



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 252 OF 2014

SOSTEN KIPKORIR BETT

(Suing as the personal representative of the estate of

the late KIBET ARAP KIPTOO.....PLAINTIFF

VERSUS

KIBOR ARAP BIEGO.....1ST DEFENDANT

IRINE BOR.....2ND DEFENDANT

EMILLY BOR.....3RD DEFENDANT

VIOLA KEMBOI.....4TH DEFENDANT

JACOB BOR.....5TH DEFENDANT

RULING

Sosten Kipkorir Bett, (hereinafter referred to as the applicant) suing as the personal representative of the Estate of the late Kibet Arap Kiptoo has brought this Notice of Motion dated 9.12.2015 under Order 45, Rule 11 and 51 of the Civil Procedure Rules, 2010 and Section 34 of the Civil Procedure Act Cap. 21 Laws of Kenya, seeking for a review and setting aside of the decree of this court dated 10.9.2014.

The application is grounded on the allegation that it was brought without unreasonable delay and that the consent entered into between the parties on 10.9.2014 was without consultation of the plaintiff. Lastly, that there was a mistake occasioned on the face of the record.

In the supporting affidavit, it is sworn that the applicant is the administrator of the Estate of the late Kibet Arap Kiptoo who owned the parcel known as **TULWET/KESSES BLOCK 2/(KETIBILONG) 16**. That he instructed the firm of Wambua Kigamwa & Co. Advocates to file a suit on an issue of encroachment of a road on his parcel of land and respondent's parcel of land known as **TULWET/KESSES BLOCK 2/(KETIBILONG)/76**.

That his claim on the main suit was to reclaim 0.7 acres of land which the defendants have unlawfully claimed to be their own as their parcels should measure 4.856 hectares only. That he has since learnt that there is an emanating decree from a consent entered into by the said firm of Advocates that adopts a survey report on a boundary dispute.

That the decree was a result of mistake of his former Advocate's not informing the court of the proper

cause that is unlawful annexation of their portion of land into the defendant's land. He states that the consent entered in court was without consultation and they have been highly prejudiced. That the errors of his previous Advocates have prompted him to seek this legal redress with the Advocates now filing this application. That he makes this application for leave for the firm of M/s Birech, Ruto & Company Advocates be granted leave to represent him and thereafter he request the court to exercise judicial discretion by allowing a review of the orders made by Hon. S. Munyao.

The application is opposed by the respondents who filed grounds of opposition that the said application is bad in law, incompetent, irregular, fatally defective and otherwise an abuse of the court process and that the application is misconceived, hopelessly incurably defective nullity and lacks merit. That the application is based on an incurable illegality and ought to be struck out forthwith.

Moreover, the respondent filed a replying affidavit whose gist is that the plaintiff's application dated 9.12.2014 is scandalous, frivolous, vexatious and is otherwise an abuse of the court process meant to mislead this Honourable court and he urges this Honourable court to dismiss it with costs to the defendants. The respondent depones that he has been advised by their advocates on record the advise he verily believes to be true that the issues presented to court for hearing and determination have been dealt with and determined before this court of competent jurisdiction and that he has been further informed by his Advocates on record which information he verily believes to be true that there is no mistake or error apparent on the face of the court order and or on record and that the applicant has made this application almost 8 months after the order was made. The respondent has further been informed by his Advocates on record which information he verily believes to be true that there is no new or important evidence that has been brought before this Honourable that which was not within the applicant's knowledge at the trial and that in his plaint, the plaintiff was seeking to ascertain the boundaries between the land parcels known as Tulwet/Kesses Block 2 (Ketibilong)/16 and Tulwet/Kesses Block 2(Ketibilong)/76.

That in line with the plaintiff's prayer in the plaint dated 1.8.2014 and upon the proposal of the plaintiff's advocates on record, M/s Wambua Kigamwa and Company Advocates, this Honourable court ordered the County Land Surveyor, Uasin Gishu County to visit the two suit parcels of land to:-

- (a) Establish and/or re-establish the boundaries of these two parcels of land.
- (b) Place beacons and/or other suitable boundary marks.
- (c) Point out the boundaries to the proprietors of these two parcels of land.
- (d) Make a report on whether proprietors of either parcels has encroached into the land of the other and among other things.

That subsequently, the County Land Surveyor, Uasin Gishu visited the two suit parcels of land prepared a report with a finding that there was no encroachment by either of the two proprietors. That pursuant to this finding by the County Land Survey Officer, the court rightfully adopted the findings in the report as judgment of the court. That he has been informed by his advocates on record the information he verily believe to be correct that the consent to adopt the County Surveyor's report was entered freely and that the court in its own wisdom and discretion adopted the surveyor's report after ascertaining that it fully responded to the plaintiff's prayers as contained in his plaint.

The application is therefore mischievous and a waste of the courts time since the matter was decided and judgment delivered by a competent court. That the plaintiff's advocates on record were duly instructed and acted as the plaintiff/applicant's agent and their acts bind the applicant who has a remedy against his counsels. That the application and/or supporting affidavit do not show any proof that the firm of Wambua Kigamwa and company advocates acted without instructions from the Applicant or instructing client. That the issue of his advocates on record Wambua Kigamwa and Company acting without his instructions is not an issue to be dealt with by this court but should be handled at another forum by the Advocates Disciplinary Committee.

That as such, there is no mistake apparent on the face of the record as the judgment was delivered in accordance with the prayers in the plaintiff/Applicant's plaint dated 1st August, 2014. That the application herein does not meet the core principles for setting aside a consent or reviewing a consent. That the Applicant has not demonstrated how the recorded consent prejudice him as it tallies with the prayers he sought in the plaint dated 1.8.2014. That he has been informed by his Advocates on record that the Applicant's application lacks merit, is frivolous, vexatious and an abuse of the court process and he urges the Honourable court to dismiss the same with costs to the defendants.

I have considered the submissions by parties and do find that there are three issues for determination:

- (1) Whether the application was filed without unreasonable delay.**
- (2) Whether the consent entered into was without consultation.**
- (3) Whether there is a mistake occasioned which is apparent on the face of record.**

1. UNREASONABLE DELAY

The impugned consent was entered into on the 10.9.2014 whilst the application herein was made on 16.12.2014 more than the 90 days after the consent judgment. Whether an action is brought with unreasonable delay depends on the nature of case and explanation given by parties. The applicant had a duty to explain to the court when he came to know that the consent judgment had been entered. This he has not done. It was the duty of the applicant to prove that the delay was not unreasonable. The provision of Order 45 does not give the time limit for filing an application for review because of the circumstances under which one can apply for review as opposed to the circumstances under one can appeal and the procedures to be undertaken by a dissatisfied party who intends to appeal as the time limit for the appeal are provided for by the Court of Appeal rules. This court finds that a period of 90 days delay without explanation is unreasonable.

2. WHETHER THE CONSENT WAS ENTERED INTO WITHOUT CONSULTATION

This court finds that the applicant has not denied that he instructed Wambua & Kigamwa Advocate to act on his behalf. Moreover, he has not shown that at the time the consent was entered, instructions had been withdrawn. It is clear that the firm of Wambua & Kigamwa was on record when consent was entered. It is trite law that once an advocate is on record, any consent recorded in a dispute will always bind his client. Moreover, the applicant has not formally complained against his previous advocate at the Advocates Complaints Commission. I do find the argument that the applicant's counsel did not consult him misplaced.

Circumstances under which a consent judgment may be interfered with were considered in the case of *Brooke Bond Liebig (T) Limited – vs- Maliya (1975) E.A. 266*. It was stated that *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 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 misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement. In the instant case the applicant has not alleged fraud, collusion or any of the reasons that can justify the setting aside of the consent order made on 10th September, 2014. The record herein does not disclose facts that prove any of the grounds for setting aside a consent judgment.

3. MISTAKE APPARENT ON FACE OF RECORD

I have perused the consent and do not find any mistake or error apparent on the face of record as the record of the consent judgment is clear.

In conclusion, the court finds that the applicant has not satisfied the provisions of Order 45 of the Civil

Procedure Rules and that the application has no merit hence the same is ultimately the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF OCTOBER, 2015.

ANTONY OMBWAYO

JUDGE

Delivered in the presence of: