



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 301 OF 2009

SIMEON MUEKE MAINGI.....PLAINTIFF

VERSUS

STEPHEN MULWA ILIVI1ST DEFENDANT

VITO AUTO SPARES LIMITEDINTERESTED PARTY

RULING

1. By a Motion dated 30th May, 2014, the Plaintiff **Simon Mueke Maingi** seeks judgment in terms of consent letter dated 12th May, 2014 and that his names **Simeon Mueke Maingi** be corrected.
2. The application is based on Section 25 rule 5 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Rules, Section 20 of the Environment and Land Court Act and all enabling provisions of the law.
3. The same is predicted on the grounds that the dispute herein involves the Plaintiff and Defendant No. 1.
4. The Plaintiff and the 1st Defendant reached a compromise in respect to the suit properties and the same was reduced into a consent herein.
5. The Defendant No.1 has filed an Affidavit sworn on 26th November, 2014 to oppose the Application.
6. The Interested Party filed a Replying Affidavit to oppose the Application sworn by Victoria Agbaje on 9th July, 2014.
7. The Applicant's case is that the suit properties were registered in the names of the 1st Defendant in trust for himself and the Plaintiff. However, in breach of that trust, the 1st Defendant attempted to alienate one of the properties Mavoko **Town Block 2/110** to the Interested Party.
8. However, the Plaintiff and 1st Defendant reached a compromise and through their advocates on record signed and filed a consent.
9. The 1st Respondent's case is that he learned of the consent when his new advocate informed him that the same had been filed by the Plaintiff's advocate together with R. M. Matata Advocates.

10. He denies ever instructing R. M. Matata advocates to enter into the matter and even record any consent.
11. The 1st Defendant testified and reiterated what he avers in the Affidavit.
12. The Interested Party has opposed the Application as he was not a party to the same. He claims to have bought **Mavoko Town Block 2/110** from the 1st Defendant and did not know the issue of trusteeship over the suit lands.
13. The Applicant submitted that his Affidavit sworn on 26th January, 2015 shows the sequence of events in detail and how the settlement was arrived at and which led the advocates in signing the consent.
14. It was submitted that once a party appoints an advocate to represent hi whatever he does binds the party. Counsel referred the court to **HCCC. No. 2252/1989 Arbunth Niot Export Service Limited Vs Manchester Outfitters Suiting Division Limited and Another.** It was submitted that a consent judgment can only be set aside on ground of which would justify setting aside a contract (refer to **Wasike Vs Wamboko (1982 – 1980) KLR 625** when it was held that the consent just like a contract, can only be set aside on the ground of fraud, mistake or misrepresentation).
15. In respect to the Interested Party's objection to the entry of judgment, the Applicant submitted that his claim lies on refund of Kshs. 2 million paid for one of the suit land because he never got the Land Board Consent to validate the agreement.
16. He acknowledges that the consent of Land Control Board was necessary in his transaction with 1st Defendant. The 1st Defendant agrees and acknowledges that he will refund the purchase price.
17. The Plaintiff testified and narrated how him and the 1st Defendant participated in the settlement leading to the recording of instant consent. The 1st Defendant never filed written submissions.
18. The Interested Party submitted that there was no valid settlement. It was submitted that a consent cannot be valid as it was not signed by all the parties including itself. (**Refer to Karitu Vs Mugo (2014) eKLR.**)
19. After going through the material before the court, the court finds the following issues emerge:
- (a) Whether the consent herein is valid?
 - (b) Whether any party will be prejudiced by the same?
 - (c) Whether it can be entered as judgement of the court?
20. The consent entered into by the parties was signed by Mutunga and Muindi advocates for the Plaintiff and R. M. Matata for the 1st Defendant.
21. In the consent, the parties shared the suit lands in the ration of 45% in favour of the Plaintiff and 55% in favour of the Defendant No.1.
22. The Interested Party's interest was taken care of by the 1st Defendant acknowledging that he would refund the purchase price.
23. R. M. Matata advocates were on record for the 1st Defendant. The 1st Defendant deny that he instructed R. M. Matata to act for him yet he never took any action against Mr. Matata or even write a protest letter to him. The 1st Defendant never sought an order form the court to summon the said advocates to come to court and be cross – examined on who instructed them or even paid the fees to act

for the 1st Defendant. From the oral evidence the Affidavits, the court has no doubt that the firm of R. M. Matata advocate was on record on instructions of the 1st Defendant in line with the case of Manchester Outfitters above. The 1st Defendant is bound by the acts of his advocate and thus the terms of the consent entered.

24. As for the Interested Party, he entered into a sale agreement but never got a Land Board Consent to enable the transfer of part of the suit land that he was buying. He has sought for extension of time to apply for the consent of Land Control board.

25. However, as it is now, 45% of the suit land he was buying is to go to the Plaintiff. The 1st Defendant is to refund him the purchase price. The Interested Party should pursue the refund of the purchase price or proceed with suit for the 55% remaining of the land he was buying, assuming that he will get extension of time to apply for the Land board Consent.

26. The court thus makes the following orders:-

(a) The Application dated 30th May, 2014 is allowed as prayed.

It is so ordered.

Dated, Signed and Delivered at Machakos this 27th day of January, 2017.

O. A. ANGOTE

JUDGE