



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1565 OF 2000

LIVINGSTONE KUNINI NTUTU..... PLAINTIFF

VERSUS

COUNTY COUNCIL OF NAROK.....1ST DEFENDANT

OL KIOMBO LIMITED.....2ND DEFENDANT

THE ATTORNEY GENERAL3RD DEFENDANT

RULING

Introduction

This ruling is on an application by the 1st Defendant's by way of a Notice of Motion dated 12th March 2009 and filed on the same date, in which it is seeking the following outstanding orders:

1. The Court stays the execution of its decree entered against the 1st Defendant dated the 24th of November 2005.
2. That the consent judgment between the 1st Defendant and Plaintiff and the decree entered on the 24th of November 2005 against the 1st Defendant in favour of the Plaintiff be reviewed, varied, discharged and/or set aside on any terms as this Court may find fair and just, and the Defendant be granted leave to present his defense to the Plaintiff's claim on any date the court may deem fit and just.

The main ground for the 1st Defendant's application is that the Plaintiff is in the process of executing the decree and judgment herein, which judgment was entered into as a result of a consent emanating from an unconstitutional and illegal resolution by the 1st Defendant, and which resolution has since been vacated and/or overturned by the said Defendant. The particulars of the said unconstitutionality and illegality areas are given as follows:

- a. That the suit property was the subject of a constitutional trust held by the 1st Defendant pursuant to the provisions of section 115 of the previous Constitution, and has never prior to its registration in the Plaintiff's name been adjudicated under the provisions of the Land Adjudication Act, 284 as stipulated by section 116 of the previous Constitution.
- b. That the area purportedly represented by the suit property has never, pursuant to the provisions of section 7 subsection (1) of the Wildlife (Conservation and Management) Act, been excised from the trust land of the Maasai Mara National Reserve, and that its registration was not preceded by any resolution of the National Assembly approving the excision thereof as required under section

- 7 subsection (2) of the Wildlife (Conservation and Management) Act.
- c. That the area of the suit property did not form part of Gazette Notice No. 145 of 1984 under which the Minister for Tourism and Wildlife expressed his intention to declare the Talek excision area or cessation area to cease to be part of the Trust Land of the Maasai Mara National Reserve.
 - d. That the area of the suit property did not form part of the Minister cessation order published vide Legal Notice 412 of 1992 made under section 8 of the Wildlife (Conservation and Management) Act, and that area had therefore not been excised from the Trust Land of the Maasai Mara Reserve and therefore was still held in trust by the 1st Defendant in terms of Section 115 (2) of the previous Constitution.
 - e. That the councillors of the 1st Defendant in office at the time the consent judgment was entered acted in an unconstitutional, reckless and negligent manner, without due diligence and in total breach and disregard of their mandate and/or duty as trustees in purporting to yield or cede the proprietorship of the area of the suit property to the Plaintiff herein without adjudication or setting apart.

The consent judgment that is the subject matter of this application was entered on 13th May 2002, upon the filing and recording of a consent letter of the same date signed the Advocates for 1st Defendant and Plaintiff, and was on the following terms:

1. That the 1st Defendant statement of Defence and Counter Claim dated 7th October 2000 be and is hereby struck out.
2. That Judgment be and is hereby entered against the 1st Defendant and in favour of the Plaintiff in terms of prayers 1 and 2 of the Amended Plaint dated and filed in court on 18th December, 2000.
3. That the Plaintiff do hereby waive prayers 3, 4 and 5 of the Amended Plaint dated and filed in court on 18th December, 2000.
4. That the suit be and is hereby marked as settled as between the Plaintiff and the 1st Defendant with no order as to costs.

The 1st Defendant's Case

The 1st Defendant explained the alleged unconstitutionality and illegality of the said consent in supporting affidavits sworn on 12th March 2009 by Joseph Mutua Malinda, and on 20th May 2011 by Pius Mwinzi Mutemi. The Deponents were respective Clerks of the said Defendant at the time of filing of the said affidavits.

According to the deponents, the suit property which measures about 3,978.51 acres originally vested as trust land in the said 1st Defendant pursuant to the provisions of section 115 (1) of the previous Constitution of Kenya. Further, that a title has now been issued to the 1st Defendant over the said property which states that the land shall only be used for the purposes of a national reserve as set out in the Wildlife (Conservation and Management) Act.

The deponents explained the origin of the process leading to the registration of the suit property in the Plaintiff's name as being Gazette Notice 145 of 1984, published by the Minister for Tourism and Wildlife and that notified of his intention to declare that the Telek excision area would cease to be part of the Maasai Mara National Reserve. Further, that by Legal Notice No. 412 of 1992, the Minister of Tourism and Wildlife published an order for the cessation of part of the said Maasai Mara National reserve to be in accordance with the L. N. No. 100 of 1969. The deponents stated that one of the affected areas in the aforesaid legal notice was "Talek" described in the schedule to the notice as being all that area marked "B" on the boundary plan No. 216/50, measuring approximately forty eight square kilometers and situated on the North East of the Maasai Mara National reserve.

The 1st Defendant avers that the suit property was not and has never been part of the area subject of the cessation namely the "Talek" area or any other area of the Maasai Mara National Reserve. The 1st

Defendant relied on a boundary survey report dated 8th June 2005 carried out by its surveyor showing that the suit property was outside the Talek excision area. Reliance was also placed on a Government District Surveyor report also dated 8th June 2005 that showed that the National Reserve's trust land last excision was under Legal Notice 412 of 1992, and the said National Reserve's boundary is still as it was after the 1992 excision. The 1st Defendant annexed copies of the said gazette notices and survey reports.

A detailed account of what followed after the said excision is given by the 1st Defendant. In summary, it is stated that a notice of the establishment of an adjudication section was declared, whereby individual titles were to be registered in favour of the benefit of members resident in the said area of excision which was clearly marked in the Boundary Map 216/50. The said beneficiaries were described in the said notice as members of the "Koiyaki Group" which was registered as such under the Land (Group Representatives) Act (Cap 287 Laws of Kenya), The 1st Defendant in this respect annexed copies of the notice of the establishment of an adjudication section- "Talek" and the complete register of members of the Koiyaki Group.

According to the 1st Defendant the adjudication exercise was undertaken and officially completed on the 5th of June 1997 in accordance with the Land Adjudication Act, and a certificate of finality signed on the 29th August 1997 by the Director of Land Adjudication and Settlement. Further, that subsequent to the completion of the adjudication exercise, the Principal Land Adjudication Officer forwarded the adjudication register to the Chief Lands Register for registration and issuance of title deeds, which adjudication register had a total of 154 parcels covering a total area of 4521.81 acres, with parcel No. 154 being the only parcel created through determination of the only objection raised during the objection period.

It is the 1st Defendant's contention that the title to the suit property as parcel 155 was allegedly illegally created by an adjudication record dated 25th June 1997. The 1st Defendant in this regard relied on various documents for the position that only 154 parcels were created out of the adjudicated parcel.

The 1st Defendant states that the second aspect of illegality of the said consent was in the fraudulent nature of the resolution by its Finance, Staff and General Purposes committee which illegally and improperly convened a meeting on 10th May 2002, and purported to instruct another Advocates other than the one on record at the time to enter into a consent with the Plaintiff which effectively yield ownership of the suit property to the latter. Further, that the said Committee purported to give the suit property to the Plaintiff through powers that it did not have, and that the said meeting was attended by non-members to discuss issues that were not on the agenda. It was also stated that there no statutory notice of, or item on agenda for the compromise of the suit between the 1st Defendant and Plaintiff as is required.

The 1st Defendant in this respect relied on Further supporting affidavits sworn by Solomon Moriaso, Tilal Sunkuyia and Joseph Kampei ole Kuaet all sworn on 20th May 2011, in which the deponents who were councillors of the 1st Defendant at the time stated that the meeting of the Finance, Staff and General Purposes committee on 10th May 2002 was improperly convened, and that no resolution to enter a consent with the Plaintiff was reached.

The 1st Defendant contends that the said resolutions were set aside and revoked by the Game Veterinary Services Committee held on 12/7/2005 and adopted by a full council meeting held on 14/7/2005. Further, that the 1st Defendant rescinded the said resolution, consequent to demands made on 29th May 2002 by the Attorney General that the 1st Defendant had no authority to pass that resolution and enter into the consent because constitutional issues arose in the case, which were the exclusive province of the High Court of Kenya to adjudicate.

The 1st Defendant also gave an account of the proceedings undertaken by its Advocates that followed thereafter to vacate the said consent. It stated that there has been no inordinate delay in applying to set aside the consent judgment due chiefly to the existence of a stay order recorded by this court on 6th

November 2002 to the effect that no steps may be taken until the hearing and determination of a judicial review application in HCCC Misc. Application 1271 of 2002.

The Third Party's Case

Before proceeding with the Plaintiff's and 2nd Defendant's responses who in essence opposed the 1st Defendant's application, I will give a brief account of the Third Party's case, which was in support of the said application. The Third Party's response was in a replying affidavit sworn on sworn on 9th May 2012 by Edward Kakoi, a State Counsel in the Attorney General's office. The deponent stated that while the suit herein was still pending and after the application herein had been filed, the Government through the District Land Registry-Narok revoked the title the suit property by Gazette Notice No. 2934 of 2010. Further, that upon the said cancellation the Plaintiff filed a Judicial Review application in Nairobi H. C. JR of 2010 to quash the decision to cancel the title. He attached copies of the said gazette notice and application for judicial review. It was the Third Party's contention that as the subject matter in this suit is no longer in existence, any proceedings in this suit are purely an academic exercise.

The Plaintiff's Case

The Plaintiff opposed the 1st Defendant's application in a replying affidavit he swore on 28th April 2011. He states therein that he is registered absolute proprietor of the suit property, having been so registered on 14th October 1997, and he attached a copy of his title. He further stated that the said registration being a first registration raised an irrefutable presumption that the same was done within the confines of the law and the same is indefeasible.

The Plaintiff also contended that it is not available for the 1st Defendant to question the adjudication process at this stage, as the Land Adjudication Act provides for any objection within sixty days of publication of the notice of completion of the adjudication register. Further, that the 1st Defendant extinguished its right of objection and cannot bring the same through the instant application. The Plaintiff also averred that that once the suit property was registered as a first registration, the provisions of the Land Adjudication Act ceased to apply, and any impeachment of the adjudication process is misconceived and ill-advised for being time barred.

The Plaintiff stated that registration of the suit property in his name was done within the confines of the Constitution, the Wildlife (Conservation & Management) Act, the Land Adjudication Act and Registered Land Act. He denied any irregularity, illegality and or unconstitutionality in the registration of the suit property. He contended in this respect that he was tried and acquitted of any fraud in this respect by a trial conducted in **Nairobi Chief Magistrate Criminal Case No. 2157 of 2003** wherein the 1st Defendant was the Complainant and the 3rd Party herein the Prosecutor, and he annexed a copy of the judgment given in the said case.

On the consent judgment, the Plaintiff averred that that the 1st Defendant on its own motion and volition decided to enter into a consent with him in this case which he accepted. Further, that the 1st Defendant's Finance and General Purposes Committee duly passed a resolution to this effect on 10th May 2002. The Plaintiff annexed as evidence a letter from the 1st Defendant's clerk dated 22nd May 2002 confirming with the 1st Defendant's then Advocates that the meeting were duly constituted, and that the 1st Defendant had within its right compromised its suit with the Plaintiff.

The Plaintiff further averred that his claim against each of the defendants herein is separate, severable and distinct, and that each of the defendants can therefore compromise the suit separately. Further, that the 1st Defendant was within its right to compromise the suit with the Plaintiff to the exclusion of other defendants whose claims would continue to subsist.

The Plaintiff stated that he was aware that the 2nd Defendant commenced judicial review proceedings in **Nairobi High Court Miscellaneous Application No. 1271 of 2002** seeking to among other things,

review the 1st Defendant's decision made on 10th May 2002, and to quash the council minutes of the same date that culminated in the signing of the consent judgment between the 1st Defendant and himself. He stated that the 1st Defendant opposed the said application and defended its decisions, and that the court in the judgment of Khamoni J. in **Nairobi High Court Miscellaneous Application No. 1271 of 2002** held that the resolutions of 10th May 2002 were duly passed and refused to fault the 1st Defendant's decisions making process. Lastly, the Plaintiff contended that that the delay of seven (7) years by the 1st Defendant in filing this application was inordinate, and that the 1st Defendant's indolence cannot be aided by the court.

The 2nd Defendant's Case

The 2nd Defendant in its pleadings filed in court essentially opposed the 1st Defendant's application, although its Advocate, Mr. Gichamba, at the hearing thereof submitted that they were not taking a position in this matter. I will therefore briefly summarise the response of the 2nd Defendant from its pleadings for the purpose of the record. The 2nd Defendant's response was in replying affidavits sworn on 30th September 2009, 18th May 2011 and 25th July 2012 by its Director, Tobiko Shunkur. The 2nd Defendant stated that it was aware of the processes leading to the consent judgment, the allegations of fraud and impropriety made, and confirmed that it applied instituted Judicial Review proceedings in **Nairobi High Court Miscellaneous Application No. 1271 of 2002** seeking to quash the resolution and decisions of the 1st Defendant.

However, that that the 2nd Defendant herein thereafter reached an amicable settlement with the Plaintiff, in which the said Plaintiff acceded to the 2nd Defendant's request for a grant of a lease over a portion of the suit property. The 2nd Defendant annexed a copy of the Certificate of Lease. Further, that in view of the said settlement, a consent pursuant thereto was recorded on 16th November 2005 between the Plaintiff and the 2nd Defendant and filed in this Court. The 2nd Defendant's position was that it has continued to enjoy the fruits of its settlement with the Plaintiff, and did not wish to be associated with the 1st Defendant's endless approbation and reprobation in this matter, and that the 1st Defendant's present application is a gross abuse of the court process and ought to be dismissed.

The Issues and Determination.

The parties filed written submissions and their counsel also made oral submissions at the hearing of the application on 27th September 2013. The 1st Defendant relied on two sets of submissions filed on 25th June 2010 and 25th May 2011. The 2nd Defendant's submissions were filed on 18th January 2010, the Third Party's on 29th June 2012, while the Plaintiff filed submissions on 9th May 2011. I have carefully considered the pleadings and submissions filed herein, and find that the two questions for determination are whether the consent judgment entered herein and subsequent decree can be set aside and/or reviewed, and whether there can be stay of execution of the decree entered into herein.

The applicable law for setting aside a judgment or decree of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order,

and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

“ (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The applicability of these provisions to consent judgments was decided on by the Court of Appeal in **Munyiri vs Ndunguya (1985) KLR 370** where it was held that the only remedy available to parties who want to get out of a consent order is to set aside the consent order by way of review or by bringing a fresh suit in court. The Court of Appeal also affirmed in the case of **Tropical Food Products International Ltd -vs- The Eastern and Southern African Trade and Development Bank, Civil Appeal No. 253 of 2002** that the High Court has the jurisdiction to review, vary or set aside a consent judgment under Order 45 Rule 1 of the Civil Procedure Rules and section 80 of the Civil Procedure Act.

I shall now proceed to consider the various grounds raised by the parties herein in their pleadings and submissions for and against the setting aside of the said consent judgment.

Error on the face of the record

The first arguments raised by the 1st Defendant in this regard was that the consent judgment was not properly entered into as it was executed to the exclusion of all parties substantially affected by the suit, and particularly that it was executed by the Advocates for the 1st Defendant and Plaintiff to the exclusion of the Advocates representing that 2nd Defendant and Third Party.

The 1st Defendant relied on the decision in **Joyce Wangechi Kiboi -vs- Jecinta Muthoni Mburu & Another, Nairobi HCCC No. 547 of 2002** where the court stated that an illegality cannot give rise to any rights under the law, and proceeded to set aside a consent order entered into by an advocate who had not taken out a practicing certificate. Reliance was also placed on the case of **Bonventure Tours and Travel Ltd -vs- Rose Chebet and Others (2007) e KLR** where the court set aside an ex-parte order granting leave to amend the Plaintiff without hearing any of the Defendants.

The Third Party also made similar submissions.

The Plaintiff and 2nd Defendant on their part argued that the 1st Defendant freely and voluntarily settled and compromised the suit herein with the Plaintiff and cannot allege that such consent was erroneous because the 2nd Defendant and 3rd Party did not participate. Further, that by the time the decree was entered the Plaintiff and 2nd Defendant had already entered into a consent, and the Third Party had discontinued its suit. The Plaintiff also argued relying on the decisions in **National Bank of Kenya Ltd v Njau, (1995 – 1998) 2 EA 249** which was also followed in the case of **Nyamogo v Nyamogo Advocates v Kogo, (2000) 1 EA 173**, that an error should be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points of which may conceivably be two

opinions.

It is the view of this court that a consent judgment is essentially a compromise of a suit by the parties. Under Order 25 Rule (5) (1) of the Civil Procedure Rules it is provided that a court shall, on the application of any party, order that an agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, Similar provisions were provided for in Order XXIV Rule 6 of the repealed Civil Procedure Rules that were applicable at the time the consent judgment herein was entered into.

From a plain reading of the said rules it is not necessary at the time of settlement for a suit to be settled wholly, and therefore for all parties to consent to such settlement. However, if a consent judgment or settlement seeks to dispose of an entire suit involving multiple parties, then all the parties must of necessity be involved and consent to such settlement. In the present case the consent between the 1st Defendant and Plaintiff sought to settle the suit as between the Plaintiff and 1st Defendant only, and I therefore find the participation of the other parties in the said consent was not mandatory.

The second argument put forward by the 1st Defendant on this ground was that there was an error on the face of the decree as it was not signed, and was irregular on its face as it did not meet the threshold of Order XX of the repealed Civil Procedure Rules and Order 22 of the 2010 Civil Procedure Rules. I am in this respect guided by the provisions as to the definition of a decree and requirements as to the content of a decree. A decree is defined in section 2 of the Civil Procedure Act as follows:

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

***Explanation.* — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”**

The contents of a decree are provided in Order XX Rule 7 of the repealed Civil Procedure Rules and currently in Order 21 Rule 8 of the 2010 Civil Procedure Rules, which both require that the decree shall bear the date when judgment was delivered, and shall agree with the judgment. In **Simon Kinyua vs Eveready Batteries (K) Ltd (2004) LLR 4725** the Court of Appeal held in this respect that the format of a decree provided in the said rules must be strictly followed, and that a decree bearing two dates would be fatally defective.

I have perused the decree issued on 24th November 2005 which was attached to the Replying Affidavit sworn by Tobiko Shunkur on 18th May 2011 as Annexure “TS1”. The said decree bears three different dates, and refers to two consents. It is impossible from the said decree to determine what judgment was entered on what date with regard to the respective consents. It is my view that the reason that the definition of a decree allows for preliminary decrees is to cater for circumstances such as the one that obtained in which the consent judgment between the Plaintiff and 1st Defendant was entered, as there

were outstanding matters still to be resolved in the suit at the time. It is therefore the finding of this court that it not clear from the said decree what each particular consent judgment determined.

In addition the said decree contains reference to a notice of discontinuance dated 13th October 2005 by the Third Party. A notice of discontinuance cannot be the subject of a decree as defined hereinabove, as it does not conclusively determine the rights of the parties with regard to all or any of the matters in controversy in the suit. I therefore find that the decree issued on 24th November 2005 had fatal errors on its face, and was therefore defective.

The third limb of the argument by the 1st Defendant as regards error on the face of the record relate to the irregularities in the processes of passing the resolution on the consent judgment by the 1st Defendant's Finance and General Purposes Committee. It was argued in particular that the 1st Defendant's Advocates who recorded the consent were not properly instructed, the meeting was not properly convened, and that the committee was not mandated to pass a resolution to settle the suit.

The Plaintiff and 2nd Defendant in response argued that the resolution by the 1st Defendant has been sanctified by the court as a result of the decision by Khamoni J. in the judicial review application in **Nairobi High Court Miscellaneous Application No. 1271 of 2002** seeking to quash the resolution of the 1st Defendant, and cannot be challenged to undo the appointment of the Advocate and instructions to him to enter into a consent. Further, that it is therefore subject to the doctrine of *res judicata* and estoppel.

I have perused the judgment by Khamoni J. delivered on 8th May 2009 in **Nairobi High Court Miscellaneous Application No. 1271 of 2002** that was attached as annexure "TS 5" to the 2nd Defendant's Replying affidavit sworn by Tobiko Shunkur on 30th September 2009. I note that the said judge dismissed the Notice of Motion brought by the 2nd Defendant dated 7th November 2002 for the reason that this suit was the better place to raise the issues raised therein. The doctrine of *res judicata* cannot therefore apply as the judge made no substantive findings as to the regularity or otherwise of the resolutions made by the 1st Defendant.

This finding notwithstanding, I am of the view that the issue of the regularity of the said resolutions by the 1st Defendant should be the subject of a substantive application as held by Khamoni J., and cannot be raised in review proceedings as an aspect of error on the face of the record. I also agree with the Plaintiff's arguments in this respect that an error on the face of the record must be apparent on its face of the consent judgment and should not be the subject of drawn arguments as would be the case herein.

Discovery of New Evidence

The 1st Defendant argued that they had discovered new facts since the consent judgment was entered into, and relied on a letter dated 23rd April 2013 which was annexure "JMM14" to the 1st Defendant's supporting affidavit sworn by Joseph Mutua Malinda on 12th March 2009. The said letter which was written by the then Director of Prosecutions, and addressed to the Criminal Investigation Department, stated that the signature of F.R.S. Onyango, the then Chief Land Registrar, on the letter dated 16th September 1997 and certified on 6th February 2001 by the Narok District Land Registrar was a forgery.

It is further submitted by the 1st Defendant that the Government through Legal Notice no. 2934 of 2010 dated 26th March 2010 cancelled the title to the suit property as the allocation was illegal and unconstitutional. Further, that a certificate of title by the president under the Registration of Titles Act vested the entire Mara Talek area including the land under dispute in the hands of Narok County Council. Counsel for the 1st Defendant argued that this constitutes discovery of new and important matters warranting the setting aside of the consent order.

The Plaintiff and 2nd Defendant on their part submitted that the facts alleged to be new evidence were within the 1st Defendant's knowledge and were events subsequent to the recording of the consent

judgment, and cannot therefore be the basis of review on the ground of discovery of new information. The Plaintiff cited the case of **Chrispinus Lawrence Wanyama v Public Service Commission of Kenya & Another (2007) eKLR** in this respect.

I find that I must agree with the Plaintiff on this ground as the material time under Order 45 Rule 1 with regard to the existence of the new evidence is the time when the decree was passed or the order made, but that such evidence was not within a person's knowledge or could not be produced by him. This rule therefore requires that the new evidence or matter being relied on should have been in existence at the time of the consent judgment, and does not therefore apply to any evidence or facts that arise after a decree is passed or order made. The letter relied upon by the Plaintiff as new evidence was written on 23rd April 2013, and the Legal Notice cancelling the Plaintiff's title made on 26th March 2010 Both documents do not therefore qualify as new evidence within the meaning of Order 45 Rule of the Civil Procedure Rules.

Other Sufficient Reason.

The 1st Defendant argued in great detail under this ground that the consent judgment entered into with the Plaintiff was vitiated by unconstitutionality and illegality and void *ab initio*. It is submitted in this regard that the 1st Defendant had no capacity to enter into a contract as the suit property had never prior to its registration under the Registered Land Act (now repealed) been set apart and/or adjudicated under the provisions of the Land Adjudication Act (now repealed) as stipulated by section 116 of the repealed Constitution. It is also the 1st Defendant's case the area of the suit property was not part of the cessation order described in legal notice no. 412/92 and therefore, that any consent order recorded against the constitution is a nullity and should be set aside *ex debito justitiae*.

The court was referred to the case of **Royal Media Services Ltd -vs- Commission of Custom and Excise, Nairobi HC Misc Application no. 383 of 1995** and the case of **James Joram Nyoga & anor - vs- Attorney General, Misc.Civil Application no. 1732 of 2004** where the court held that since the land in dispute was trust land held by the government on behalf of the public, the Commissioner of Lands could not purport to pass any title to the applicant under the Registration of Titles Act (now repealed).

Further, the 1st Defendant while referring to section 7 of the Wildlife (Conservation and Management Act) submitted that the Minister was under an obligation to consult a competent authority in relation to national reserves, before any excision was carried out.

Accordingly, it was argued that the unconstitutional and illegal consent cannot estopp the 1st Defendant from ensuring that the suit property remains part of the trust land of Maasai Mara National Reserve. Counsel relied on the cases of **Southend -On-Sea Corporation -vs- Hodgeson (Wickford) Ltd, (1961) 2 ALL ER 46** and **Tarmal Industries Ltd -vs- Commissioner of Customs and Excise, (1968) EA 471** for the submission that there cannot be an estoppel raised in exercise of a power which is a legislative function.

The Plaintiff on its part submitted that this ground could not succeed for reasons that the argument seeks to interrogate a question that goes beyond the scope of review. Counsel relied on the case of **Nyamogo v Nyamogo Advocates v Kogo (2000) 1 EA 173** to the effect that a long drawn argument cannot be subject of review; the challenge is in itself in the nature of what ought to have been in the 1st Defendant's defence. The Plaintiff argued that a settlement as the one herein superseded any other defence a party could have had. Counsel referred the Court to the case of **Lochab Transport Limited v Kenya Arab Orient Insurance Limited (1986) eKLR**

The Plaintiff further submitted that even if he were to concede to the argument of unconstitutionality and illegality, it could not succeed because the title he holds is a first registration under the Registered Land Act (since repealed) and thereby protected from rectification. Counsel submitted that a first registration according to the decision in **Obiero v Opiyo** is not impeachable for whatever reason. Further, that the application also ought to fail as the Chief Lands Registrar's office on its own motion wrote to the 1st Defendant on 17/5/2007 advising that it had no claim.

The ground of sufficient reason in the context of consent judgments has been the subject of many judicial decisions. In **Brooke Bond Liebig Ltd vs Mallya (1975) E.A 266** it was that a court can review a consent judgment on the same grounds that would justify the varying and rescinding of a contract between the parties. These grounds have been restated in various court decisions as follows: instances where the consent judgment was obtained by fraud or collusion; or by an agreement contrary to the policy of the court; if 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. See in this regard the decisions in **Brooke Bond Liebig Ltd vs Mallya (1975) E.A 266** and **Flora Wasike vs Destimo Wamboko (1988) KLR 429**,

Allegations of unconstitutionality and illegality of a consent judgment are a serious policy issue that this court must have regard to, and it is in addition an established principle under contract law that an illegal contract is not enforceable on grounds of public policy. In the instant application it has not been disputed that the law that was applicable at the time of the recording of the consent judgment was section 116 of the repealed Constitution, and which provided as follows as to the registration of individual titles to trust land:

“(1) A county council may, in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this subsection applies shall apply to an area of Trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council it shall cease to be Trust land.

(2) The laws to which subsection (1) applies are - (a) the Land Consolidation Act and the Land Adjudication Registration of individual titles to Trust land. Cap. 283, and

(b) any other law permitting the registration of individual titles to estates, interests or rights in or over land that, immediately before registration, is Trust land (except so far as the law permits the registration of estates, interests or rights vested in persons or authorities for whose use and occupation the land has been set apart under this Chapter).”

Section 116 of the repealed Constitution made it clear that such registration was to be subject to such conditions as were provided in applicable Act of Parliaments. In the present case, since the land that was being registered was a game reserve, and the applicable law was the then Wildlife (Conservation and Management) Act (Cap 376), which at section 7 provided the following conditions to be met before a game reserve could be registered in individual titles:

“(1) Subject to subsection (2), the Minister, after consultation with the competent authority, may by order declare that any National Park, National Reserve, local sanctuary or a specified part thereof, shall cease to be a National Park, National Reserve or local sanctuary.

(2) No order shall be made under subsection (1) unless—

(a) a notice of the intention to make the order, with details thereof, and inviting objections thereto within a period of not more than 60 days, has been published in the Gazette and in at least one newspaper circulating throughout Kenya; and

(b) not earlier than sixty days after the last date of such publication a draft of the order has been laid before the National Assembly and the National Assembly has by resolution approved the order.

Under section 2 of the Act, a competent authority was defined as follows:

“competent authority” means—

(a) in relation to Government land, the Minister for the time being responsible for matters

relating to land;

(b) in relation to Trust land, the county council in which the land is vested;

(c) in relation to any other land, the owner thereof or the person for the time being entitled to the rents and profits thereof;”

In the instant application, the Minister for Tourism and Wildlife gave 30 days’ notice of his intention to declare that the area described as “Talek” measuring approximately forty-eight square kilometers in the Maasai Mara Game Reserve would cease to be a game reserve in Legal Notice Number 145 of 1984 published in the Kenya Gazette on 20th January 1984. On 28th October 1992 the said Minister published the Wildlife (Conservation and Management) (Cessation of Part of Maasai Mara National Reserve) Order, 1992 as Legal Notice No 412 of 1992 in which he ordered that the said Talek area measuring approximately forty-eight square kilometers shall cease to be part of Maasai Mara National Reserve.

I have perused the boundary survey report dated 8th June 2004 which was annexure “JMM5” to the 1st Defendant’s supporting affidavit sworn by Joseph Mutua Malinda on 12th March 2009, and which attached the above cited legal notices. The said report was on the survey undertaken of the Talek area measuring approximately forty-eight square kilometers excised from Maasai Mara, and confirmed that 154 parcels had been carved out of the excised area and that the total area was 4720 hectares.

Other additional evidence brought by the 1st Defendant that only 154 parcels were carved out of the excised land was as follows:

Firstly, the 1st Defendant annexed a letter dated 13th August 1997 from the Principal Land Adjudication and Settlement Officer from Narok to the Director Land Adjudication and Settlement which was annexure “JMM8” to the 1st Defendant’s supporting affidavit sworn by Joseph Mutua Malinda on 12th March 2009, confirming that there were only parcels No. 1-154 at the “Talek” adjudication section. Secondly was an area list clearly showing that only 154 parcels of land were created during the adjudication process, which was annexure “JMM9” to the 1st Defendant’s supporting affidavit sworn by Joseph Mutua Malinda on 12th March 2009, and which area list the 1st Defendant states was thereafter altered afterwards to illegally and irregularly reflect a further parcel of land.

The third key evidence was a letter dated 5th October, 2000 from the Director of Land Adjudication and Settlement to the Permanent Secretary Ministry of Lands and Settlement, which was annexure “JMM10” to the 1st Defendant’s supporting affidavit sworn by Joseph Mutua Malinda on 12th March 2009. The said letter stated that the Talek adjudication section was declared an adjudication section on 6th May 1997; that its adjudication register was published section on 6th June 1997; that the certificate of finality was signed on 29th August 1997 when the adjudication register was forwarded to the Chief Land Registrar for registration and issuance of title deeds; that the said adjudication register forwarded had only a total of 154 parcels covering an area of 4521.81 hectares and that the parcel for the suit property was a nullity.

The fourth was a letter by the Chief Land Registrar dated 16th September 1997 to the Land Registrar Narok, confirming receipt from the Director of Land Adjudication of An Area List, 1 volume of adjudication register for parcels 1-154 and Registry Index Maps sheets: (145/3/4/ & 145/4/3, 2 (145/3/4 & 145/4/3) and that no errors were detected when checking the adjudication records. The letter was certified by the Chief Land Registrar on 01/02/01 and which was annexure “JMM 12” to the 1st Defendant’s supporting affidavit sworn by Joseph Mutua Malinda on 12th March 2009.

The 1st Defendant alleged that another letter of the same date from the said the Chief Land Registrar which was certified by the Narok District Land Registrar, on 6th February 2001 and that purported to show an adjudication register for parcels 1 – 155 was a forgery. This forgery was the subject of the letter dated 23rd April 2003, annexed as “JMM14” to the 1st Defendant’s supporting affidavit sworn by Joseph

Mutua Malinda on 12th March 2009, which letter was written by the then Director of Public Prosecutor Mrs. Kidula, stating that the signature of Mr. F. R. S. Onyango, the then Chief Land Registrar, on the letter certified by the Narok District Land Registrar on 6th February 2001 was a forgery.

The 1st Defendant also relied on a letter from the Director, Kenya Wildlife Service dated 3rd October 2000 addressed to the then Advocates for the 1st Defendant, Kenta Moitalel & Company Advocates in which he stated that the suit property was illegally registered in the name of the Plaintiff. The said letter was annexed as “JMM19” to the 1st Defendant’s supporting affidavit sworn by Joseph Mutua Malinda on 12th March 2009.

The last document relied upon by the 1st Defendant was a letter dated 6th October 2000 by the Commissioner of Lands to the Secretary to the Cabinet and Head of the Civil Service annexed as “JMM18” to the 1st Defendant’s supporting affidavit sworn by Joseph Mutua Malinda on 12th March 2009, stating that his investigation on the Talek adjudication exercise revealed that the correct area of the excision of forty-eight square kilometers was exceeded during adjudication, creating illegal land parcels including the suit property.

This court cannot overlook the concerns raised as to the constitutionality and legality of the registration of the suit property from all the relevant offices that were concerned in the processes of excision, adjudication and registration of the suit property. In addition, the Plaintiff has not disputed nor brought any evidence to controvert the evidence presented by the 1st Defendant that shows that the area covered by the suit property was not part of the land excised for adjudication by Legal Notice 412 of 1992. The Plaintiff and the Chief Land Registrar in the letter dated 17th May 2007 that was annexed as “TS8” to the Replying Affidavit sworn by Tobiko Shunkur on 30th September 2009 cannot in this respect rely on the Land Adjudication Act and repealed Registered Land Act to argue for the indefeasibility of the title the suit property, as these Acts were subject to the Constitution, and cannot have been intended to undermine due process and the rule of law.

I also note in this regard that the Plaintiff’s acquittal of forgery in **Nairobi Chief Magistrate Criminal Case No. 2157 of 2003** did not conclusively address the issue of the constitutionality and the illegality of the registration of the suit property as the said Magistrates court had no jurisdiction in this respect.

It would thus be in the public interest and interest of justice that the issue of the constitutionality and legality of the Plaintiff’s title be determined conclusively, and it would also be against public policy in the circumstances to compromise on the suit herein. I therefore find that sufficient reason exists in the evidence put forward by the 1st Defendant in this regard for the setting aside of the consent judgment entered into with the Plaintiff on 13th May 2002.

Unreasonable delay

I will lastly address the arguments by the Plaintiff that there has been undue delay as the resolution by the 1st Defendant was passed on 10/5/2002 and the letter communicating the consent between the Plaintiff and the 1st Defendant was entered in court on 13/5/2002. Subsequently, that the 1st Defendant’s application was filed in March 2009, seven years after the making of the impugned consent. It was submitted that the delay was inordinate, unreasonable and inexcusable. The Plaintiff referred the Court to the decisions of **National Bank of Kenya Limited v Orengo (2005) eKLR** where the court held that a delay of 6 years was inordinate and **Benson Mbuchu Gichuki v Evans Kamende Munjua C.A. 79/2004** where the Court held that an application for review brought 4 years after recording the consent judgment was inordinate.

The 1st Defendant argued that there has been no inordinate delay in applying to have the consent order set aside. It was contended that upon discovery of the alleged fraud and illegal dealings between the Plaintiff and the 1st Defendant, a stay order was recorded by the court on 6th November 2002 directing that no steps may be taken in the file until the hearing and determination of **Nairobi High Court Miscellaneous**

Application No. 1271 of 2002. Further, the 1st Defendant also attributed the delay to having been partly caused by abdication of duty on the part of the 1st Defendant's advocates, and submitted that any delay caused was not so prolonged that it cannot be excused by the court.

The court was referred to the case of **Trust Bank Ltd -vs- Amolo Co. Ltd (2003) KLR 350** and **Essanji & Another -vs- Solanki, (1968) EA 224** for the submission that where possible, disputes should be heard on their own merit. Further reliance was placed on the cases of **Walter Enock Nyambati Osebe & Justus Mongumbu & 2 Others, Kisii Election Petition No. 1 of 2008** and **Kenya Anti-Corruption Commission -vs- Imperial Bank Ltd & 4 Others, HCCC No. 203 of 2007** for the submission that under Article 159(2)(d) of the Constitution, courts must administer justice without undue regard to procedural technicalities.

I have perused the court order issued on 6th November 2002 in **Nairobi High Court Miscellaneous Application No. 1271 of 2002**, which was attached as Annexure "JMM 34A" to the 1st Defendant's Replying Affidavit, and note that a stay of the decision of the 1st Defendant to enter into a consent judgment and of any proceedings or actions founded thereon was granted by Rimita J. upon application on a certificate of urgency by the 2nd Defendant herein. The suit was then determined by the ruling delivered by Khamoni J. on 8th May 2009. It is therefore the case that the 1st Defendant's hands were tied in this matter, and they could not proceed with any other proceedings until delivery of the said ruling. I therefore find that the 1st Defendant is not culpable for the delay in filing the instant application. I again reiterate in this regard that it would be in the interests of public policy and justice that this matter be heard and determined substantively.

I accordingly allow the 1st Defendant's Notice of Motion dated 12th March 2009 for the foregoing reasons, and hereby order as follows:

1. The consent judgment between the 1st Defendant and Plaintiff recorded herein on 15th May 2002, and the decree issued on the 24th of November 2005 against the 1st Defendant in favour of the Plaintiff is together with all consequential decree and actions arising therefrom are hereby set aside, and the suit herein shall proceed to full hearing.
2. The 1st Defendant is granted leave to file and serve a Defence to the Plaintiff's claim in the suit herein within 30 days of the date of this ruling.
3. The costs of the 1st Defendant's Notice of Motion dated 12th March 2009 shall be in the cause.

The outstanding prayer for stay of execution of the decree issued on 24th November 2005 has consequently been overtaken in light of the orders given hereinabove.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 19th day of March, 2014.

P. NYAMWEYA

JUDGE