



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 109 of 2008

HOBSON NYANGAU ONCHURU PLAINTIFF

VERSUS

TOM O. MOGOI 1ST DEFENDANT

GEORGE N. MOGOI 2ND DEFENDANT

RULING

1. The plaintiff filed a chamber summons under the old **Order XXXIX Rules 1 and 2** of the **Civil Procedure Rules** and **Sections 3, 3A and 63 (e)** of the **CPA**. By the 2nd application, the plaintiff sought injunctive orders against the defendants, their agents and or servants to restrain the said defendants from in any way whatsoever interfering with the parcel of land known as Central Kitutu/Daraja Mbili/2860 pending the hearing and determination of the suit herein.
2. The application which was supported by the sworn affidavit of the plaintiff dated 17th September 2008 was opposed vide a Replying Affidavit sworn by the 1st defendant on 20th November 2008. The 1st defendant denied the plaintiff's allegations that he (1st defendant) had sold any portion of the suit land to the plaintiff and that he was privy to the actions of the 2nd defendant, actions which were the cause of the plaintiff's claim and the application for injunction.
3. On the 24th September 2008, Musinga J. (as he then was) issued an order for maintenance of status quo pending hearing and determination of the application.
4. The gist of the plaintiff's case, as can be seen from both the plaint and the instant application is that after he purchased a portion of the suit land measuring 93'x92', he took possession of the same and brought materials on site ready for construction of a permanent house. However, before he could start, the 2nd defendant invaded the land, chased away and evicted the plaintiff therefrom and also scattered and destroyed all the building materials that were on site.
5. Both defendants entered appearance and filed defence. The 1st defendant stated that he had nothing to do with the 2nd defendant's destructive actions. The 2nd defendant on the other hand alleged that the 1st defendant sold a portion of the suit land which was co-owned by the two defendants without the permission authority and or consent of the said 2nd defendant, resulting in the filing of Kisii CMCC NO. 54 of 2008 in which he (2nd defendant) obtained restraining orders against the 1st defendant herein. The

2nd defendant denied the plaintiff's and 1st defendant's claims.

6. On the 25th July 2011, the following order was filed in court:-

“By consent, it is hereby agreed between the plaintiff and the 1st defendant:-

1. **That judgment be and is hereby entered for the plaintiff in terms of prayer (a) of the plaint with no order as to costs.**

2. **This matter to proceed to hearing between plaintiff and 2nd defendant and upon the conclusion the 1st defendant will execute transfer documents in favour of the plaintiff”**

7. The above consent was drafted on the letter-head of Kerosi Ondieki & Co. Advocates and signed by Kerosi & Co. Advocates for the plaintiff and M/s J.O. Soire & Co. Advocates on behalf of the 1st defendant. The said consent was filed in court on 6th October, 2011.

8. When the matter came up for hearing on 6th October 2011, counsel for the 2nd defendant objected to the proposed consent since the same was in general terms. I have heard arguments of Mr. Omwenga for the 2nd defendants. His argument is that if the consent as proposed were to be adopted, the same would remove the 2nd defendant from the proceedings. He also contended that the 2nd defendant was never consulted about the said consent. He also said that because there is another suit being Kisii HCCC NO.157 of 2010 – Tom Mogoi Ogeche (1st defendant herein) against Hobson Nyangau Onchuru (plaintiff herein) it would not be prudent to adopt the consent proposed herein.

9. Counsel for the 1st defendant, Mr. Soire, opposed the arguments by counsel for the 2nd defendant. His argument was that the fact that the 2 defendants herein are brothers does not mean that they have to take a common stand always.

10. Mr. Ombachi, appearing amicus curiae, and representing Tom Mogoi Ogeche in Kisii HCCC NO.157 of 2010 prayed that that the two suits should be consolidated so that the real issues in controversy can come out for consideration by the court. He supported Mr. Omwenga in opposing the adoption of the proposed consent.

11. Mr. Kerosi in reply to the submissions against the efforts to adopt the proposed consent submitted that a consent order is an agreement between 2 parties and nobody can interfere save when it is obtained by fraud. He further submitted that the plaintiff is a purchaser for value from the 1st defendant of a portion of suit land which belongs to the 1st defendant by registration under **Cap 300** as fortified by **Article 40** of the **Constitution**. He further submitted that the issue raised in HCCC NO.157 of 2010 could have been ventilated in HCCC NO.109 of 2008, that the 1st defendant is ready to transfer part of suit land and that the objections to consent are illegal. He also contended that even if the suit goes to trial, it would be a mere waste of time. He further submitted that after perusing the court file in HCCC NO.157 of 2010 he had noted that it discloses no cause of action. He urged the court to adopt the consent.

12. I have considered the above submissions of the respective counsel and in principle; there is no doubt that a consent order is a serious matter. In **Kenya Commercial Bank Ltd. –vs- Specialized Engineering Co. Ltd. [1982] KLR 485**, Harris J. is on record as having said at P.493;

“The marking by the court of a consent is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made such an order is not lightly to be set aside or varied save by consent or on one or other of the recognized grounds”

Also see **Wasike –vs- Wamboko [1988] KLR 429**.

13. Applying the above principles to this case prayer (a) of the plaint which the plaintiff seeks this court to adopt as a consent order states:-

“An order directing the defendant to sign and/or execute all the relevant Land Control Board consent and transfer forms to facilitate the registration of the plaintiff as the proprietor of a portion measuring 92 feet by 93 feet of land parcel NO. Central Kitutu/Daraja Mbili/2860 and in default thereto the Executive Officer of this honourable court be authorized to so execute all the relevant documents.

14. There is no gainsaying that the consent order which is the subject matter of the application as entered by the consent of only the plaintiff and the 1st defendant with the aim as currently submitted by Mr. Omwega, counsel for the 2nd defendant removing the 1st defendant from the proceedings. In any event, prayer (a) of the plaint refers to “defendant” when there are 2 defendants in this suit. Who is the defendant referred to in that prayer?

15. Further the 2nd defendant was never informed about the consent and upon file. There is also the existence of HCCC No.157 of 2010 where there are allegations of fraud on the part of the 1st defendant on how he registered the suit property as the sole proprietor while the 2nd defendant alleges that the suit land was bought jointly.

16. Counsel for the plaintiff pointed out that the suit land belongs to the 1st defendant by registration under **Cap 300**. However, court notes there are allegations of fraud in the circumstances under which such registration was concluded. I agree with Mr. Omwega for the 2nd defendant and Mr. Ombachi who appeared as a friend of the court that HCCC NO.157 of 2010 and HCCC No.109 of 2008 primarily deals with the suit property and it would not serve the interests of justice for this court to record the consent order which basically aims to exclude the 2nd defendant from the suit and also to shut out the claim of the 2nd defendant in HCCC No.157 of 2010.

17. In the premises and for the reasons above given, this court declines to adopt the consent dated 25th July 2011 and filed in court on 6th October 2011 as between the plaintiff and the 1st defendant.

18. I direct the parties to move ahead and fix this suit for hearing bearing in mind that it would be prudent to consolidate this suit with Kisii HCCC NO.157 of 2010 since the subject matter is the same and with the 2 defendants herein warring against each other.

19. The 2nd defendant shall get costs of this objection.

20. It is so ordered.

Dated and delivered at Kisii this 16th day of November, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Mose for Kerosi Ondieki (present) for Plaintiff

Mr. Obure for J.O. Soire (present) for 1st Defendant

Mr. Ongige for Omwenga (present) for 2nd defendant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.