



REPUBLIC OF KENYA



Waweru v Seke & 3 others; Mundia & others (Interested Party) (Environment & Land Case 91 of 2011) [2025] KEELC 3452 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3452 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 91 OF 2011**

AY KOROSS, J

APRIL 29, 2025

BETWEEN

FRANCIS NGIGE WAWERU PLAINTIFF

AND

SAMUEL KALOVOTO SEKE 1ST DEFENDANT

WILSON MORRIS WAMBUA 2ND DEFENDANT

WASWA INVESTMENT COMPANY LIMITED 3RD DEFENDANT

MWALIMU TOWN PROPERTIES LIMITED 4TH DEFENDANT

AND

SIMON WANJEMA MUNDIA & OTHERS INTERESTED PARTY

RULING

Introduction

1. This ruling seeks to determine the 3rd defendant's notice of motion that has been moved under several provisions of law, and it is dated 27/10/2023 and also on the plaintiff's preliminary objection (PO) dated 7/12/2023.

3rd defendant's case.

2. It seeks numerous reliefs from this court, some of which are spent, and the residual prayers for determination are: -
 - a. That this honourable court be pleased to set aside the consent judgment and decree recorded in this matter on 27/04/2022 and any consequential orders thereto and set the matter down for hearing on merits.



- b. That the costs of this motion be provided for.
3. The motion is supported by the grounds set out on the body thereof and the supporting affidavit of the 3rd defendant's chairman and director, Vincent Onyango Ogilo, which he deposed on 27/10/2023.
4. In brief, he stated the 1st and 2nd defendants and interested parties (IPs) entered into a consent on 27/04/2022 without the knowledge, concurrence or presence of the 3rd and 4th defendants.
5. In his view, they colluded and caused the court to adopt the consent as an order of the court in respect of land parcel no. LR Mavoko Town Block 3/1973, yet this property was never the subject of determination. He argued this amounted to a mistake.
6. According to him, these 3rd and 4th defendants had never been served with a hearing notice, and they only learnt of the consent on 23/10/2023 when a person claiming under the plaintiff invaded a plot within land parcel no. LR Mavoko Town Block 3/1973 belonging to one of the 3rd defendant's members.
7. He asserted the 3rd defendant had filed a defence and counterclaim in this matter claiming ownership of LR Mavoko Town Block 3/1974, which was the suit property.
8. He maintained that the motion had been filed without unreasonable delay, and the consent had highly prejudiced the 3rd defendant's membership.

Plaintiff's case

9. In opposition, by the law firm of M/s. D.K. Thuo & Co. Advocates, the PO raised the following points of law: -
 - a. M/s. Arum & Co. Advocates, who represented the 3rd defendant, was present when the case was heard and applied for an adjournment, which was rejected by the court, and the court is therefore functus officio.
 - b. The 3rd defendant's recourse lies in the Court of Appeal.
10. Noteworthy, the other parties did not file any documents in opposition.

Parties' submissions

11. The court directed the parties to file written submissions. In compliance, the law firm of M/s. Gorrety Adhiambo & Co. Advocates, who are on record for the 3rd defendant, filed written submissions dated 29/02/2024; those of the plaintiff's counsel, which were undated, were filed on 27/09/2024 and lastly, the IPs' law firm on record, M/s. Bw'oigara, Getange & Co. Advocates filed theirs dated 1/07/2024. The other parties did not file any submissions.
12. 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.

13. I have carefully considered the motion, its grounds, affidavits, and the filed written submissions, and the following issues, which shall be handled separately, arise for determination.
 - a. Whether the PO met the legal threshold and whether its grounds are merited.



- b. Whether the consent judgment should be set aside.
- c. What orders should be issued, including an order as to costs?

Analysis and Determination

a. Whether the PO met the legal threshold and whether its grounds are merited.

14. This court agrees with the 3rd defendant's counsel that the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (Supra) has long settled the principle of POs.
15. A PO must be on a point of law, and it is premised on the assumption that all the facts pleaded by the other side are correct. On page 700, paragraphs D-F of this decision, Law JA had this to say:

“...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
16. Apart from the 3rd defendant's counsel, none of the other counsels addressed me on this issue. In his submissions, the plaintiff's counsel merely argued on the merits of the PO.
17. The 3rd defendant's counsel contends that the grounds of the PO raise matters of fact that have been contested and will require the court to assess the pleadings and call for evidence to test the veracity thereof.
18. Indeed, this court agrees with the 3rd defendant's counsel as these grounds of the PO point to matters of fact that have been contested, with the 3rd defendant alluding that the erstwhile counsel was present in court while the plaintiff's counsel insists otherwise.
19. This calls for the adduction of evidence to prove it, and consequently, I find the PO does not meet the legal threshold of Mukisa (Supra). Having failed to meet the legal standards, the court will not proceed further on the 2nd limb of this issue.

b. Whether the consent judgment should be set aside.

20. 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).
21. As held in the Court of Appeal decision of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR), 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.
22. Additionally, a consent judgment can be set aside if certain conditions remain to be fulfilled and or are yet to be carried out as was held in the Court of Appeal decision of Flora N. Wasike v Destimo Wamboko [1985] KECA 149 (KLR).
23. In Flora N. Wasike's decision (Supra), Nyarangi J went on to state that a consent judgment can be set aside for any other reason that would persuade the court. This also includes that of public policy (See the Court of Appeal decision of Samson Munikah Practicing As Munikah & Company Advocates v Wedube Estates Limited [2007] Keca 176 (Klr).



24. When faced with similar circumstances as this case, where a litigant or its counsel did not have knowledge of a consent judgment, the Supreme Court of Kenya in the decision of *Waiguru & another v Karua & 2 others* [2019] KESC 89 (KLR) had this to say: -

“...it is clear to us that there could not have been any consent without the participation and acknowledgment of the 1st Respondent or her Advocate.”

25. This court’s understanding of this decision that is binding on this court is that if a party and or its counsel did not participate in the consent, then such consent is a nullity ab initio and should not see the light of day.

26. In this case, the plaintiff’s counsel is silent whether the 3rd defendant’s counsel was present when the consent was recorded and later adopted by the court on 27/4/2022.

27. Since this is a court of record, the record shows that on the fateful day, only Mr. Thuo, the plaintiff’s counsel, the 1st defendant, Mr. Macharia, the 2nd defendant’s counsel and Mr. Gesicho, the IPs counsel, were present in court.

28. This affirms the 3rd defendant’s position that the consent was entered without the 3rd and 4th defendants’ knowledge, concurrence or presence or that of their counsel.

29. The silence of all the other parties to the proceedings of 27/4/2022 is resounding that all the parties were aware of the grave consequences of their actions when they intentionally left out the 3rd and 4th defendants in recording the consent.

30. As a party to the proceedings, the 3rd and 4th defendants had a right to be heard before the adverse orders of 27/4/2022 could be made against them. This right to a fair hearing is a legal cornerstone that cannot be wished away by any of the parties.

31. Therefore, for reasons, the consent was entered without their knowledge and participation of the 3rd and 4th defendants; this court has no qualms in finding the consent was unprocedural, irregular, unlawful and a nullity.

32. The upshot is that this court finds the motion dated 27/10/2023 is merited and it is allowed. The PO is dismissed. Costs shall abide by the outcome of the main suit. Thus, this court ultimately makes the following final disposal orders: -

- a. The notice of preliminary objection dated 7/12/2023 is hereby dismissed.
- b. That consent judgment entered on 27/4/2022 and all consequential orders that ensued therefrom, including the decree, are hereby set aside.
- c. That since the matter is part heard, further directions shall be made on the hearing of this matter.
- d. Costs shall abide by the outcome of the main suit.

Orders accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 29TH 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;

Mr. Getange for interested parties

Mr. D.K. Thuo for plaintiffs

N/A for defendants

Ms Kanja- Court Assistant

