



Owuor & 2 others (Suing as the School Management Committee of Lukhuna Primary School) v Bunyasi & 5 others (Environment & Land Case 119 of 2010) [2022] KEELC 3389 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3389 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 119 OF 2010
FO NYAGAKA, J
JULY 29, 2022

BETWEEN

VITALIS OTIENO OWUOR 1ST PLAINTIFF
KENNEDY SIRALI 2ND PLAINTIFF
JOHN SAKWA NACHOLI 3RD PLAINTIFF
SUING AS THE SCHOOL MANAGEMENT COMMITTEE OF LUKHUNA
PRIMARY SCHOOL

AND

ESTATE OF SAMSON WASIKE BUNYASI (SUED AS TRUSTEES
OF SAMARITAN EVANGELICAL OUTREACH SELF HELP
GROUP) 1ST DEFENDANT
PHILEMON BUSOLO (SUED AS TRUSTEES OF SAMARITAN EVANGELICAL
OUTREACH SELF HELP GROUP) 2ND DEFENDANT
JOHN WESONGA (SUED AS TRUSTEES OF SAMARITAN EVANGELICAL
OUTREACH SELF HELP GROUP) 3RD DEFENDANT
BEATRICE LUDENYI (SUED AS TRUSTEES OF SAMARITAN EVANGELICAL
OUTREACH SELF HELP GROUP) 4TH DEFENDANT
COMMISSIONER OF LANDS 5TH DEFENDANT
ATTORNEY GENERAL 6TH DEFENDANT



RULING

1. Before me are two Applications for determination. The first one was a Notice of Motion dated 01/11/2021 and the second another one dated 26/01/2022. I will determine them together, as per the directions of the Court given on 25/05/2022. Each of the parties submitted on both jointly.

The 1st Application

2. The first Application was brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 8 Rule 3, Order 51 of the *Civil Procedure Rules*, Article 159 of the *Constitution* and all other enabling provisions of the law. It sought orders that: -
 - (1) This Honorable Court be pleased to grant leave to the Plaintiff/Applicant to amend the plaint as shown in the draft amended plaint.
 - (2) The annexed draft amended plaint be deemed as duly filed and served upon payment of requisite court fees.
 - (3) Costs of this application be in cause.
3. It was based on ten (10) grounds which were summarized on its face and an annexed affidavit sworn by one Joan Chelangat Rotich, the head teacher of the Plaintiff school. The School was represented by the three persons named as its Management Committee. The said affidavit reproduced almost verbatim the content of the grounds. In brief the Applicant's grounds were that some issues or facts that were inadvertently not pleaded in the Plaint hence the need to amend it to correctly address them. The Affidavit deponed that the facts were already covered by the documentary evidence on record hence the proposed amendment was for purposes of determining the real question in controversy between the parties. Also, that since the suit had not been heard, the application was timeous. Again, that the application was made bona fide and no prejudice would be caused to the defendants if it was allowed. Additionally, that if the Application was not allowed it would occasion substantial loss and hardship to the Plaintiffs and lead to them suffering grave injustice. The Applicants opined that the Court had unfettered discretion to allow the prayers sought in the interest of justice, and it was merited.
4. The Application was opposed by the 1st Defendant. He relied on a number of grounds, namely, that the Application was brought after a period of over 10 years of the suit being in Court, and it was part-heard and the 1st Defendant had already filed and prepared his Defence, hence it was an after-thought, belated and unconscionable. Also, he argued that the proposed Amendments would not only alter the Plaintiffs' grievance in the suit, but were such as would unduly prejudice the 1st Defendant, absolve the Commissioner of Lands who was the principal and proper Defendant in the suit, and cause a miscarriage of justice. Furthermore, it was argued that the proposed Amendments would greatly prejudice the 1st Defendant because it removed the allegations of fraud against the 5th Defendant, yet the alleged fraud needed to be inquired into by the Court and could not be simply wished away.
5. It was the 1st Defendant's contention that the Application was an abuse of the process of court, and made with unclean hands. His further argument was that the Attorney-General was, by an unconscionable and inequitable consent dated 1/11/2021 which perpetrated a conspiracy against due process, the principles of natural justice and fair play; the consent was mischievous, unfair, an abuse of the court process, lacking in conscience, contrary to public policy, a conspiracy against due process, a mockery of justice and done in bad faith and with unclean hands and against the Principles of Public



Service as well as those of Leadership and Integrity, enshrined in Articles 232 and 73 of the Kenya [Constitution](#), respectively, removed as a Defendant.

6. His other argument was that the Attorney General was improperly on record herein for the Plaintiffs, having transformed himself from being the 6th Defendant into the Plaintiffs' Advocate in this same suit, without seeking the leave of the honourable court. For that reason, he contended that the Attorney General was conflicted as he filed a Defence and his participation in this suit had for the last over ten (10) years been that of opposing the Plaintiffs' suit. To the 1st Defendant, the Commissioner of Lands and the Attorney General had been principal Defendants in the suit, hence the Attorney General who all along had been in the suit as the then 6th Defendant and the 5th Defendant's Advocate could not therefore rightly enter into a Consent with the Plaintiffs removing himself and his client from being the 6th and 5th Defendants respectively, and then dramatically suddenly return into the suit as the Plaintiffs' Advocate and seek to amend the Plaint to effect his said metamorphosis and panel-beat the suit to fit his new interests.
7. He stated further that the Attorney General being the Principal Legal Advisor to the Government including the Office of the Commissioner of Lands, having represented the said Commissioner of Lands should not be allowed to now turn around and conduct the same suit for the Plaintiffs. He then argued that there was no evidence that the suit was filed with the Consent of the Attorney General or the Government and having been filed as a private suit against the Government it could not now evolve into a suit by the Government with the Attorney General now sanitizing it. He argued again that the Attorney General's action of removing himself from the suit as a party and making himself in it as the Plaintiffs' Advocate is against public policy and good sense, and makes a mockery the presumption that acts of public officers were done in good faith.
8. The 1st Defendant also filed a Preliminary Objection to the Application. It was to the effect that the Application offended the principle of estoppel. It was his preliminary objection that the Attorney General was conflicted in the matter, and the Application was an abuse of the Court process hence made after undue and prolonged delay of over 10 years and would cause prejudice to the 1st Defendant.

The 2nd Application

9. The Second one was brought by the 1st Defendant under Sections 3A and 63 (e) of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya and Articles 73 (1) (a) (i), (ii) and (iii), (2) (b), (c) and (d), 159 (2) (a) and 232 of the [Constitution](#) of Kenya, 2010. Through it he sought the following orders:
 - (a) ...spent.
 - (b) This honourable court be pleased to set aside the Consent entered into between the Plaintiffs and the 5th & 6th Defendants dated 1/11/2021 and filed herein on 8/11/2021 (*sic*).
 - (c) Costs of this Application be in the cause.
10. The Application was supported by the affidavit of one Prof. Nixon Sifuna, the learned counsel for the 1st Defendant. It was based on nine (9) grounds. These were that the Attorney General entered into an unconscionable and inequitable consent between him and the Plaintiffs' then Advocates, namely, Ms. Risper Arunga and Company Advocates. The consent was dated 1/11/2021 and filed on 8/12/2021. His argument was that the consent was entered into, with unclean hands and perpetrated a conspiracy against due process, the principles of natural justice and fair play. The thrust of the argument was that by marking as withdrawn the suit against the Attorney General and the Commissioner of Lands, it effectively removed them as the 6th and 5th Defendants respectively despite having been principal Defendants in the suit.



11. The other ground was that the consent was mischievous, unfair, an abuse of the court process, lacking in conscience, contrary to public policy, a conspiracy against due process, a mockery of justice and done in bad faith. He argued that the consent was against the Principles of Public Service as well as the Principles of Leadership and Integrity, enshrined in Articles 232 and 73 of the Kenya Constitution, respectively.
12. A further ground was that both the Commissioner of Lands and the Attorney General were Principal Defendants in the suit hence the latter who the Plaintiffs had sued as the 6th Defendant, and was the 5th Defendant's Advocate should not have been allowed to enter a consent with the Plaintiffs to remove himself and his client, the Commissioner of Lands, from being the 6th and 5th Defendants respectively and later return in the same suit to drive it as the Plaintiffs' Advocate. His further contention was that after so removing himself and his clients as the 6th and 5th Defendants from this suit, the Attorney General now returned into this suit as the Plaintiffs' Advocate.
13. He again contended that given the role that the Commissioner of Lands played in issuing to the 1st Defendant the title deed to the suit land, namely, Kitale Municipality Block 3/714, and the Attorney General being the Principal Legal Advisor to the Government including the office of the Commissioner of Lands who had all along been the 5th Defendant, the suit against them should not be withdrawn.
14. Again, he argued that acts of the Attorney General's office were vogueish as well as a reckless disregard for law and the process of courts and such acts were in the public domain in this country hence the Applicant was not surprised by the actions herein, a trend courts should smack. The other ground was that the interest of justice and fair play required that the consent be set aside, and the Attorney General as well as the Commissioner of Lands be restored into this suit as Defendants as before.
15. Lastly, he contended that the Application was made in good faith, without delay, and would not prejudice the Plaintiffs in anyway, but would enable Court to effectively adjudicate and determine this suit.
16. The Supporting Affidavit basically reiterated the contents of the grounds of the Application hence I will not reproduce the contents. However, I note that to the Affidavit were annexed a copy of the impugned consent which was marked as "NS 1". Another annexure to it was a copy of the Application dated 1/11/2021 which the Attorney General filed for the Plaintiffs to Amend their Plaint. It was marked as "NS 2".
17. The Application was opposed strongly by the Respondents. The Respondents' filed Replying Affidavit sworn by one Joan Chelangot Rotich, the Headteacher and Secretary of the Board of Management of Lukhuna Primary School, the Plaintiff School. She deponed that the Application was incurably defective, incompetent, frivolous and scandalous and devoid of substance in law and the supporting affidavit was full of falsehoods and misrepresentations tailored to win sympathy of the court. Her contention was that the suit was instituted to recover the suit parcels of land herein from the defendants. It was filed by Vitalis Otieno Oduor, Kennedy Sirali and John Sakwa Nacholi who were the Plaintiff School Management Committee members.
18. She stated that the Lukhuna Primary School was a public primary school managed by a Board of Management duly appointed by the Ministry of Education under the provisions of the Basic Education Act. She then deponed that being a public school, the Ministry of Education referred the dispute in court to the Office of the Attorney General for guidance on the proper way of resolving the dispute. She annexed to her Affidavit a copy of letter dated 30/09/2021 marked as 'JCR 1, by which the facts were laid bare.



19. The deponent stated further that as a diligent litigant the School opted to drop all its claims against the 5th and 6th defendants because the 5th defendant was misled into dealing with land previously set aside as a public utility. She deponed further that on instructions of the Ministry of Education the School changed its advocate from Ms. Risper Arunga & Co. Advocates to the Office of Attorney General and Department of Justice. This was by the Minutes of the Board of Management dated 29/09/2021, a copy of which was annexed to the Affidavit and marked as 'JCR 2'.
20. She then contended that by virtue of Article 156 of the Constitution the Hon. Attorney General was the Principal Legal Advisor of Government and all public entities including public schools, upon formal request. Further, that the Hon. Attorney General was also mandated to represent the government and all government entities including public schools in court and other tribunals in all matters, other than criminal matters.
21. She argued that the defendants had no moral or legal authority to dictate how the plaintiff school should conduct its case including determining which advocate the Plaintiff school should retain and including which parties the Plaintiff should sue or not sue, to add or even substitute in a matter. She then alluded to the fact that the Civil Procedure Act, Chapter 21 Laws of Kenya and the Civil Procedure Rules, 2010 permit a party to change an advocate as and when need arose. Her deposition was that it was becoming very expensive to retain the firm of Ms. Risper Arunga & Co. Advocates hence the decision to engage government lawyers.
22. Her further deposition was that the amendment of the pleadings was necessary to restructure the case to accord with the case theory the Attorney General had developed. She then argued that if the Defendants were aggrieved they were at liberty to commence a fresh suit against the Commissioner of Lands whom they accused of fraud or they may elect to enjoin him in this matter or summon him as their witness.
23. The deponent stated further that 1st Defendant had failed to demonstrate any prejudice he was likely to suffer by the consent and plaintiffs' choice to be represented by Hon. Attorney General hence their application was unfounded and made in bad taste. She argued that no provision of law had been cited which prohibited the Plaintiff school from engaging the Office of the Attorney General as its legal counsel in this matter. She deponed further that the defendants' challenge to the representation of the Plaintiff was a clear digression from the substantive issues that ought to be expeditiously heard and determined by this court. Her view was that the consent entered into and recorded was not an abuse of the court process as it is meant to discharge substantive justice over procedural technicalities. Moreover, she deponed that the consent was not meant to defeat the ends of justice but made in good faith and in a bid to advance the rule of law, the defence of public properties and safeguard the interests of the innocent students whose school stands to lose the suit land.
24. The deponent's main argument was that the Defendants failed to show that the impugned consent was entered into by either fraud, mistake, misrepresentation, collusion, duress, undue influence, agreement contrary to policy of the court, lack of capacity of parties, misapprehension or ignorance of material facts and hence it should not be set aside by the court.
25. She contended further that the applicant failed to establish any impropriety or conflict of interest for the sole reason that the Commissioner of Lands was substituted by the National Land Commission upon promulgation of the Constitution, 2010, and by dint of the Constitution and the National Land Commission Act, 2012 the Attorney General did not have express instructions to represent the National Land Commission in the matter. She then argued that the public interest for the Attorney General to represent the Plaintiff school outweighed the defendants' objections. She then prayed that be dismissed and or struck out with costs.



Submissions

26. The parties were given opportunity to file submissions. Both the 1st Defendant/Applicant and the Plaintiffs filed. But the 2nd to 4th Defendants did neither replied to the Applications nor filed theirs. And it appears from the record that the firm of Ms. Walter Wanyonyi & Co. Advocates may or may not be on record for them.

(a) The 1st Defendant's Submissions

27. The 1st Defendant began his submissions by summarizing how the parties herein, together with those removed by the impugned consent found their way into the instant suit. He also restated how the consent challenged was entered into, ten (10) years later. He summarized that the Attorney-General removed himself from the suit and later, on 08/12/2022 filed an Application dated 01/11/2022 for orders for amendment of the Plaintiff. He then gave a summary of issues for determination. These were whether the consent dated 1/11/2021 should be set aside and the two parties removed by it from the pleadings as Defendants should be restored to their original position, and whether the Plaintiffs should be allowed to amend the Plaintiff.
28. On whether the consent dated 1/11/2021 should be set aside, the 1st Defendant submitted that it was mischievous, unfair, an abuse of the court process, lacking in conscience, contrary to public policy, a conspiracy against due process, a mockery of justice, done in bad faith and with unclean hands. He repeated the contention in the grounds in support of the Affidavit. He also submitted that the procedure for removal of a party as provided in Order 1 Rule 10(2) of the *Civil Procedure Rules* was not followed because the Plaintiffs made no Application to the Court to remove the 5th and 6th Defendants.
29. Lastly, he submitted that the Attorney General had come improperly on record herein for the Plaintiffs, having transformed himself from being the 6th Defendant in the suit into the Plaintiffs' Advocate in the same suit, without seeking the leave of this honourable Court, as he was one of the Defendants sued by the Plaintiffs, and in fact a principal Defendant and was also representing the 5th Defendants then. He then submitted on the issues sequentially and I reproduce the summaries as hereunder.
30. On whether the Attorney General as well as the Commissioner of Lands should be restored into the suit as Defendants the Applicant submitted that the two were principal Defendants hence should have been left in the proceedings as such rather than the Attorney-General removing himself as a Defendant and returning as the legal counsel for the Plaintiff. He reiterated the role of the Commissioner of Lands played in issuing to him the title deed to the suit land and submitted that the suit against both should not be withdrawn. He urged that the two parties be restored into this suit as Defendants as before.
31. On whether the plaintiffs should be allowed to amend the Plaintiff, he submitted that the Application that seeking to amend it was brought after the suit had been in court for over 10 years and was part-heard while the 1st Defendant had already filed and prepared his Defence hence was an after-thought, belated and unconscionable. He stated further that the proposed Amendments would not only alter the Plaintiffs' grievance in the suit, but were such as would unduly prejudice the 1st Defendant, absolve the Commissioner of Lands and cause a miscarriage of justice.

(b) Respondents' Submissions on the Application dated 26/01/2022 and theirs of 1/11/2021

32. The Respondent summarized the grounds for the Application for amendment of the Plaintiff, particularly how the Applicants had sought advice from the government's legal advisor and concluded that the amendment was necessary. They also submitted on the preliminary objection. They restated the grounds of the second Application which was by the 1st Defendant.



33. On whether the consent should be set aside they submitted that the consent only withdrew the suit against the 5th and 6th defendants. It did not in any way affect the rights of the Applicant. They submitted that they, the Plaintiffs, had a right to discontinue the case against the Defendants by way of a notice of withdrawal of suit. They relied on the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR. Their argument was that the 1st defendant could not force them to maintain a suit against the 5th and 6th defendants. They cited Order 25 Rule 1 of the *Civil Procedure Rules* about withdrawal of a suit against a Defendant before a suit is set down for hearing. They also cited Order 25 Rule 2 which related to the withdrawal of a suit after it is set down for hearing, as in this case hence a written consent signed by all the parties. It was their view that the withdrawal did not affect the suit against the 1st to 4th defendants hence it was unnecessary for them to consent. The claim was specific to the 5th Defendant and the 6th as its legal counsel. Their view was that a consent could only be set aside albeit in exceptional circumstances. They relied on *Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd* [1982] KLR 485 and that of *Brooke Bond Liebig (T) Limited v Maliya* [1975] E.A. 266.
34. It was their submission that upon the promulgation of the *Constitution*, 2010 and the enactment of the *National Land Commission Act*, 2011, the 5th Defendant ceased to exist and its functions taken over by the National Land Commission hence necessary to withdraw the case against the 5th Defendant. They submitted that the Applicant did not allege mistake, fraud or misrepresentation or contrary to the policy of the court or that it should be defeated for any other cause on the entry of the consent. They wondered how learned counsel would plead to facts and not his clients, and frowned at such conduct. They submitted in the end that there was no evidence that the Attorney General is conflicted in the matter since he came on record under Article 156(4) (b) of the *Constitution* and not as a party in the proceedings. He did so merely in response to public interest call for the need to defend public institutions in courts. He did not and had never represented the 1st to 4th defendants in this matter hence no conflict of interest. He had merely been enjoined in the suit pursuant to Section 12 of the *Government Proceedings Act* Chapter 40 of the Laws of Kenya but there was no specific claim against the Attorney General.
35. On whether they should be allowed to amend the Plaint, they relied on Section 100 of the *Civil Procedure Act* Chapter 21 and Order 8 Rule 5 of the *Civil Procedure Rules*. Their view was that the instant Application sought leave of the court to amend the Plaint to facilitate just determination of the real issues in controversy. Theirs was that the question whether the intended amendments would alter the cause of action as suggested was that not true since the same was to show that the suit land in question was public land which ought to remain in the plaintiff's possession as a block. Regarding the delay of ten years they relied on Order 8 Rule 3 of the *Civil Procedure Rules*. They then cited the cases of *Lafey Construction Ltd v Prism Investments Ltd* [2020] eKLR; *City Clock Ltd v County Clock Kenya Ltd & another* [2020] eKLR; and *John Nyagaka Ogoro v Reynold Karisa Charo & 5 others* [2021] eKLR. They prayed for the dismissal of the Application dated 26/01/2022 and the grant of the one dated 01/11/2021.

Analysis and Determination

36. I have anxiously considered the two applications. First, it appears to me that the 2nd to 4th Defendants were not keen in participating in the Applications or they were not served. Their Advocates seem to have withdrawn from acting for them but there was a law firm previous to the one that withdrew which does not appear to have been rightly changed from. Thus, when the subsequent law firm withdrew from acting, it remained unclear whether the representation reverted to the former counsel or they remained unrepresented.



37. Second, I note that it appears to me that the Application dated 26/01/2022 aimed at setting aside the consent entered into by the part of the Plaintiffs and the Defendants was actuated by the fact that the Plaintiffs had moved the Court with the Application dated 01/11/2021. That is why the Applicant in the application dated 26/01/2022 argued profusely against the application filed earlier that the Applicants had transformed themselves as lawyers of the Plaintiffs after removing themselves from the record as the 6th Defendants. He was bitter that that application was urged by what this Court would loosely refer to as his “former associate’ on the same side of the divide in the dispute”. For this reason, the Court would consider first the Application dated 26/01/2022 and then the one dated 01/11/2021.
38. In any event, by first determining whether the consent should or should not be set aside it would set stage for considering the merits or otherwise of the Application to amend the Plaintiff. This is because, if the consent is set aside and the 5th and 6th Defendants are restored into the proceedings then the presence of the Attorney General as the Plaintiffs’ counsel would be an automatic issue because the Attorney General would not be appearing on the different sides of the dispute in whichever capacity at the same time. From the foregoing the question that this Court considers that comment themselves for consideration are:
- (a) Whether the application dated 26/01/2022 is merited;
 - (b) Whether the application dated 01/11/2021 is merited;
 - (c) Who to bear the costs of the Applications?

(a) Whether the application dated 26/01/2022 is merited

39. In considering whether or not the Application dated 26/01/2022 has merits or not, this Court is tasked to find whether or not the Applicant brought himself within the arm bit of the requirements for setting aside a consent order. The law on setting aside a consent order or judgment is now well settled. It can only be done where it is shown that the same was entered into by the Plaintiffs and the 5th and 6th Defendants. This has been restated in a myriad of cases. Actually, the Court of Appeal has, in *S M N v Z M S & 3 others* [2017] eKLR, 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.”
40. Therefore, for instance, in *Flora N. Wasike v 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 *J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.*”
41. In *Purcell v FC Trigell Ltd* [1970] 2 All ER 671, 676 Winn LJ said:
- “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”.



42. 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.”

43. In the instant case, the argument by the applicant was that the consent dated 01/11/2021 was entered into by mischief, and was unfair, an abuse of the court process, lacking in conscience, contrary to public policy. It must be noted that the consent was entered into by the then 5th and 6th Defendants Advocates and those of the Plaintiff. It was on behalf of the parties. It is not in dispute that none of the parties to the consent has voiced any issue with the consent. Thus, to them the consent was proper and binding.

44. Of the binding nature of consent judgments or orders, in the seminal book *Setton on Judgments and Orders* (7th Edn), Vol.1 pg 124 the learned author states that:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... it 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 material facts, or in general for a reason which would enable the court to set aside an agreement.”

45. The issue of setting aside the consent, and the application for that were raised by the 1st Defendant who was not a party to the consent. Having not been party to the consent, it is clear that the same was not binding on him. The law is that a consent is binding on all the parties thereto and can only be set aside under the circumstances that would justify setting aside a contract. As was stated in the case of *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485, Harris, J held 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.”

46. In my view, the 1st Defendant who was not a party to the consent could only rightly raise issues about and apply to set aside the consent if only, first, it affected him, and second, he showed that it was vitiated by the factors that would justify its being set aside as a contract would as stated above. He did not do as much.

47. Aside from the argument that the then 5th and 6th Defendants were Principal Defendant or parties in the suit, there is no mistake, fraud, collusion, the nature of being contrary to public policy that is shown on the part of the parties who entered into the consent. It was only a mere statement that was put forth by the Applicant about the consent being contrary to reason and public policy. Beyond the statement is no evidence of the sort.

48. Regarding how the consent was entered into, first of all, the suit had been set down for hearing; the Plaintiffs wished not to maintain the suit against the 5th and 6th Defendants; thus, in terms of Order 24 Rule 2(1) of the *Civil Procedure Rules*, the parties had to file a consent to the effect of withdrawal of the suit. The provision reads that, “Where a suit has been set down for hearing it may be discontinued,



or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties”. The Plaintiffs wished to withdraw the suit against the 5th and 6th Defendants. They entered into the consent impugned. There was nothing wrong with that if they negotiated and came to an agreement that the suit be withdrawn as it was. Thus, it is not open for the other Defendants, more so the Applicant, to cry wolf simply because they were taking cover, finding shelter or camouflaging in an action maintained by the Plaintiffs against a party in allegations of fraud which the Plaintiffs think do not attach to the said parties.

49. Again, in terms of whom the Plaintiffs should sue or not sue, it is their case and they cannot, and there is no law, that compels them to maintain an action against a party they do not wish to continue a case against. Much less on the part of the Defendants to compel and or direct them to bring into the suit any party they do not wish to since they, the Defendants, now feel that they are in the cold. However, if they feel so sufficiently cold in their Defence as to feel they feel the need of warmth, in their Defence, of the parties taken out of the pleadings by the Plaintiffs, and if they wish to have any party brought in, they can move the Court appropriately, perhaps under Order 1 Rule 15 of the Civil Procedure Rules, if they satisfy the conditions therein or indeed any other law regarding addition of parties.
50. Even as the Court makes that finding, it is a point to note that a party to any matter does not rely on others to found and ventilate their case, whether the Plaintiff or claimant or defendant or respondent. Each ought to have their narrative of the claim or defence. He who relies on others essentially shows and implies that his case is weak. He cannot purport to say that others are principal parties. In civil matters I have not come across the usage and reference of principal and other parties. It is becoming clear that the 1st Defendant seems to know how weak or strong his case is and wishes to ‘call for assistance and company’ of others.
51. At the least of it all the 1st Defendant/Applicant is at liberty to call witnesses from the defunct Office of the Commissioner of Lands if they so wish, to support his Defence case if he is of the view that he has been deprived of a co-defendant whose defence and evidence he would have relied on had the said Defendant been left to be in the proceedings. All is not lost to him. In any event, it is not clear how the 1st Defendant arrived at the argument that the 5th and 6th Defendants were Principal Defendants and not he or other Defendants.
52. The Respondents explained satisfactorily how and why they arrived at the consent to remove the parties so taken out of the proceedings by the consent dated 01/11/2021. It was clear that the Plaintiff was and still is a public entity which stated that it was misled into suing the other public entity for actions not perpetrated by that other entity. Further, it was stated that the then 6th Defendant was only joined in the proceedings as by law, the Constitution and the Government Proceedings Act, as the only institution that is sued as representative of government. The party had no role in the proceedings apart from being sued as the principal legal advisor of government. His role and presence in the pleadings was wholly dependent on the Plaintiffs maintaining the Claim against the 5th Defendant. Without the 5th Defendant being in the suit since the Plaintiffs did not wish to maintain the suit against them, there was no need of the 6th Defendant, hence the consent. There was nothing unconscionable, fraudulent, erroneous, or contrary to public policy in it contrary to the argument by the 1st Defendant.
53. The 1st Defendant is a party who should be left, in the pleadings, to firm and prosecute his Defence based on his actions in the transactions that gave rise to the instant suit and should not rely on others’ actions. If his Defence crumbles by absence of other parties he should not endeavor to compel the adverse parties to bring in parties to the suit to assist in his Defence. Thus, there is no merit in the Applicant’s prayer that the 5th and 6th Defendants be restored in the suit as parties.



54. The upshot of the analysis is that the Application dated 26/01/2022 is wholly unmeritorious, completely devoid of sound reasoning and basis, vexatious and an abuse of the process of the Court. It is hereby dismissed with costs to the Respondents.

(b) Whether the Application dated 01/11/2021 is merited

55. The next question that arose was the merits or otherwise of the Application dated 01/11/2021. The Applicants moved the court to amend its Plea in terms of the annexed amended draft. The Application was opposed very strongly. In addition to the Replying Affidavit, the 1st Defendant raised a preliminary objection to the Application. It was dated 19/01/2022 and filed on 20/01/2022. In my view it is in order to consider first the preliminary objection since if it succeeds it will determine the Application at once.

56. The Preliminary Objection was to the effect that the Application offends the principle of estoppel, the Attorney General is conflicted, the Application is an abuse of the court process, and it was made after undue and prolonged delay of over 10 years. The question that arises is whether the issues raised in the objection manifest a preliminary objection. A preliminary objection was defined in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.

"So far as I'm aware, 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."

57. Furthermore, Sir Charles Newbold stated in the same case as follows:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

58. From the points raised by the Respondent, none of them qualifies to be a preliminary objection. The issues he raised require the use and support of facts in order to be proven. Thus, I dismiss the preliminary objection and proceed to analyze the Application on merit.

59. The issue that then remains for determination is whether or not the application is meritorious. Amendment of pleadings is provided for under Section 100 of the *Civil Procedure Act* and Order 8 of the *Civil Procedure Rules*. Section 100 of the Act provides that, "The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding." Order 8 Rule 1 provides for amendment of pleadings without leave of the Court. This ordinarily occurs when pleadings have not been closed. Order 8 Rule 3 provides for amendment of pleadings with leave of the Court. Generally, it occurs where pleadings have been closed hence the parties have to move the Court appropriately. Order 8 Rule 5(1) provides for the general power to amend pleadings. It stipulates that:

"For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion



or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

61. It therefore goes without saying that since pleadings closed in this matter over ten years ago, an application to amend the pleadings was necessary by whichever party that was desirous to do so. However, they have to bring themselves within the parameters of the permitted discretion of the Court to grant such amendment. It is needless to say that the Court exercises discretion judiciously whenever it is presented to an application of such nature. It must consider the demand of justice for all the parties and especially if any of the parties would be prejudiced by the proposed amendments, among other factors. However, it is important to note that amendments can be allowed at any stage of the proceedings. But where they are sought when the matter is at the nascent stage, as long as they are to bring the real issues in controversy before the Court, they should be freely allowed.
62. I have considered the Application before me. The Applicants explained in detail why it necessitated that the Application be brought. I will not repeat the reasons at this point. The Application was opposed strongly for reasons which, too I will not repeat. I have considered them all, weighed each parties' contentions over the amendment. I have also noted that one of the complaints by the 1st Defendant/ Respondent is that the Application was urged ten years after the institution of suit. But as I have stated, amendments can be allowed at any stage of proceedings. In so far as the suit is alive before this Court, the party is entitled to apply to amend its pleadings irrespective of how long it has taken. The other complaint is was that it will change the character of the Plaintiffs' case and therefore prejudice the 1st Defendant. I have considered the proposed amendments as shown in the annexed draft Amended Plaintiff, I see no much change in the character or nature of the Plaintiffs' case. All that the Plaintiffs are proposing to say is that the 5th and 6th Defendants are no longer in the suit and the allegations against them are therefore to be removed, that the 1st to 4th Defendants illegally and unprocedurally acquired some portions of the Plaintiffs' land through fraud, misrepresentation and illegality. They propose to plead the particulars of fraud, misrepresentation and illegality against the defendants as the law requires, and that the title held by them is therefore void and the defendants be evicted and enjoined. That does not change the character of the Plaintiffs' case. In my view the proposed amendments are merited. In any event the Defendants have neither testified in the case nor presented their case so as to be in a position that they would argue that it would prejudice their case or evidence if the amendments were allowed at this stage. They will have a chance to file their Amended Defences and prosecute them.
63. As to the contention that the Attorney General is conflicted in the proceedings by representing the Plaintiffs, having been sued earlier by them, it is the Court's view that the contention is flawed. It is not gainsaid that the Attorney General is the lawful principal legal advisor of government and its public institutions, as provided for under Article 156 (4) (a) (b) of the *Constitution*. The office was sued by the Plaintiff's not as an individual but an office. The Plaintiffs did so by virtue of the legal requirement that the Attorney General as the Principal Legal Advisor be enjoined in the proceedings as a party, as provided for under Section 12 of the *Government Proceedings Act*. Absent of any government department or the government itself as a Defendant in the suit automatically removes the Attorney General from the proceedings.
64. It is not denied that the Plaintiff is a public institution. By law, its legal representative is the Office of the Attorney General. That is a legal right that is vested on it and which cannot be taken away. It is sad that the Plaintiff may have mistakenly sued the Attorney General at first. That does not remove the constitutional and legal unction that the Office of the Attorney General is the proper legal counsel that should represent the public institution in the circumstances. In any event the 1st Defendant has not shown what prejudice he would suffer by the Attorney-General representing the Plaintiffs. He is not arguing, for instance, that he had passed over evidence or instructions to the office of the Attorney



General while the said office was acting as the 6th Defendant, that the Attorney General then has in its possession that it would now use against the him or his case. He only argued for the sake of it because the Attorney General had been joined as a 6th Defendant previously. In any event, if the Attorney General cannot represent the public institution, the Plaintiff, who else could on behalf of government yet the said institution has a constitutional right to be represented by a counsel of its choice? At best it can only be represented by a counsel who can only be appointed by the same said office, the Attorney General, and the Attorney General would be controlling the said counsel from the background as a puppet. Thus, that would only happen for what I would term as “public relations and semblance purposes that the Attorney General is not in picture”. It would be an absurdity and a mockery of justice and the legal process and profession. What that would mean is that the parties would be pretending before the Court and playing theatrics just to satisfy the public eye that one is truly represented by an independent counsel. The Court will not allow that to happen.

65. The totality of the analysis herein is that the Application dated 01/11/2021 succeeds. The Plaintiffs are given fourteen (14) days to amend their pleadings in terms of the annexed draft Plaintiff and they serve it within the said period. The Defendants have corresponding leave to file an amended Defence to the Amended Plaintiff within fourteen (14) days of service. The Plaintiffs have the usual leave to file a Reply to the Amended Defence within seven (7) days of service.
66. This suit will be mentioned on 13/10/2022 to confirm close of pleadings and take a date for further hearing.

Order accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 29TH DAY OF JULY, 2022.

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

