



**Okombo v Ajwang (Environment & Land Case 12 of 2022)
[2022] KEELC 3366 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 12 OF 2022
GMA ONGONDO, J
MAY 31, 2022
(FORMERLY MIGORI ELC APPEAL NO. 6 OF 2017)**

BETWEEN

JOHN ODERO OKOMBO APPLICANT

AND

SAMSON OOKO AJWANG RESPONDENT

RULING

1. On 22nd December 2021, the applicant, John Odero Okombo, through M/S Omondi Abande & Company Advocates mounted an application by way of Notice of Motion dated 21st December 2021 pursuant to, inter alia, Article 50(1) of *the Constitution* of Kenya, 2010, Section 1A, 1B, 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, as read with Order 9 Rule 9(a), Order 12 Rule 7, Order 45 Rule 1, and Order 51 Rule 1 of the *Civil Procedure Rules*. He is seeking the orders infra;
 - a. Spent
 - b. That the honourable court be pleased to review, vary and/or set aside its consent judgment made on 13th July 2010 against the appellant/applicant herein.
 - c. That the honourable court be pleased to grant leave to the firm of Omondi, Abande and Company Advocates to come on record as advocates for the appellant/applicant herein.
 - d. That costs of this Application be provided for.
2. The anchorage of the application is the applicant's supporting affidavit dated 21st December 2021 sworn by John Odero Okombo and filed on 22nd December 2021 as well as annexed documents including copy of consent judgment and copy of judgment dismissing the appeal. It is also anchored on grounds 1 to 11 set out on the face of the Application.



3. Briefly, the applicant's case is that he instituted a civil suit against the respondent herein in Kisii High Court Civil Suit No. 10 of 2008. The respondent also filed another suit, being Kisii High Court Civil Suit No. 100 of 2008. The two suits were consolidated despite his objection. That he did not sign the consent judgment dated 13th July 2010. He has urged the court to set aside the consent judgment dated 13th July 2010 and the subsequent decree in Kisii High Court No. 100 of 2008 which was consolidated with Kisii Originating Summons No. 10 of 2008.
4. The respondent in person filed a Replying Affidavit dated 28th January 2022 on even date.
5. The respondent, Samson Ooko Ajwang, deposed that the suit land is registered in the name of his late mother, Risper Obonyo Ojwang. He further stated that the applicant did not oppose the application for consolidation of the two matters, Kisii HCCC No. 10 of 2008 (OS) and Kisii HCCC No. 100 of 2008. The respondent further deposed that the matters were decided in favour of the respondent herein and decree issued. The respondent lamented that the applicant has consistently refused to obey the orders issued by the court. the respondent urged the court to dismiss the instant application with costs.
6. In addition, the respondent through M/S Robert Ochieng Advocates opposed the application by way of Grounds of Opposition dated 30th January 2022 and filed on 31st January 2022. Counsel stated, inter alia, that the order allowing the application for the consolidation of Kisii HCCC No. 10 of 2008 (OS) and Kisii HCCC No. 100 of 2008 was made in the presence and acquiescence of the applicant herein. Further, that the applicant herein neither preferred an appeal against the said consent judgment nor filed an application for review from the judgment.
7. Counsel also stated that the applicant failed to particularize how the consent judgment could have been procured on the basis of fraud, collusion. Counsel urged the court to dismiss the instant application with costs.
8. On 20th January 2022, the court ordered and directed that the application be argued by way of written submissions pursuant to Order 51 Rule 16 of the Civil Procedure Rules, 2010.
9. Consequently, learned counsel for the applicant filed submissions dated 18th February 2022 on 22nd February 2022. To fortify the submissions, counsel relied on the following cases; *Protus Hamisi Wambada & Anor. -vs- Eldoret Hospital* (2020) eKLR, *Kenya Commercial Bank Ltd. -vs- Specialised Engineering Co. Ltd.* (1982) KLR 485, among other authoritative pronouncements.
10. Learned counsel for the respondent filed submissions on 14th February 2022. To buttress the submissions, counsel cited several authorities including *Kenya Commercial Bank Ltd. -vs- Specialised Engineering Co. Ltd.* (1982) KLR 485 and others. Counsel urged the court to dismiss the application with costs.
11. I have duly examined the application, the replying affidavit and the rival submissions. On that account, the twin issues for determination are whether on the basis of the application;
 - a. The applicant has satisfied the conditions for setting aside the consent order dated 13th July 2010 and the leave sought herein; and
 - b. Who should bear the costs of the instant application



12. On consent judgment, the decision in *S M N vs Z M S & 3 Others* [2017] eKLR is very instructive. The Court of Appeal stated as follows:

“There is no dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us. Generally a court of 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.” (Emphasis added)

13. The Court went on to cite with approval various cases on grounds for setting aside consent judgment and stated thus:

“We may highlight a few of the authorities to illustrate the approach attendant to the issue at hand:-

In *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR this Court stated:

“It is now 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 *JM Mwakio vs Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983.”

In *Purcell vs F C Trigell Ltd* [1970] 2 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 knowledge of the material matters by legally competent persons..”.

See also *Hirani vs Kassam* (1952) 19 EACA 131, at Page 134; *Brooke Bond Liebig Ltd vs Mallya* [1975] EA 266 at 269 and Seaton on Judgments and Orders (7th Edn), Vol 1, at Page 124.

In *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* [1982] KLR 485, Harris, J correctly held, inter alia, that -

“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.” (Emphasis laid).

14. In *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR, the Court of Appeal stated as follows:

“A Court of 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.”



15. Similarly, in the case of *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266, it was held:-
- “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.”
16. It is my considered view that in the instant application, the applicant did not place before the court any evidence to demonstrate that the consent entered into between the parties on 13th July 2010, which was adopted as an order of the court, was obtained illegally or through fraud; See S.M.N, Flora N. Wasike and Purcell cases (*supra*).
17. I also note the issue of delay in bringing the instant application to court. Article 159 (2) (b) of *the Constitution* of Kenya, 2010 provides thus:
- “In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (b) justice shall not be delayed”
18. The consent judgment in issue is dated 13th July 2010 yet the instant application was lodged on 22nd December 2021, more than eleven years later!
19. In the case of *Utalii Transport Co. Ltd. & 3 Others –vs- NIC Bank Limited & Another* (2014) eKLR the court stated thus:
- “Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court’s mind on the delay, caution is advised for Courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality” (Emphasis added).
20. It is thus, my considered view that there was inordinate delay in lodging the instant application. No explanation for the delay has been given by the applicant in the circumstances.
21. I further note that the applicant herein has lodged an appeal from the Ruling and Order of the Hon. L. Kaittany, DR dated and delivered on 2nd October, 2013 in Kisii HCCC No. 10 of 2008 (as consolidated with Kisii HCCC No. 10 of 2008 (OS). The Memorandum of Appeal is dated 16th October 2013 and was filed on 17th October 2013. I am therefore, of the considered view that upsetting the consent judgment dated 13th July 2010 may prejudice the appeal before this court.
22. Notably, I will not grant any orders with respect to Prayer No. 3 in the Application. The same can be effected pursuant to Order 9 Rules 5 and 6 of the Civil Procedure Rules, 2010.
23. Wherefore, I find that the application lodged by way of Notice of Motion dated 21st December 2021 substantially lacks merit. I proceed to dismiss the same with costs to abide the appeal.
24. Orders accordingly.

DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 31ST DAY OF MAY 2022

G M A ONGONDO



JUDGE

In the presence of:

Mr. R. Ochieng, learned Counsel for the Respondent

Appellant- present

Okello, Court Assistant

