



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 160 OF 2014

JAVAN LEWA MUYE.....PLAINTIFF

VERSUS

SHIVA ENTERPRISES LTD

COMMISSIONER FOR LANDS

KILIFI COUNTY COUNCIL (NOW KILIFI COUNTY GOVT)

ATTORNEY GENERAL (sued in a representative capacity for and on behalf

of the government of Kenya, Ministry of Lands, Housing and Land Registrar/

Registrar of titles, Kilifi County).....DEFENDANTS

AND

MBEYU MWANDAZA MWANGONI... INTERESTED PARTY/APPLICANT

RULING

1. The Application before me for determination is the Notice of Motion dated 15th March 2017 brought under Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 40 & 51 of the Civil Procedure Rules and Section 19 of the Environment and Land Court Act. The Interested Party/Applicant seeks orders:

1. That this application be certified as urgent, service be dispensed with and the same to be heard at first instance.

2. That this Honourable Court be pleased to enjoin the Interested Party/Applicant as a party to this suit.

3. That this Honourable Court be pleased to issue a temporary Injunction restraining the Plaintiff/and the 1st Defendant/Respondent from constructing any structures, transferring and/or dealing in any manner with PLOT NO.LR.1000/III/MN CR. NO.27426 pending the hearing and determination of this suit.

4. That this Honourable Court be pleased to set aside the decree entered herein on the 17th November, 2015 and all consequential orders emanating therefrom.

5. That upon grant of prayer 5 above this Honourable Court be pleased to consolidate this suit with MSA ELC NO.4 OF 2017.

6. That costs be in the cause.

2. The Application is supported by the affidavit of Mbeyu Mwandaza Mwangoni, the Applicant and is based on the following grounds:

1) The Interested Party/Applicant is the lawful owner of the suit property and is in occupation of it.

2) **The Plaintiff and the 1st Defendant have, without the knowledge of the Applicant, sub-divided the suit (sic) amongst themselves have now commenced construction thereof.**

3) **The Plaintiff and the 1st Defendant have never been in occupation and use of the suit property.**

4) **The suit property and PLOT NO. MN/III/1847 CR. NO.26553 were allocated to the Interested Party/Applicant on the 13th November, 1991 and the Applicant and her family have been in occupation for over 30 years and have their homestead thereon.**

5) **The Respondents' actions are illegal, and contrary to the provisions of the constitution of Kenya.**

6) **The Applicant's (sic) title was obtained irregularly and/or fraudulently.**

3. The Applicant avers that it has just come to her knowledge and has also been informed by her advocates that a decree has been issued herein wherein the suit property is to be shared between the Plaintiff, his advocates and the 1st Defendant. She states that she had no knowledge of the suit and that she is the rightful and lawful owner of the suit property which was allocated to her on 13/11/1991 and has been living on it with her family for over 40 years without interference from third parties until recently. She has attached a letter of allotment dated 13th November 1991 marked a "MMI" and copies of letters from the area Chief marked as "MM2 a, b and c". The Applicant further avers that the Plaintiff and the 1st Defendant have never been on the suit property as claimed in the pleadings and the titles issued to any person other than herself are forgeries and/or have been irregularly allotted as she has never sold and/or transferred the suit property to anybody. The Applicant avers that she filed **ELC Case No. 4 of 2017** against the defendant herein and others claiming the suit property and has attached an amended plaint marked "MM-4". It is the Applicant's contention that it is in the interest of justice that she be enjoined in this suit to enable her defend her interests in the subject matter.

4. The Application is opposed by the Plaintiff who filed grounds of opposition dated 16th May, 2017. The Plaintiff contends that this matter has been determined between the Plaintiff and the defendants whereby a consent judgment has been entered and the Applicant has not demonstrated that the said consent judgment is vitiated by illegality to warrant it to be set aside. That the Applicant's letter of allotment had conditions which required payment to be made within thirty (30) days from 13th November, 1991, hence without evidence of such payment, her right lapsed upon the expiry of those thirty (30) days. That **PLOT NO. LR.1000/III/MN CR.27426** and **PLOT NO.MN/III/1847 CR NO.26553** are two different parcels of land and the suit filed by the Applicant relates to latter title and has not been determined.

5. The Application is also opposed by the 1st Defendant through a Replying Affidavit sworn by Joseph Muturia on 11th May, 2017. He depones that in or about 1986 the 1st defendant made an application for allotment of property in Kijippwa area, Kilifi and was allocated unsurveyed Plot 'A' vide a letter of allotment dated 11th May 1987 which plot later became known as **PARCEL NO MN/III/1000**. That the 1st defendant was the original allottee of the plot and therefore any subsequent allotments over the same are null and void. That the 1st defendant immediately took possession, fulfilled all conditions of the Grant and paid all the rents and rates and on 18th April 1995 was issued with the title document. The letter of allotment and title documents are annexed and marked "**JM1 and JM2**" respectively. That the property was subject of this suit and was settled by consent judgment entered on 7th November 2015. That the said property now comprises three subdivisions being **NO.11096(ORIGN NO.1000/12)/SECTION III/MAINLAND NORTH, NO.11097(ORIG. NO.1000/13/SECTION III MAINLAND NORTH AND NO.11098(ORIG. NO.1000/14) SECTION III MAINLAND NORTH**". Copies of the decree and titles are annexed and marked "JM 3". He depones that the 1st Defendant has been in possession of the suit property at all times and denies the Applicant's averments that they have resided thereon for a period of 40 years and further deny that there is a Kaya Shrine thereon. It is the 1st Defendant's contention that the letter of allotment dated 11th November, 1991 which the applicant relies on was obtained fraudulently, is a forgery, invalid, null and void since the Chief Land Registrar could not allocate land which had been previously allocated to the 1st Defendant. The 1st Defendant further contends that in the circumstances there would be no point setting aside the consent judgment entered herein as it will serve no purpose and will result in a waste of judicial time and occasion grave injustice to the parties in this suit since the Applicant does not and/or has not demonstrated any lawful interest in the suit property. Relying on legal advice, the 1st Defendant avers that the only prudent action that the Court may take is to direct that the status quo be maintained pending prosecution of **ELC Case No.4 of 2017** by the Applicant.

6. The Application was canvassed by way of Written Submissions. The Applicant filed written submissions dated 5th April 2018 through M/s Oduor Siminyu wherein counsel reiterated the issues in the Application. It was submitted that this suit has not been settled fully as parties are yet to comply with some clauses and that **ELC Case No.4 of 2017** involves the same suit properties, same parties and raises similar questions of law and therefore it would be prudent and in the interest of justice that the Applicant be enjoined in this Suit, judgment be set aside and the matter be consolidated with **ELC Case No.4 of 2017**.

7. M/s Kadima & Company Advocates for the Plaintiff filed submissions dated 11th May, 2018 in which it was submitted that no prima facie ownership has been shown by the Applicant to warrant the setting aside of the decree or the consolidation. That consolidation of the suits will not assist in the expeditious disposal or just determination of two suits, but will create an unnecessary burden upon the plaintiff who has no interest and is not a party in the **ELC Case No.4 of 2017**. Further, it was submitted that this suit has reached an advanced stage where consent judgment was entered, decree extracted and parties are finalizing on execution and that setting aside the judgment in the absence of fraud and the consolidation sought will not serve any purpose other than to derail the determination of the case and pervert the course of judgment. That pursuant to the consent judgment entered, subdivisions has been done and **PLOT NO.1000/III/MN** is no longer in existence, and therefore the application has been overtaken by events. They relied on the case of **Joseph Okoyo -v- Edwin Dickson Wasunna (2014)eKLR** where the Court referred to the case of **Korean United Church of Kenya & 3 Others -vs- Seng Ha Sang (2014)eKLR** in which the Court observed that:

"Consolidation of suits is done for purpose of achieving the overriding objective of the Civil Procedure Act that is for expeditious

and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”

It was submitted that the two suits cannot be consolidated as one suit has been concluded and that the two suits are not between the same parties. That consolidation will confuse issues and further prolong the resolution of the matters in dispute.

8. I have carefully considered the application, the affidavits and the submissions made by the parties as well as the authorities cited. The main issues for determination are whether the applicant should be enjoined in this suit; whether the judgment herein should be set aside, and whether the suit herein is amenable to consolidation with **ELC Case No. 4 of 2017**.

9. Under Order 1 of the Civil Procedure Rules a party may seek joinder either as a plaintiff or defendant. Order 1 Rule 10 (2) provides as follows:

10 (2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit, be added”

11 In her application, the Applicant seeks to be enjoined in this suit and to have judgment herein and all consequential orders set aside and subsequently have the suit to be consolidated with **ELC Case No.4 of 2017**. From the wording of the application, the applicant simply wants to be joined as a party. In my view, the Applicant’s recourse could have been to be enjoined either as a plaintiff where she can rightly agitate her rights of ownership of the suit property or as a defendant where she could defend the suit and probably raise a counter-claim to assert her rights. In this case, there is already judgment entered by consent of the parties on 17th November 2015. The decree has already been extracted and executed. Ordinarily a suit would come to an end when a Court has rendered a decision and that decision has been acted upon or executed. At that point the Court is said to be “functus officio” and any party who is aggrieved must now pursue the course of appeal or review to a higher Court. In my view, the application to be enjoined has come too late. If the applicant wants to agitate her rights over the suit property, it is my view that the same can be adequately addressed in ELC Case No. 4 of 2017 where she is the Plaintiff. I do not think that it is necessary to enjoin the Applicant in this suit at this stage.

12 The applicant also wants the judgment entered herein and all consequential orders to be set aside. The judgment herein which was entered on 17th November, 2015 arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgment or consent orders has been clearly stated and well settled. As was stated by the Court of appeal in the case of Board of Trustees National Social Security Fund –vs Michael Mwalo (2015)eKLR, “**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 the Court.**”

13 In the case of **Brooke Bond Liebig (T) Limited –v- Mallya (1995) EA 266**, Law JA stated the law at P. 269 in these terms:

“The circumstances in which a consent judgment may be interfered with were considered by this Court in Hirani –v- Kassam (1952) 19 EACA 131, where the following passage from Seton on Judgments and Orders, 7th Edition , Vol. 1 P.124 was approved:

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 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 misrepresentation or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”

14 In the case of **Flora Wasike –v- Destimo Wamboko (1988)1 KAR 625**. Hancox JA as he then was stated:

“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.”

15 The issue for determination in this application is whether the applicant has met the threshold for setting aside of the consent judgment. The record shows that the consent judgment was entered by the parties to the suit on 17th November, 2015. The suit was filed in Court in 1995. It was settled by that consent judgment about twenty (20) years later. I find that the applicant has not proved that there was misrepresentation, mistake or coercion. There is no suggestion of fraud or collusion. As already stated, a Court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for varying or rescinding a contract between parties. No such circumstances have been shown to exist in this case. Although the Applicant has stated that she has an interest in the suit property and was not aware of this suit and therefore never participates during the hearing, I find that the Applicant has filed a separate suit which is pending to agitate her rights. She has not been left without a remedy. Accordingly, I decline to set aside the judgment herein.

16 The Civil Procedure Rules mandate this Court to consider consolidation of suit with a view of furthering expeditious disposal of cases under Order 11 Rule 3 (1) (h). Indeed Courts have powers to order consolidation of suits pending before it. However, the provisions of the rule are very clear. The Courts convene a conference and consider consolidation of suits after the close of pleading. In my view, the suits must be pending before the same Court. The suits must have the same or similar questions of law or fact. In this case, both parties are in agreement that this case was concluded on 17th November 2015 when judgment was entered. Thereafter the decree was extracted and executed. There is therefore nothing pending in this suit. This suit is not pending and as such the Court cannot order it to be consolidated with **ELC Case No.4 of 2017**. The suit property in this suit was subdivided and three parcels resulting therefrom registered. The 1st

Defendant has annexed copies titles of the resultant subdivisions. From the above therefore I find that the order for consolidation cannot issue.

17 In the result, I find that the Application has no merit and the same is hereby dismissed with costs.

DATED, DELIVERED and SIGNED at MOMBASA this 26th day of September, 2018

C. YANO

JUDGE