



**Gichaga v Kabangi & 2 others (Environment & Land Case
E001 of 2023) [2025] KEELC 3026 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3026 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E001 OF 2023**

**AE DENA, J
APRIL 2, 2025**

BETWEEN

KENNETH MACHARIA GICHAGA PLAINTIFF

AND

SAID HASSAN KABANGI 1ST DEFENDANT

DIANI KWETU SERVICES LIMITED 2ND DEFENDANT

REGISTRAR OF LANDS KWALE 3RD DEFENDANT

RULING

1. The Applicant through its Notice of Motion Application dated 30th January, 2024 seeks the following orders; -
 1. Spent
 2. That the firm of Messrs Musa Nyariki & Co. Advocates be allowed to come on record to act for the 2nd Defendant /Applicant in this suit
 3. That the Honourable court be pleased to order stay of execution of Decree issued by this Honourable court on 2nd October, 2023 and incidental orders thereto pending the hearing and determination of this Application.
 4. That the Consent recorded on 2nd October, 2023, proceedings and subsequent orders granted against the 2nd Defendant/Applicant be set aside.
 5. That this Honourable Court be pleased to stay all and/or any further proceedings on the suit property pending the hearing and determination of this Application.



6. That this Honourable court be pleased to order a fresh hearing of both the plaintiff's case and the 2nd Defendant/Applicant's case in the interest of Justice.
 7. That this Application be served on the Plaintiff/Respondent and heard inter parties on such date and time as this Honourable Court may direct.
 8. That costs of this application be in the cause.
2. The application is anchored on the grounds on its face and the depositions in the Supporting Affidavit of Sally Njeri Adser. It is deponed that the 2nd Defendant does not have a physical office anywhere in Kenya and neither is there a place in Diani known as Diani Shopping. That the process server lied under oath when he deponed he had served the 2nd Defendant at its office premises at Diani Shopping House No. 3 along Diani Beach Road. A copy of the affidavit of service dated 1st May 2023 was attached as DKSL
 3. That the allegation that he served the 1st Defendant with summons to enter appearance at Naivas Supermarket in Diani were also lies since the 1st Defendant died well before the alleged meeting happened.
 4. It is averred that since the 2nd Defendant was never served with the said summons to enter appearance as well as the mention notices to appear in court, the proceedings before court ought to have been set aside. That upon the alleged service happening and the falsified affidavit of service being filed, the suit ought to have proceeded to trial wherein the Plaintiff ought to have presented his evidence as to the allegations contained in the plaint. It is stated that the actions of the Plaintiff and the 3rd Defendant recording a consent instead of going for a full trial greatly disadvantaged the 2nd Defendant for reason that its rightful property was taken away by the consent between the Plaintiff and the 3rd Defendant who ordinarily should have been the proper party to guide this Honourable Court to arrive at a just finding. A copy of the Consent dated 21.09.2023 is attached as DKSL 2. The court is also invited to make an order for the said process server to be cross examined.
 5. It is further stated that failure of the matter to proceed to full trial meant that the allegations fronted by the Plaintiff went unchallenged even by the 3rd Defendant who presented documents in court which clearly pointed towards the allegation in the Plaint being mere fabrications. The deponent attached a draft defence which according to him raises triable issues that can defend the title that it held prior to the Decree dated 2nd October 2023.
 6. That it is in the interest of justice if the proceedings and the resultant decree is set aside and the suit heard a fresh.
 7. The application is opposed vide the replying affidavit of the plaintiff. It is deponed that Sally Njeri Adser has failed to provide the CR12 to corroborate/reveal the directors of the 2nd defendant thus making her a stranger to these proceedings. That there is no resolution appointing Sally Njeri Adser to initiate or respond to these proceedings on behalf of the 2nd defendant. The 2nd defendant is a company duly registered in Kenya with premises in Diani and to depone it has no registered office in Kenya is contrary to the law and evidences falsehoods.
 8. That the 2nd Defendant was duly served with summons and pleadings as per the affidavit herein. The 2nd Defendant being a company cannot swear under oath falsehoods as to the existence of life or demise of the 1st respondent without annexing any certificate of death. It is deponed that the matter was closed by consent upon perusal of all documents when the fraudulent entries made by the 1st and 2nd Defendant became apparent. The court is urged to dismiss the application with costs.



9. The 3rd Defendant did not participate in this application.

Submissions

10. The application was disposed by way of written submissions. The applicant's submissions were uploaded on 7/11/2024 but are not dated. Mr Ganzala did not file submissions despite the opportunity to do so. I will rely on the replying affidavit.

Determination

11. I have considered the application, the supporting affidavit, the attendant submissions. I have also considered the 2nd Defendants response to the application. The issue that commends determination is Whether the Applicant has met the threshold for reviewing or setting aside the consent judgement and consequential decree entered by the court on 2/10/23.
12. The prayer for stay of execution of the decree of 2/10/23 is spent. It is noteworthy that on 27/02/24 parties agreed by consent that the said orders be granted for a period of 21 days to enable negotiations. These orders were subsequently extended until 23/9/2024. The court in my view should focus on the prayer for setting aside the consent judgement herein and prayer for fresh hearing.
13. The applicants submissions largely addressed the prayer for stay of execution and whether the requirements for grant of orders of stay have been met. I have already stated this limb of the application is spent. Citing the phrase audi alteram partem the court is invited by the applicant to be guided by the principles of natural justice and not condemn the applicant unheard. That the applicant has a good defense that raises triable issues.
14. The application has been brought under the provisions of section 3 and 3A of the Civil Procedure Act, Orders 10 Rule 11, 7 Rule 1, 50 Rule 6 of the Civil Procedure Rules.
15. The matter of setting aside judgment entered by consent of the parties has been a subject of many judicial decisions. The circumstances/threshold to be met for a consent judgement to be set aside are now settled.
16. In the case of Samson Munikah practicing as Munikah & Company Advocates Vs Wedube Estates Limited Nairobi Civil Appeal No. 126 of 2005 the court stated; -

“This appeal raises the vexed question: (of) what are the circumstances in which a consent judgment may be set aside” In *Broke Bond Liebig (T) Ltd v Mallya (1975) E.A. 266* the then Court of appeal for East Africa set out the circumstances in which a judgment freely entered into by parties to a dispute in court would be set aside: -

“The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani V Kassan (1952)19 EACA 131* where the following passage from Section on judgments and orders, 7th Edition vol. 1, P. 124 was approved:

“Prima Facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them 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



material facts, or in general for a reason which would enable the court to set aside an agreement”.

17. The Court of Appeal in the case of Board of Trustees National Social Security Fund versus Micheal Mwalo [2015] eKLR stated thus

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. 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.”

18. Applying the above to the facts of the instant case, I must first point out that the consent was entered into by only two parties in the suit, the Plaintiff and the third defendant. It was therefore not a consent of all the parties to the suit. This was after the plaintiff filed an affidavit of service to the effect that the 1st and 2nd Defendants had been duly served with the pleadings but failed to enter appearance. The applicant states that it was never served and the averments in the same were falsehoods because the 1st Defendant died before this suit was filed and that the 2nd Defendant does not have office premises at the location he was allegedly served.

19. The court was not presented with any proof that the 1st Defendant is deceased. However, what is clear from the Affidavit of service is that the documents that were served if at all were just but the Notice of Motion and not the suit papers. The particulars of the secretary who allegedly received the document is not disclosed. This raises a doubt on service.

20. Be that as it may, while I note that the cases cited lean towards respecting agreements of the parties, they also donate the power to the court to deviate from this position. In the instant case the agreement did not involve all the parties in the suit and specifically the main parties in dispute who are the Plaintiff and the 2nd Defendant claiming interest over the subject matter. Had both these two parties signed the consent then the court would have been hesitant in setting aside the consent. The Attorney General had no interest in the suit property except for the allegations raised against its office. This is compounded further by the fact that a doubt has been cast on the service as observed earlier. The certainty of service of the pleadings and hearing date upon the 2nd Defendant has not been confirmed.

21. On the basis of the above I would set aside the consent judgement and add that it would be against court policy for the Attorney General to have participated in the consent in the manner above explained.

22. Additionally, the 2nd Defendant has attached a draft of the intended defence which in their view raises triable issues. Having reviewed the said draft I have noted there are indeed disputed facts that require further examination and resolution through a full trial. It is trite a triable issue need not be a defence that must succeed. See County Government of Trans Nzoia v Manaseh Distributors & Wholesalers Limited (Civil Appeal 10 of 2018) [2024] KEHC 389 (KLR) (29 January 2024) (Judgment) where the court cited with authority the Kenya Trade Combine Ltd v Shah, Civil Appeal No 193 of 1999, where it was stated as follows:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.’



23. No litigant should be shut out of court without being heard. If possible, everyone must be able to access justice. The court finds support in the following judicial decisions; -

24. The powers of the Court to set aside ex parte proceedings is discretionary and should be exercised judiciously. This position was affirmed in the case of *Patel v E.A. Cargo Handling Services Limited* [1974] E.A. 75 where it was stated:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

25. The court agrees with the dictum in *Patrick Omondi Opiyo T/A Dallas Pub v Shaban Keah & Another* [2018] eKLR where their Lordships stated as follows:

“Service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal systems applaud. Where therefore judgment is entered against a party who has not been served and hence not been heard, such judgment will be set aside ex debito justitiae.”

26. The upshot of the foregoing is that the court finds that the Notice of Motion Application dated 30th January, 2024 is merited and it is disposed in the following terms

1. That the firm of Messrs Musa Nyariki & Co. Advocates be allowed to come on record to act for the 2nd Defendant /Applicant in this suit.
2. That the Consent recorded on 2nd October, 2023, proceedings and subsequent orders and decree granted against the 2nd Defendant/Applicant be set aside.
3. That the 2nd Defendants Draft Statement of Defence shall be deemed as duly filed effective from the date of payment of the requisite court fees.
4. That the case to be heard on merit.
5. That the matter shall be fixed for mention before the Deputy Registrar ELC Kwale for initial pretrial directions on 16th May 2025
6. That leave to appeal this ruling is granted if required.
7. That costs of the application shall abide the outcome of the main suit.

It is so ordered.

RULING DATED SIGNED AND DELIVERED THIS 2ND DAY OF APRIL 2025.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -



Mr. Ganzala for the Plaintiff

No appearance for the Applicant/2nd Defendant

No Appearance for the 3rd Defendant

