



**Nairobi City Council (Now being Nairobi City County Government  
v Commissioner of Lands & 2 others (Environment & Land Case  
5 of 2021) [2022] KEELC 15490 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15490 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 5 OF 2021  
LC KOMINGOI, J  
NOVEMBER 24, 2022**

**BETWEEN**

**NAIROBI CITY COUNCIL (NOW BEING NAIROBI CITY COUNTY  
GOVERNMENT) ..... PLAINTIFF**

**AND**

**COMMISSIONER OF LANDS ..... 1<sup>ST</sup> DEFENDANT**

**GAMEX SHELTER HUNTERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**MUTHITHI INVESTMENTS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated June 25, 2020 brought under section 1A, 3, 3A and 63 (e) of the Civil Procedure Act, and order 51 rule 1 of the Civil Procedure Rules, section 13 and 19 of the Environment and Land Act and the inherent power of the court.
2. It seeks orders:-
  1. Spent.
  2. Spent.
  3. Spent
  4. That the honourable court be pleased to review, vary, set aside and/or discharge its orders made on February 8, 2000 vesting the property herein being LR no 23917 Nairobi on the 3<sup>rd</sup> defendant/respondent.
  5. That upon such review, the suit herein be reinstated and be heard on merits.



6. That costs of this application be provided for.
3. The grounds are on the face of the application and are set out in paragraphs 1 to 21.
4. The application is supported by the affidavit of Joseph Omosa Advocate of the plaintiff sworn on June 25, 2020. It is also supported by the affidavit of J G Mwangi, Chief Officer Lands Department at Nairobi City County sworn on June 25, 2020.
5. The application is opposed. There is a replying affidavit sworn by Peter Thurania Ndungu, a director of the 3<sup>rd</sup> defendant/respondent.
6. On April 22, 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.
7. I have considered the notice of motion, the affidavits in support and the annexures. I have also considered the affidavits in response, the written submissions and the oral highlights. The issue for determination is whether this application is merited.
8. The 3<sup>rd</sup> defendant/respondent, after it was concluded that the 2<sup>nd</sup> defendant/respondent did not have a valid title, approached the plaintiff/applicant seeking to be allocated LR no29917 (the suit property)
9. Parties negotiated and the 3<sup>rd</sup> defendant/respondent paid the plaintiff for the suit property. This led to the consent order issued on February 8, 2000 vesting the suit property on the 3<sup>rd</sup> defendant/respondent. The 3<sup>rd</sup> defendant/respondent duly paid for the property and complied with all requirements.
10. Pursuant to the consent order dated February 8, 2000, the plaintiff/applicant herein issued a lease dated February 5, 2001 over the suit property to the 3<sup>rd</sup> defendant/respondent. It is the 3<sup>rd</sup> defendant/respondent's submission that the lease issued to the 3<sup>rd</sup> defendant/respondent has nothing to do with the fraudulent certificate of title held by the 2<sup>nd</sup> defendant/respondent.
11. It is not in dispute that the suit property has been subject to various suits before the Environment and Land Court and the plaintiff/applicant has participated in some of them. They are:-
  - (i) ELC Case no 437 of 2014: Muthithi Investments vs Andrew Kyendo and others.
  - (ii) Court of Appeal in Civil Application no Nai. 310 of 2014 (UR 332/2014), Dick Ouma Ochieng & 10 Others v Muthithi Investments Ltd.
  - (iii) ELC Application no 1084 of 2014 (OS) Mary Ouma Odhiambo & 74 Others vs Muthithi Investments Ltd.
12. In December 2019, eviction orders were issued in ELC 437 of 2014, Muthithi Investments vs Andrew Kyendo & Others against the squatters who occupied the suit property. The 3<sup>rd</sup> defendant/respondent partially executed the eviction orders after which they entered into a sale agreement with the occupants. The suit property has been sold to the current occupants.
13. In the case of *Brook Bond Liebig Ltd v Mallya* [1975] EA 266 the Court of Appeal held that:-

“A consent order cannot be varied or discharged unless obtained by fraud or collusion, or 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”.



And the *Flora Wasike case* (Supra) stating:

“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....

In *Purcell v FC Trigell Ltd* [1970] 2 All ER 671, Winn L) said at 676;

“It seems to me that, if the 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, and I see no suggestion here that any matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract”

14. Similarly, in *Hirani v Kassam* [1952] EA 131 the Court of Appeal of East Africa held that:-

“*Prima facie*, any order made in the presence and with consent of 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 if the 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.”

15. I find that the plaintiff/applicant has not demonstrated any fraud as against the 3<sup>rd</sup> defendant/respondent. In the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR. It was held that:-

“.....It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR (G&F) 742 wherein the court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”  
In cases where fraud is alleged, it is not enough to simply infer fraud from the facts”.

16. I agree with the counsel for the 3<sup>rd</sup> defendant/respondent’s submission that the issue of consent judgment was considered in ELC 437 of 2014: *Muthithi Investments vs Andrew Kyendo & Others* where it was held that the lease to the 3<sup>rd</sup> defendant was duly issued by the plaintiff. I find that the application does not meet the threshold for setting aside the consent judgment dated February 8, 2000.

17. The consent order has been in force for twenty-two (22) years. The delay in seeking the reconstruction of the alleged missing file has not been explained. In the case of *Joshua Ngatu v Jane Mpinda & 3 Others* [2019] e KLR the court stated as follows:-

“Thus one of the legal basis of the doctrine of laches is ensuring that legal claims are brought forth in a reasonable timely period so that evidence and reliable witnesses are can be found. As pointed out earlier on, the transaction that culminated in alienation of the suit land from the plaintiff to other parties occurred sometime in 1977. Going by plaintiff’s application of 2008 in ELC 132 of 2007, and taking into account the contents of his supporting affidavit of 4.5.2018, plaintiff was aware of this aged transaction. No plausible explanation has been advanced as to why he is lodging the claim at this time.....



This is a court of law as well as a court of equity and the court will not hesitate to stop the plaintiff in his tracks because he is guilty of laches. Plaintiff is a dishonest litigant, who has abused the court's processes and the court will exercise its discretion to ensure that this abuse is brought to an end. In light of the foregoing findings, it is unnecessary to consider the application of May 4, 2018. I find that the preliminary objections filed herein by defendants are merited. This suit is hereby dismissed with costs to defendants.”

18. Similarly in *Pop-in (Kenya) Ltd & 3 Others v Habib Bank A.G Zurich* [1990] e KLR the Court of Appeal held:-

“Parties are not permitted to begin fresh litigation because of the new views they may entertain of the law or the case, or new versions which they may present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end except when legal inequity is exhausted”.

19. I find that the delay in bringing this application has not been explained.  
20. I find no merit in this application and the same is dismissed with costs to the 3<sup>rd</sup> defendant/respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

.....

**L KOMINGOI**

**JUDGE**

**In the presence of:-**

**No appearance for the plaintiff/applicant**

**No appearance for the 1<sup>st</sup> – 3<sup>rd</sup> defendants/respondents**

**Mutisya – court assistant**

