



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC NO. 2936 OF 1980

MONICA KOKI.....PLAINTIFF

=VERSUS=

KOYAKE OLE SAKUDA.....DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 12th May 2006. This application seeks among other orders review and setting aside a consent judgement entered on 14th September 1981. This consent was given pursuant to a letter dated 7th September 1981 by the plaintiff's advocates M/s Kamau & Co. Advocates asking the Deputy Registrar to record the consent which was thumb printed by the defendant who was acting in person.
2. Both the plaintiff and the defendant have since passed on. The suit herein was filed in 1980. There is no response to the application dated 12th May 2006. This is perhaps because of the directions given by Justice Kimondo on 20th July 2012 directing that the notice of motion dated 19th July 2012 is the one which was to be heard first. The application dated 19th July 2012 was seeking to challenge the joinder of one Philip Kibuba Nzioka as a representative of the original plaintiff M/s Monica Koki (deceased).
3. The directions by Justice Kimondo were never complied with as the court file is said to have gone missing until the court issued notice to show cause why the suit should not be dismissed. This is when the present application was re-activated, leaving aside the one of 19th July 2012.
4. The plaintiff had sued the defendant for transfer of 26 acres out of LR No. Ngong/Ngong/2468. The defendant who had been served did not enter appearance. It would appear that the case was set to proceed by way of formal proof. On 8th April 1981, the case was before the late Justice Chesoni as he then was. The judge raised a number of issues such as the need for consent of the Land Control Board. The plaintiff's lawyer applied for time to go and seek for instruction from his client.
5. The record shows that there are no further proceedings which were taken in this file until 14th September 1981 when a consent was recorded. The defendant first made an application seeking to set aside the consent judgement on 26th May 2003. This application was made by the applicant in person. This application was withdrawn pursuant to a notice of withdrawal filed on 12th May 2006 by his lawyers who had come on record.
6. The Plaintiff contends that he did not thumb print on the alleged consent judgement; that the place where he allegedly thumb printed has been torn; that the advocate who represented the plaintiff did not have a practising certificate; and that the transaction did not get the consent of the Land Control Board and that the decree was executed after 12 years from the date of issue.
7. The defendant contends that there is a time the plaintiff approached him to sell three acres to her but that he declined to do so. The property in issue has been subdivided and sold to a number of third parties who are over 30 in number. It is on this basis that he is seeking an order of cancellation of those titles so that the property can revert to the original title number.
8. I have carefully considered the applicant's application as well as the submissions in support of the same. The original plaintiff, the original defendant and the lawyer who was involved in the consent are all deceased. The person who was allowed to come in place of the deceased plaintiff was not a legal representative of the estate of the deceased. This is why the application dated 19th July 2012 was filed to challenge his inclusion in this suit. The person who came in place of the deceased defendant had not even obtained letters of administration ad litem in respect of the estate of the deceased defendant. He was allowed in on the basis of an application he had made in a succession cause but which application was yet to be determined. He was allowed because the application had not been opposed. This fact came to the attention of the court later after he had been allowed to come into the suit.

9. The application to set aside the consent judgement was made for the first time on 26th May 2003. This is a period of almost 22 years after the said consent was signed. There is no evidence to show that the deceased defendant was not the one who thumb printed on the consent. He had previously thump printed on other documents including the sale agreement annexed to the application. The only reason which the deceased defendant seems to have in support of his allegations that he never signed the consent judgement is that the portion where he is alleged to have thump printed has been thorn off from the court record. If this be the case, there were other documents in which he is said to have thump printed. He should have had these documents subjected to examination. I believe he had an ID card. His thumb print Impressions are in the registration Bureau at the Registrar of Persons and Deaths. He should have subjected those thumb print impressions to examination. He did not do that .

10. The law regarding setting aside a consent are clear. The defendant has not proved that those grounds exist in this case to warrant the setting aside of the consent judgment. The suit property has since been subdivided and is in the hands of third parties who have built their houses and settled on the same if the replies to an application for joinder made on 23rd June 2006 are anything to go by. Though this application of 23rd June 2006 was withdrawn, there is another one dated 8th February 2006 which still remains unprosecuted. This application too seeks joinder of some 34 persons who purchased the suit property from the deceased plaintiff.

11. The defendant in his submissions relied on the case of **National Bank of Kenya Limited -vs- Wilson Ndolo Aya** in which the Court of Appeal had declared documents filed by an unqualified advocate as null and void. In the present case, the defendant had relied on information from the Law Society of Kenya that Mr Kamau of Kamau & Company Advocates who had represented the plaintiff had at some stages not taken out his annual practicing certificate. Even if this was the case, the Ndolo Aya case (supra) was declared to be bad law by the Supreme Court of Kenya in the case of **National Bank of Kenya Limited –Vs- Anaj Warehousing Limited [2015] e KLR**.

12. The issue for determination in this application is whether the consent was obtained fraudulently or not. The issue of land control board consent and the failure by the plaintiffs advocate to take out practicing certificates are not for determination in this matter. The defendant was only expected to demonstrate that there are grounds for setting aside the consent of 14th September 1981. As there is no demonstration of such grounds, I find that the grounds being raised are side shows. I find no merit in this application. Public policy demands that litigation has to come to an end. I proceed to dismiss the application dated 12th May 2006 with no order as to costs.

It is so ordered.

Dated, and signed at Nairobi on this 31st day of July, 2018

E. O. OBAGA

JUDGE

Delivered in the presence of:-

Mr Kirimi for Mr Mwaniki for the Defendant

Court Assistant : Hilda

B M EBOSO

JUDGE

31/7/2018