the rest of the prayers as sought except for restraining the Plaintiff from interfering with land parcel number KAJIADO/ KAPUTIEI – SOUTH/3177.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 11th day of April, 2018

CHRISTINE OCHIENG

JUDGE