



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 213 OF 2011

GEORGE MARTIN KENYATTA 1ST PLAINTIFF

PETER NYACHIENGA ANASSI 2ND PLAINTIFF

VERSUS

JULIUS MOKAYA MOTURI 1ST DEFENDANT

JOSEPH KENYATTA OMAMBIA 2ND DEFENDANT

DISTRICT LAND REGISTRAR, NYAMIRA 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The 1st and 2nd defendants by a Notice of Motion dated 29th July 2013 expressed to be brought under Order 2 Rule 15 (a) (c) (d) Order 25 Rule (1), (2) Order 51 Rules 1, 2, 3 and 13 (2) and Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act seeks orders that;-
 1. **That the honourable court be pleased to adopt the consent judgment herein dated and filed on 18th July 2013 as the judgment of this court.**
 2. **That the consent judgment dated 18th July 2013, filed in court on the same date negates and/or collapses the substance of the 1st plaintiff's claim against the defendants with the effect of fully settling the suit as between the 1st plaintiff, the 1st and 2nd defendants.**
 3. **That in the alternative prayer 2 above, an order do issue striking out the 1st plaintiff's claim and/or extending the effect of the same to the 1st plaintiff.**
 4. **That a declaration do issue that the consent judgment as filed in court on 18th July 2013 between the 2nd plaintiff, 1st defendant and 2nd defendant has infections/binding/compelling consequence that instantly discharges the whole of the plaintiffs claim against the defendants**
 5. **That cost of this application be in the cause.**
2. The application is supported on the grounds set out on the face of the application and on the annexed supporting affidavit by Julius Mokaya Moturi, the 1st defendant herein. The applicants contend that the consent entered between the 2nd plaintiff and the 1st and 2nd defendants fully settled the 2nd plaintiff's claim against the defendants and at the same time disposed of the 1st and 2nd defendants counter-claim against the plaintiffs. Thus they argue that if the consent is adopted as the judgment of the court there would be nothing left to try in the instant suit as the consent

resolves all the issues.

3. The 1st plaintiff filed grounds of opposition dated 14th October 2015 and a replying affidavit sworn on 4th March 2016 in opposition to the applicants' application. The 1st plaintiff contends that the application is misconceived and an abuse of the court process. He argues the application lacks merit and is bad in law and asserts that the consent was obtained by omission, mistake and/or fraudulently. The 1st plaintiff further avers that he was the registered proprietor of land parcel **West Mugirango/Siamani/6454** which was a resultant subdivision of land parcel number **West Mugirango/Siamani/ 3585** owned by his father. The 1st plaintiff claims that the land registrar had unlawfully and irregularly cancelled his title to **parcel number 6454** which precipitated the instant suit against the land registrar seeking a rectification of the register. The 1st plaintiff further states he had sold to the 2nd plaintiff a portion of the suit land but the 2nd plaintiff had only made a partial payment of the consideration leaving the balance to be paid on transfer.
4. The 1st plaintiff asserts that he was not a party to the consent dated 18th July 2013 and consequently the same cannot bind him and neither can the same be imposed on him. The consent dated 18th July 2013 that has provoked the present application was in the following terms:-

By consent:

The 2nd plaintiff's claim/suit against the 1st and 2nd defendants be and is hereby marked settled in the following terms:-

1. **The 1st and 2nd defendants to jointly pay the 2nd plaintiff a sum of Kenya shillings One Million Eight Hundred Thousand (Kshs. 1,800,000/=) in full and final settlement same being the deposit paid towards the purchase price of West Mugirango/Siamani/6454 and damages. The said amount be paid in cash or vide banker's cheque in 14 (fourteen) days from the date hereof.**
2. **That upon payment of the amount stated in item one (1) above the 2nd plaintiff's claim based on the sale agreement for purchase of West Mugirango/Siamani/6454 dated 24th June 2011 be marked settled.**
3. **The 1st defendant continues with occupation of the parcel or portion of land curved or to be curved out of West Mugirango/Siamani/3585 as per the sale agreement dated 1st October, 2011 binding the 1st and 2nd defendants.**
4. **That the 2nd plaintiff shall on this settlement have no claim or otherwise against the 1st and 2nd defendants in respect of the property or properties the subject matter of this suit.**
5. **Each party to bear own costs.**

Dated at Kisii this 18th day of July, 2013.

Mose Nyambega & Co. Advocates for the 1st and 2nd defendants

G. M Nyambati & Co. Advocates for the 2nd plaintiff.

5. From the record the firm of **G. M Nyambati & Co. Advocates** filed the instant suit on behalf of the 1st and 2nd plaintiffs and as at 18th July 2013 when the consent was made there had been no change of advocate filed on behalf of the plaintiff yet the firm of G. M Nyambati & Company Advocates expressly signed the consent for and on behalf of the 2nd plaintiff only. **Why was the 1st plaintiff left out when the consent was crafted?** Definitely the consent cannot bind the 1st plaintiff if he was not party to it. The 1st plaintiff claims his title to land parcel number 6454 was unlawfully and irregularly cancelled by the 3rd defendant and he seeks the rectification of the register. The consent did not address this issue and did not also involve the 3rd defendant. The issue whether the subdivision of land parcel **West Mugirango/Siamani/3585** to create land parcel **West Mugirango/ Siamani/6454** among others was lawfully done remains alive. Further the

issue whether or not the 3rd defendant should rectify the register to restore the cancelled title in respect of **West Mugirango/Siamani/6454** also remains alive. The consent does not dispose of these issues.

6. The consent as I see it merely settles issues as between the 2nd plaintiff and the 1st and 2nd defendants. The agreed position as between these parties can only form part of the evidence at the trial but cannot subsume the issues that the 1st plaintiff raises in the suit. To the extent that the 1st plaintiff does not concede title number **West Mugirango/Siamani/6454** was unlawfully excised out of **West Mugirango/Siamani/3585** that remains an issue to be tried and the court cannot properly hold that the consent between the 2nd plaintiff and the 1st and 2nd defendants effectively puts to rest all the issues in this suit.
7. I have perused and considered the submissions by the applicants' counsel and the authorities he has referred the court to but with respect I do not find any basis for the proposition that the consent entered herein can bind the 1st plaintiff who was not a party to it. In the case of **Kenya Commercial Bank Ltd -vs- Specialized Engineering Co. Ltd [1982] KLR 485** which the applicant cites the advocates for both parties in the suit drafted and recorded a consent in court but which the plaintiff subsequently declined to approve and an application to set aside or vary the consent was made. The court in declining to set aside the consent order inter alia held:-

1. **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 collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general which would enable the court to set aside an agreement.**
2. **The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.**

8. As illustrated earlier in this ruling the 1st plaintiff was not a party to the consent dated 18th July 2013 and therefore cannot be bound by the same. While parties to a suit are at liberty to enter into agreements/consents and/or compromises, the court would be slow to endorse such as judgments of the court when not all parties to the suit are parties to the agreement, consent and/or compromise. In the instant matter the consent entered into between the 2nd plaintiff and the 1st and 2nd defendants may well have settled the issues as between them but not with the 1st plaintiff who has issues with the 3rd defendant and the 1st and 2nd defendants who he alleges to be in trespass of his land parcel **West Mugirango/Siamani/6454**. It would in the circumstances be inappropriate for the court to adopt the consent as a judgment as the applicants seek. The issues in the suit cannot be disposed fully by the consent as argued by the applicants. The 1st plaintiff has a right to be heard on the issues that I have flagged in the course of this ruling.
9. In the premises I find and hold the applicants application dated 29th July 2013 to be lacking in merit and accordingly order the same to be dismissed. I direct that the costs of the application be in the cause.
10. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 3rd day of June, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

.....

for the 1st and 2nd plaintiffs

..... for the 1st and 2nd defendants

..... for the 3rd and 4th defendants

..... Court Assistant

J. M MUTUNGI

JUDGE