



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 70 OF 2011

MESHACK A MECHA.....1ST PLAINTIFF

D N IKUA.....2ND PLAINTIFF

VERSUS

STEPHEN KIPRONO CHUMO & 2 OTHERS.....DEFENDANTS

RULING

(application to set aside a consent; suit by plaintiffs claiming to have purchased land from the 1st defendant; 1st defendant having sold the land to the applicants and title now with the applicants; applicants not party to the suit; consent entered between 1st defendant and the plaintiffs that 1st defendant will transfer the land to the plaintiffs; applicants now applying to set aside that consent; application allowed; consent could not be entered or be executed without the involvement of the applicants who are the registered owners; consent order set aside; plaintiffs directed to amend plaint to include the applicants in the suit as defendants)

1. The application before me is that dated 20 June 2013 filed by two persons namely David Gitau Mbugua and Cecilia Njoki Gatehi. They seek for orders that they be enjoined as 4th and 5th defendants to this suit and for the setting aside of the consent order dated 17 October 2011. A brief background will reveal why the applicants have filed this application.

2. This suit was commenced by way of plaint filed on 31 March 2011. The two plaintiffs pleaded that they are owners of the land described as Uns. Residential Plot No. B situated within Nakuru Municipality having purchased it from the 1st defendant, who it is pleaded, had been allocated the land by the Commissioner of Lands (3rd defendant) in the year 1999. It is averred that in the month of January 2011, some strangers came to the plot alleging to have bought it from the 1st defendant and wanted to develop the land. The plaintiffs then called the 1st defendant who stated that he had by mistake sold the plot to the 3rd parties upon obtaining lease documents from the 2nd defendant (Nakuru District Land Registrar) and 3rd defendant. It is pleaded that the defendants had no title to pass as the same had passed over to the plaintiffs. In the suit, the plaintiffs sought a declaration that the land belongs to them and costs of the suit.

3. The 1st defendant entered appearance through the law firm of M/s Gordon Ogolla & Associates Advocates. He also filed a defence wherein he averred that the land was sold to a 3rd party by error and that the error is regretted. He pleaded that he is ready and willing to revert back the title to the plaintiffs.

4. On 9 September 2011, a consent was drawn between the law firms of M/s Ikuu, Mwangi & Company

Advocates for the plaintiffs and the law firm of M/s Gordon Ogolla & Associates Advocates for the 1st defendant. The consent which was filed on 17 October 2011 was drawn as follows:-

(i) The 1st defendant do transfer all that parcel of land known as Nakuru Municipality Block 15/858 to the plaintiffs;

(ii) Any claim by 3rd parties over the plot be dealt with by the 1st defendant refunding any consideration paid to him by error;

(iii) The suit against the 2nd and 3rd defendants be and is hereby withdrawn with no orders as to costs.

(iv) The costs of the suit be granted to the plaintiffs in any event and the matter be marked as settled.

5. An order confirming the above orders was issued on 21 June 2012.

6. Through a letter dated 19 March 2013, the plaintiffs applied that the 1st defendant do show cause why he should not be committed to civil jail for failing to comply with the decree.

7. It is then that this application to set aside the consent was filed. In the application, it is stated that the applicants are the registered owners of the land parcel Nakuru Municipality Block 15/858. It is deposed in the supporting affidavit that the applicants purchased the property from the 1st defendant on 9 July 2007. It is the view of the applicants that the consent of 17 October 2011 was entered into fraudulently to deny them ownership of the said property. It is argued by the applicants that it is improper for the parties to have entered into the consent without their involvement.

8. Before the application could be heard, the 1st defendant died, and he was substituted with the administrators of his estate. They did not file anything to oppose the present application. The plaintiffs have however opposed the motion.

9. I have considered the matter alongside the written submissions of counsel for the applicant and of the plaintiffs.

10. I have no doubt in my mind that the consent must be set aside. In the suit, the plaintiffs wished to have ownership of what was described as Uns. Residential Plot No. B situated within Nakuru Municipality. It will be observed that the consent entered into was for land that was registered as Nakuru Municipality Block 15/858. It is not very clear to me whether they refer to the same land. But let us assume that they relate to the same land; I have seen from the copy of title annexed by the applicants, that they became registered as proprietors on 31 January 2013. Clearly, the 1st defendant could not be able to abide by the consent for he had already transferred the land to the applicants by this time. Transfer to the plaintiffs can only be done upon cancellation of the title of the applicants and their title cannot be cancelled without them first being heard. They can only be heard if they become parties to this suit and if the consent between the plaintiffs and the 1st defendant is set aside. I would not go as far as saying that the consent is fraudulent, but there is no way the plaintiffs can obtain what they seek, without the involvement of the applicants in this suit.

11. It is for the above reasons that I find it necessary to set aside the said consent and the same and all other consequential orders are hereby set aside.

12. In place thereof, I do direct the plaintiffs to amend their plaint to reflect two aspects. If the land parcel Nakuru Municipality Block 15/838 is the same as the land described as Uns. Residential Plot B in Nakuru Municipality, then let the plaint be amended to reflect this position. Secondly, the plaint must be amended to include the two applicants as defendants. The plaintiffs need to also consider what prayers they need to seek from court. I direct further that the amended plaint be filed and served within 30 days from today. If the plaint is not amended, then really there will be no suit to go for trial and the original plaint is at risk of

being struck out.

13. On costs, each party to bear his/her own costs.

14. It is so ordered and directed.

Dated, signed and delivered in open court at Nakuru this 22nd day of February 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :

No appearance on the part of counsels and parties.

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU