



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 142 OF 2015**

**PATRICK KIPKETER KIRUI.....PLAINTIFF**

**VERSUS**

**JOSEPH KOECH.....DEFENDANT**

**AND**

**JOEL KIMUTAI BOSEK.....1<sup>ST</sup> INTERESTED PARTY**

**NAOMI CHELAGAT RONO.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. By Notice of Motion dated 27<sup>th</sup> June 2018, the defendant sought the following orders:

**1. Spent.**

**2. That the order made on by this honourable court on 3<sup>rd</sup> May, 2018, restraining the defendant/applicant from interfering with the interested parties possession and occupation of property known as L.R. Nakuru/ Olenguruone/Amalo/108 be and is hereby reviewed, varied and set aside.**

**3. Spent.**

**4. That pending the hearing and determination of this suit an injunction do issue restraining the interested parties by themselves, their agents, employees, servants, assigns or any person claiming through or under them from entering, remaining, subdividing, alienating, selling, developing, damaging, interfering or otherwise dealing with the 4 acres claimed by the defendant/applicant on land known as L.R Nakuru/Olenguruone/Amalo/108.**

**5. That leave be granted to the defendant/applicant to amend the statement of defence dated 8<sup>th</sup> August 2015.**

**6. That the OCS Olenguruone Police Station to ensure compliance with orders herein.**

**7. That costs be provided for.**

2. The application was supported by an affidavit sworn by the defendant. He deposed that on 3<sup>rd</sup> May 2018, his advocate withdrew his application dated 17<sup>th</sup> April 2018 and entered into a consent to have Interested Parties' application dated 15<sup>th</sup> February 2017 allowed, all without his instructions and without counsel informing him that he did so. That his advocate's said actions were against his interest and were triggered by the fact that the advocate did not have a practicing certificate. He added that he did not know when he instructed the advocate that he did not have a valid practicing certificate. That when he instructed his current advocates, he was not aware of the injunctive orders issued on 3<sup>rd</sup> May 2018. When he became aware, he withdrew his application dated 24<sup>th</sup> May 2018 which sought similar injunctive orders as the present one.

3. The application was opposed by the plaintiff through Notice of Preliminary Objection dated 2<sup>nd</sup> July 2018. The objection was to the effect that the application was an omnibus one and that there was total misjoinder of causes of action and reliefs sought in the application.

4. On their part, the Interested Parties responded to the application through a replying affidavit sworn on 11<sup>th</sup> July 2018 by Joel Kimutai Bosek, the 1<sup>st</sup> Interested Party. He deposed that the application is ambiguous, omnibus and an abuse of process.

5. The application and the preliminary objection were heard together by way of written submissions. The Applicant filed submissions on 27<sup>th</sup> July 2018 while the Interested Parties filed submissions on 20<sup>th</sup> July 2018. The plaintiff opted not to file any submissions. He relied entirely on the preliminary objection. I have considered the preliminary objection, the application, affidavits filed and the submissions.

6. I will deal with the preliminary objection first. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, Law JA stated:

***So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.***

7. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit or the application which it targets.

8. The present objection is that the application is omnibus and that it suffers from fatal misjoinder of causes of actions. No law has been cited that bars the filing of such an application as the one before the court. The objection does not raise a pure point of law which has the capacity to dispose of the application. The matters raised are discretionary and should have been raised as grounds of opposition. In the circumstances, the preliminary objection is dismissed.

9. Pursuant to prayer 2 of the application, the defendant seeks setting aside of the consent orders of 3<sup>rd</sup> May 2018. The orders made on 3<sup>rd</sup> May 2018 were that:

1. ***Notice of Motion dated 15th February 2017 is allowed in terms of prayers 2, 3, 4 and 5 thereof.***
2. ***For the avoidance of doubt, the applicants are joined as Interested Parties.***

10. The implication of prayers 2, 3, 4 and 5 of Notice of Motion dated 15th February 2017 being allowed was that the Interested parties were enjoined in the proceedings and allowed to file their pleadings, an injunction was granted restraining the plaintiff and the defendant from interfering with the Interested Parties' possession and occupation of the property known as L.R. Nakuru/ Olenguruone/Amalo/108. Still on 3<sup>rd</sup> May 2018, defendant's Notice of Motion dated 17<sup>th</sup> April 2018 was withdrawn by consent. Through the said application, the defendant had sought an injunction to restrain the interested parties and their agents or servants from entering, sub-dividing, alienating or dealing with the aforesaid property.

11. The orders sought to be set aside were consent orders. The principles applicable are that a court of law will not set aside an order made by consent except in circumstances that would form a sound basis for varying or rescinding a contract between parties. The Court of Appeal in **S M N v Z M S & 3 others [2017] eKLR** as follows:

***17. There is now dearth of authorities on the law governing the setting aside of consent Judgments or orders .... Generally 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.***

12. Similarly, in **Flora N. Wasike vs Destimo Wamboko [1988] eKLR** the Court of Appeal 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: see the decision of this Court in J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.***

13. The Applicant states that his advocate did not have a practising certificate as at the date when the consent was entered into. That is a serious allegation. He has not provided any evidence to that effect. Ordinarily, evidence on whether or not a particular advocate is licenced to practice law at any particular time is readily available from the Law Society. Though the applicant has founded his argument on the fact that counsel for the plaintiff had raised a preliminary objection to the effect that the defendants' advocate had no practising certificate, it must be noted that a preliminary objection is not evidence. In any case, the preliminary objection was not heard and determined. As such, anything raised in it remains moot. The Court of Appeal considered a somewhat similar scenario in **S M N v Z M S & 3 others** (supra) and stated as follows:

***The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High Court that he was involved in fraud or colluded with another advocate or person to subvert the cause of justice in a matter pending in Court is certainly one of utmost gravity. It destroys the advocate's honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charges.***

14. I am therefore not persuaded that valid grounds have been established to warrant setting aside the consent orders of 3<sup>rd</sup> May 2018. That

being the case, prayer 4 of the application cannot issue as it would be in conflict with the orders of 3<sup>rd</sup> May 2018.

15. Regarding prayer 5 of the application, the general rule is that leave to amend when sought before judgment, should be granted unless there would be injustice to the opposite party which cannot be compensated by costs. In **Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others[2014] eKLR** the Court of Appeal stated:

[22] The learned authors of *Halsbury's Laws of England, 4<sup>th</sup> Ed. (re-issue), Vol. 36(1)* at *paragraph 76*, give some insights on the amendments of pleadings:-

***“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. ....The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”***

16. The plaintiff and interested party have not suggested or even shown that the proposed amendment will occasion them any prejudice. In the circumstances, I see no reason why the amendment should not be allowed.

17. In the end, I make the following orders:

- a) The Notice of Preliminary Objection dated 2<sup>nd</sup> July 2018 is dismissed.
- b) Prayers 2, 4 and 6 of Notice of Motion dated 27<sup>th</sup> June 2018 are dismissed.
- c) Leave is hereby granted to the defendant to amend his statement of defence. The amended defence to be filed and served within seven (7) days from the date of delivery of this ruling.
- d) The Plaintiff and the Interested parties to file and serve reply to amended defence, if need be, within 14 (fourteen) days of service.
- e) Costs in the cause.

**Dated, signed and delivered in open court at Nakuru this 8<sup>th</sup> day of November 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Karen Wanderi for the defendant/applicant

Mr Karanja for the plaintiff/respondent

No appearance for the Interested Parties

Court Assistants: Gichaba & Lotkomoi