



**Khaemba v Wanyonyi; Kalume (Interested Party) (Civil Case  
11 of 2007) [2022] KEELC 4905 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4905 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
CIVIL CASE 11 OF 2007  
BN OLAO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**JOHN MAKOKHA KHAEMBA ..... PLAINTIFF**

**AND**

**RICHARD WANYONYI ..... DEFENDANT**

**AND**

**NANCY KHANJILA KALUME ..... INTERESTED PARTY**

**RULING**

- (1) The dispute regarding the ownership of the land parcel no Ndivisi/ Makuselwa/122 (the suit land) was first determined in Webuye Resident Magistrate’s Court Civil Case No 201 of 1999 in which John Makokha Khaembawas the plaintiff just as he is in this case while one Christopher Wanyonyi Wabombawas the defendant. The case was heard by Hon L N Mutende – Senior Resident Magistrate (as she then was). And in a judgment delivered on November 14, 2003, the court found in favour of the plaintiff. A decree followed in the following terms: -

“It Is hereby ordered & decreed that: -

1. The land parcel No Ndivisi/makuselwa/122 measuring 4.5 acres be and is hereby transferred to the plaintiff.
2. The Executive Officer of this court be and is hereby ordered to sign transfer forms on behalf of the defendant.”

The record shows that following that decree, the plaintiff was issued with a title deed to the suit land dated May 31, 2005.



- (2) Four years later, the plaintiff filed this suit against Richard Wanyonyi (the defendant herein) seeking his eviction from the suit land for being a trespasser. The defendant filed a defence through the firm of Wanyama Wanyonyi Advocates denying the allegation of trespass and adding that the plaintiff's title to the suit land was tainted with fraud and that infact the plaintiff holds it in trust for him.
- (3) On May 4, 2007 the defendant filed a Notice to act in person and on the same day, a consent letter was filed signed both by the defendant and the firm of Omukunda & Company Advocates for the plaintiff. The consent which was dated May 2, 2007 reads: -

“By consent: -

1. Land parcel No Ndivisi/makuselwa/122 be sub – divided into two portions measuring 1.5 acres and 3 acres.
2. That the portion measuring 1.5 acres be transferred by the plaintiff to the defendant.
3. That the defendant, his agents, heirs, servants or anybody else claiming through him be and is hereby restrained from utilizing the portion measuring 3 acres in any way whatsoever.
4. Each party to bear his own costs.
5. The suit be marked as settled.”

The above consent was adopted as an order of the court on June 4, 2007.

- (4) Nancy Khanjila Khalume(the applicant/interested party) has now approached this court vide her Notice of Motion dated April 6, 2022 and premised on the provisions of orders 45 and 51 of the [Civil Procedure Rules](#) seeking the following remedies against the plaintiff: -

1. Spent
2. That this honorable court be pleased to have the applicant be enjoined in this suit as an interested party and be granted leave to enter appearance and file her pleadings.
3. That upon being enjoined, the applicant do pray that this honourable court be pleased to issue an order of temporal injunction restraining the plaintiff, his servants, agents from encroaching trespassing, entering or interfering with the land parcel No Ndivisi/makuselwa/122 pending the hearing and determination of this application *inter – parties*.
4. That upon being enjoined, the applicant do pray that this honorable court be pleased to issue an order of temporal injunction restraining the plaintiff, his servants, agents from encroaching trespassing, entering or interfering with the land parcel No Ndivisi/makuselwa/122 pending the hearing and determination of this suit.
5. That this honourable court be pleased to review, vary, set aside and or discharge the consent order and consequential orders made by this Honourable Court on June 4, 2008.
6. That costs of this application be provided for.

The application is predicated on the grounds set out therein and is also supported by her affidavit to which are annexed several annextures.



- (5) The gist of the application is that the applicant is the daughter of the later Christopher Wanyonyi Wabomba Alias Wanyonyi Wabomba who was the first registered proprietor of the suit land in 1963 and was issued with a title deed. That the said Christopher Wanyonyi Wabomba Alias Wanyonyi Wabomba remained in occupation of the suit land until his demise in 1990 when the applicant and his family assumed occupation thereof. That the applicant and her family are saddened by the allegation of the plaintiff herein that he purchased the suit land from her brother Richard Wanyonyi who is and has been a person of un – sound mind for decades. That neither Richard Wanyonyi Nor Christopher Wanyonyi Wabomba entered into any sale agreement with respect to the suit land and the purported consent order recorded on June 4, 2008 is a forgery perpetrated by the plaintiff who has unlawfully and without any colour of right proceeded to forcefully occupy the suit land which he is now tilling and planting sugar cane thus jeopardizing the applicant’s efforts to develop it.
- (6) The following documents have been annexed to the supporting affidavit:-
1. Copy of title deed to the suit land showing the first registered owner on July 16, 1963 was Wanyonyi Wabomba.
  2. Certificate of Official Search showing the registered owner of the suit land as at May 31, 2005 is the plaintiff.
  3. Green Card to the suit land.
  4. Report by Dr Dickson O Nyamogo On Richard Wakasiaka Lunani together with other medical documents.
  5. Consent order dated May 2, 2007.
  6. Photographs of a man and houses.
- (7) The application is opposed and the plaintiff filed a replying affidavit dated May 11, 2022 in which he has deponed, *inter alia*, that the suit land was transferred to him vide orders made in Webuye Resident Magistrate’s Court Civil Case No 201 of 1999 and he was issued with the title deed in 2005. That the applicant’s father, one Wanyonyi Wabomba, sold the suit land to his father in 1968 and moved after demolishing his house. That thereafter, the plaintiff’s father one Khaemba Wabomba Wakasiaka took possession of the suit land which his family has utilized for over 54 years while the applicant’s father who is still alive lives in Nairobi. That this application which has been filed after 15 years is incompetent as the applicant has not annexed any intended suit nor explained in what capacity she has come to this court. That it is not true that the applicant stays on the suit land. This application is a waste of time, an abuse of the court process and should be struck out.

Annexed to the replying affidavit are the following documents: -

1. Decree issued in Webuye Resident Magistrate’s Court Civil Case No 201 Of 1999 – John Makokha Khaemba v Christopher Wanyonyi Wabomba.
2. Transfer of Land Form dated March 7, 2005 signed by Executive officer Webuye court.
3. Copy of title deed to the suit land dated May 31, 2005 in the name of John Makokha Khaemba.
4. Copy of Official Search dated January 14, 2022 in respect to the suit land.



- (8) When the application was placed before me on April 6, 2022, I directed that it be canvassed by way of written submissions. However, only the applicant filed her submissions through the firm of Situma & Company Advocates and although the plaintiff was served, he did not file any submissions.
- (9) I have considered the application, the rival affidavits and annexures as well as the submissions by Mr Kundu counsel for the applicant.
- (10) From the Notice of Motion dated April 6, 2022, it is clear that the applicant seeks the following orders: -
  1. To be enjoined in these proceedings as an interested party.
  2. Injunction pending trial.
  3. Review, setting aside or discharge of the consent order recorded on June 4, 2008.

I shall consider those remedies in that order: -

### **1: Application To Be Joined As Interested Party.**

Order 1 rule 10(2) of the [Civil Procedure Rules](#) provides that: -

“The court may at any stage of the proceedings, either upon or with the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in a suit, be added.”

11. In [Black’s Law Dictionary](#) 10<sup>th</sup> Edition, an interested party is defined as follows: -

“A party who has a recognizable stake (and therefore standing) in a matter.”

12. In the case of [Francis K Muruatetu & Another v R & 5 Others](#) 2016 Eklr, the Supreme Court set out the following elements that a court should consider in an application for joinder as an interested party. These are: -
  1. The personal interest or stake that the applicant has in the matter must be set out in the application.
  2. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is merely peripheral.
  3. The prejudice to be suffered by the intended interested party in case of non – joinder must be demonstrated to the satisfaction of the court and must not be remote.
  4. The applicant must set out the case and/or submissions which he intends to make before the court and demonstrate their relevance and show that those submissions are not merely a replication of what the other parties will be making before the court.
13. I have looked at the application, the supporting affidavit and the documents annexed thereto and I do not see what personal interest the applicant has in the suit land. It is clear to me that she is trying to re – agitate the claims of her later father Christopher Wanyonyi Wabomba Alias Wanyonyi Wabomba and her brother Richard Wanyonyi which were determined by competent courts way back on November 14, 2003 and June 4, 2008 respectively. As was held in [Francis Muruatetu & Others V R](#) (*supra*), the intended interested party’s interest in the subject matter of the dispute must be clearly identifiable.



That has not been set out in the applicant's application and as the plaintiff has pleaded in paragraph 12 of his replying affidavit, "the applicant has not drafted suit and annexed her intended particulars of claim." In the absence of any particulars as to what her interest in the suit land is, this court is unable to exercise its discretion in her favour.

- (14) The plaintiff has also averred in paragraph 13 of his replying affidavit that the application is defective because the applicant "does not show in which capacity she has come to this court." In paragraphs 3 and 5 of her supporting affidavit, the applicant depones as to how her late father has been in occupation of the suit land "until his demise in the year 1990" and how her brother Richard Wanyonyi "was declared a person of unsound mind since the year 2001 before the institution of this suit and thus he could not have represented himself in this suit." Of course as an interested party, the applicant cannot be canvassing the interests of his late father and brother. That is not what the applicant should be pursuing. And even if she is pursuing the interest of her late father and brother, she has not produced any Grant of Letters of Administration appointing her as a legal representative to the estate of her father nor any Power of Attorney authorizing her to act on behalf of her brother if he is indeed of unsound mind. All that she has availed is a letter from Dr Dickson O Nyamogow which is in respect of one Richard Wakasiaka Lunani And Not Richard Wanyonyi the applicant's brother.
- (15) It is also instructive to note that the transfer of the suit land to the plaintiff was done on November 14, 2003 (almost 20 years ago) in Webuye Resident Magistrate's Court Civil Case No 201 of 1999. Those are the proceedings in which the applicant ought to have sought to be enjoined because it was in those proceedings that the ownership of the suit land was determined. The purpose of joining a party in proceedings, as is clear from the law cited above, is to enable the court effectually and completely to adjudicate upon and settle all questions in the suit." It would not be efficacious therefore for the applicant to be enjoined in these proceedings almost 20 years after the ownership of the suit land had been determined in other proceedings in another Court. That is not what the provisions of order 1 rule 10(2) of the *Civil Procedure Rules* was meant to achieve. By the time the consent order was being recorded in this case on June 4, 2008 some 14 years ago, the ownership of the suit land had long been determined.
- (16) The prayer for the applicant to be enjoined in these proceedings is not meritorious. It is accordingly rejected.

## **2: Injunction Pending Trial**

- (17) This court having rejected the applicant's prayer to be enjoined in these proceedings, she has been rendered a busy body with no locus to seek any orders in this matter. In any case, an order for injunction can only be made pursuant to an application under order 40 of the *Civil Procedure Rules*. No such application is before me and therefore, even if this had been a proper case in which to make an order for joinder, there would have been no basis upon which to grant any orders of temporary injunction as sought. Further, the suit was compromised through the consent order dated June 4, 2008.
- (18) That prayer is similarly for dismissal.

## **3: Review, Setting Aside Or Discharge Of The Order Dated 4<sup>th</sup> June 2008.**

- (19) The power to review any decree or order is set out under order 45 rule (1) of the *Civil Procedure Rules* as follows:-

"Any person considering himself aggrieved –



- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.” Emphasis mine.

Section 80 of the *Civil Procedure Act* provides that: -

“ Any person who considers himself aggrieved –

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

(20) It is clear from the above that “any person” may seek the remedy of review of a decree or order. However, he must satisfy the following requirements:-

1. Show that there is a discovery of new and important matter or evidence which was not within his knowledge or could not be produced earlier.
2. Demonstrate that there is some mistake or error apparent on the face of the record.
3. Show any other sufficient reason.
4. Make the application without unreasonable delay.

(21) The applicant has not satisfied any of those requirements to warrant the orders sought. It is clear from her own supporting affidavit that she has always been aware about the litigation regarding the suit land. There is no error or mistake apparent on the face of the record with regard to the consent order recorded on June 4, 2008 between the plaintiff as the registered proprietor of the suit land and the applicant’s brother. Most importantly, the prayer to review the consent order dated June 4, 2008 is being filed 14 years after the event, a delay which is clearly unreasonable and has not even been explained.

(22) The prayer for review is not available to the applicant.

(23) And with regard to the setting aside and/or discharging the consent order, it was held in *Brooke Bond Liebig v Mallya* 1975 E a366 that: -

The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances e g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reason as would enable a court to set aside or rescind a contract.”



The above was also the position in the earlier decision of *Hirani v Kassam* 1952 19 E A C A 131 where the court citing Seton On *Judgments And Orders* 7th Edition Vol 1 page 124 said: -

*Prima facie* any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or actions, and those claiming under them ..... and cannot be varied or discharged unless obtained by fraud or collusion by an agreement contrary to the policy of the court ..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

24. When the consent order was recorded on June 4, 2008, the applicant’s brother was acting in person having let go his counsel Wanyama Wanyonyi Advocate through a Notice of Cessation of Advocate and a Notice of Intention to Act in person dated May 4, 2007 and filed on the same day. The applicant suggests in paragraph 5 of her supporting affidavit that her brother Richard Wanyonyi could not have signed the consent since he “was declared a person of unsound mind since the year 2001 before the institution of this suit.” However, the medical report by Dr Dickson O Nyamogo which she has produced relate to one Richard Wakasiaka Lunani and there is no evidence to suggest that it is the same person as Richard Wanyonyi. It also appears from paragraph 6 of the applicant’s supporting affidavit that her complaint about the consent order is that the plaintiff registered himself as the proprietor of the suit land. This is how she has averred: -

6 “That neither my late father nor my brother Richard Wanyonyi has ever entered in any written land sale agreement over the same land parcel and the purported consent recorded on June 4, 2008 is a total forgery since the plaintiff instead registered the whole land parcel measuring 4.5 acres into his name which prompted me to request I be furnished with Court file copies and proceedings.”

- 25 I have already reproduced the consent order which was adopted on June 4, 2007 as a judgment of this court. It is clear from the said judgment that the suit land was to be sub – divided into two portions with the plaintiff retaining 3 acres and Richard Wanyonyi the applicant’s brother 1.5 acres. If the plaintiff proceeded to register himself as the proprietor of the whole suit land rather than the 3 acres, and that appears to be the applicant’s complaint, that does not render the consent order invalid. All that Richard Wanyonyi needed to do was to extract the decree and file it with the Land Registrar Bungoma for execution or take out proceedings to cite the plaintiff for contempt. A lawful consent order is not invalidated by subsequent events. It can only be considered to have been obtained through fraud, misrepresentation, collusion against public policy or other vitiating circumstances which existed at the time when it was signed by the parties and adopted as a judgment of the court. In the circumstances of this case, the applicant has been unable to demonstrate that the consent order executed on May 2, 2007 and subsequently adopted as a judgment of this court on June 4, 2008 is liable to be set aside or discharged.

(26) That prayer is accordingly rejected.

(27) The up – shot of all the above is that the Notice of Motion dated April 6, 2022 is devoid of any merit. It is dismissed with costs to the plaintiff.

BOAZ N OLAO.

JUDGE

21ST SEPTEMBER 2022.



RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 21ST DAY OF  
SEPTEMBER 2022 BY WAY OF ELECTRONIC MAIL.

BOAZ N OLAO.

JUDGE

21ST SEPTEMBER 2022.

