



**Opondo & another v Osir & another (Environment and Land Miscellaneous Application E18 of 2021) [2023] KEELC 17500 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17500 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E18 OF 2021**

**E ASATI, J  
MAY 25, 2023**

**BETWEEN**

**PLISTER ADHIAMBO OPONDO ..... 1<sup>ST</sup> APPLICANT**

**JOSHUA ODHIAMBO OGONGO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JACOB NDEGE OSIR ..... 1<sup>ST</sup> RESPONDENT**

**PATHACK YUDA OSIR ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the notice of motion application dated April 11, 2023 brought pursuant to the provisions of order 45, order 22 rule 29 [Civil Procedure Rules](#) and section 3A [Civil Procedure Act](#). The application seeks for orders that;
  - a. The court reviews, varies or sets aside the consent order of December 5, 2022.
  - b. The court grants an order of stay of the consent order dated December 5, 2022 pending hearing and determination of lower court file No ELC 443 of 2018.
  - c. That the court makes further or other orders as it may deem just and expedite in the circumstances of this case.
  - d. That the cost of the application be provided for.
2. The grounds upon which the application is brought are that the applicants were arrested on March 15, 2023, arraigned in court and are remanded in Kisumu Maximum Prison by virtue of the consent order dated December 5, 2022 which was entered to by the applicant in ignorance of material facts. That there is an ongoing suit in the lower court *vide* ELC 443 of 2018 between the parties over the same subject matter and the same is coming up for further hearing of the respondents' case on the



August 2, 2023. That the consent order was precipitated by mistake of counsel. That unless the matter is determined on priority basis, irreparable damage shall be occasioned to the applicants.

3. The application was supported by the averments in the supporting affidavit of the 1<sup>st</sup> applicant sworn on April 11, 2023.
4. The application was opposed *vide* the grounds of opposition dated April 20, 2023.
5. The application was argued orally on April 26, 2023.
6. I have considered the application, the grounds advanced in opposition thereof and the oral submissions made by counsel appearing for the parties. The basis of the application is the consent order dated December 5, 2022. The substantive prayer sought is a prayer for review, varying and/or setting aside of the consent order. While the applicants contend that the consent order was entered into by the applicants in ignorance of material facts, the respondents argue that the consent order dated December 5, 2022 was entered into in favour of the applicant to enable them settled taxed costs in reasonable instalments and setting the consent order aside would allow the respondents to recover the entire amount outstanding in one instance. That it has not been demonstrated that the consent order was obtained through fraud, collusion or ignorance or non-disclosure of material facts.
7. I have perused the consent order dated December 5, 2022. I note that it originated from a consent letter dated November 30, 2022 signed by the advocates for both parties and filed in court on December 1, 2022. All the court did was to adopt the contents of the said consent letter as an order of the court at the request of counsel for the applicants on December 5, 2022 when the matter was mentioned before the Deputy Registrar. A consent order can only be reviewed and/or set aside on grounds of fraud, non-disclosure of material facts or mistake or for a reason which would enable the court to set it aside.

The court of appeal in *Board of Trustees, National Social Security Fund v Michael Mwalo* [2015]eKLR held that a court of law will not interfere with a consent judgement except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgement, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of court. None of these grounds have been demonstrated herein. All the circumstances of the case show that the consent order was entered for the sake, in favour of and out the request of the applicants. In any case the consent is spent as the applicants already defaulted on the same, were arrested and committed to civil jail for 30 days on March 16, 2023 as stated in the application.

8. As regards the prayer for stay of the consent order pending determination of the suit in the lower court, my view is that the outcome of the suit will not have a bearing on the consent order. The consent order related to costs of an application herein that was dismissed with costs. The costs were taxed and have been paid partly.
9. I find no merit in the application and dismiss it. As regards costs, noting that the applicants are already labouring to pay the costs, the subject of the consent order and that a subsequent application dated August 1, 2022 was dismissed on October 25, 2022 with costs to be paid by the applicants, I consider it to be in the interest of justice that in this application each party bear own costs.

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 25<sup>TH</sup> DAY OF MAY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,  
JUDGE.**



In the presence of:

Maureen- Court Assistant.

Ohayo Advocate for the Applicants.

Kouko Advocate for the Respondents.

