



REPUBLIC OF KENYA



KENYA LAW
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**Njabikha & another v Njabhika & 3 others (Environment & Land Case
5 of 2019) [2024] KEELC 819 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 5 OF 2019
EC CHERONO, J
FEBRUARY 22, 2024**

BETWEEN

MARTIN WANYONYI NJABIKHA 1ST PLAINTIFF

**MARTIN NYONGESA NJABIKHA (SUING AS THE LEGAL
REPRESENTATIVES OF THE ESTATE OF THE LATE HEZEKIEL
NJABIKA ALIAS EZEKIEL NJABIKHA KISEMBE ALIAS EZEKIEL
NJABIKA) 2ND PLAINTIFF**

AND

JULIUS NAMASWA NJABHIKA 1ST DEFENDANT

**THE REGISTERED TRUSTEES OF THE CHURCH OF JESUS CHRIST OF THE
LATER DAYS SAINTS IN KENYA 2ND DEFENDANT**

**REGISTERED TRUSTEES CHURCH OF JESUS CHRIST OF THE LAT'ER
DAYS SAINTS IN KENYA 3RD DEFENDANT**

LAND REGISTRAR BUNGOMA 4TH DEFENDANT

RULING

1. Before me for determination is a Notice of Motion Application dated 6th October, 2023 and brought under Article 159 (2) of the *Constitution* of Kenya 2010, Section 20 of the *Environment and Land Court Act* 2011, Section 59 C of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 46 Rule 20 and Order 50 Rule 1 of the Civil Procedure Rules 2010 for orders that this Honourable Court be pleased to set aside the orders issued on 27th July, 2023 and to vacate the hearing date scheduled for 23rd October, 2023.
2. The Application is supported by grounds set on its face as well as on the sworn affidavit of Dr. Fred Ojiambo SC, MBS counsel for the Applicant herein, dated the 6th October, 2023.



3. The applicant's case is that this matter was settled by parties pursuant to a Settlement Agreement dated 16th September 2021 and an order issued by the court on 14th December, 2021 and that the same cannot be fixed for a hearing date as requested by the plaintiff/respondent despite the delay in implementation and compliance with the settlement agreement.
4. The said Application was opposed by the Plaintiff/Respondent's vide a Replying Affidavit sworn on the 10th November, 2023 in which he seeks to have the application dismissed for being an abuse of the court process. It was averred that the plaintiff/respondent had executed a consent on settlement in a view of finalizing the matter and that it is the defendants who had not yet executed the consent. The plaintiff/respondent averred that in fact the 3rd defendant/respondent had not complied with the terms of the settlement agreement which required them to deposit some funds to the firm of advocates representing the estate of the deceased.
5. It was averred that as a result of the 3rd defendant/respondent's non-compliance, the plaintiff/respondent has filed an application dated 8th February, 2022 seeking to set aside the orders of 16th December, 2021. They urged the court to first hear and determine the application dated 8th February, 2022 and added that the applicants herein had no audience for failure to comply with the consent judgment.
6. Directions were taken to have the application canvassed by way of written submissions. The applicants filed submissions dated 23rd November, 2023 where they submitted that this matter was settled when the parties entered into a settlement agreement and filed a consent adopting it as an order of the Court. They argued that the said settlement agreement remained binding on the parties and enforceable as long as it had not been varied or set aside.
7. They relied on various case law such as *Samuel Mbugwa Ikumbu v Barclays Bank of Kenya Limited* (2015) eKLR, *Board of trustees National Security Social Fund v Micheal Mwalo* (2015) eKLR, *Paragon Electronic Limited v Fatma Musee* (2022) eKLR and *Geoffery M. Asanyo & 3 others v Attorney General* (2018) eKLR.
8. By way of background, this is a matter that was instituted by way of a plaint filed herein on 12th March, 2019 where the plaintiff sought for several orders against the defendants in respect to the suit land parcel No. Ndivisi/makuselwa/527 which is said to have since been sub-divided into parcels no. Ndivisi/makuselwa 2087, 2088 and 2089 and transferred to the 2nd and 3rd defendants. It is the plaintiff's case that the sub-division and transfer was fraudulently done by the 1st defendant who is their brother in collision with the 2nd and 3rd defendant prior to succession being done with respect to the estate of the deceased who was the original owner.
9. During the compliance stage, parties-initiated negotiations which were fruitful and they entered into a settlement agreement compromising the matter and recorded a consent on 14th December, 2021. The matter was mentioned severally in court to confirm compliance with the consent judgment leading to the proceedings of 27th July, 2023 which saw the court fix the mater for hearing on 23rd October, 2023 thus the current application.
10. I have considered the Applicant's application, the supporting affidavit, annexures thereto and submissions. I have also considered the reasons given for and against the said application.
11. It is not in contention that the parties therein entered into a consent judgment dated 14th December, 2021. The law on consent judgment has been litigated on and settled by courts previously. See the case



of *Kasmit Wesonga Ongoma & another v Wanga* [1987] eKLR , this Court differently constituted said:-

“ A consent judgment is a judgment the terms of which settled and agreed to by the parties to the action.”

12. In the case of *Flora N. Wasike v Jestimo Wamboko* [1988] eKLR Hancox JA cited *Setton on Judgments and orders* (7th edition) vol 1 page 124, and reiterated that;

“ Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”

13. In *Hirani v Kassam* [1952] 19 EACA 131 the Court of Appeal held;

“It is now well 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.

14. It is clear that this suit had been concluded by way of a consent judgment which has not been set aside and remains valid and enforceable in law. Therefore, this is not a matter that is open for trial and it therefore goes without saying that the same cannot be fixed for hearing of the main suit again

15. I have perused the court record and I note that indeed there is an application dated 8th February, 2022 by the plaintiff/respondents that has not been dealt with. Directions had been issued on how to canvass the same but parties opted to negotiate. From the record, it appears that parties were unable to reach any agreement on how to compromise the application and to settle the concerns raised by the plaintiff/respondent herein who is the applicant in that application. I note the hearing date of 23rd October, 2023 was for that application (dated 8th February, 2022) which is still pending and not for the main suit as may have been interpreted by the applicant herein.

16. Ultimately, I proceed to strike out this application which I hereby do with Costs in the cause. Parties shall comply with the directions of this court issued on 14th February, 2022 forthwith in relation to the application dated 8th February, 2022.

17. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY, 2023.

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HON.E.C CHERONO

JUDGE

In the presence of;

Juma Waswa H/B Alubala for plaintiff

Defendants/advocate-absent.

