



**Makau & another v Attorney General & 3 others (Environment & Land Case 466 of 2017) [2025] KEELC 3394 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3394 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 466 OF 2017**

**AY KOROSS, J  
APRIL 29, 2025**

**BETWEEN**

**PATRICK M. MAKAU ..... 1<sup>ST</sup> PLAINTIFF**

**FLORENCE M. MWANGANGI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**SINOHYDRO TIANJEN ENGINEERING COMPANY LIMITED .... 2<sup>ND</sup>  
DEFENDANT**

**MINISTRY OF MINING ..... 3<sup>RD</sup> DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4<sup>TH</sup>  
DEFENDANT**

**RULING**

1. This ruling seeks to determine the 3<sup>rd</sup> defendant's notice of motion dated 25/06/2024 that has been moved under Sections 1, 1B and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules (CPR). It seeks numerous reliefs from this court, some of which are spent, and the residual prayers for determination are: -
  - a. That the compromise and settlement agreement dated 7/08/2020 be and is hereby declared void.
  - b. The consent dated 11/08/2020 and decree given on 25/11/2020 be and are hereby set aside.
  - c. In the alternative to prayers (a) and (b) above, the court does order that the 4<sup>th</sup> defendant be discharged from performing the compromise and settlement agreement dated 7/08/2020.
  - d. Costs of the motion be awarded to the 4<sup>th</sup> defendant.



2. The motion is supported by the grounds set out on the body thereof and the supporting affidavit of the 4<sup>th</sup> defendant's business coordinator Wang Xiaoxiao which he deposed on 24/06/2024.
3. In summary of the grounds and affidavit, he stated the consent judgment of 11/08/2020 was made under economic duress caused by injunctive reliefs in the plaintiffs' favour against the 4<sup>th</sup> defendant. Further, the plaintiffs had filed suit in fulfilment of the terms thereof in Machakos HCCC E023 of 2023 ("current suit").
4. He stated in the alternative, and in light of the letter dated 5/05/2021 that was allegedly issued by the plaintiffs, the court should deem the consent agreement as frustrated because the plaintiffs had denied it access to certain properties.

#### **Plaintiffs' case**

5. In opposing the motion, the 2<sup>nd</sup> plaintiff, Florence M. Mwangangi, with the authority of her co-plaintiff, filed an affidavit she swore on 18/09/2024.
6. She contended the consent judgment could only be set aside on appeal or review, yet the 4<sup>th</sup> defendant had not moved the court in such a manner.
7. She maintained this motion had been filed with an inordinate delay- a delay of close to 4 years.
8. She argued that in arriving at the consent, the parties had had several engagements comprised of engineers, consultants, agents and counsel and the consent was signed voluntarily, willingly, knowingly, without duress or any other undue influence.
9. Furthermore, she maintained the consent judgment had partially been fulfilled as the construction had been undertaken by Enzyne Creations Ltd, which was unable to execute the works as contractors.
10. Nonetheless, the 4<sup>th</sup> defendant replaced it with another contractor namely Jinsing Enterprises Co. Ltd who effectively executed the works for a few months to the foundation level but left the site in July 2021 after only completing 10% of the works.

#### **1<sup>st</sup> and 2<sup>nd</sup> defendants' case**

11. Through senior state counsel, M/s. Kubai, these defendants filed grounds of opposition dated 28/10/2024 in which they raised the following grounds: -
  - a. The motion is malafides.
  - b. The parties and the advocates in the compromise and settlement agreement were all aware of material facts and there could have been no mistake or misunderstanding and it was binding on the parties.
  - c. The motion is unmeritorious as the threshold for the grant of the orders could only be set aside on grounds of fraud or collusion, lack of consensus between the parties, or public policy or for such reasons as would enable the court to set aside or rescind a contract.
  - d. The motion was frivolous, vexatious and an abuse of the court process.
12. Significantly, the 3<sup>rd</sup> defendant did not participate in these proceedings.



### **Parties' submissions**

13. The court directed the parties to file written submissions. In compliance, the law firm of M/s. Hamilton Harrison & Mathews, who are on record for the 4<sup>th</sup> defendant, filed written submissions dated 8/01/2025.
14. These submissions framed the following issues for determination; when can a consent judgment be set aside, whether the consent and consequential consent judgment and decree should be declared void and whether the 4<sup>th</sup> defendant should be discharged from performing the consent.
15. The 2<sup>nd</sup> plaintiff's submissions dated 3/01/2025 adopted the 4<sup>th</sup> defendant's issues as the matters arising for determination.
16. The 1<sup>st</sup> and 2<sup>nd</sup> defendant's submissions dated 5/02/2025 filed by their counsel framed 2 issues for determination, which were whether a consent judgement/decree can be set aside or varied, and who bears the costs of the motion.
17. Therefore, upon identifying and considering the issues for determination, this ruling shall, later on in its analysis and determination, consider the arguments posited on the particular issue in the submissions and also bear in mind the law and judicial precedents.

### **Issues for determination.**

18. I have carefully considered the motion, grounds of opposition, affidavits and the filed written submissions and the following issues which shall be handled separately arise for determination.
  - a. Whether the consent judgment should be set aside.
  - b. What orders should be issued, including an order as to costs?

### **Analysis and Determination**

#### **a. Whether the consent judgment should be set aside.**

19. The power of this court to adopt consents or agreements of the parties and issue further orders is found in Order 25 Rule 5 of the Civil Procedure Rules (CPR).
20. However, before this court proceeds further, it must address certain issues that were raised by the plaintiffs in respect of the manner in which the 4<sup>th</sup> defendant has moved the court.
21. This court agrees with the 2<sup>nd</sup> plaintiff that the consent judgment can only be set aside on appeal or review. Being the court that adopted the consent, it follows that a review of the consent judgment should suffice in the circumstances of this case.
22. Nevertheless, even if the 4<sup>th</sup> defendant has not invoked Section 80 of the *Civil Procedure ACT* and Order 45 Rule 1 of the Civil Procedure Rules, which apply in instances of review, it is this court's humble view that this is a minor infraction.
23. In light of Article 159 (2) (d) of *the Constitution*, this court considers the 4<sup>th</sup> defendant's oversight a technical issue that does not go to the merits of the motion before this court.
24. As submitted by all parties who filed submissions, it is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside of a contract, for example, on the grounds of fraud, mistake or misrepresentation.



25. This court adopts the position taken by the Court of Appeal in Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd [1980] KEHC 11 (KLR), which held that:

“prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings 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 materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement.”

26. The 4<sup>th</sup> defendant has proffered 2 grounds why the consent judgment should be set aside which are economic duress and frustration by the plaintiffs.

27. Thus, it was incumbent upon it to substantiate these grounds by tendering sufficient evidence and proving the consent judgment warranted being set aside. It must be noted that when considering such an application, the court has to exercise judicious discretion.

28. As stated in Chitty on Contracts, Volume 1 - General Principles, paragraphs 10-028, one of the ingredients of economic duress is proof by an applicant that it lacked a reasonable alternative by stating:

“The claimant must show that, as a separate and independent requirement, that in an objective sense, they had no reasonable alternative - in other words, that any reasonable person in the same predicament would have acted in the same way.”

29. Closer home, the Court of Appeal in LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft (‘Deg’) & others [2011] KECA 1 (KLR) summarised the tests of assessing economic duress in the following manner: -

“(43) The relevant factors in determining whether economic duress has been established include whether the victim protested, whether there existed an effective alternative remedy, the availability of independent advice, the benefit received and the speed with which the victim sought to avoid the contract (see Pao on -Vs- Lau Yiu [1979] 3 ALL ER 65 p. 78, 79).”

30. The reason advanced by the 4<sup>th</sup> defendant as to why it believes there was economic duress is the existence of an injunctive relief in the plaintiffs’ favour.

31. On the application of the tests outlined in LTI Kisii (Supra) and in agreeing with the plaintiffs and 1<sup>st</sup> and 2<sup>nd</sup> defendants’ counsel, this court concludes the 4<sup>th</sup> defendant has not met the threshold for several reasons, as shall be seen shortly.

32. Article E of the consent demonstrates that parties had several engagements and, in their presence, they were represented by their respective engineers and consultants and in the execution thereof, they were jointly represented by the law firm of Odera Obar & Co. Advocates. There was no protest whatsoever in signing the agreement.

33. Additionally, instead of executing the consent, the parties had the option of setting down the matter for hearing on a priority basis. Further, if indeed the 4<sup>th</sup> defendant was genuine in its allegations, it would have taken urgent steps to file this motion yet it filed it inordinately late- a period of close to 4 years.

34. Of most significance is that paragraph 4.12 of the consent is very categorical that there was no duress in executing the agreement, and it was entered into by free will.



35. To refresh the 4<sup>th</sup> defendant's memory of this paragraph that binds it, it is paramount for this court to extract it word for word: -

“The parties expressly represent and warrant that this agreement has been freely and voluntarily entered into and they did not execute this agreement under duress of any kind, from any party or person, regardless of whether they are a signatory hereto”.

36. As has been submitted by the plaintiffs and 1<sup>st</sup> and 2<sup>nd</sup> defendants' counsel, this court finds that the case for economic duress never arose and it appears the 4<sup>th</sup> defendant is just fishing for an avenue of absolving itself from the consent judgment and the matter in Machakos HCCC E023 of 2023.

37. Turning to the ground of frustration, in Halsbury's Laws of England, Vol 1. 9(1), 4th edition, paragraph 897, the authors state as follows: -

“As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated.”

38. As evidence of non-performance of the contract by frustration which hindered the performance of the consent judgment, the 4<sup>th</sup> defendant has tendered an incomplete, undated and unsigned document whose makers are unknown. This court has totally been unable to comprehend the contents therein and it follows it does not meet the threshold of frustration as stated in Halsbury's (Supra).

39. The 4<sup>th</sup> defendant entered into a consent judgment willingly and in the absence of evidence of frustration or economic duress, this court finds the notice of motion is not merited. It entered the consent well knowing the injury they had caused to the plaintiffs' house and wanted to make good for the damages thereof, and it is bound by the terms thereof.

40. The upshot is that the Motion dated June 25, 2024 is dismissed and since costs follow the event, this court awards costs to the plaintiffs and 1<sup>st</sup> and 2<sup>nd</sup> defendants.

Orders accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF APRIL, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

**29.04.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

1<sup>st</sup> plaintiff

2<sup>nd</sup> plaintiff

Mr. Mwihuri for 4<sup>th</sup> defendant

Ms Kanja- Court Assistant

