



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 8 OF 2017

JONATHAN KENGA KITHI.....PLAINTIFF

VERSUS

AMIN RAMADAN KARISA.....1ST DEFENDANT

GURPNER HEIDE MARIE.....2ND DEFENDANT

KILIFI DISTRICT LAND REGISTRAR.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. By this application dated 3rd July 2017, the Honourable the Attorney General, the 4th Defendant herein prays for an order that the proceedings and/or consequential orders of consent adopted herein on 4th April 2017 be set aside. The application which is supported by an affidavit sworn by Mwarome Munga attached thereto is premised on the grounds:-

i) That the Plaintiff filed this suit as against the Defendants on 17th January 2017;

ii) That there have been several cases in Court concerning the suit property including Malindi ELC Petition No. 22 of 2016, formerly Mombasa Petition No 45 of 2016 the existence of which was previously unknown to the 4th Defendant/Applicant;

iii) That in the said Petition No. 45 of 2016, the Court ordered that the Director Land Adjudication and Settlement to issue a letter of offer to one Salim Bakari and the said letter has since been issued;

iv) That the consent order adopted herein on 4th April 2017 is in conflict with the order issued in the said Petition No. 45 of 2016 and may embarrass the Court if executed; and

v) It is therefore in the interest of justice that the consent order be set aside.

2. By a Replying Affidavit filed herein on 3rd October 2017, the Plaintiff Jonathan Kenga Kithi strenuously opposes the grant of the orders sought. The Plaintiff avers that he is the legal administrator of the estate of the late Kenga Randu who died intestate on 22nd July 1998 and was buried on the parcel of land number Kilifi/Vipingo/176.

3. The Plaintiff further avers that the late Kenga Randu was allocated the suit property and had lived on the land with his children until his demise and they have never been informed of any Court proceedings in regard to the suit property until very recently when they challenged the 1st and 2nd Defendants' titles to the suit property.

4. It is his case that immediately after the 1st and 2nd Defendants were informed that the Plaintiff had sued them, the 1st and 2nd Defendants voluntarily consented to return back the suit property which consent was also voluntarily consented to by the 3rd and 4th Defendants/Applicants.

5. The Plaintiff refutes the Applicant's contention that there is already a letter of offer in the name of Salim Bakari and states that:-

a) They also have a letter of offer which was duly accepted and as a result, it was wrong for the 3rd and 4th Defendants to proceed to issue another letter of offer without revoking the one issued to the Plaintiff's late father;

b) The 3rd and 4th Defendant have no locus to prosecute Mr. Salim Bakari's case as he is not a party to this suit; and

c) If there are such orders as alleged, the same were irregular as at the time they were obtained, the Plaintiff's late father had passed on and no suit could be properly brought against him.

6. I have considered the application and the response thereto. I have also taken into account the written submissions filed by the Learned Counsels for the respective parties herein.

7. There is no dearth of authorities on the law governing the setting aside of consent Judgments or orders, and I am grateful to the Counsels on both sides for citing some of them in their submissions. Generally a Court of law will not interfere with a consent Judgement except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.

8. In *Kenya Commercial Bank Ltd –vs- Specialized Engineering Company Ltd(1982) KLR 485*, Harris, J held inter alia 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 collusion 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 or a reason which would enable the Court to set aside an agreement.”

9. In the matter before me, the parties herein appeared before me on 4th April 2017 and agreed and entered into a consent providing as follows:-

1.” That the 1st and 2nd defendants do hereby agree to cancellation of title No. Kilifi/Vipingo/176, the suit property herein in favour of the Plaintiff.

2. That the 1st and 2nd Defendants agree to handover, and vacate possession of the suit property herein forthwith.

3. That the 3rd Defendant cancels the 1st and 2nd Defendant's title No. Kilifi/Vipingo/176 and issues a new title in the name of the Plaintiff Jonathan Kenga Kithi.

4. That there is no order as to costs.”

10. Some three months down the line, the 3rd and 4th Defendants filed the present application stating that it had subsequently come to their knowledge that another party had filed a separate suit being Malindi ELC Petition No. 22 of 2016(formerly Mombasa Petition No. 45 of 2016) in which orders have since been issued directing the Director of Land Adjudication and Settlement to issue a letter of offer to the Petitioner therein one Salim Bakari in regard to the suit property.

11. The Plaintiff is opposed to the setting aside of the consent orders arguing that his own father Kenga Randu was allocated the suit property under the Vipingo Settlement Scheme and that they were never informed of any Court proceedings in regard to the suit property until recently when they challenged the 1st and 2nd Defendant's titles.

12. It is to be noted that the Plaintiff has not challenged the existence of the Order granted in the said Malindi Petition No. 22 of 2016. I am persuaded however by the Applicant's submissions that the existence of the two conflicting Court orders with regard to the same parcel of land is likely to cause embarrassment. This Court has a duty to promote stability in its decisions by reducing the possibility of inconsistency emanating from its Judgments and orders.

13. In the circumstances of the case, I find merit in the application dated 3rd July 2017. Accordingly the consent orders as adopted by this Court on 4th April 2017 are hereby set aside and vacated forthwith.

14. The costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 11th day of October, 2018.

J.O. OLOLA

JUDGE