



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO.206 OF 1998

KYALO MUNYAO.....1ST PLAINTIFF
PETER MULI.....2ND PLAINTIFF
BENARD MASAI KAVOI.....3RD PLAINTIFF
SIMEON MUEKE MAINGI.....4TH PLAINTIFF
REGINA NGUNYA MUTETU5TH PLAINTIFF
MUTUA NZIOKI.....6TH PLAINTIFF
BEATRICE MUTUA.....7TH PLAINTIFF
MWIKALI TUMBO.....8TH PLAINTIFF

VERSUS

JUSTUS NGILA MOSA1ST DEFENDANT
MULEI MATU2ND DEFENDANT
MUTISO KATHUMA.....3RD DEFENDANT
MUASA KATIKU.....4TH DEFENDANT

RULING

1. In the Application dated 4th December, 2017, the 4th Defendant is seeking for the following orders:

- a. That the firm of B.M. Mungata & Co. Advocates be granted leave to come on record for the 4th Defendant/Applicant in place of the firm L.M. Wambua & Co. Advocates.*
- b. That the consent order dated 1st November, 2007, and further dated 7th November, 2007 and issued on 30th October, 2008 be set aside and the matter be heard on merit.*
- c. That the court do grant any and/or further orders as it may deem fit to grant.*

2. The Application is premised on the grounds that the consent was fraudulently entered into; that the consent goes against the legal principles and that the consent was made without the Applicants' authority.

3. According to the Affidavit of the 4th Defendant, after filing the Defence, he waited for the matter to be set down for hearing; that he never gave to his advocate instructions to record the consent of 1st November, 2007 and that by the time the consent was signed by the advocates, both the 1st and 2nd Defendants had died.

4. The Plaintiffs/Respondents filed Grounds of Opposition in which they averred that the consent order was entered into freely; that the

Application is an afterthought and that the Defendants' advocate had the authority to enter into the said consent.

5. In response, the Plaintiffs' advocate deponed that all the members of Ngelani Ranching Unity, including the Applicants have benefited from the consent order; that the Application was filed after ten (10) years and that the filing of the Application was an afterthought.

6. The 4th Defendant's advocate submitted that the consent order was entered into without instructions; that the advocates on record should have informed the court about the death of the two Defendants and that the Defendants were not aware of the consent orders.

7. The Plaintiffs' advocate submitted that a consent order is like a contract whose limitation period is six (6) years; that the Applicant has not stated how his advocate acted outside the scope of his authority and that the Application should be dismissed. Both the Plaintiffs and the Defendants' advocate filed a bundle of authorities which I have considered.

8. The 4th Defendant has deponed that he never instructed his advocate to enter into the consent of 7th November, 2007. According to the said consent, the Plaintiffs and the Defendants agreed to have parcel of land known as L.R. No. 8914 sub-divided into 22 equal blocks representing the original 22 shareholders; the three (3) Plaintiffs to be recognized as "*shadow members*" and that the Defendants and the Management Committee of Ngelani Ranching Unit Limited be at liberty to excise 100 acres to finance the sub-division of L.R. 8914 and settle debts of the Ranch. The consent provided that the suit should be marked as settled with no order as to costs.

9. Although the consent order was signed by the firm of L.M. Wambua and Co. Advocates for the Defendants, the evidence before me shows that the 1st and 2nd Defendants had already died by the time the consent was signed. Indeed, the Plaintiffs have not responded to the assertion by the 4th Defendant that the 1st and 2nd Defendants have never been substituted since their demise.

10. Having not denied that indeed the 1st and 2nd Defendants were long dead before the consent of 1st November, 2007 was signed by the two advocates, I find that the said consent was signed without the Defendants' instructions.

11. Considering that the said consent was adopted by the court, the limitation period is twelve (12) years and not six (6) years as submitted by the Plaintiffs' year. In any event, the said limitation period can only be used as against the Plaintiffs during execution.

12. For those reasons, I find that the 4th Defendant has shown that the consent order of 1st November, 2007 was entered into fraudulently and without the authority of all the Defendants. Consequently, I allow the Application dated 4th December, 2017 in terms of prayer Nos. 2 and 3.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE