



ARC Petroleum Limited v Muge; Attorney General (Applicant) (Environment & Land Case 329 of 2016) [2024] KEELC 3360 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3360 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 329 OF 2016
NA MATHEKA, J
APRIL 23, 2024**

BETWEEN

ARC PETROLEUM LIMITED PLAINTIFF

AND

JOSEPH KIPLAGAT MUGE DEFENDANT

AND

THE HON. ATTORNEY GENERAL APPLICANT

RULING

1. The application is dated July 27, 2023 and is brought under article 159 2(d) of the *Constitution* section 1A, 1B. 32 & 63 (e) of the *Civil Procedure Act*, order 45 rule 1, 51 rule 1 of the *Civil Procedure Rules* seeking the following orders;
 1. That this Application be certified as urgent and be heard ex-parte in the first instance;
 2. That the suit herein be re-opened to allow hearing of the application.
 3. That pending the hearing and determination of the Application inter-partes this Honorable Court be pleased to issue temporary injunctions restraining the Plaintiff, Defendants and or any other party from disposing, selling and/or dealing with all that parcel of land known as Plot L.R No. MN/1/7822, contained in CR. No. 22042 measuring approximately 0.2117 Ha.
 4. That the Chief Land Registrar and the Hon. Attorney General be added as the 2nd and 3rd defendants in this suit.
 5. That this Honourable Court be pleased to review, vary and set aside the orders issued by this court on December 6, 2016.
 6. That the costs of this application be provided for.



2. It is based on the following that the consent order was obtained by fraud and material misrepresentation. That *vide* a letter dated September 26, 2019 Harrison Kikuvi Muambi lodged a complaint with the Chief Land to the effect that he is the owner of the suit parcel of land and he has never transferred the suit parcel of land to any other person and the original Title Documents are in his possession. That investigation undertaken by the National Police Service reveal that Joseph Kiplagat Muge of National Identity Card No. 1xxx who is alleged to have purchased the suit property from Harrison KiKuvi Muambi does not exist and that he is a phantom. That investigation undertaken by the National Police Service carried out at the reveal that National Identity Card No. No. 1xxx is held by Richard Maritim and not Joseph Kiplagat Muge. That the consent contained in the letter dated November 17, 2016, which was adopted as an order of court, was obtained by fraud and contravenes express statutory provisions. That section 33(3) of the [Land Registration Act](#) is very if the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of tease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of tease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such. That to the extent that the consent order directed the Land Registrar to issue a provisional title, for the property known as MN/1/7822 contained in CR. No. 22042 without Gazettement, it is contravened section 33(3) of the [Land Registration Act](#) and ought to be set aside with all the other consequential processes undertaken pursuant to the order. That from the investigation report it is clear the defendant misrepresented to court that he was the owner of the suit property having purchased it from Harrison Kikuvi Muambi. That from the investigation undertaken by the National Police Service it is clear there is no person known as, Joseph Kiplagat Muge of National Identity Card No. 1xxx capable of purchasing the suit parcel of land and or entering into a consent. That clearly the order issued on December 6, 2022 was obtained by fraud and material misrepresentation and ought to be set aside *ex-debito justitiae*. That unless the impugned order is set aside Harrison Kikuvi Muambi's right to property will be infringed.
3. The Respondent raised a Preliminary Objection to the Plaintiff's Notice of Motion application dated July 27, 2023 and the entire suit on the following grounds that the parties seeking to be enjoined to the suit do not disclose the cause of action. The Applicant's application is an abuse of the Court process as the Applicants lack the requisite *locus standi*. That the Court is *functus officio* and is therefore bound by its decision issued on the December 6, 2016 and/or lacks authority to deviate since the judgment has not been reviewed and/or appealed against. The Applicants application does not disclosed any specific breach of Law by the Respondent and contravenes the provisions of rule 10 sub -rule 2 (e) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms Practice and Procedure Rules\) 2013](#) and also fails to meet the requirement set out in [Ananita Karimi Njeru v The Republic \(1976-1980\) KLIR 1272](#) and upheld in [Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others \(2013\) eKLR](#).
4. This court has considered the preliminary objection the Applicant submitted that the Chief Land Registrar is the custodian of all land records and orders issued by the court had the effect of changing the registration details of the suit parcel. This could lead to the risk of the Applicants being sued for compensation. I concur with the Applicant's submissions and find that the Applicants do have an interest in this matter as there will be the ones to execute the orders. Secondly, this court is not *functus officio* as it is being asked to review its orders after the discovery of new and material facts. Indeed, there are allegations that the Plaintiff company never entered into the sale agreement and the shareholders denied issuing instructions in this matter. I find that the preliminary objection is not merited and I dismiss it with costs.



5. This court will now consider the application and the submissions therein. The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig v Mallya* (1975) EA 266 where the Court stated that;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

6. And in the case of *Flora N. Wasike v Destimo Wamboko* (1988) eKLR Hancox JA cited *Setton on Judgments and Orders* (7th edition) vol 1 page 124, and stated that;

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

7. This means then that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside. So, was this a case of fraud or misrepresentation or mistake on the part of the 2nd Respondent. *The Black's Law Dictionary* defines “fraud” as;

“1. Knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime.”

8. Misrepresentation is defined as;

“1. The Act or an instance of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.

2. The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.

9. And “mistake” as;

“1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (1) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.

10. The Applicant’s case is that the said consent and orders were obtained fraudulently. This court has perused the court records and find that investigations undertaken by the National Police Service reveal that Joseph Kiplagat Muge of National Identity Card No. 1xxx who is alleged to have purchased



the suit property from Harrison KiKuvi Muambi does not exist and that he is a phantom. That the National Identity Card No. No. 1xxx is held by Richard Maritim and not Joseph Kiplagat Muge. Harrison Kikuvu Muambi lodged a complaint with the Chief Land to the effect that he is the owner of the suit parcel of land and he has never transferred the suit parcel of land to any other person and the original Title Documents are in his possession. I find that the consent contained in the letter dated 17th November 2016, which was adopted as an order of was entered fraudulently and must be set aside. Indeed there is an application in the file by the interested party which state that the use of the plaintiff's company name was done without his knowledge and or consent. I find that the application dated 27th July 2023 is merited and I grant the following orders;

1. That the Chief Land Registrar and the Hon. Attorney General be added as the 2nd and 3rd Defendants in this suit.
2. The Court reviews and sets aside the consent order dated December 6, 2016 and the case be reopened again to be listed for hearing on merit.
3. That the cost this application to the Applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF APRIL 2024.

N.A. MATHEKA

JUDGE

