



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwaura v Chief Land Registrar & 4 others (Environment and Land  
Appeal 1 of 2018) [2022] KEELC 3496 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3496 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL 1 OF 2018**

**LN GACHERU, J**

**JULY 28, 2022**

**BETWEEN**

**NDIRANGU MWAURA ..... APPELLANT**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR MURANG'A ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPH IRUNGU NGARI ..... 4<sup>TH</sup> RESPONDENT**

**ROBINSON KARANJA GICHERU ..... 5<sup>TH</sup> RESPONDENT**

*(An Appeal against the ORDER of NMJ, the 1st Respondent issued on the 21/10/2010)*

**JUDGMENT**

1. By a Re-amended Memorandum of Appeal dated 7<sup>th</sup> June 2021, the Appellant herein appealed against the decision of the Chief Land Registrar, that was issued on the 21<sup>st</sup> October 2010, in its entirety on the following grounds;
  - a. That the 1<sup>st</sup> Respondent erred in fact by failing to adhere by the terms of the amended decree dated 8<sup>th</sup> March 2010, which had directed the 2<sup>nd</sup> Respondent (an agent of the 1<sup>st</sup> Respondent) to direct a government surveyor to the disputed parcels of land being Loc.3/mukangu/209,74 & 217 in accordance with the registry index map.
  - b. That the 1<sup>st</sup> Respondent erred in fact in failing to provide an in-depth analytical report of how if any the alignment of the boundaries was done to satisfy the terms set out in the amended decree.



- c. That the 1<sup>st</sup> Respondent misdirected himself by finding that the land boundary dispute had been resolved without actual proof of the same having been done.
2. Based on the above grounds, the Appellant sought for orders that;
    - a. The Appeal be allowed
    - b. The decision of the 1<sup>st</sup> Respondent dated 21<sup>st</sup> October 2010, be set aside
    - c. The Appellant be awarded costs of this Appeal and in the Superior Court.
  3. Before this Court delves into the merits of the instant appeal, it will outline the background from which it originates. The Appellant herein is the Legal Representative of Daniel Kung'u Mwaura (deceased). The said Daniel Kung'u Mwaura, filed a suit against the 4<sup>th</sup> and 5<sup>th</sup> Respondents, at the District Land Disputes Tribunal at Maragua, which award was delivered and adopted as an Order of the Court via D.0 Case No.70 of 2006, on 16<sup>th</sup> October 2006.
  4. Subsequent to the Order issued on 16<sup>th</sup> October, 2006, a Decree issued on 8<sup>th</sup> December 2006, was extracted. Through a Consent Order issued 25<sup>th</sup> September, 2009, the parties by consent agreed to vary the afore-referenced Decree to read as follows;
 

“ That the District Land Registrar, be and is hereby ordered to send the Government surveyor to the disputed lands L.R. No. Loc. 3/mukangu/209, L.R. No. Loc. 3/mukangu/74, and L.R. No. Loc. 3/mukangu/217, to sort out the boundary dispute in accordance with Register Index Map (Mukangu Sheet No.6)”
  5. Following the said Consent Order, the aforementioned Decree was amended on 4<sup>th</sup> August 2009, and subsequently issued on 8<sup>th</sup> March 2010. It is this Amended Decree that is the subject of the instant Appeal.
  6. On 22<sup>nd</sup> June, 2021, the Court directed that the instant Appeal be canvassed by way of written submissions.
  7. The Appellant filed his written submissions dated 15th July 2021, through the Law Firm of Muturi Njoroge and Co Advocates. Counsel for the Appellant rehashed the background of the dispute between the parties culminating into the impugned Consent Order of 25th September 2009, and the Amended Decree dated 8th March 2010, the subject of this Appeal.
  8. On whether the 1st Respondent adhered to the terms of the Amended Decree, the Appellant submitted that the 1st and 2nd Respondents failed to obey the Orders, and issued a Letter dated 21st October 2010, which stated that the boundary issue had been solved and could not be revisited. That no proof was supplied as to how the dispute was resolved and what became of the resolution. The Appellant relied on the case of *Shimmers Plaza Limited vs. National Bank of Kenya* (2015) eKLR, where the Court of Appeal stated that Court Orders must be obeyed and parties against whom such orders are made cannot be allowed to trash them with impunity.
  9. The Appellant submitted further that the 1st and 2nd Respondents failed/or refused to comply with the Decree issued on 8th March 2010, and unless this Court intervenes, the Appellant will suffer prejudice. He therefore urged this Court to allow the Appeal as prayed.
  10. The 4th and 5th Respondents filed their written submissions dated 2nd December, 2021, through the Law Firm of Jessee Kariuki & Co Advocates in opposition of the Re-Amended Memorandum of Appeal dated 7th June 2021. They submitted that the instant Appeal seeks the interference of this



Honourable Court on the discretion of the Chief Land Registrar. That parameters are well set out on instances when this Court can interfere with the discretion of a lower Court and or tribunals. Reliance was placed on the case of *Mbogo vs. Shah* (1968) EA 93, where the Court stated that the Court of Appeal should not interfere with the exercise of discretion of a Judge, unless it is satisfied that the Judge in exercise of his discretion misdirected himself in some matter.

11. Further the 4th and 5th Respondents submitted that a Consent judgment, has the effect of a Contract and can only be set aside on grounds, which would justify the setting aside of a contract. They relied on a litany of cases inter alia *Samson Munikah Practicing as Munikah & Company Advocates Vs. Wedube Estates Limited* [2007] eKLR, where the parameters of setting aside consent judgment were discussed. It was their further submissions that litigation must come to an end in accordance with the principle of finality as set out in the case of *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others* (2007) eKLR. The 4th and 5th Respondents based on the above, urged this Court to dismiss the instant Appeal with Costs.
12. The Court has considered the available evidence as well as the submissions thereafter by parties. The Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has carefully considered the whole proceedings herein.
13. Being a first Appeal, it is this Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by Section 78 of the *Civil Procedure Act*. See also the case *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where it was held;

“...this court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
14. Therefore, this Court is under a duty to reconsider the evidence that was presented before the Chief Land Registrar and revisit the facts as presented before her, analyze the same, evaluate it and arrive at an independent conclusion, but always remembering, and giving allowance to the fact that it was the Chief Land Registrar, who had the advantage of hearing the parties.

In the case of *Ephantus Mwangi and Another vs. Duncan Mwangi* Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278, the Court of Appeal held that:

“A member of an appellate Court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

15. The Court will also take into account that it will only interfere with the discretion of the Chief Land Registrar, where it is shown that the said discretion was exercised contrary to the law or that the said Chief Land Registrar misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is



plainly wrong. See the case of *United India Insurance & 2 Others Vs East African Underwriters (K) Ltd* (1985) eKLR, where the Court of Appeal observed as hereunder;

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at the first instance, would or might have given different weight to that given by the Judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of or consideration of which he should not have taken account; fourthly, that he failed to take account of or consideration of which he should have taken account; fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

16. This Court has considered the Record of Appeal, the grounds of Appeal, the written submissions by the parties, and the Consent Order presented to the Chief Land Registrar and the Court finds that the issue for determination is whether the instant Appeal is merited.
17. It is not in doubt that the instant Appeal emanates from a Consent Order issued on 25<sup>th</sup> September 2009, and the Amended Decree issued on 8<sup>th</sup> March 2010, pursuant to the said Consent Order.
18. It is trite that 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. 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.”

19. Further in [Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited](#) [2015] eKLR, the Court of Appeal in laying down the basis for setting aside a consent judgement or order stated as follow:

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, and agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts”

20. This Court is guided by the above decision and it finds and holds that indeed the principles to be followed in setting aside a consent judgment are well settled in law. A Court will not interfere with consent judgment, unless the vitiating factors of a contract are proven. The said vitiating factors include but are not limited to fraud, illegality, mistake and coercion.
21. In the instant Appeal, the Appellant has neither pleaded nor established the existence of the said vitiating factors, and therefore this Court will shy away from setting aside the Consent Order of 25<sup>th</sup> September 2009.
22. In addition to the above, the Court notes that in the Ground of Appeal in the Re Amended Memorandum of Appeal dated 7<sup>th</sup> June 2021, it appears like the Appellant is seeking for the Appeal to be allowed on the ground that the 1<sup>st</sup> Respondent has failed to comply with the decision of Tribunal,



which was delivered on 21<sup>st</sup> October 2010. It Appears like the Appellant is attempting to cite the 1<sup>st</sup> Respondent for contempt via the instant Appeal.

23. Contempt of Court is that conduct or action that defies or disrespects authority of Court. Black's Law Dictionary 9<sup>th</sup> Edition, defines contempt as:
24. The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a Court or legislature. Because such conduct interferes with the administration of justice.
25. Properly put, contempt is conduct that impairs the fair and efficient administration of justice. Section 5 of the *Judicature Act*, confers jurisdiction to the Superior Courts to punish for contempt. Order 40 Rule (3) of the Civil Procedure Rules (2010), provides that in cases of disobedience, or of breach of any terms of a temporary injunction, the Court granting that injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.
26. The reason why Courts punish for contempt is to uphold the dignity and authority of the Court, ensure compliance with directions of the Court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by Courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him.
27. Based on the above, the Court notes that the appropriate Application that the Appellant ought to have filed is one for contempt and not an Appeal. An Appeal requires the Appellant to show in its grounds of Appeal the error in law or fact, that the trial Court or the tribunal made in its Judgment, and which grounds or errors, the Appellant has not highlighted in the instant Appeal.
28. Having carefully considered the pleadings herein and the written submissions together with the relevant provisions of law, the Court finds and holds that the Re-Amended Memorandum of Appeal dated 7<sup>th</sup> June 2021, is not merited and the same is dismissed entirely with costs to the 4<sup>th</sup> and 5<sup>th</sup> Respondents herein.
28. In a nutshell, the Appeal herein is dismissed entirely with costs to the 4<sup>th</sup> & 5<sup>th</sup> Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

**L. GACHERU**

**JUDGE**

**In the presence of; -**

Joel Njonjo - Court Assistant

N/A for the Appellant

N/A for the 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> Respondent

N/A for the 3<sup>rd</sup> Respondent

Mr Macharia H/B for Jessee Kariuki for the 4<sup>th</sup> & 5<sup>th</sup> Respondents



**L. GACHERU**

**JUDGE**

**28/7/2022**

