



REPUBLIC OF KENYA



KENYA LAW
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**Muthamia v Government (County) Surveyor, URRU & 3 others (Environment & Land
Petition E005 of 2023) [2024] KEELC 13197 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13197 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND PETITION E005 OF 2023

CK NZILI, J

NOVEMBER 13, 2024

**N THE MATTER OF PROTECTION OF THE RIGHT TO PROPERTY
UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ABUSE OF ADMINISTRATIVE ACTION
CONTRARY TO ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF THE NATIONAL
VALUES AND PRINCIPLES OF GOVERNANCE AS PROVIDED
UNDER ARTICLE 10 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTION 22 AND 23 OF
THE SURVEY ACT, CAP 299 LAWS OF KENYA**

AND

IN THE MATTER OF SECTION 15 OF THE LAND REGISTRATION ACT 2010

AND

**IN THE MATTER OF SECTION 3 AND 4 OF THE
FAIR ADMINISTRATIVE ACTION ACT 2015**

BETWEEN

JOSEPH KITHINJI MUTHAMIA PETITIONER

AND

THE GOVERNMENT (COUNTY) SURVEYOR, URRU 1ST RESPONDENT

THE LAND REGISTRAR, URRU 2ND RESPONDENT



AND

RULING

1. There are two applications before this court. The first one is dated 13.9.2024 in which Arphaxad Kirimi Mutwiri seeks to be joined as a 4th respondent/interested party in this petition; there be a stay of implementation of a decree issued on 20.5.2024 and a consent dated 14.5.2024, the orders issued on 14.5.2024, 20.5.2024, 3.6.2024 and all the consequential orders to be vacated or set aside and he be given an opportunity to file his replying affidavit and submissions to the petition.
2. The grounds are that if the orders of the court are implemented, they will displace L.R No's. Antuamburi/3162 and 11821 on the grounds that belong to him, the petitioner intentionally omitted to disclose or include him in the petition for apparent reasons, yet he knew that he would object to the petition and that the suit parcel of land was rectified through a court order in Tigania ELC No. E029 of 2023. In an affidavit sworn on 13.9.2024, Arphaxad Kirimi Mutwiri, has averred that he had filed Tigania ELC No. E029 of 2023 over the subject matter against the petitioner as the 5th defendant, together with the Hon. AG as per the annexed memorandum of appearance and amended plaint annexed as AKM "1", "2" & "3".
3. Further, it was averred that parties resolved the matter by a consent order attached as AKM "4," and eventually, the lower court marked the suit as withdrawn on 5.2.2024, as per annexure marked AKM "6".
4. The applicant averred that the petitioner was dishonest, for he failed to disclose those facts in the petition, yet he has not preferred any appeal against the said orders, with a view of secretly misleading or obtaining favorable orders.
5. The petitioner opposes the first application through a replying affidavit sworn on 3.10.2024 by Joseph Kithinji Muthamia. He says that the Environment and Land Court case in Tigania law courts gave no substantive orders and was merely marked as withdrawn with no orders as to costs; hence, the court did not express itself on the subject matter of this petition or give any orders touching on his land or even him as an individual which are contradictory to the orders given by this court. He urges the court to find the application as lacking merits.
6. The 4th intended respondent/interested party relied on written submissions dated 3.10.2024, urging that he was a necessary party to this petition, in view of the facts set out regarding the previous suit and the likely effect of the petition on him and his land, yet he was condemned unheard.
7. The second application is dated 7.10.2024, the applicant is seeking to be joined as an interested party to the petition. The reasons, as contained on the face of the application and an affidavit sworn by Stella Kirimi on 7.10.2024, are that she is the owner of L.R No. Meru North Antuamburi/3162, as per the annexed copy of a title deed and an official search marked as SK 01 (a) & (b). She says that the land forms part of the petition before the court, making her a necessary party who shall be affected by its outcome. She further says that she has an identifiable stake in the proceedings.
8. The petition dated 17.4.2023 was filed before this court on 19.4.2023 against the county surveyor, land registrar Urru, and the Hon. A.G. The petitioner was seeking that the 1st & 2nd respondents be



- compelled by order of mandamus to affix or set up on L.R No. Tigania/Antuamburi/7021, survey mark (beacons), note the boundaries to the said land as georeferenced and surveyed to the required standards, so as to make it compatible with the cadastral map for the registration, noting where the land lies.
9. The court was also asked to declare that the failure or refusal to do so by the respondents was a breach of the petitioner's constitutional rights under Articles 40 & 47 of *the Constitution*. The petitioner had also sought the provision of security through the O.C.S Mikinduri Police Station during the exercise by the 1st and 2nd respondents in fixing the beacons.
 10. After the petition was served upon, the respondents' parties appeared before the court severally until 20.5.2024, when they recorded a settlement by a consent letter dated 14.5.2024 in line with *the Constitution* of Kenya (Protection of Fundamental Rights & Freedoms) Practice & Procedure Rules 2013) Mutunga Rules. The matter was, therefore, marked as closed. A decree to that effect was issued on 3.6.2024.
 11. The interested parties urge the court to join them in an already settled matter. The 1st applicant urges the court to vacate, set aside, and or vary the orders made on 22.5.2024 and all the consequential orders as made, for they will displace his parcel of land the petitioner withheld vital information; he intentionally left him out in the petition, and that he was condemned unheard, otherwise, his parcel of land was rectified through a court order.
 12. Other than annexing annexures marked DKM "1" – "6," the 1st intended interested party did not furnish the court with the intended replying affidavit to the petition to be used as his defense if he is allowed to join the petition. Additionally, the 1st intended interested party has not established the nexus between L.R No. Antuamburi/7021 and his parcels of land, that are likely to be affected by the decree of this court.
 13. Coming to the 2nd intended interested party, he has not sought for the decree of the court to be set aside, nor has he attached a proposed replying affidavit to the petition, setting out the nexus between her land L.R No. Meru North/Antuamburi/3162 with L.R No. Tigania/Antuamburi/7021.
 14. An interested party or a necessary party to a petition seeking to set aside a decree or order ex debito Justitiae has to demonstrate his stake in the substratum of the matter, order, or decree sought to be set aside and especially show that the same was obtained in breach of rules of natural justice.
 15. A party seeking to join proceedings post-judgment must make full disclosure of all material facts within his knowledge, which, had they been brought to the attention of the court, it would not have reached the decision that it made in his absence. See *Uhuru Highway Developments Ltd vs Cental Bank of Kenya & others* (1995) eKLR.
 16. The intended interested parties blame the petitioner for deliberately omitting them or not disclosing there were previous orders of the court that conflicted with the decree of this court. None of the intended parties have disclosed a final decree or order made before 20.5.2024 in the lower court, that contradicts the decree of this court.
 17. The respondents are said to have been parties in Tigania PMCC ELC No. E029 of 2023. They have not, in the applications, denied that they entered into a valid consent judgment whose implications were an order of mandamus directing the 1st – 2nd respondents to undertake a statutory duty ordained by the law.



18. The law grants this court the power to enter a consent judgment in a constitutional petition to compromise a petition. In the instant consent letter, the same was executed by the parties through their legal representatives.
19. A consent judgment has a contractual effect. It can only be set aside on conditions that would justify the setting aside of a contract under Section 67 of the *Civil Procedure Act*. See Brooke bond Liebig Ltd vs Mallya (1975) E.A 266, KCB vs Benjoh Amalgamated Ltd (2017) eKLR, KCB vs Specialized Engineering Co. Ltd (1982) KLR 485 and Flora Wasike vs Destio Wamboko (1982 – 1988) 1 KAR 625. Evidence of fraud, collusion, illegality, mistake, undue influence, or misrepresentation is lacking. See Hiram vs Kassam (1952) 19 EACA 130.
20. As to whether the consent judgment should be set aside, the court must also consider the motive, character of the proceeds, nature of the proceedings, reliefs sought, the convenience to the administration to justice, expense of the parties, interest of justice and possibilities of undue hardship. See Hangzhou Agrochemical Industries Ltd vs Panda Flowers Ltd (2012) eKLR. The intended interested parties have dismally failed to advance any stake in relation to the subject matter of the petition, offer any possible defense to the petition and lastly, justify the re-opening of the consent judgment.
21. I find no merits in the two applications, and are, as a result of this dismissed with costs to the petitioner.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13TH NOVEMBER, 2024

In presence of

C.A Kananu

Kimathi for the petitioners

Ondieki for 1st intended interested party

Nyaga for 2nd intended interested party

Mr. Juma for 1st – 3rd respondents

HON. C K NZILI

JUDGE

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