



**Yator v Uasin Gishu County & another (Environment & Land Case 349 of 2016) [2024] KEELC 7581 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7581 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 349 OF 2016  
JM ONYANGO, J  
NOVEMBER 13, 2024**

**BETWEEN**

**PRISCA YATOR ..... PLAINTIFF**

**AND**

**UASIN GISHU COUNTY ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 6<sup>th</sup> February 2024, the Plaintiff filed an application seeking the following orders:
  - a. Spent
  - b. That the alleged consent order issued by this Honourable Court on the 16<sup>th</sup> July 2019 and all consequential actions therefore be and is hereby set aside pending he hearing and determination of the main suit.
  - c. That the alleged written consent be served upon the Plaintiff.
  - d. That the Defendant /Respondent either by itself, Land Registrar, Uasin Gishu County, its agents or any other person acting on its behalf be restrained from implementing, approving or transferring title on behalf of ELD/MUN BLOCK 25/3.
  - e. That the status quo be maintained.
  - f. That any other order this Honourable Court may deem fit.
  - g. That the costs of this application be provided for.



2. The application is predicated upon the 22 grounds stated on its face and on the Applicant's supporting affidavit sworn on 6<sup>th</sup> February 2024. The long and short of it is that she was not privy to nor was she aware of the consent order issued on 16<sup>th</sup> July 2019. She avers that if the alleged consent order is implemented, she will be denied a chance to be heard and she stands to lose her property.
3. The plaintiff filed a Further affidavit in which she accused the 2<sup>nd</sup> defendant's counsel of filing documents in court without serving her.
4. The application is opposed by the 2<sup>nd</sup> Defendant through the Replying Affidavit of S.K Lel, the County Attorney, sworn on 26<sup>th</sup> June, 2024. He gives a background of this matter as follows: The plaintiff was initially represented by the firm of Birech, Ruto & Company Advocates in March 2017. On 19<sup>th</sup> November 2018 she appointed the firm of Mukabane & Kagunza Advocates. When the matter came up for mention on 23<sup>rd</sup> May, 2019 in the presence of counsel for the plaintiff and Defendants, the court ordered the County Surveyor Uasin Gishu County together with the private surveyor appointed by the plaintiff to visit the suit land and confirm if a survey was done and file a report in court within 14 days.
5. The matter was fixed for mention on 20<sup>th</sup> June, 2019 when Mr. Yego Advocate held brief for Mr. Kagunza, the Plaintiff's counsel. The matter was subsequently mentioned on 16<sup>th</sup> July, 2019 in the presence of the defendant's counsel and in the absence of the plaintiff's counsel. On the said date the court ordered that the survey be done within 14 days and that the plaintiff to appoint a surveyor within 7 days. The matter was fixed for mention on 25.9.2019 and the 2<sup>nd</sup> Defendant was directed to serve the plaintiff with the order. On 25.9.2019 the plaintiff's advocate attended court and informed the court that the plaintiff's private surveyor had passed on. The County Surveyor subsequently conducted the survey on 27.9.2019 and filed his report in court on 30.9.2019.
6. The County Surveyor appeared in court on 5<sup>th</sup> December 2019 when he was cross-examined on his report by counsel for the plaintiff and the parties were directed to file their submissions. The Applicant was dissatisfied with the directions issued on 5<sup>th</sup> December, 2019 and she filed an application seeking an order that the judge recuses herself. This was followed by an application dated 25.1.23 seeking to stop the implementation of the mutation approved by the County Surveyor on 6<sup>th</sup> July, 2021. Following the dismissal of her application the applicant filed the instant application.
7. In response to the Applicant's Further affidavit, Ms Chesoo, learned counsel for the 2<sup>nd</sup> Respondent filed a Supplementary Affidavit sworn on 16.10.24 in which she refuted the accusations by the Applicant.
8. The court directed that the application be canvassed by way of written submissions but only the Applicant filed her submissions while the 2<sup>nd</sup> Respondent opted to rely on their Replying affidavit and Supplementary affidavit.
9. Having considered the Notice of Motion, Supporting and Further Affidavit as well as the Replying Affidavit, Supplementary Affidavit and the Plaintiff/ Applicant's submissions, the following issues arise for determination\_
  - a. Whether the consent order issued on 16.7.2019 should be set aside.
  - b. Whether an injunction should be issued to restrain the Defendant from approving or transferring the title in respect of land parcel no. Eldoret Municipality Block25/3.



## Analysis and Determination.

10. From the outset I must point out the order issued by the court on 16.7.2019 was made in the presence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counsel and in the absence of the Plaintiff and her advocate. From the proceedings, I note that the court directed that the order be served upon the Plaintiff.
11. When the matter came up for mention on 25.9.2019 Miss Koech held brief for Mr. Kagunza and Mr. Odongo informed the court that the County Surveyor had visited the site on 6.9.2019 in the presence of the Plaintiff's private surveyor. The presence of Miss Koech suggests that the plaintiff's counsel was served with a mention notice and the order issued on 6.9.2019 and even though he did not attend court personally, he instructed Miss Koech advocate to hold his brief and represent the Plaintiff. The court then directed that the surveyors be summoned to attend court and explain their reports. It is instructive to note that on 5.12.2019 the plaintiff's counsel and the 2<sup>nd</sup> defendant's counsel cross-examined the County surveyor on his report and the court directed the parties to file their submissions.
12. Having participated in the proceedings ensuing from the orders issued on 16.7.2019, the Applicant can therefore not turn around and ask the court to set aside the said order. At any rate, the directions contained in the order of 16.7.2019 were not new as the court had issued similar orders on 23.5.2019 in the presence of counsel for the plaintiff. It could well be that the plaintiff's former counsel may not have clearly explained to the plaintiff the import of the orders issued by the court.
13. Even though the court has a discretion to set aside its orders, such discretion must be exercised judiciously to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who had deliberately sought to obstruct or delay the course of justice. See the case of *Shah v Mbogo* (1967) E.A 116.
14. With regard to consent orders, the court cannot interfere with a consent order except in circumstances as would afford a good ground for varying or rescinding a contract.
15. If indeed the Applicant was dissatisfied with the orders issued on 16.7.2019, she would have applied to have those orders set aside at the earliest possible opportunity. Instead, the Applicant filed an application 28.2.2020 seeking an order that the judge recuses herself and another application dated 25.1.2023 seeking an order to stop the implementation of the mutation form approved by the County Surveyor on 6.7.2021. It is only when these applications were dismissed that she chose to file the instant application. The 4-year period of delay in bringing the application is inordinate and the same has not been explained.
16. The applicant has therefore failed to demonstrate that the court ought to exercise its discretion in her favour.
17. Regarding the order of injunction, I note that the Applicant filed a similar application dated 25.1.23 in which she sought to stop the implementation of the mutation approved by the Uasin Gishu County Surveyor on 6th July 2021. The said application was dismissed and the court cannot revisit the same application as the matter is res judicata. The doctrine of res judicata is set in section 7 of the [Civil Procedure Act](#) which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit, or the suit in which such issue has been subsequently raised and has been heard and finally decided by the court”.



18. The upshot is that the application lacks merit and it is hereby dismissed with no order as to costs.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF NOVEMBER 2024.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of;**

1. Prisca Yator - Plaintiff
2. Miss Rotich for the 2<sup>nd</sup> Respondent

Court Assistant: Kuto

