



REPUBLIC OF KENYA



Muchiri & another v Njuguna; Wambua & 4 others (Interested Parties) (Environment & Land Case 129 of 2017) [2024] KEELC 1201 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1201 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 129 OF 2017**

JM MUTUNGI, J

MARCH 7, 2024

BETWEEN

PETER KARIUKI MUCHIRI 1ST PLAINTIFF

DANIEL WACHIRA NJUGUNA 2ND PLAINTIFF

AND

STEPHEN MUCHIRI NJUGUNA DEFENDANT

AND

MUENI WAMBUA INTERESTED PARTY

TABITHA WAGATWE NJUGUNA INTERESTED PARTY

DAVID KARIMI MUCHIRI INTERESTED PARTY

LYDIA WAMBUI INTERESTED PARTY

ROSEMARY NYAGUTHII KABIRO INTERESTED PARTY

RULING

1. This Ruling is on the Applicant's Notice of Motion application dated 23rd January 2023 seeking the Court to review the order issued on 3.10.2017 and any other consequential orders; to cancel and/or revoke the resultant titles emanating from the subdivision of L.R Mutira/Kaguyu/4708; and to join the Applicant to the suit. The Motion is predicated upon the provisions of Section 1A, 1B, 3A, 63(c) and (e) of the *Civil Procedure Rules* and orders 40 rules 1, 2, 3(2) and 51(1) of the Civil Procedure Rules and Section 68 of the *Land Registration Act*.
2. The Application is premised on the grounds that there existed valid court orders issued vide Embu C.M Civil Suit No. 125 of 2005 between Mueni Wambua versus Stephen Muchiri Njuguna and Civil Appeal No. 28 of 2008 between Stephen Muchiri Njuguna Versus Mueni Wambua, concerning the



suit property in which the Defendant was ordered to pay the Applicant the sum of Kshs. 882,200/- together with interest calculated at the rate of 35% per annum from 22.3.2004 until payment in full. In default of payment, the Court ordered for the attachment of the suit land in satisfaction of the claim by the Interested Party as against the Defendant. The Respondents herein raised objection to the attachment of the suit land which was consequently dismissed with costs. The Applicant averred that Respondents subsequently colluded to defeat justice by filing the present suit, and entered into a consent dated 20.09.2017 by which the Respondents effectively shared out the suit land amongst themselves. The Respondents did not join the Applicant in the suit though she had an interest in the suit land.

3. The Application was supported by the affidavit of Mueni Wambua who reiterated the grounds in support and stated that she was awarded a decretal amount of Kshs. 882,200/- together with costs and interest at 35% per annum from 22.03.2004 in Embu CMCC No. 125 of 2005 as against Stephen Muchiri Njuguna (who is also the Defendant herein) and after he failed to pay the decretal sum the Court ordered for the attachment of the suit land and sale by way of a public auction and issued a prohibitory order as against the suit land. The Applicant further stated that the 2nd to 5th Interested parties filed objection proceedings to the attachment which was dismissed with cost. She averred that it was at this point that the Plaintiffs connived with the Defendant and the 2nd to 5th Interested parties and colluded to share the suit land amongst themselves without the knowledge and/or consent of the Applicant.
4. The Application was opposed through a Replying Affidavit sworn by Peter Kariuki Muchiri and Daniel Wachira Njuguna dated 23rd May 2023. The 1st and 2nd Respondents' grounds of opposition to the motion are that the suit land was trust land held by the Defendant on behalf of the Respondents; that the subdivision of the suit land was made pursuant to an order dated 4th March 2009, that had been issued by the land tribunal court at Kerugoya, that the subdivision resulted into Mutira/Kaguyu/4707 and 4708 and that the Defendant sold his portion Mutira/Kaguyu/4707 and the other Respondents shared Mutira/Kaguyu/4708. That the Respondents live in the suit land and that the Applicant was not their relative. That other than life interest over the suit land, the Defendant did not have any interest over the suit land and that the applicant ought to have known this. For the foregoing reasons, the Plaintiffs/Respondents urged the Court to dismiss the Applicant's application with costs.
5. The Applicant filed a Supplementary Affidavit Dated 11th October 2023 in response to the Plaintiffs Replying Affidavit. The Applicant disputed the fact that L.R Mutira/Kaguyu/1691 was trust land and maintained that she was not a party to the tribunal's proceedings in PMLDT Case No. 5 of 2009. She averred that her interest had been the suit land Mutira/Kaguyu/4708 which was fraudulently subdivided into L.R Mutira/Kaguyu/5958, 5959, 5960 and 5961.
6. The parties canvassed the application by way of written submissions. I have considered the application, the affidavit in support, the supplementary affidavit and the Replying Affidavit in opposition and I have considered the submissions by the parties. The issues for determination in this matter are;
 1. whether the Applicant has made out a case to justify the Court to review the Order dated 5th October 2017.
 2. Whether the Applicant should be joined in this suit.
 3. Whether the Land Registrar Kirinyaga should be ordered to cancel land titles Mutira/Kaguyu/5958 to 5961 and have the original title Mutira/Kaguyu/4708 restored.



7. Order 45, rule 1(a) and (b) is clear that for the Court to review its decision, certain requirements should be met. Order 45 rule 1(a) and (b) provides 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.”

Section 80 of the [Civil Procedure Act](#), Cap. 21 Laws of Kenya provides for review of decree or orders in the following terms:-

“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.”

8. The expression “any person considering himself aggrieved” means a person who has suffered a legal grievance. Under Section 80 of the [Civil Procedure Act](#), the Court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. Order 45 Rule (1) provides the conditions that an Applicant for review needs to satisfy to warrant review.

9. Under Section 80 of the [Civil Procedure Act](#), the Court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously.

In the Case of *Brooke Bond liebigh Versus Mallya* (1975) EA 266, the Court held that “...a consent judgment derives its legal effect from the agreement of the parties. It may only be set aside for fraud, collusion or for any reason that which would enable the court to set aside an agreement.”

In the Case of [Tropical Food Products International Ltd –vs- East and Southern African Trade and Development Bank \(The PTA Bank\)](#) (2007) eKLR cited by the Applicant, the Court of Appeal considered the circumstances under which a consent Judgment/or order may be interfered with. The Judges made reference to their decision in the Case of *Flora Wasike –vs- Wamboko* (1982-88)I KAR 625 where the Court following *Hiran –vs- Kassam* (1952) 19 EACA 131 accepted the principle 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 on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary



to the policy of the court ... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

In the same Case of Hiran –vs- Kassam Case (supra) Windham J, (as he then was) stated that “a court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for varying or rescinding a contract between the parties.”

10. A consent Judgment/order carries the same weight as a contract/agreement duly entered into by parties and consequently the Court will be slow and cautious in varying, reviewing and/or setting aside such a Judgment or order. The factors that may lead the Court to interfere, vary or set aside a consent Judgment or order include but are not limited to the following:-
 - a. Fraud
 - b. Mistake
 - c. Collusion
 - d. An agreement being contrary to the policy of the Court,
 - e. Absence of sufficient material facts
 - f. Ignorance of material facts
 - g. Any general reason which may enable a court to set aside an agreement (see any other sufficient reason under Order 44 Civil Procedure Rules)”

In the Case of *Kenya Commercial Bank Limited Versus Specialized Engineering Co. Limited* (1982) eKLR 485, Harris, J held that:

“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 for a reason which would enable the court to set aside an agreement.”

11. The Applicant herein seeks to have the order declaring the suit land as trust land and sharing it amongst the Plaintiffs, Defendant and interested parties and lifting the prohibitory orders placed on the suit land as ordered in the consent order dated 5th October 2017 reviewed and all consequential orders and actions flowing therefrom set aside and/or cancelled. The Applicant relied on the ground that the Plaintiffs and Defendant failed to disclose to the Court that the suit land was not available for sharing as there existed attachment orders over the suit land and any dealings respecting the suit land had been prohibited through a prohibitory order issued by the Court and registered against the title.
12. I have reviewed and considered the Court record including the annexures to the Affidavit sworn in support of the application by the Applicant. From the record it is evident that the impugned consent order dated 20th September, 2017 entered into by the Plaintiffs then represented by C. S. Macharia & Company Advocates and the Defendant acting in person was accepted and endorsed as an order of the Court by the Deputy Registrar on 3rd October 2017. There were two sets of consent orders:-

The first consent order was as follows:-

Consent Order



Kindly record a consent order in the following terms:-

1. That the caution, restriction, inhibition and/or prohibitory order lodged on the register of land parcel Number Mutira/Kaguyu/4708 be lifted.

Dated at Kerugoya this 20th day of September, 2017.

Signed by the parties and/or their respective Advocates.

The second consent order was as follows:-

Consent Order

Kindly record a consent order in the following terms:-

1. That a declaration be issued that the Defendant herein holds land parcel number Mutira/Kaguyu/4708 for himself and in trust for his entire family which includes the Plaintiffs herein.
2. That land parcel number Mutira/Kaguyu/4708 be shared as hereunder;
 - (a) Daniel Wachira Njuguna - 1 ½ Acres
 - (b) Tabitha Wagatwe Njuguna – 1 Acre
 - (c) David Karimi Muchiri - 1 Acre jointly with Peter Kariuki Muchiri, Stephen Muchiri Njuguna and Lydia Wambui to be enjoined on this parcel to get life interest.
 - (d) Rosemary Nyaguthii Kabiro(minor) – ¼ Acre and Stephen Muchiri be Registered for life interest.
3. That this suit be marked as settled with no orders as to costs.

Dated at Kerugoya this 20th day of September 2017.

Signed by the parties and/or their respective Advocates.

13. The Court record is clear that the Applicant, Mueni Wambua and the Defendant herein had a litigation before Embu Magistrates Court vide Civil Case No.125 of 2005 where the Applicant was the Plaintiff and the Defendant was Stephen Muchiri Njuguna, the Defendant herein. The Applicant obtained Judgment in her favour on 4/2/2008 against the Defendant in the sum of Kshs 882,000/- together with interest at 35% per annum from 22/3/2004 until payment in full. The Defendant's appeal to the High Court was dismissed by Muchelule, J (as he then was) vide a Judgment dated 11th November 2011 but delivered on 7th December 2011. The Applicant herein as the successful party in the Embu Magistrate's Court matter applied for execution of the decree therein by way of attachment of land parcel Mutira/Kaguyu/4708 then registered in the name of Stephen Muchiri Njuguna who was the Judgment Debtor. The Court issued a prohibitory order restraining any dealings with the land until further orders of the Court in Embu CMCC No. 125 of 2005. The prohibitory order was registered against the title and the annexed copy of certificate of official search dated 9th July 2012 shows that the caution registered by Mueni Wambua claiming a purchaser's interest and the prohibitory order were as at the date of the search in force.
14. The Interested Parties, the record further reveals objected to the attachment of the land parcel claiming the land belonged to them (being family property) based on an award made by the Land Disputes Tribunal. The objection to attachment was dismissed by the Embu Chief Magistrate's Court. The Interested parties application for stay of execution before the High Court pending their appeal against the Magistrate's order dismissing their objection to the attachment was granted on condition that the



objectors deposited the decretal sum of Kshs 882,000/- and costs of Kshs 105,000/- in Court within 30 days of the order given on 10/8/2016 by Bwononga, J. They failed to do so and the conditional order lapsed.

15. I have made extensive reference to the Court record to illustrate and demonstrate that the Plaintiffs who instituted the instant suit were privy to the suit that had been instituted by the Applicant before the Embu Magistrates Court and the resultant appeal in the High Court, Embu and the stay and objection proceedings that directly related to the execution of the decree that emanated from the suit before the Magistrate's Court at Embu.
16. The Plaintiffs without doubt were well aware that the Applicant had obtained a Judgment and decree in the Embu Magistrate's Court suit against the Defendant herein and that she had taken out execution proceedings against the Defendant that had not been completed. In pursuit of execution of the decree, the Applicant had applied for attachment and sale of land parcel Number Mutira/Kaguyu/4708 which was then registered in the name of the Defendant. The Court pursuant to the application for attachment of the property, had issued and a Prohibitory Order had been registered against the property barring all dealings with the property without further orders of the Court. After the Plaintiffs and the Interested parties were given conditional stay of execution by the High Court at Embu to enable them to appeal against the trial Court's dismissal of their objection to attachment, they failed to honour the terms of the stay with the consequence that the stay lapsed and the Applicant was at liberty to proceed with the execution.
17. It is clear that when the Plaintiffs and the Interested parties objection proceedings at Embu Law Courts hit a dead end, they connived and colluded with the Defendant to institute proceedings before the ELC Kerugoya with the objective of frustrating the execution efforts of the Applicant before the Embu Magistrate's Court. The Plaintiffs and the Defendant instituted the present suit in 2017 well fully aware that the suit property the subject of the suit was subject to attachment proceedings in execution of a decree in favour of the Applicant and against the Defendant in Embu CMCC No. 125 of 2005 and that a prohibitory order had been registered against the property. The fact that the Plaintiffs and the Defendant in the suit before this Court entered into a consent whose effect was to have the prohibitory order registered against the suit property in execution of the decree in the Embu Magistrate's Court removed without the involvement of the Applicant in whose favour the prohibitory order was registered, is clear evidence that the Plaintiffs and the Defendant were acting dishonestly and fraudulently with the object of defeating and circumventing justice to the prejudice of the Applicant. The consent entered inter alia was in the following terms:-

“ That the caution, restriction, inhibition and/or prohibitory order lodged on the register of land parcel number Mutira/Kaguyu/4708 be lifted.”
18. The Prohibitory Order had been registered against the property on application by the Applicant when she applied to attach the property in execution of the decree in the Embu Magistrate's Court case. It could not be lifted without her consent and/or the decree being satisfied. The Court before which the prohibitory order was issued was the Court competent to lift the prohibitory order unless there had been an appeal and/or successful objection to attachment before an Appellate Court.
19. I in the premises entertain no doubt that the consent entered into by the Plaintiffs and the Defendant to remove the prohibitory order registered against land parcel Mutira/Kaguyu/4708 was fraudulent and was entered into in collusion to defeat the Applicant's interest in the suit property. Equally the consent order entered into by the Parties sharing out the parcel of land was fraudulent as the parties could not purport to share out land that was already under attachment and a prohibitory had been registered. It is clear and evident that the Plaintiff, the Defendant and the Interested parties schemed



and connived together to pull the carpet under the feet of the Applicant to frustrate her execution of the Court decree in the Embu Magistrate's Court. The Court was misled to adopt the consent which effectively set aside orders that had been issued by another Court. I am accordingly satisfied sufficient grounds exist to warrant the review of the Court order issued on by the Court on 3rd October 2017 adopting the consent order.

20. Accordingly, I find the Notice of Motion application dated 23rd January 2023 to have merit and I allow the same and issue the following consequential orders:-
1. That the Court order given by the Court on 3/10/2017 is hereby reviewed and all consequential orders flowing therefrom are set aside and the suit is ordered to be heard denovo.
 2. The subdivision of land parcel Mutira/Kaguyu/4708 and the resultant titles issued being land parcel numbers Mutira/Kaguyu/5958,5959, 5960 and 5961 are hereby ordered cancelled and revoked forthwith.
 3. The County Land Registrar Kirinyaga is directed to cancel and expunge entry No. 5 of 9/10/2017, Entry No.6 of 9/10/2017 and Entry No. 7 of 7/2/2018 in the register of land parcel Mutira/Kaguyu/4708 and to reinstate the land back to the original status prior to the orders of 3/10/2017.
 4. That the Applicant, Tabitha Wagatwe Njuguna, David Karimi Muchiri, Lydia Wambui and Rosemary Nyaguthi Kabiro are ordered to be joined as the 1st to 5th Interested Parties in the suit respectively.
 5. The suit is fixed for mention on 7/5/2024 for directions.
 6. The cost of the applications are awarded to the Applicant.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY Via VIDEO LINK THIS 7TH DAY OF MARCH 2024.

J. M. MUTUNGI

ELC - JUDGE

