



**Leboo & 2 others (Suing as members of Lembus Council of Elders) v Director of Kenya Forest Service & another; Miti Bora Sawmills Limited & another (Interested Parties) (Environment & Land Case 273 of 2013) [2024] KEELC 1103 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1103 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 273 OF 2013  
EO OBAGA, J  
FEBRUARY 29, 2024**

**BETWEEN**

**JOSEPH LEBOO ..... 1<sup>ST</sup> PLAINTIFF  
WILLY NGURUTU ..... 2<sup>ND</sup> PLAINTIFF  
PHILIP SURA ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS MEMBERS OF LEBBUS COUNCIL OF ELDERS**

**AND**

**THE DIRECTOR OF KENYA FOREST SERVICE ..... 1<sup>ST</sup> RESPONDENT  
BARINGO COUNTY FOREST CO-ORDINATOR ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MITI BORA SAWMILLS LIMITED ..... INTERESTED PARTY  
ROWAN FORESTER INTERNATIONAL SAWMILL ..... INTERESTED PARTY**

**RULING**

1. This is a ruling in respect of a notice of motion dated 7.9.2021 in which the plaintiffs are seeking the following orders: -
  - a. Spent
  - b. Spent
  - c. This Honorable court be pleased to review, vary, vacate and/or set aside the consent order made on 18<sup>th</sup> December, 2014, and to make fresh orders and conditions for compliance.



- d. In the alternative, this honourable court be pleased to order that this matter to proceed for full hearing and determination of this matter.
  - e. Costs of this application be provided for.
2. The Plaintiffs/Applicants contend that the Defendants/ Respondents' advocate duped them into signing a consent dated 18/12/2024 which gave the Respondents a leeway of harvesting trees in the forest without proper procedures being followed. They further contend that the Respondents failed to disclose all material facts at the time of recording the consent.
  3. The Applicants argue that the Respondents are yet to comply with the conditions which were stipulated in the consent. They further argue that they did not have full facts at hand when the consent was filed. They state that the consent order of 18.12.2024 is no longer useful as it has been overtaken by events. The applicants seek to have the consent set aside so that new conditions can be set aside.
  4. The Applicants deponed that the Respondents have no regard for conservation of forests as they are only busy collecting money from saw millers who are allocated immature forest to harvest thus causing degradation of the environment. They further deponed that the forests which were harvested between 2014 and 2015 are yet to be reforested and that the forest management plans which were to be supplied to them have since expired as the lifespan of a forest management plan is five years.
  5. The Applicants contend that as a community, they were not involved in the activities of the Respondents and that they are apprehensive that the government will open up 5000 hectares of forest for harvesting which includes the 8 forest blocks of Lembus forest without a management plan.
  6. The Applicants' application was opposed by the Respondents through grounds of opposition dated 4.12.2023 and filed in court on 6.12.2023. The Respondents contend that the Applicants have not given sufficient grounds to warrant the court setting aside the consent order; that the issues raised in the suit have been overtaken by events including the repeal of the Forest Act 2005 and the enactment of the Forest Conservation Management Act and that the application which has been brought after 7 years is brought in bad faith.
  7. On 13.12.2023 the parties agreed to have this matter disposed of by way of written submissions. The Applicants were given 7 days to file and serve written submissions and the Respondents were given 7 days to file their submissions upon being served. As at the time of writing this ruling, it is only the Respondents who had filed their submissions.
  8. I have considered the Applicants' application as well as the opposition to the same by the Respondents. I have also considered the submissions by the Respondents. The only issue for determination is whether there are sufficient grounds to have the consent order set aside.
  9. Before I proceed to determine whether to set aside the consent order of 18.12.2014 or not, it is important to reproduce it in verbatim:-

“Consent Order

The parties herein do wish to record the following consent order.

That by consent;

- a. The Defendant through National Environment Management Authority having conducted a comprehensive Environment Impact Assessment and a licence thereof having been issued on 1<sup>st</sup> April 2014 copies whereof the Defendants undertakes to avail to the plaintiff;



- b. Parties recognize that there is established Eight Community Forest Association for every station under which the plaintiffs have been fully incorporates and their participation operationalized and the 1<sup>st</sup> Defendant nevertheless undertakes to provide the plaintiff with the entire list of membership of the various CFA's;
- c. Parties recognize that there is a Participatory Forest Management Plan which was developed and a forest management agreement copies whereof the 1<sup>st</sup> Defendant hereby undertakes to avail to the plaintiff as and further undertakes to ensure full compliance.
- d. Parties recognize that there is a Planation Management Plan which was complete, a copy whereof the 1<sup>st</sup> Defendant hereby undertakes to avail to the Plaintiffs and which the 1<sup>st</sup> Defendant further undertakes to ensure full compliance.
- e. Parties hereby confirm that there are mechanism that ensure the community through the Community Forest Associations will access benefits from the Forest Resources.
- f. All parties shall ensure compliance with the law and only pre-qualified saw millers shall be allowed to carry out the harvesting.

This matter shall be marked as settled with no orders as to costs.

Dated at Eldoret this 18<sup>th</sup> day of December, 2014.

Signed

E. C. Rotich & Co. Advcoates

Advocates for the Plaintiff

Signed

Chairman Lembus Council of Elders

Signed

Kalya & Co. Advcoates

Advocates for the Defendants

Signed

Baringo County Forest Co-ordinator

10. Prior to the signing of the consent of 18.12.2014, the Applicants had filed a suit against the Respondents in which they sought the following reliefs:-
- a. The defendants, their agents and/or anybody claiming through them be permanently restrained from the illegal and irregular harvesting of the timber and fuel wood materials in Sabatia, Maji Mazuri, Kiptuget, Chemususu, Naivasha, Koibatek, Chmurgok and Esegeri Block of Lembus Forest within Baringo County, and the said illegal allocation be nullified.
  - b. The defendants their agents and/or anybody claiming through them be permanently restrained from the illegal and irregular harvesting of the Timber and fuel wood materials in all constituent forests in Baringo County and the said illegal allocation be nullified.



- c. Costs of this suit.
- d. Any other relief this Honourable court may deem fit and just to grant.
11. The suit which had been filed by the Applicants was settled in terms of the consent signed on 18.12.2014. There are numerous decisions from the superior courts which state grounds upon which a consent order can be set aside. In the case of *Hirani –vs- Kassan* (1952) 19 EACA 131 the court of Appeal quoted a passage from *Seton on Judgements and Orders*, 7<sup>th</sup> edition Vol. IP. 124 where it was stated as follows:-
- “*Prima facie*, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them.... And cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court.... Or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”
12. Further in the case of *Kenya Commercial Bank limited –vs- Specialized Engineering Co. Ltd* (192) KLR P. 485, the Court of Appeal held as follows: -
- “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 by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misappropriation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”
13. From the consent which was signed on 18.12.2014, it is clear that the Applicants were represented by a firm of Advocates who signed the consent order. The chairman of the Applicants also signed the consent order. In the consent order, it is clear that the parties were all aware of how the forests are managed and how harvesting should be carried out. The Respondents undertook to avail any documents which were mentioned in the consent.
14. The Applicants contend that their counsel was duped into signing the consent and that they did not have full material facts at the time of signing the consent. They also contend that the Respondents did not provide the documents which they undertook to avail. The Applicant did not provide details of the alleged material facts which they did not have at the time of signing the consent.
15. The Applicants concede that the consent of 18.12.2014 has been overtaken by events and is no longer useful. Indeed, on 31.10.2023, the Applicants’ counsel informed the court that most of the applications filed herein had been overtaken by events and the prayers in the present application had been rendered moot. She indicated that she was only interested in pursuing prayer (C) of the Notice of motion dated 7.9.2021.
16. There is no evidence of the alleged material facts which the Applicants allege were not within their knowledge when signing the consent order. No fraud is alleged on the part of the Respondents. The consent was not signed against the policy of the court. The parties were not ignorant of material facts. The terms of the consent are clear that the parties were cognizant of the operations of the management of forest and the community participation.
17. The Applicants themselves concede that the Forest Management plans which were to be supplied to them have since expired as the lifespan of a Forest Management plan is five years. The Applicants’



counsel has conceded that there have been decisions from other courts which have determined the issues being pursued by the Applicants. As the Applicants are not keen on pursuing this case which was settled by the consent signed, there is no point of setting aside a consent which has been overtaken by events.

18. The Applicants had filed a notice of motion dated 6.12.20221 seeking to stop bids which were in the process of being signed. This application was overtaken by events through pronouncement in ELC Petition No. 1 of 2022 at Milimani in Nairobi which nullified the bids in contention. There are other new cases which came up stopping harvesting of forests even after there were pronouncements by the Executive that forests were to be opened to saw millers to harvest mature trees. This being the case, I find that the consent which was signed on 18.12.20214 which settled this case and which has been overtaken by events cannot be set aside as no grounds have been shown to warrant its setting aside. Consequently, I proceed to dismiss the notice of motion dated 7.9.2021 with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Ms. Keston for Mr. Omusundi for Interested parties.

Court Assistant –Laban

