



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 77 OF 2013**

**ONESMUS MUNIO NDUMBI .....PLAINTIFF**

**VERSUS**

**JOSEPH NJOGU PAULO .....1<sup>ST</sup> DEFENDANT**

**MUKURIA PAUL NDUMBI .....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Consent entered into by some of the parties; one of the litigants not a party to the consent contesting its adoption as an order of court; plaintiff suing both defendants claiming that they fraudulently subdivided his land and procured titles in their name; one defendant compromising the suit and being ready to return his title to the plaintiff and a consent executed; the other defendant contesting the adoption of the consent arguing that it will prejudice his defence; consent freely entered; no admission of fraud in the consent; no prejudice will be caused to the other defendant as he will defend the suit in the ordinary way; objection to the consent overruled; consent adopted as an order of the court)***

1. Through a consent dated 26 January 2017 and filed on 6 February 2017, the plaintiff and the 2nd and 3rd defendants, compromised this suit. This consent is contested by the 1st defendant hence the need to make a ruling as to whether or not the same should be adopted by this court.

2. The background is that this suit was commenced by way of plaint filed on 17 January 2007 which plaint has been amended a couple of times. In the original plaint, the plaintiff sued two persons, namely Joseph Njogu Paulo and Mukuria Paul Ndumbi. He pleaded that he is the registered owner of the land parcel Subukia/Subukia Block 12/52 (Arash) measuring about 0.92 Ha, which land he stated was transferred to him in the year 1996. He pleaded that in the year 1999, the said 1st and 2nd defendants subdivided this land into four portions, being numbers 1183, 1184, 1185 and 1186, and that they transferred to themselves and took possession of the land parcel numbers 1183 and 1185. In the plaint, the plaintiff sought orders of vacant possession of the said land parcels number 1183 and 1185 which he pleaded were illegally excised from the original land parcel No. 52.

3. The law firm of M/s Karanja Mbugua & Company Advocates entered appearance for the 1st and 2nd defendants and filed defence. It was pleaded that the land parcel No. 52 was owned by one Paul Ndumbi Karanja (deceased) and that vide a will dated 1 June 1994, he bequeathed this land to both plaintiff and the two defendants who are all brothers. It was pleaded that to avoid problems, the late Paul Ndumbi undertook subdivision and transfer of this land. It was pleaded that the land was then subdivided into the four portions, with the parcel No. 1183 being in the name of Joseph Njogu (1st defendant), parcel No.

1184 being in name of Paul Ndumbi Karanja (the deceased), parcel No. 1185 being in name of Mukuria Paul Ndumbi (2nd defendant), and the parcel No. 1186, being in the name of Onesmus Muniu (the plaintiff).

4. The original plaint was amended on 15 May 2009 but there is nothing significant in this amendment since it only added a pleading that there was a previous suit being Nakuru CMCC No. 1050 of 2007.

5. In the course of time, the original 2nd defendant, Mukuria Paul Ndumbi, died on 14 September 2009. An application to substitute was filed so as to have the administrators of his estate substituted for the deceased 2nd defendant. The application was allowed and the two administrators of the estate of the deceased 2nd defendant, namely Teresia Nyanjua Mukuria and Paul Ndumbi Mukuria, were admitted into the proceedings in place of the 2nd defendant. The plaint was then amended on 16 May 2013, and these two persons were now named as the 2nd and 3rd defendants respectively. There was otherwise no change in the original pleadings in so far as cause of action is concerned. These two new defendants also continued to be represented by the law firm of M/s Karanja Mbugua & Company Advocates.

6. On 26 January 2017, these two defendants representing the estate of Paul Ndumbi Mukuria, filed a Notice to Act in person. It will be observed that it is on the same day that the consent herein was drawn between these two defendants and the plaintiff, represented by the law firm of M/s Leina Morintat & Company Advocates. That consent is in the following terms :-

*(i) That the registration of the (sic) Mukuria Paul Ndumbi (now deceased) as the proprietor of parcel NO. Subukia/Subukia Block 2/1185 (Arash) be and is hereby cancelled and the said parcel be registered in the name of Onesmus Muniu Ndumbi.*

*(ii) That Teresiah Nyanjau Mukuria and Paul Ndumbi Mukuria being the administrators of the estate of the late Mukuria Paul Ndumbi to execute the transfer documents herein.*

*(iii) That upon compliance of 1 and 2 above, the suit against the 2nd and 3rd defendants stands withdrawn with each party bearing their own costs of the suit.*

7. The consent is signed by the law firm of M/s Leina Morintat & Company Advocates for the plaintiff and the 2nd and 3rd defendants who are acting in person.

8. Mr. Karanja Mbugua, now left as acting solely for the 1st defendant, has contested the adoption of this consent. He pointed out that the plaintiff filed the suit against the original two defendants and sought judgment against them jointly and severally. He submitted that both original defendants were jointly accused of fraud and misrepresentation, which led to the issuance of four different titles. He submitted that the defendants are intertwined and that no consent may be entered by only some of the defendants. He submitted that his client is of the view that the consent exposes him and submitted that the plaintiff should move his case against all defendants to prove his case.

9. On his part, Mr. Mwalo for the plaintiff, submitted that the consent should be adopted since there are distinct titles in issue in the matter. He submitted that the land parcel No. 1185 is registered in the name of the original 2nd defendant. He submitted that if the consent is allowed, they would still pursue their case as against the 1st defendant.

10. The 2nd and 3rd defendants were in court when the above was argued and they personally confirmed that they freely entered into the consent at hand.

11. I have considered the matter. Generally, parties are free to enter into consents. However, the court is not bound to adopt, as orders of the court, all consents of the parties, and may in some instances reject them. The court always bears oversight over a matter that is before it and may reject a consent, if for example, it is aimed at stealing a march on one of the parties, if it is a clear fraud apparent on the face of it, if it is outrightly illegal, or if it is against public policy. A consent is therefore always subject to scrutiny by the presiding judicial officer.

12. I have pored over the consent. Nowhere in the consent is it admitted that there was any fraud or illegality committed by the original 2nd defendant (now deceased). The administrators of his estate are however not averse to having his registration cancelled and the title returned to the plaintiff. I observe that the parties herein are relatives. It may be that after consideration of the issues, the 2nd and 3rd defendants, thought it best to resolve the issue amicably and return the title to the land parcel No. 1185 to the plaintiff. I have confirmed that they have entered into this consent out of their own free will.

13. It has been argued that the consent will prejudice the 1st defendant. I do not think so. As I have mentioned earlier, there was no admission of any fraud in the consent. The 1st defendant can of course proceed to protect his title to the land parcel No. 1183 and defend any allegation of fraud. I do not see how the return of the title to the parcel No. 1185 compromises his defence. If the court holds that there was no fraud in the manner in which he acquired his title, so be it; he will remain as registered proprietor of this land. Of course if the court holds otherwise, he will have to surrender this title to the plaintiff. But I really do not see how it can be said that by compromising the suit, in so far as it relates to the parcel No. 1185, the 1st defendant is prejudiced in so far as his defence to proprietorship of the land parcel No. 1183 is concerned.

14. For the above reasons, I will admit the consent as drawn and adopt it as an order of this court. The case will otherwise proceed as against the 1st defendant in the ordinary manner.

15. I make no orders as to costs in so far as the arguments herein are concerned.

16. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 28<sup>th</sup> day of March 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :**

Mr. Morintat present for the plaintiff

Mr. Githui holding brief for Mr. Karanja Mbugua for the 1<sup>st</sup> defendant

2<sup>nd</sup> & 3<sup>rd</sup> defendants acting in person

Court Assistant :Nelima

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**