



**Wachira alias Erastus Kang'aru Wachira v Kang'aru & 3 others; Kang'aru
(Third party); Njogu (Interested Party) (Environment & Land Case
8 of 2020) [2023] KEELC 19929 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19929 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 8 OF 2020
JO OLOLA, J
SEPTEMBER 22, 2023**

BETWEEN

**ERASTUS WAHOME WACHIRA ALIAS ERASTUS KANG'ARU
WACHIRA PLAINTIFF**

AND

REUBEN KAMONJI KANG'ARU 1ST DEFENDANT

TIMOTHY NJOGU KANG'ARU 2ND DEFENDANT

JOB NDIRANGU KANG'ARU 3RD DEFENDANT

SAMUEL MBUTHIA KANG'ARU 4TH DEFENDANT

AND

LEONARD WACHIRA KANG'ARU THIRD PARTY

AND

ERASTUS IRUNGU NJOGU INTERESTED PARTY

RULING

1. By the Notice of Motion dated February 14, 2023, Erastus Irungu Njogu (the Intended Interested Party/Applicant) prays for orders as follows:
 1. That this Honourable Court be pleased to expunge/nullify the consent filed herein on the February 6, 2023;
 2. That alternatively this Honourable Court be pleased to give better or further directions; and
 3. That the costs of this application be provided for.



2. The application is supported by a short Affidavit sworn by the Applicant himself in which he avers at the relevant Paragraphs 3 to 9 thereof as follows:
 3. That this matter emanated from the last written Will of the late Erastus Kang'aru Wachira which was adopted *vide* HC Succ 396 of 1995. (Annexed hereto is a copy of the confirmed grant marked "EIN 1");
 4. That I was a direct beneficiary to the Estate of my grandfather (Annexed hereto is a copy of the said Will marked "EIN 2");
 5. That this matter was referred for mediation and a report (was) filed in this Honourable court;
 6. That I was enjoined in this matter as attested by the order (of) this Court on May 12, 2022 (Annexed hereto is a copy of the said Order marked "EIN 3");
 7. That by a consent filed, dated and filed (sic) in this Court the Parties herein excluded me from participating or consenting to the contents may be because I was not represented by an Advocate;
 8. That the consent therefore is a nullity as it did not involve/include all Parties concerned;
 9. That I am contesting the said consent and I want an account of the properties bequeathed to me through my grandfather's will which was adopted by the Honourable Court."
3. The application is opposed. By Grounds of Opposition dated February 16, 2022, Erastus Kang'aru Wachira (the Plaintiff) objects to the application on the grounds that:
 1. The application is misconceived and incompetent;
 2. The application is bad in law, a gross abuse of the process of Court and untenable;
 3. The application is fatally and incurably defective;
 4. The application is frivolous and vexatious; and
 5. The application is otherwise without merit and should be dismissed with costs.
4. Similarly, Reuben Kamonji Kang'aru, Timothy Njogu Kang'aru and Job Ndirangu Kang'aru (the 1st, 2nd and 3rd Defendants respectively) are opposed to the application. By their Grounds of Opposition dated and filed herein on February 22, 2023, the Defendants object to the application on the grounds that:
 1. The Intended Interested Party, vide a Notice of Withdrawal dated May 17, 2022 and filed in this Honourable Court on even date, withdrew as an Interested Party to this suit;
 2. The Intended Interested Party, pursuant to the Notice of Withdrawal dated May 17, 2022 is not a Party in the suit herein;
 3. The Intended Interested Party was present during the family meeting held on November 30, 2022 amongst the beneficiaries and executed the Beneficiaries Agreement on December 3, 2022 pursuant to the agreements arrived at in the said meeting.
 4. The Intended Interested party withdrew his claim after he was appropriately provided for and his provision is well captured in the Consent Order he seeks to set aside;



5. There was a meeting held on January 25, 2023 which assisted the Parties to reach a consensus with regards to proper distribution of the properties and wherein the Intended Interested party was present as a beneficiary but not a party to the suit;
 6. Given that the Intended Interested Party is not a Party in the suit herein, he was not required to execute the consent dated February 6, 2023 and filed on even date in this Honourable Court.
 7. Consents filed and adopted as an order of the Court are executed only by the Parties and/or their Advocates on record in a particular suit; the consent dated February 6, 2023 was executed by Advocates for the Plaintiff, Advocates for the 1st, 2nd and 3rd Defendants; the 4th Defendant in person and finally Advocates for the Third Party. These are the known Parties of this suit in accordance with Court records;
 8. The consent dated February 6, 2023 resulted in the conclusion of the suit herein. The Intended Interested Party has always been aware of the ongoing Court proceedings and has filed the application herein as a way of delaying the proper execution of the terms of the consent dated February 6, 2023; and
 9. The orders sought in the Intended Interested Party's application would render the efforts of the Parties herein to settle the suit and the directions given by this Honourable Court on February 13, 2023 as obtuse and thus the said application ought to be dismissed with costs.
5. Leonard Wachira Kang'aru (the Third Party) is equally opposed to the application. In his Replying Affidavit sworn on February 23, 2023, the Third Party asserts as follows at the relevant Paragraphs 2 to 8 thereof:
2. That the application is ill-advised and an abuse of the Court Process. The same ought to fail and be dismissed with costs;
 3. That on May 17, 2022, the Applicant filed a notice of withdrawal dated the same date, which I annex hereto and mark "LWK 1";
 4. That the said notice indicates that the Applicant has withdrawn from the suit, "as his interest have been settled pursuant to the Partial Mediation Agreement dated March 28, 2022;
 5. That on December 15, 2022, the Honourable Court gave the Parties in the suit a final opportunity to mediate their dispute. The case was to be mentioned on February 6, 2023, for further directions;
 6. That on January 25, 2023, all the Parties met at Ibis Hotel and held deliberations. My brother Kamonji Kang'aru joined the meeting online;
 7. That the Applicant was in the family meeting of January 25, 2023, and in fact participated in the discussion; and
 8. That the application is an afterthought, which has no place in law."
6. I have carefully perused and considered both the application as well as the respective responses thereto. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
7. By his application before the Court, the Applicant urges the Court to be pleased to expunge or nullify the consent filed by the Parties herein on February 6, 2023. In the alternative, the Applicant urges the Court to be pleased to issue what he terms as better or further directions.



8. The principal ground for the said prayers is the Applicant's contention that while he is one of the Parties herein, he was not involved in the execution of the Consent Agreement before it was filed in Court. It is accordingly his case that since all the Parties were not involved in execution of the Consent before it was filed in Court, the same is a nullity and ought to be expunged from the record.
9. From the material placed before me, the Applicant had by a Chamber Summons application dated April 6, 2021 applied to be enjoined as an Interested Party in this suit on account that he is a grandson of one Erastus Kang'aru Wachira who had bequeathed to him certain interests in the suit properties. That application was allowed by the Court on May 3, 2021.
10. Subsequently and following a Ruling delivered herein on November 4, 2021 the matter was referred to a Court Annexed Mediation process. The Parties having subjected themselves to the mediation, a Partial Mediation Agreement dated March 28, 2022 was filed herein. That Agreement which was executed by the Applicant provides that the parties had consented to partially settle the suit in the terms provided therein. In respect of the Applicant, Paragraph 2 of the Consent provides as follows:

“2. That Erastus Irungu Njogu to be allocated Section ‘C’ on sectional Nyeri Municipality Block III/11 as well as Kshs.20,000/- every month to be paid directly by the agent responsible for the rent collection.”

11. Thereafter on May 17, 2022, the Applicant as the Interested Party in these proceedings filed a Notice of Withdrawal giving notice to the other Parties as follows:

“Take Notice That the Interested Party hereby withdraws from the suit herein as his interests have been settled pursuant to the Partial Mediation Agreement dated March 28, 2022.”

12. While in the submissions filed by the Applicant's Counsel on record they contend that the Applicant was duped into filing the said notice, there was no averment on oath made by the Applicant that he was either duped into filing the notice and/or by whosoever. Indeed in his Affidavit filed in support of the present application, the Applicant does not make any reference to the Notice of Withdrawal.
13. As was stated by Mativo J (as he then was) in *Priscilla Nyambura Njue vs Geovhem Middle East Limited and Another* (2021) eKLR;

“The consequence of an act of withdrawal is that the Plaintiff ceases to be a Plaintiff before the Court. If he is the only Plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court. If he withdraws only a part of the suit that part goes out of the jurisdiction of the Court and it is left with only the other part. This is a natural consequence of the act; a further consequence imposed by sub-rule (3) is that he cannot institute a fresh suit in respect of the subject matter. He becomes a subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal. If he is absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a Plaintiff before the Court.

It stands reason that when on withdrawal the Plaintiff ceased to be a party and the Court ceased to have jurisdiction over the suit and thus became functus officio, nothing but a fresh suit can again invest the Court with jurisdiction over it. As far as the withdrawn suit is concerned the suit is at an end and no further proceedings can be taken in it; the suit and the Plaintiff do not exist and no application such as one for revoking the withdrawal can be made in the suit or by the Plaintiff.”



14. By parity of reasoning, it follows that having withdrawn as an Interested Party from this suit on May 17, 2022, the Applicant ceased to be a party in these proceedings and he cannot walk back in the case and insist he is a party in the manner he has done herein.
15. Having ceased to be a party in the proceedings, there was no basis either in fact or in law upon which the Applicant could insist on executing the consent filed herein by the Parties and dated February 6, 2023. At any rate, it was apparent from his Notice of Withdrawal dated May 17, 2022 that the Applicant withdrew from the suit on the basis that his interest had been settled pursuant to the Partial Mediation Agreement dated March 28, 2022.
16. As we have seen above, the Partial Mediation Agreement had allocated a Section of all that property known as Nyeri Municipality Block III/11 to the Applicant. A perusal of Clause 6 of the consent dated February 6, 2023 which the Applicant wants to be expunged reveals that he remains the beneficiary of the same property in the manner proposed in the Partial Agreement.
17. It follows that the Motion dated February 14, 2023 is clearly misconceived and without any basis. The Applicant had neither the capacity nor any basis to lodge the application. The same is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 22ND DAY OF SEPTEMBER, 2023.**

In the presence of:

Mr. Makura for the Applicants

Mr. W. Gikonyo for the Plaintiff/Respondent

Ms Otiende for the 1st, 2nd and 3rd Defendants

Ms Omweri holding brief for L. Mwai for the 3rd Party

Court assistant - Kendi

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J. O. OLOLA

JUDGE

