REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CIVIL SUIT NO. 162 OF 2007

THE BOARD OF GOVERNOR

CHANGAMWE SECONDARY SCHOOL..................................PLAINTIFF

-VERSUS-

THE COMMISSIONER OF LANDS

THE ATTORNEY GENERAL..DEFENDANTS

AND

TURF DEVELOPERS LIMITED..APPLICANT

RULING

1. The chamber summons application for ruling is dated 12th January 2010 seeking the following orders :-

   1. That this application brought by TURF DEVELOPERS LIMITED be certified as urgent and service thereof upon the Plaintiff and Defendants be dispensed with in the first instance.

   2. That the Decree passed on the 9th day of December 2009 and all consequential orders be set aside.

   3. That this Honourable Court be pleased to join the applicant Turf Developers Limited as a Defendant to this suit.

   4. That the plaintiff by itself, its servants, agents or employees and or students howsoever be restrained from entering onto or trespassing upon or from taking possession of or damaging, wasting, developing, selling, leasing, alienating, transferring, charging, mortgaging or in any way from dealing whatsoever with all that parcel of land known as Plot No. MN/VI/3458 until the hearing and final determination of this suit or until further orders of this Honourable Court.

   5. That costs of this application be provided for.

2. The application is supported by several grounds on the face of it and the affidavit sworn by Ashok

Labshanker Doshi. Briefly, the applicant deposes that he is the registered owner of land parcel No MN/vi/3458 having absolute and indefeasible rights and annexed thereto a copy of the title deed. He deposed further that the plaintiff misrepresented material facts and failed to disclose the existence of the HCCC No 485 of 2000 involving the same parties and same subject matter. The applicant avers that orders were issued in HCCC No 485 of 2000 and certain negotiations entered into between the parties.

3. The applicant deposes that the plaintiff/respondent agreed to have this suit marked as settled vide correspondences annexed as ADL 6, 7, 8 and 9. When the applicant's advocate received no confirmation to the said correspondences, he instructed the advocate to peruse this Court file only to ascertain that the parties had fraudulently entered into a consent judgement revoking his title. This order was also registered against the title at the lands registry. He urged the Court to set aside the decree passed on the 9th December 2009 through the consent order.

4. The plaintiff opposed the application via preliminary objection filed in Court on 25th February 2010. In the objection, three grounds were raised

(i) The Court has no jurisdiction to set aside the Decree between the Plaintiff and the Defendant herein and the Court is now *functus officio.*

(ii) That by dint of Section 24 of the Registration of Titles Act Cap 281 the intended Defendant/Applicant cannot set aside the Decree herein but can only bring a fresh action to recover damages if any.

(iii) The Court cannot grant the orders sought by virtue of the provisions of Section 24 of Cap 281. The plaintiff prays that the Application be dismissed with costs.

5. The defendants also opposed the application by them filing grounds of opposition. The grounds included inter alia :-

a) The relief sought is improper and incapable of being granted

b) The Court is functus officio in so far as the applicant involvement in HCCC No 162 of 2007 is concerned.

(c) The applicant was all along aware of the suit yet it took no action to enjoin itself before the said consent was recorded.

(d) It is in the public interest that the consent remain undisturbed.

6. The advocates for the applicant and the plaintiff made oral submissions. Mr Khanna for the applicant submitted that the applicant is directly affected by the outcome of this case. That the plaintiff illegally acquired the property and prayers (a) and (b) of the plaint are still pending for the Court to determine. Further that the consent circumvented the authority of the Court in making the declaratory orders that were sought. Mr Khanna submits that order 1 rule 10 (2) of the Civil Procedure Rules, 2010 gives the Court powers to enjoin parties who are to be affected by its orders. He urged the Court to exercise its powers and admit the applicant as a necessary party. He also urged the Court to set aside the decree as the orders made were in abuse of the Court process.

7. Mr Oddiaga for the plaintiff submitted that there is no suit before the Court for the applicant to join since the consent order was executed and the grant cancelled. He continued that the land was a public utility by the school and a grant is a special title which can be cancelled by either the Court or the Commissioner of Lands. That the Commissioner of Lands conceded the allocation was erroneous and the applicant can only challenge the cancellation by seeking damages from the Commissioner. Mr Oddiaga submitted that there is no prayer pending as the other prayers have been abandoned. The plaintiff submitted that prayer (a) and (b) of the plaint was withdrawn on 16th December 2014. He urged the Court to reject the application and dismiss it with costs.

8. Mr Khanna in brief response submitted that he was shocked to learn of the notice of discontinuance of the prayer (a) and (b) since none had been served on them. He said the notice went against the oxygen principles and urged the Court to disallow it. He submitted that the respondents were relying on the fact that the suit land was public property yet there was no evidence to that effect. He stated that page 42 of what does not show the grant was cancelled and the decree only revoked the plot. Lastly he submitted that the issues of special conditions can only be determined at a full trial. He urged the Court to allow the application.

9. In considering the pleadings filed and submissions rendered, I find two issues for determination in this application ;

a) Whether there is a suit before the Court for the applicant to join or this Court is *functus officio*

b) Whether this Court can set aside the decree of 9th December 2009 obtained by way of a consent order.

10. In a plaint dated 4th July 2007, the plaintiff sought three main prayers in terms of prayer (a), (b) and (c). The consent order between the parties to this suit allowed prayer (c) of the plaint leaving prayers (a) and (b) pending. On 16th December 2014 during the pendency of this application, the plaintiff filed a "notice of withdrawal" in which the plaintiff withdrew and discontinued prayer (a) and (b) of the plaint. From the record of this file, this application was first heard and determined with a dismissal. However it was later re-instated following the Court of appeal decision. It is the plaintiff's case that there is no suit pending before this Court for theapplicant to join.

11. The record does show that at the time when this application was filed, the two prayers in the plaint were still pending. Otherwise there would have been no reason for the plaintiff to file the notice of withdrawal on 16th December 2014. The application is seeking to join the applicant as well as set aside the decree of 9th December 2009. The question whether there was a suit for the applicant to join when the application was filed would be answered in the positive. This is so because the consent order only partially settled the suit. What is then the effect of the discontinuance of the pending prayers in to the applicant joining the suit ? In my considered view, the notice of withdrawal filed 4 years down after the application was filed cannot be used to defeat the rights of the applicant who already moved the Court to join this suit. In any event if this Court does get to set aside the consent judgement then there will still be dispute to be determined. The notice of withdrawal of suit has also not been endorsed as an order of this Court. Consequently I find the prayer of seeking to be joined as capable of being granted and this Court is not functus officio in this matter.

12. The second issue is whether the consent of 9th December 2009 can be set aside. The applicant submitted that it was illegally and fraudulently obtained. The principles for setting aside consent orders/judgement was laid out in the case of **Flora Wasike vs Wamboko (1988) IKLR 429** where the Court of Appeal held that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not. The Court of appeal in this case referred to the case of **Purcell vs F. C Trigell Ltd (1970) 2 All ER 671** in which Winn L. J said at 676 ;

> "It seems to me that if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons..."

13. Further in the case of **Hirani vs Kassam (1952) 19 EACA 131,** the Justices quoted Seton on Judgements and Orders 7th Edn Vol 1 page 124 where it is stated that consent orders/judgements may be set aside if

i) Obtained by fraud or collusion

ii) By Agreement contrary to the policy of the Court

iii) When given without sufficient material facts or misrepresentation or in ignorance of material facts

iv) In general for a reason which would enable the Courts to set aside an agreement.

This provision was also followed in the case of **Brook Bond i.e big vs Mallya (1975) EA** where it was held “a consent judgement may only be set aside for fraud, collusion or for any reason which would enable the Court to set aside an agreement.

14. In relation to the present case, the applicant was not a party to the consent. He has submitted that the consent was entered without the parties disclosing material facts or mis representing facts as they did not disclose the existence of the suit HCCC No 485 of 2000 involving the same parties and same subject matter. The record show the facts not disputed by the respondents are

i) This applicant is the registered owner of the suit property

ii) Before this suit was filed, the applicant had sued the plaintiff and the defendants vide MBS HCCC No 485 of 2000

iii) Some consent order was entered into on 16.4.2009 in HCCC 485 of 2000 between the applicant's advocates, the plaintiff's advocate on record and Muturi Gakuo & Kibara Advocates

iv) There were correspondences on record as regards the settlement of this suit and HCCC No 485 of 2000 (see annextures “ALD 5”, “ALD 6”, AKLD 7” to the application).

15. The plaintiff submitted that the land in dispute is a public utility being used by school therefore the applicant has no interest in it as a private citizen. From the chronology of facts set out above, when the consent was being reached by the plaintiffs and the defendants, they were well aware of the applicant's interest in the subject matter in dispute because of the existence suit HCCC 485/2000. The consent was reached in my view in collusion between the defendant and the plaintiff to defeat the interests of the applicant and defeat the orders issued in HCCC No 485 of 2000. The parties in reaching this consent indeed mis represented facts to the Court. The attorney general in his grounds of opposition shifted blame on the applicant for not joining this suit despite being made aware to protect his interests. It is my opinion that the fact that the applicant did not join this suit does not absolve respondents from any wrongdoing especially as regards the negotiations that had been on – going between the parties on the two suits (485 of 2000 and 162 of 2007).

16. I am of the view and I so hold that the circumstances of which the parties herein entered the consent judgement was clouded with collusion and failure to disclose material facts. Consequently I am convinced that this is a matter of general importance for the Court to set aside the consent judgement to enable the applicant get an opportunity to present his case and defend his title deed. In the case of **Evan Gachoki Njuki & 3 others vs Wilson Njuki Karukuma (2008) eKLR,** Kasango J. while setting aside a consent judgement in an application brought by an applicant who was not a party in that suit held that the parties in entering into the consent in that matter concealed material facts and mis represented the truth. On locus of the applicant, the Judge stated that section 80 of the Civil Procedure Act and Order XLIV allowed any one aggrieved by an order to approach the Court. In the present case, the applicant invoked the discretion of the Court under section 3A of the Civil Procedure Act. I am satisfied that the the applicant is aggrieved by consent judgement and is right to challenge it by bringing the present application.

17. In conclusion and for the reasons contained in the body of this ruling, I find the chamber summons dated 12th January 2010 to be merited and allow it in terms of prayer 2, 3 and 5. I find prayer 4 was not proved. These are my orders.

RULING dated and delivered at Mombasa this **30th** day of **October 2015**

A. OMOLLO

JUDGE