



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 193 OF 2017

JULIUS MUTUNGA WAMBUA.....PLAINTIFF

VERSUS

JOSEPH MUTISYA KILUNDO.....1ST DEFENDANT

THADDEUS MUSYOKI KILUNDO.....2ND DEFENDANT

MASIKA KILUNDO.....3RD DEFENDANT

MWELU KILUNDO.....4TH DEFENDANT

SYOMBUA NDUVI.....5TH DEFENDANT

RULING

1. There is before me a notice of motion application by the Defendants/Applicants expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act, Order 18 rule 10 and Order 51 rule I of the Civil Procedure Act for orders:-

- 1) That this court does set aside its order of 9th April, 2018 marking the Defendants/ applicants case as closed.**
- 2) That this court do re-issue summons to the Land Registrar Makueni to appear and testify before court on a date suitable to the court and the parties herein.**
- 3) That the costs of this application be in the cause.**

2. The application is predicated on the grounds on its face and is supported by the affidavit of Thaddeus Musyoki Kilundo sworn at Nairobi on the 17th April, 2018 and filed in court on the 19th April, 2018 together with the application. The application is dated 17th April, 2018 and was filed in court on 19th April, 2018.

3. The Plaintiff/Respondent has opposed the application vide his replying affidavit sworn at Nairobi on the 3rd May, 2018 and filed in court on the 4th May, 2018.

4. On the 17th May, 2018 the parties herein filed a consent order dated 16th May, 2018 to the effect that the Defendants/ Applicants' application be disposed off by way of written submissions. The consent was adopted by the court on the same day that it was filed.

5. The Applicant has deposed in paragraph 2 of his supporting affidavit that on the 7th February, 2018 he instructed his advocate on record to apply for the Land Registrar Makueni to be called to testify and produce the lands register relating to LR Number Makueni/Kikumini/117. He went on to depose in paragraphs 4, 5 and 6 that his advocate was given a copy of the Registrar's green card for the said Makueni/Kikumini/117 which was thereafter produced by consent of both parties as an exhibit upon which the Applicant instructed his advocate to close the Defendant's case.

6. The Applicant further deposed in paragraph 7 that when he perused a copy of the green card admitted in court, he was shocked to note that it did not contain any mention of LR number Makeni/Kikumini/617 and 618 which are actual subdivisions of LR number Makueni/Kikumini/117 done in 1988.

7. On the other hand, the Respondent has deposed in paragraphs 4, 5, 6 and 7 that it was the Applicant who procured the green card which was produced in court by consent of the parties. The Respondent contends that the Applicants' affidavit does not adduce any grounds as to

why the consent entered by both parties should be set aside. He surmises that the application by the Applicant is meant to frustrate him by ensuring that this matter does not reach its logical conclusion.

8. The Applicant's counsel in his submissions urged the court to employ the "slip rule" and set aside the judgement of 9/4/2018 so that it can order the Land Registrar to appear in court to explain the anomaly in the green card dated 9th April, 2018 and produced in court as DEX no. 8. He went on to submit that it would be unfair for the court to rely on part of the information in making its decision. The counsel relies on the cases of Vallabhdas Karsandas Ronica V Mansukhlal Jivraj and others [1965] EA 700, Lakhamshi Brothers Ltd V Raja & sons [1966]EA 313 and Tailor and Another V Lawrence and Another [2003]QB 52,8.

9. On the other hand, the Respondent's counsel framed up three issues for determination namely:-

- a) **Whether the court should set aside the consent order of the parties, seeking to produce the green card and dispensing with the Registrar's attendance?**
- b) **The legality of the affidavit commissioned by an advocate without a practicing certificate.**
- c) **Whether the application dated 17th April, 2008 should be allowed.**

10. I will adopt the three issues as framed by the Respondent's counsel save that I will frame the first issue as follows:-

- a) **Whether the court should set aside the consent order dated 9th April, 2018.**

11. On the first issue the Respondent's counsel submitted that it is trite law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or of certain conditions remain to be fulfilled which are not carried out. The counsel cited the case of Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd [1982] KLR 485 where Harris, J held that:-

"The grounds on which a consent order can be set aside are

- i. Where the consent was obtained fraudulently*
- ii. In collusion between the parties*
- iii. Where the consent is contrary to the policy of the court*
- iv. Where consent is on insufficient material facts*
- v. Where consent is based on misapprehension or ignorance of material facts*
- vi. Any other sufficient reason**

12. The counsel added that the Applicant has not demonstrated any of the grounds that are conditional precedent to the setting aside of a consent order as this application seeks to do.

13. The counsel further submitted that the Applicants are the ones who procured the green card from Makeni Land Registry and had sufficient time to peruse it before they sought consent from the Respondent to produce it. The counsel submitted that the Applicant is on a fishing expedition as he does not provide details of the issues that the Registrar is to testify to or what might be missing or omitted in the document that was produced.

14. Regarding the commissioning of an affidavit by a non-practicing advocate, the Respondent's counsel cited section 2 of the Oaths and Statutory Declarations Act Chapter 15 of the Laws of Kenya which provides for the appointment of only practicing advocates as commissioners of oaths by the Chief Justice. The counsel further cited section 5 of the Advocates Act Chapter 16 of the Laws of Kenya which provides that; ***A person cannot be qualified to be a practicing advocate unless:-***

- a) **He has been admitted as an advocate**
- b) **His name is for the time being on the Roll; and**
- c) **He has in force a practicing certificate**

15. The counsel added that possession of a practicing certificate is a constant condition precedent before one can qualify to act as an advocate in any respect including as a commissioner of oaths.

16. The counsel went on to submit that on the above fact alone, the advocate who commissioned the Applicant's affidavit to the notice of motion application dated 17th April, 2018 is in contravention of the Advocates Act and the Oaths and Statutory Declarations Act. The counsel added that in particular, the advocate offends the provisions of sections 31, 33 and 34 of the Advocates Act and as such, the

document that he commissioned cannot amount to an affidavit.

17. The counsel pointed out that order 51 rule 4 of the Civil Procedure Rules requires any application before court to be accompanied by an affidavit and thus this application before this court is incompetent for lack of supporting affidavit.

18. The counsel submitted that any evidence commissioned by non-qualified advocate remains as not commissioned at all and void. The counsel cited the case of **Hosea Mundui Kiplagat V Sammy Komen Mwaita & 2 others [2013] eKLR** in support of his submissions.

19. I have read the application, the supporting and the replying affidavits. I have also read the submissions that were filed by the counsel on record.

20. Order 18 rule 10 of the Civil Procedure Rules provides as follows;

“The court may at any stage of the suit recall any witness who has been examined and may, subject to the law of evidence for the time in force, put such questions to him as the court thinks fit.”

21. My reading of the above rule 10 of order 18 of the Civil Procedure Rules clearly shows that the witness sought to be recalled never testified. The document he was to produce in evidence was produced by consent of the parties herein. The above being the case, then the witness cannot be recalled.

22. As to whether or not the consent order of 9th April, 2018 can be set aside, I am in agreement that with the Respondents’ counsel that the grounds for setting aside are as stated in the case of **Kenya Commercial Bank LTD Vs Specialised Engineering Co. Ltd [1982]KLR 485** and no such grounds were placed before me by the Applicant.

23. As to the legality of the affidavit commissioned by an advocate without a practicing certificate, I agree with the Respondent’s counsel that the said document cannot amount to an affidavit. As such, the application before this court is incomplete for being without a supporting affidavit.

24. As to whether the application dated 17th April, 2008 should be allowed, based on my finding in issues number one (1) and two (2), the logical conclusion is that the same cannot be allowed. However, the matter before me involves land which is an emotive issue. Article 159 of the Constitution demands that suits be decided without undue technicality. The question that one can pose at this stage is, what prejudice will the Respondent suffer if the application is allowed? In my view, he will suffer none save for the delay in concluding this matter and can be compensated by an award of costs. He will have a chance to cross-examine the Applicant’s witness.

25. Justice demands that all parties be granted a chance to ventilate their case so as to enable the court arrive at a fair decision. The application could have been made orally by the Applicants without necessarily filing a formal application. Bearing that in mind, I will allow prayers (a) and (b) of the application. Consequently, witness summons shall issue to the Land Registrar Makueni to appear in court and testify. The Applicant shall bear the costs of the application.

Signed, dated and delivered at Makueni this 26th day of October, 2018.

Mbogo C.G

Judge

IN THE PRESENCE OF:

Mr. Muthiani holding brief for Mr. Narangwii for the Plaintiff/Respondent

Mr. Mutua for the Defendants/Applicants

Mr . Kwemboi Court Assistant

MBOGO C.G, JUDGE

26/10/2018