



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimeu v Kyunguti & 4 others; Matata & another (Interested Parties) (Environment & Land Case 18 of 2019) [2025] KEELC 1170 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1170 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 18 OF 2019  
EO OBAGA, J  
MARCH 13, 2025**

**BETWEEN**

**CHRISTOPHER VATA KIMEU ..... PLAINTIFF**

**AND**

**AGATA MUTISO KYUNGUTI ..... 1<sup>ST</sup> RESPONDENT**

**KAIINI NDAA NDETO ..... 2<sup>ND</sup> RESPONDENT**

**PENIDET'TA MUKUNYO NDAA ..... 3<sup>RD</sup> RESPONDENT**

**TIMONTHY MUTUA MUKWA ..... 4<sup>TH</sup> RESPONDENT**

**DANIEL MAWIOO KYATHE ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**ALEXENDER MWANZA MATATA ..... INTERESTED PARTY**

**SAMSON MWATHANI KIMOLO ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. This is a ruling in respect of a Notice of Motion dated 1<sup>st</sup> October, 2024 in which the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants as well as the Interested Parties seek the following orders:
  1. Spent
  2. That this honourable court does grant leave to the firm of C. M. Muthiani Advocates to come on record for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants and the interested parties.
  3. Spent



4. That this honourable court be pleased to review and set aside the consent judgment made on the 12<sup>th</sup> July, 2022 and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants be allowed to file their statements of defence as per the annexed draft statement of defence.
5. That the cost of this application be borne by the Plaintiff and the 1<sup>st</sup> Defendant herein.

### **Applicant's contention**

2. The Applicants contend that their parcels of land have been adversely affected by the consent recorded on 12<sup>th</sup> July, 2022 between the Plaintiff and the 1<sup>st</sup> Defendant. They state that their titles have been cancelled yet they were never heard, were never party to the recording of consent and were never served with any court documents.
3. The Applicants state that the Plaintiff did not disclose to the court that by revoking title deeds for Makueni/Iuani/335, 2618, 2617, 2973, 2974 and 2975, the revocation was going to affect many people not parties to the suit but have constructed and lived on the land whose titles have been revoked. They contend that the consent should have been between the Plaintiff and 1<sup>st</sup> Defendant in respect of parcels where they were affected but not on other parcels belonging to other persons.
4. They further state that the consent was recorded by the counsel who were acting for the Plaintiff and the 1<sup>st</sup> Defendant. These two advocates were not representing the 2<sup>nd</sup> to 5<sup>th</sup> Defendants and interested parties. They further state that the consent filed was as a result of collusion between the Plaintiff and the 1<sup>st</sup> Defendant.

### **Plaintiff/Respondent's contention**

5. The Applicants' application was opposed by the Plaintiff/Respondent based on a replying affidavit sworn on 15<sup>th</sup> January, 2024. The Respondent contends that the Applicants' application is frivolous, vexatious and an abuse of the process of court. He states that the consent which was entered was regular and that no fraud was involved to warrant its setting aside.
6. The Respondent states that the Defendants/Applicants ignored summons which were served upon them and that the court proceeded to adopt the consent after it was satisfied that the matter was undefended. The Respondent states that decree was issued on 23<sup>rd</sup> January, 2023 and the same has been executed and there is therefore nothing to stay.
7. The Respondent further states that the Defendants/Respondents have not exhibited any draft defence to the application and that the inclusion of the interested parties to this application is unprocedural as there are no interested parties.

### **1<sup>st</sup> Defendant/Respondent's contention**

8. The 1<sup>st</sup> Defendant/Respondent opposed the Applicants' application based on a replying affidavit sworn on 16<sup>th</sup> January, 2025. The Respondent contends that the Applicants' application is an abuse of the process of court. The proper procedures of securing the court order were followed as the Defendants were duly served. She states that the application is meant to delay the course of justice and deny her from enjoying the fruits of the orders.
9. The Respondent states that the Applicants were aware of the case. She argues that there are no justifiable reasons why the court can set aside the consent order in the absence of a draft defence. The Respondent states that she would be greatly prejudiced if the consent order was to be set aside. The



Respondent argues that the Defendants are seeking to evade execution of the decree and that the inclusion of the interested parties is unprocedural.

### **Parties Submissions**

10. The court directed parties to file written submissions. The Applicants filed their submissions dated 15<sup>th</sup> January, 2025. The Plaintiff filed his submissions dated 17<sup>th</sup> January, 2025. The 1<sup>st</sup> Defendant indicated that she was relying on the submissions of the Plaintiff.

### **The Plaintiff/Applicants submissions**

11. The Applicants submitted that they had proved that the consent which was recorded by the Plaintiff and the 1<sup>st</sup> Defendant did not meet the requirements of the law. They relied on Section 25 Rule 5 of the Civil Procedure Rules which states as follows:
  1. Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.
  2. The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.
12. The Applicants submitted that there was collusion between the Plaintiff and the 1<sup>st</sup> Defendant in recording the consent which affected parties who were not party to it but were affected by it. The Applicants relied on the case of Kenya Commercial Bank Ltd - vs- Specialized Engineering Company Ltd (1982) KLR 485.
13. The Applicants further submitted that the parties to the consent failed to disclose that there were other parties who were to be affected by the consent. The Applicants further relied on the case of Board of Trustees National Social Security Fund -vs- Michael Mwalo (2015) eKLR.
14. The Applicants submitted that it was necessary for the firm of C. M. Muthiani & Co. Advocates to seek leave of court to come on record for the Applicants. They cited order 9 Rule 9 of the Civil Procedure Rules which states as follows;

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

  - a. upon an application with notice to all the parties; or
  - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
15. The Applicants submitted that it is necessary for them to be given an opportunity to file and be heard on their defence. They relied on the case of David Gicheru -vs- Gicheha Farm Limited & another (2020) eKLR.

### **Plaintiff/Defendant's submissions**

16. The Plaintiff submitted that the consent entered into was regular and was not opposed by the 1<sup>st</sup> Defendant who was the only one who entered appearance. The Applicants ignored summons to enter



appearance and that there was no fraud involved. The Plaintiff argues that if indeed the Defendants were not served as alleged, they should have called the process server for cross examination.

17. The Plaintiff submits that the Decree has already been executed and that the Defendants have not exhibited a draft defence.

### **Analysis and Determination**

18. I have carefully considered the Applicant's applicants' application, the opposition thereto by the Plaintiff and the 1<sup>st</sup> Defendant as well as the submissions by the parties and authorities cited. The following are the issues which emerge for determination.

- i. Whether there is need for the court to sanction the firm of C.M. Muthiani & Co. Advocates to come on record for the Applicants.
- ii. Whether the interested parties are properly on record in this matter.
- iii. Whether the Applicants have met the threshold for grant of orders of setting aside the consent recorded on 12<sup>th</sup> July, 2022.
- iv. Who is to bear the costs of this application.

#### **1. Whether there is need for the court to sanction the firm of C. M. Muthiani advocates to come on record for the Applicants**

19. It is clear that this matter was concluded by a consent which was recorded on 12<sup>th</sup> July, 2022. There was no advocate who was appearing on behalf of either the 2<sup>nd</sup> to 5<sup>th</sup> Defendants or the interested parties. There is therefore no change of advocates post judgment which was as a result of the decree extracted from the consent order which would have required the firm of C. M. Muthiani advocates to seek the sanction of the court. Order 9 Rule 9 is clear as to when such sanction is required. I therefore find that there was no need for the firm of C. M. Muthiani Advocates to seek the sanction of the court before representing the Applicants. They simply needed to file a notice of appointment.

#### **2. Whether the interested parties are properly on record in this matter**

20. There is a clear procedure on how a party can come into a suit. This is through an application to court for joinder or through the court's own motion. The interested parties have not applied to court to be made parties to this case. The court has also not ordered their joinder as parties. I therefore find that they are improperly on record in this case.

#### **3. Whether the Applicants have met the threshold for grant of orders of setting aside the consent recorded on 12<sup>th</sup> July, 2022.**

21. In the case of Kenya Commercial Bank Ltd (Supra), Harris J. stated as follows:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such fact in general for a reason which would enable the court to set aside an agreement.”



22. Further in the case of Board of Trustees National Social Security Fund (Supra) it was held as follows:

“The judgment arose from consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A court of the law will not interfere with a consent judgment 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 judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of court.”

23. From the decisions, it is clear that a consent order can only be set aside if it shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorant of such fact in general for a reason which would enable the court to set aside an agreement.

24. In the instant case, the Plaintiff and the 1<sup>st</sup> Defendant are related. The Plaintiff is a step brother of the 1<sup>st</sup> Defendant. All circumstances in this matter show that the two colluded to enter into the consent. They were aware that the effect of the consent was to affect title holders who were not party to the consent.

25. The consent filed was contrary to the policy of the court. The policy of the court is that in land matters where some parties do not enter appearance and where the claim is not a liquidated claim, the case has to be proved in a formal proof hearing. This was not done. This was clearly contrary to the policy of the court.

### **Disposition**

26. The consent which was entered on 12<sup>th</sup> July, 2022 is therefore liable to be set aside on ground of collusion and being contrary to the policy of the court. Consequently, I proceed to allow the Notice of Motion dated 1<sup>st</sup> October, 2024 to the extent that the consent judgment entered on 12<sup>th</sup> July, 2022 together with the consequential orders are hereby set aside. The Defendants are at liberty to file their defence to the Plaintiff's claim within 14 days from the date hereof.

The costs of this application shall be borne by the Plaintiff and the 1<sup>st</sup> Defendant.

It is so ordered.

.....

**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

In the Presence of:

Mr. Muthiani for 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

Mr. Munyasya for 1<sup>st</sup> Defendant

Mr. Kituku for Plaintiff

Court assistant - Steve Musyoki

