



REPUBLIC OF KENYA



**Nabhan (Suing as the administrator of the Estate of Rashid Bin Salim)
v Kirauni & 3 others (Environment & Land Case E085 of 2022)
[2023] KEELC 22526 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E085 OF 2022
EK MAKORI, J
DECEMBER 13, 2023**

BETWEEN

**KHADIJAH KHAIDUM NABHAN (SUIING AS THE ADMINISTRATOR OF
THE ESTATE OF RASHID BIN SALIM) PLAINTIFF**

AND

KHAMIS KIBARANA SHABANI 1ST DEFENDANT

MARTIN KASAGA KIRAUNI & 2 OTHERS 2ND DEFENDANT

RULING

1. On the 10th of May 2023 parties in this matter recorded the following consent:
 - i. That the defendants herein (squatters) who are 219 in number and also known as Barani Mujibu Members have acquired property rights and interest for the portion of land measuring 97 acres from the subject property being plot No. 1 Group X Mujibu Barani – Malindi and which they are in occupation and use accordingly.
 - ii. That the defendants herein (squatters) who are 219 in number do cause sub-division of the land and each member registered on the portion occupying using and consequently be issued with title documents accordingly.
 - iii. That the remainder of the property upon sub-division be registered in the name of the plaintiff/and or its nominees and issued with the title documents accordingly.
 - iv. That the Kilifi County Surveyor cause the sub-division between the parties herein within 60 days from the date of service of the order and consequently



to procure the title documents accordingly to wit the parties herein to pay all relevant statutory payments for the completion of the sub-division process and registration accordingly.

- v. That the Land Registrar Kilifi/Mombasa if need be reconstruct the records, remove any caution, caveat, or restriction, and consequently proceed and register the order herein and comply by registering the sub-division and proceed to issue the document(s) respectively.
- vi. That the OCS of the nearest police station/ Kilifi, the Deputy County Commissioner, and the County Commissioner Kilifi ensure that the exercise of the sub-division and settlement of the squatters in the respective portion is peaceful and they enjoy quiet possession of the property.
- vii. That each party bears their costs.
- viii. That each party is to be at liberty to apply.
- ix. That the matter be marked as settled.

2. The interested party aggrieved by those orders has brought an application and notice of motion dated August 9, 2023 which seeks:

- i. Spent
- ii. Leave to the applicant to be enjoined as a party in this suit.
- iii. Stay of execution of orders issued on 12th May, 2023.
- iv. Orders dated May 12, 2023 be stayed and the entire suit be heard de novo.
- v. Costs be provided.

3. The application is opposed.

4. The applicant averred that he is the registered owner of land known as Plot No. 1 Group X Mujibu Barani-Malindi (the suit property). Applicant stated that the plaintiff had no locus standi to institute this suit or enter any consent as she is not the registered owner of the suit property.

5. That there is a pending suit which the parties are all aware, ELC E005/2023 over the same subject matter where counsel for the plaintiff herein is the counsel for the defendants.

6. The Court was misled to enter the consent dated May 12, 2023 ordering the suit property to be registered in the name of the plaintiff and the 219 others (squatters). This is an act that has the bearing of using the court to deprive the true owner of his parcel of land.

7. The plaintiffs/respondents have field grounds in opposition stating the application beforehand does not meet the threshold of setting aside consent orders.

8. That the court on entering the consent became fuctus officio.

9. The interested parties have no cause of action, no claim for the land in question, and there is ELC No. 005/2023 the applicant can ventilate his claim there.

10. The issue for the determination of this Court is whether to set aside the consent orders dated 12th May 2023.



11. Consent orders can ordinarily be set aside if the following conditions are met as enunciated by Mogeni J. in the case of *Wema Foundation Trust Company Limited v County Government of Nairobi City & another* [2022] eKLR:

“In the Court of Appeal in the case of *Brooke Bond Liebig Ltd V Mallya* [1975] EA 266 at 269 Law Ag P said:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

8. In *Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd* [1982] KLR 485, Harris J correctly held inter alia, that –
 1. 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 facts in general for a reason which would enable the court to set aside an agreement.
 2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.
9. In *Hirani V. Kassam* [1952] 19 EACA 131 the Court of Appeal held;

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676: -

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which



would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

12. I have perused the entire record in ELC No. 005/2023 and compared the same with the current suit. In this matter, the plaintiff is seeking a declaration that the defendants are trespassers on Land Plot No. 1 Group X Mjibu Barani-Malindi, demolition, and eviction orders be issued against the defendants to be supervised by the area administration with costs.
13. By the suit papers filed, the plaintiff claims the land as a beneficial owner and administrator of the estate of one Rashid Bin Salim but no title document has been displayed by the plaintiff.
14. On the other hand, the applicants/interested parties stated - they are the registered owners of the suit land and have an entire matter pending ELC No. 005/2023 which seeks a declaration that they are the rightful proprietors of the land in question, eviction order against the defendants in this suit with costs.
15. The suit is pending before this Court (Makori J.). There is an application for injunctive orders pending a ruling.
16. From the record the consent entered on 12th May 2023 was entered by parties and their counsels who were aware of the pendency of ELC.005/2023. Parties are aware of it. They are parties. Counsel for the plaintiff here is counsel for the defendant in ELC.005/2023. I smell mischief in the manner the consent was entered. It aimed to defeat the progression of ELC.005/2023. None of the parties in this suit has title to the land. The consent smacks of a fraudulent scheme orchestrated by the parties and their counsels. Note for example order No. 4:

“That the Land Registrar Kilifi/Mombasa if need be reconstruct the records, remove any caution, caveat, or restriction, and consequently proceed and register the order herein and comply by registering the sub-division and proceed to issue the document(s) respectively.”

Why reconstruct the records remove any cautions, caveats, or restrictions, and register the parties herein as proprietors? It means the parties were aware of such encumbrances but proceeded to record the current consent anyway.

17. The Court was duped to enter that consent. Counsels in this matter did not, as officers of the Court assist the Court in reaching a fair and just verdict. The application dated 9th August 2023 will be allowed in its entirety. The Consent Order entered on 12th May 2023 is hereby set aside. The interested parties are enjoined in this suit which has to commence de novo and all parties be heard on merit. The respondents will bear the costs of this application. Since the orders were obtained fraudulently, the Land Registrar is hereby directed to expunge the consent order from its record and cancel any dealings that could have emanated from that fraudulent scheme as if it never existed. This is an extra measure to restore the dignity of this Court. It is so ordered.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 13TH DAY OF DECEMBER 2023.

E. K. MAKORI



JUDGE

