



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gakinya v Kamunya (Civil Appeal 18 of 2018)  
[2022] KEHC 12621 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12621 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL APPEAL 18 OF 2018  
CM KARIUKI, J  
JULY 28, 2022**

**BETWEEN**

**GEORGE NJERU GAKINYA ..... APPELLANT**

**AND**

**DAVID KAMUNYA ..... RESPONDENT**

*(Being an appeal against the Ruling of Honourable J. Wanjala Chief Magistrate delivered on 19th July, 2017 in the Chief Magistrate Court at Nyahururu Civil Suit No. 261 of 2014)*

**JUDGMENT**

1. The instant appeal from ruling from Nyahururu CMCC 261/2014 delivered on July 19, 2017 dismissing plaintiff's notice of motion dated January 25, 2017.
2. The appellant being aggrieved with aforesaid order a ruling lodged instant appeal and set out.
3. Memorandum of appeal;
  - I. The learned trial magistrate erred in law and in fact in failing to appreciate that the appellant had proved his cases on a balance of probabilities.
  - II. The learned trial magistrate erred in law and in fact in failing to address her mind on the evidence adduced and hence, made erroneous findings dismissing the application dated January 25, 2017
  - III. The learned trial magistrate erred in law and in fact in failing to address her mind on the evidence adduced by the plaintiff.
  - IV. The learned trial magistrate erred in law and in fact in failing to find that the honourable court lacked the requisite jurisdiction to adopt the consent letter dated April 27, 2016 and to issue the subsequent decree on May 5, 2016.



- V. That learned trial magistrate erred in law and in fact in failing to set aside consent judgment adopted on May 3, 2016 and the subsequent decree issued on May 5, 2016.
  - VI. The learned trial magistrate erred in law and fact in failing to hold that the entire suit was filed was time barred as it violated the provisions of section 4, 5 and 6 of the *Limitation of Actions Act*, cap 22 laws of Kenya having been filed 24 years after the rise of the cause of action.
  - VII. The learned trial magistrate erred in law and fact in failing to hold that Nyahururu CMCC No 261 of 2014 was res judicata Nyahururu CMCC No 83 of 1992.
  - VIII. The learned trial Magistrate erred in law and fact in failing to hold that the stay granted in Malindi HC Petition No. 3 of 2016 affected the inherent powers that resulted in adopting the consent on May 3, 2016 and further issuance of the decree on May 5, 2016.
  - IX. The learned trial magistrate erred in law and fact in failing to hold that the honourable court lacked jurisdiction to adopt the consent order adopted on May 3, 2016 and hence the subsequent decree issued on May 5, 2016 amounted to an illegality.
  - X. The learned trial magistrate erred in law and fact in failing to make a finding that as a result of lack of jurisdiction the consent order adopted on May 3, 2016 amounted to an illegality hence null and *void ab initio*.
  - XI. The learned trial magistrate erred in law and in fact in addressing her mind to issues which were not before court and hence made an erroneous finding dismissing the application dated January 25, 2017.
3. The parties opted to canvass to appeal via submissions which they filed and exchanged.
  4. The background of matter arises from the consent order that was gladly recorded by parties to the appeal. In 1990, the appellant sold a motor vehicle registration number KXX 454 Nissan Lorry to the respondent for a consideration of Kshs 250,000/- whereby, the respondent paid a sum of Kshs 80,000/- in cash and balance of Kshs 170,000/- was to be paid in kind by way of transfer of plot No Nyahururu Municipality Block 11/61 by the appellant and certificate of lease was issued on February 24, 2011.
  5. The appellant later found out that the said plot had a double allocation and it had been allocated to two other persons. He filed a civil suit Nyahururu CMCC No 261 of 2014 claiming the balance of the purchase price of Kshs 170,000/-. The respondent denied liability to pay Kshs 170,000/- since he had already transferred the said plot to the appellant as it was agreed earlier and further filed a preliminary objection raising the issue of limitation of action, *res judicata* and abuse of the court process
  6. Prior to hearing and determination of the preliminary objection, parties on their own motion and willful involvement of their respective advocates, compromised the suit and filed a consent letter on April 27, 2016, whereby the respondent agreed to pay the appellant Kshs 170,000/- and in consideration the appellant agreed to execute all the transfer documents relating to plot No Nyahururu Municipality Block 11/61 and effect transfer in favour of the respondent. Pursuant to the said consent letter a decree was issued on May 5, 2016 and the matter was settled.



7. The appellant later changed his mind about the consent he had freely and voluntarily recorded and filed an application dated January 26, 2017 seeking for orders of review, setting aside, rescinding and expunging the consent from the court record and that the suit do proceed to full trial from where it had reached prior recording the consent. The application was heard, determined and a ruling was delivered on July 19, 2017 dismissing the application for review with the costs to the respondent.

### **Appellant's Submissions**

8. It is submitted for the appellant that the time of the consent decree, the court had no jurisdiction to entertain the issue revolving around ownership of all that parcel of land known as Nyahururu Municipality Block 2/61, at the time being held by the appellant. The respondent had not submitted to the justification of the magistrate having filed a notice of preliminary objection.
9. The trial court should have therefore interrogated the jurisdictional issue first, as a matter of law, given that the jurisdiction is fundamental, and without it the court cannot take any further step and ought to immediately down its tools in respect to the matter reliance is made on cases of *Owners of Motor Vessel 'Lilian S' v Caltex oil [Kenya] Ltd* [1989] KLR 1, *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and others* [2021] eKLR, and *Dhirajlal J Shah & another v Vijay Amritlal Shethia* [2008] eKLR.
10. It is contended that the adoption of the consent and the resultant decree was made in excess of jurisdiction and in disregard to the court order issued in Malindi High Court Constitutional Petition No 3 of 2016 (reported as *Malindi Law Society v Attorney General & 4 others* [2016] eKLR).
11. The trial court adopted the consent in excess of jurisdiction as this was during a period which the High Court in the case of *Malindi Law Society v Attorney General & 4 others* [2016] eKLR issued stay orders for land matters pending in the Chief Magistrate's Court.
12. During that period the subordinate courts had no jurisdiction over environment and land disputes as the provisions that had given them jurisdiction had initially been suspended by a stay order and subsequently declared unconstitutional by a judgement of this court.
13. The appeal filed herewith is merely seeking a review, rectify and or correct the record where a null and void consent order was adopted as judgement and decree of court in excess of its discretion.
14. The consent order becomes an order of the court upon being endorsed by the court, and that is why a decree was subsequently issued on the May 5, 2016. It is in this respect to be noted that under section 67 (2) of the *Civil Procedure Act*, no appeal shall lie from a decree passed by the court with the consent of parties. The only allowed legal procedure therefore through which a consent order and a decree issue thereof can be discharged is by way of review and setting aside.
15. The appellant indeed employed the correct procedure as the first applied to have the consent decree set aside reviewed by the court that adopted it, and the application having been dismissed appealed against the same, within the dictates of section 67 (2) of the *Civil Procedure Act*.
16. It is submitted that section 4 (a) of the *Limitation of Actions Act* stipulates that action may not be brought after the end of six years from the date on which the cause of action accrued where the action is founded on contract. The contractual arrangement of dealing in land between the appellant and the respondent executed in the 1990's.
17. The trial magistrate erred in both fact and law by holding as otherwise since the cause of action herein being already time-barred could not be determined on account of a consent decree.



## Respondent's Submissions

18. The respondent submits that it is a well settled principle that a consent order or decree has to be upheld unless it is violated by reason that would enable court to set aside an agreement such as fraud, mistake, misapprehension or contravention of court policy. This principle is on the premise that a consent judgement. The consent judgement once endorsed by court becomes a judgement of the court and it is binding on all the parties. Therefore, parties are estopped from asserting different positions from the stipulated agreement.
19. The respondent submits that a consent judgement should be not treated as an ordinary *ex parte* judgement. In this case a consent was entered into with the full knowledge and willingness of both parties as shown by the numerous correspondences exchanged between the parties' advocates prior to recording the consent letter dated April 27, 2016 which clearly express the intention of the parties and was consensus ad item.
20. In the case of *Ismail Sunderji Hirani v Noorali Esmail Kassam* [1952] 19 EACA 131 the Kenya trial judge dismissed the motion with costs and the applicant appealed. The Court of Appeal Eastern Africa held: -

"Where a compromise is recorded under order 24, rule 6 the decree is passed upon a new contract between the parties superseding the original cause of action."
21. The compromise of a disputed claim made bona fide is a good consideration and the court cannot interfere with it in circumstances which would afford good ground for varying or rescinding a contract between the parties.
22. The appellant has not placed any evidence before court to demonstrate any of the grounds required in setting aside the consent letter and the consequential decree in the lower court.
23. In any event, the appellant was fully aware of the consent that he was recording and he performed his part of the bargain by signing the transfer form in favour of the respondent and in consideration the respondent paid to the parties that they intended to settle the issue between them amicably once and for all and of the said intention and performing their respective parties of bargain the reached a consent that was accepted by both parties and as such the consent decree issued by the trial court on May 5, 2016 cannot be set aside or varied.
24. In that regard, the said consent decree has the effect of operating as an estoppel by record to the appellant since the appellant has not demonstrated any grounds for setting aside. See section 120 of the *Evidence Act* the appellant relies on Malindi stay orders as a ground for setting aside the said consent order whereas, the *Ismail Sunderji Hirani v Noorali Esmail Kaasam* (*supra*) case outlines the ground for setting aside consent judgement, decree and orders. Orders issued in other courts like the Malindi case is not one of them. As it stands there are no grounds laid by the applicant to warrant setting aside the consent letter and the consequential decree issued thereafter by the lower court. The appellant must accept that judicial decisions once made from a consent must be accepted as final and are not open to challenge and at some point, litigation must come to an end
25. Furthermore, this honourable court lacks jurisdiction to hear the appeal, as no appeal shall lie from a decree passed by the court with the consent of parties as it is provided for under section 67(2) of the *Civil Procedure Act*.



### **Whether The Lower Court Lacked Jurisdiction To Adopt The Consent And What Effect Did The Malindi Stay Orders Have On Civil Suit Nyahururu CMCC No 261 Of 2014**

26. The issue raised in the appeal are totally different and are not subjected to the stay orders in Malindi case. The subordinate courts are established under article 169 of the [Constitution of Kenya 2010](#) to exercise pecuniary and territorial jurisdiction over civil, criminal and environment and land case.
27. The matter before the lower court was purely a civil one in nature, where parties had entered into sale and purchase price. The Malindi case questioned the jurisdiction of the magistrates' courts handling environment and land cases. Therefore, the claim in the lower court had nothing to do with environment use and ownership of the title and the trial court was within its jurisdiction to exercise its powers in adopting the consent between the parties and in issuing a decree to that effect.
28. The averment by the appellant that the lower court had no justification to adopt a consent reached by parties are misleading, farfetched, unfounded and have no basis in both law and facts.

### **Whether Appellant Can Appeal An Order That Has Already Been Reviewed And Determined**

29. It is submitted that section 80 of the [Civil Procedure Act](#) read together with order 45 rule 2 of the [Civil Procedure Rules](#), makes it abundantly clear that the party cannot apply for review and appeal in the application for review dated January 26, 2017 which was dismissed with costs to the respondent for lack of merits. In the present appeal the appellant wants to have a second bite of the cherry. He cannot be permitted to do so. The instant appeal is a sham, frivolous, vexatious and an abuse of court process the case of [HA v LB](#) [2022] eKLR.
30. The appellant had his day in court when he chose to seek a review of the consent decree that he now wishes to appeal against. Litigation somehow must come to an end for the appellant, the basis of trial and error. Reliance is made on the case of [William Koross \(Legal personal Representative of Elijah CA Koross\) v Hezekiah Kiptoo Komen & 4 others](#) [2015] eKLR, [Ephantus Mwangi v Duncan Mwangi Wambugu](#) [1985] eKLR and [Ngugi v Kinyanjui & 3 others](#) [1989] eKLR.

### **Issues, Analysis And Determination**

31. After going through the pleadings, proceedings and submissions on record, I find the issues; whether the appeal has merit, and what is the order as to costs.
32. The appeal arises from the consent order that was recorded by parties to the appeal. In 1990, the appellant sold a motor vehicle registration number KXX 454 Nissan Lorry to the respondent for a consideration of Kshs 250,000/- whereby, the respondent paid a sum of Kshs 80,000/- in cash and balance of Kshs 170, 000/- was to be paid in kind by way of transfer of plot No Nyahururu Municipality Block 11/61 by the appellant and certificate of lease was issued on February 24, 2011
33. The appellant later found out that the said plot had a double allocation and it had been allocated to two other persons. He filed a civil suit Nyahururu CMCC No 261 of 2014 claiming the balance of the purchase price of Kshs 170,000/-. The respondent denied liability to pay Kshs 170,000/- since he had already transferred the said plot to the appellant as it was agreed earlier and further filed a preliminary objection raising the issue of limitation of action, res judicata and abuse of the court process.
34. Prior to hearing and determination of the preliminary objection, parties on their own motion and with involvement of their respective advocates, compromised the suit and filed a consent letter on April 27, 2016, whereby the respondent agreed to pay the appellant Kshs 170,000/- and in consideration the appellant agreed to execute all the transfer documents relating to plot No Nyahururu Municipality



- Block 11/61 and effect transfer in favour of the respondent. Pursuant to the said consent letter a decree was issued on May 5, 2016 and the matter was settled.
35. The appellant later changed his mind about the consent he had freely and voluntarily recorded and filed an application dated January 26, 2017 seeking for orders of review, setting aside, rescinding and expunging the consent from the court record and that the suit do proceed to full trial from where it had reached prior recording the consent. The application was heard, determined and a ruling was delivered on July 19, 2017 dismissing the application for review with the costs to the respondent.
35. It is a well settled principle that a consent order or decree has to be upheld unless it is violated by reason that would enable court to set aside an agreement such as fraud, mistake, misapprehension or contravention of court policy. This principle is on the premise that a consent judgement. The consent judgement once endorsed by court becomes a judgement of the court and it is binding on all the parties. Therefore, parties are estopped from asserting different positions from the stipulated agreement.
36. In *Hiran v Kassam* (1952) 19 EACA 131, the court held as follows;
- “Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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 the court to set aside an agreement.”
37. The respondent submits that a consent judgement should be not treated as an ordinary ex parte judgement. In this case a consent was entered into with the full knowledge and willingness of both parties as shown by the numerous correspondences exchanged between the parties’ advocates prior to recording the consent letter dated 27.04.2016 which clearly express the intention of the parties and consensus ad item.
38. In the case of *Ismail Sunderji Hirani v Noorali Esmail Kassam* [1952] 19 EACA 131 the Kenya trial judge dismissed the motion with costs and the applicant appealed. The Court of Appeal Eastern Africa held: -
- “Where a compromise is recorded under order 24 rule 6, the decree is passed upon a new contract between the parties superseding the original cause of action.”
39. The compromise of a disputed claim made *bona fide* is a good consideration and the court cannot interfere save in the circumstances which would afford good ground for varying or rescinding a contract between the parties. No ground had been shown to justify any court in interfering between the parties.
40. The appellant has not placed any evidence before court to demonstrate any of the grounds required in setting aside the impugned consent and the consequential decree in the lower court.
41. In any event, the appellant was fully aware of the consent that he was recording and he performed his part of the bargain by signing the transfer form in favour of the respondent and in consideration the respondent paid to the parties that they intended to settle the issue between them amicably once and for all. The consents reflects parties bargain reached t that was accepted by both parties and as such the consent decree issued by the trial court on May 5, 2016 cannot be set aside or varied.
42. In that regard, the said consent decree has the effect of operating as an estoppel by record to the appellant since the appellant has not demonstrated any grounds for setting aside.



43. In the *Ismail Sunderji Hirani v Noorali Esmail Kaasam* (*supra*) case court outlines the ground for setting aside consent judgement, decree and orders. As it stands there are no grounds laid by the applicant to warrant setting aside the consent letter and the consequential decree issued thereafter by the lower court.
44. On whether the lower court lacked jurisdiction to adopt the consent and what effect did the Malindi stay orders have on Civil Suit Nyahururu CMCC No 261 of 2014 ,I agree with respondent that the issue raised in the appeal are totally different and are not subjected to the stay orders in Malindi case. The subordinate courts are established under article 169 of the *Constitution of Kenya 2010* to exercise pecuniary and territorial jurisdiction over civil, criminal and environment and land case.
45. The matter before the lower court was purely a civil one in nature, where parties had entered into sale and purchase price. The Malindi case questioned the jurisdiction of the magistrates' courts handling environment and land cases. Therefore, the claim in the lower court had nothing to do with environment use and ownership of the title but money matters claim vide plaint dated December 17, 2014 and the trial court was within its jurisdiction to exercise its powers in adopting the consent between the parties and in issuing a decree to that effect.
46. The court agrees with respondent submission that, the averment by the appellant that the lower court had no justification to adopt a consent reached by parties are misleading, farfetched, unfounded and have no basis in both law and facts.
47. Thus, court finds no merit in appeal and makes the following orders;
  - (i) The appeal is dismissed.
  - (ii) Costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

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**CHARLES KARIUKI**

**JUDGE**

