



**Zameen Land & Sand Co Ltd v Jirani (Environment & Land Case
E005 of 2021) [2022] KEELC 14540 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14540 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E005 OF 2021**

AE DENA, J

OCTOBER 21, 2022

BETWEEN

ZAMEEN LAND & SAND CO LTD PLAINTIFF

AND

AMANA SAID JIRANI DEFENDANT

RULING

Background

1. The plaintiff commenced this suit by way of a plaint dated October 18, 2021. It is the plaintiff's case that it is the duly registered owner of the suit parcel Kwale/galu Kinondo/683. That it entered into a land sale agreement with the defendant on April 2, 2021 for a consideration of Kshs 35,000,000/- [Thirty-Five Million]. Further that it was an express term of the agreement for the defendant to grant the plaintiff vacant possession of the suit property immediately after payment of the purchase price. That the defendant failed to do so leading to filing of this suit.
2. The suit was listed before this court for pretrial directions on February 8, 2022 when leave was granted to counsel for the defendant to respond to the suit and comply with pretrial requirements. The matter was again fixed on February 23, 2022 for pretrial directions on which date the defendant had not complied and I granted a further 7 days to enable them comply.
3. The defendant in response to the suit filed a statement of defence on March 8, 2022 and denied that they had refused to give vacant possession. The defendant prayed as follows; -
 - a. A declaration that the plaintiff are the absolute and indefeasible owners of the suit property
 - b. That the defendant be allowed to give the plaintiff vacant possession.
4. On March 14, 2022 parties appeared before me for pretrial directions when the court was informed both parties had complied with order 11. Counsel for the plaintiff sought an early hearing date for



the reason that the defendants had admitted to the claim which was confirmed by the counsel for the defendant. In view of this the court was inclined to allow parties to pursue amicable settlement and set down the matter for mention on April 14, 2022 for recording of a consent or in absence thereof further directions.

Consent

5. On April 1, 2022 the parties in a letter dated March 25, 2022 filed a consent with a view of having the same adopted as an order of the court. The same was in the following verbatim terms;
 - a. Judgement be entered in favour of the plaintiff being the absolute and indefeasible owner of the suit property being Kwale/galu Kinondo/683.
 - b. That the defendant to grant vacant possession of the suit property being Kwale/galu Kinondo/683 to the plaintiff
 - c. That the plaintiff herein to assume possession of Kwale/galu Kinondo/683 henceforth.
 - d. That this matter be marked as fully settled.
6. It is noteworthy that in the intervening period the court became aware that there was a pending case touching on plot Kwale/Galu Kinondo/683 Kwale ELC Petition No 7 of 2021 *Waterbeach Front Properties Limited & another versus National Land Commission & 2 others*, the same suit property herein. Briefly In summary, the petitioners in Kwale ELC Petition No 7 of 2021 were able to prove that they were the registered bonafide owners of the suit property Kwale/Galu Kinondo/683. That the register of the suit property Kwale/Galu Kinondo/683 was closed on February 11, 2003 after its subdivision into plots 1515 and 1516. However, on 26/4/2018 the subdivided land was reverted to Kwale/Galu Kinondo/683 and registered in the name of Omar Salim Bengo. The reversion and subsequent registration led to the filing of Kwale ELC Petition Number 7 of 2021 and whose judgement quashed the registration of the suit parcel in the names of Omar Salim Bengo. The ownership of the land in my judgement delivered on 16/5/2022 was thus reverted back to Waterbeach Front Properties Limited and Simba Oryx Limited. The full facts can be found in the proceedings and judgement of Kwale ELC Petition No 7 of 2021.
7. When the present matter came up before me on April 4, 2022 for mention I informed counsels on the above suit and made an order that counsel peruse the file and decide how they want to move forward. On May 12, 2022 upon perusing the file Mr Oyas submitted that they had perused the file and what was happening in the other suit did not affect what was happening in the present suit. That it was for the registrar and the National Land Commission to answer to the issues therein. He stated the consent was properly before the court. Mrs Kirui for the Plaintiff urged that her client was not aware of the previous proceedings when they bought the suit property. This court issued orders for the parties to file written submissions on the issues for consideration, which they complied.

Submissions of the parties

8. The plaintiff's submitted that the defendant had agreed to enter into a consent with the plaintiff to grant vacant possession of the suit property. That during due diligence there were only a few structures which the defendant had at the time of purchase promised would be cleared. That the plaintiff was a bonafide purchaser for value. Counsel relied on the provisions of sections 26(1) of the *Land Registration Act* 2012 and 24(a) and article 40 of the *Constitution of Kenya 2010* including the holding in *Lawrence Mukiri v. The Attorney General & 4 others* (2013) eKLR.



9. The defendant submitted on where parties have entered into a consent whether the court is automatically obliged to accept and enter the same as an order of the court. Relying on the definition in *Fatuma Mohamed Haji & another v. African Banking Corporation Limited & 4 Others* (2020) eKLR it was submitted that a consent had the effect of actualizing the aspirations in article 159(2) of the *Constitution* geared towards promotion of alternative forms of dispute resolution and the overriding objectives of the *Civil Procedure Act*. Reliance was also placed in the case of *National Land Commission v Attorney General & 6 others* (2014) eKLR in buttressing the point that the judiciary should at all times in resolving disputes be guided by the Constitution. That the purpose of a consent judgement was for the parties to the same to inform the court that they have composed all their differences in a manner suitable to themselves without asking the court to make any further decision. That parties know how best to conduct their affairs and the consent was indeed a contractual agreement to resolve their differences to their satisfaction. Citing *Zacharia Okoth Obado v Edward Akong'o Oyugi and 2 Others* (2014) eKLE it was urged that it would be in order for the court to adopt the consent as the same was in accordance to the Constitution and adoption of the same has not been declared unconstitutional neither is it null and void. That the consent was freely entered into by the parties without any coercion, fraud or undue influence from either parties and their advocates who were certainly aware of all material facts and there could have been no mistake or misunderstanding.

Analysis And Determination

10. I have carefully considered the submissions of the parties in respect of the proposed consent. I will adopt the same issue as identified by the defendant.
11. Indeed this court associates with the dictum of Justice CK Yano in *John Kilonzo Ndivo v Everton Coal Enterprises Limited & 3 others* [2020] eKLR where he stated thus;-
'...The overriding objective provided for under sections 1A and 1B and the inherent power of the court under section 3A are meant for the attainment of justice to the parties who come to court. The court is therefore under a statutory obligation while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder to give effect to the overriding objective and in order to attain this objective, the court must strive towards ensuring the efficient disposal of proceedings at a cost affordable by the respective parties.'
12. The overriding objective of the *Environment and Land Court Act* 2011 is in tandem with the above and is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the act as read together with article 162[2] of the *Constitution of Kenya 2010*.
13. I have already enumerated on the history of this suit property and the import of the judgement that this court delivered in respect of the same suit property which this court is invited to adopt a consent judgement. The ownership of Kwale/Galu Kinondo/683 has already been determined in favor of another party who is neither the defendant herein nor the plaintiff. I have read the authorities cited in support of the fact that this courts hands are tied, parties having freely entered into the consent without coercion or fraud. The first limb of the consent is to the effect that Judgement be entered in favour of the plaintiff being the absolute and indefeasible owner of the suit pr operty Kwale/galu Kinondo/683. Indeed, I have seen the title document in favor of the plaintiff in the plaintiffs list of documents filed herein together with the plaint. My main issue is the existence of a judgement that has already conferred ownership to another party which I'm not aware has been overturned on appeal and which therefore still stands as a judgement of this court. It is not whether the consent has been entered through fraud or coercion. Indeed, I'm aware of the concept of freedom of contract but the circumstances of this suit are to me unique and which call for caution on my part. I ask this question,



would a judge having knowledge of the existence of another judgment render yet another judgement in contradiction to its own judgment in respect of the same subject matter in the name of upholding the principle of alternative dispute resolution? In my view no.

14. It is trite that a consent between the parties remains as a contract between the parties until is adopted as an order of the court. The consent filed herein therefore remains just an agreement between the parties. What is before me is whether I should adopt or not and not whether I should review the consent or vacate it. This court declines to adopt the same as an order of this court for the reasons given.
15. But what next considering the nature of the defence filed herein and further that this same court would have to still render itself on the final disposal of this suit? It is only fair that I avail an opportunity to the parties to address me on whether this suit can proceed to full hearing in the manner in which it is presented and in view of the circumstances.
16. The upshot of the foregoing is that I decline to adopt the consent filed by the parties in the letter dated March 25, 2022 filed on April 1, 2022 as an order of this court. The parties shall be given an opportunity to show cause within 21 days of today's date why the present suit should be retained for full hearing. I make no orders as to costs.

Orders accordingly

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 21ST DAY OF OCTOBER, 2022

A.E. DENA

JUDGE

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

Ms Kirui for the Plaintiffs

Mr. Oyas for the Defendant

Mr. Denis Mwakina- Court Assistant.

