



**Mitalo v Okello (Environment and Land Appeal E028 of 2024)
[2025] KEELC 1148 (KLR) (10 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E028 OF 2024**

AE DENA, J

MARCH 10, 2025

BETWEEN

JOHN OUMA MITALO APPELLANT

AND

JOSEPH OKELLO OKELLO RESPONDENT

RULING

1. The subject of this ruling is a consent mooted by the firm of Lugano and Achura Advocates on behalf of the Appellant and Ko'winoh & Company advocates on behalf of the Respondent. The proposed terms shall be set out later in this ruling.
2. To put matters into perspective the Appellant herein was the Defendant in Bondo Principal Magistrates Court ELC Case No. E 38 of 2022 Joseph Okello Okello (suing as the legal representative of the Estate of the late Malanga Okelo) v John Ouma Mitalo. The trial court rendered its judgement in the matter on 19/12/2023 wherein the court found that the Plaintiff had acquired a portion of East Yimbo/Nyamonye/1798 by way of adverse possession and ordered excision of the same from the title and registration in the Plaintiffs name. Both parties were represented by counsel during the trial who are different from the present counsel.
3. The Defendant then applied before the trial court for setting aside of the above judgement and an order for retrial of the entire suit. The same was on the basis that counsel acting for the defendant did not furnish the court with crucial documentation in support of the defendants evidence. That had the same been presented the outcome would have been in the defendants favor. The nature of the documents were disclosed. The advocate had failed to respond to him why the said documents were never presented. That though the defendant had filed an appeal he had been advised a retrial was the appropriate path to take. That mistakes of counsel should not be visited upon the client. Counsel for the plaintiff informed the court she did not object to the application.



4. The trial court dismissed the application noting that the application was one for review of judgement under section 80 of the *Civil Procedure Act* disguised as one for setting aside. The trial court held that the application did not meet the threshold for review since the evidence sought to be adduced was within the knowledge of the defendant but he never tendered the same at the hearing. There was also no error apparent on the face of the record. Further that the court was functus officio and could not revisit and set aside its own merit judgement, equivalent to sitting on appeal of its own decision.
5. It is noteworthy that that the present counsels purportedly filed a consent allowing the application to set aside which the trial court failed to consider for noncompliance with the provisions of order 9 of the *Civil procedure Rules*.
6. Dissatisfied with the above ruling the defendant filed the present appeal against the above and the judgement. The appellant prays that the ruling be set aside and the applicants application be allowed by granting leave to the two law firms herein to act for the appellant and respondent respectively and the judgement of the trial court to be set aside for retrial of the entire suit.
7. The following are the terms of the consent placed before court for adoption; -
 1. That the appeal herein be allowed with each party bearing its own costs.
 2. That the judgment of the court delivered on the 19th day of December 2023 in Bondo PM ELC E038 of 2022 is hereby set aside for a retrial of the entire suit.
 3. That leave is hereby granted to the firm of Lugano and Achura Advocates to come on record on behalf of the Defendant in place of the firm of Odongo Awino & Company Advocates in Bondo PM ELC E038 of 2022.
 4. That leave be and is hereby granted to the firm of Kowinoh and Company Advocates to come on record on behalf of the Plaintiff in place of the firm of Owenga Ombuya & Company Advocates in Bondo PM ELC E038 of 2022.
8. The matter was fixed for mention on 11/02/2025 when I deferred it to 20/2/2025 to enable the court review the consent vis a vis the proceedings of the trial court. On 20/2/2025 I invited the parties to submit on why the court should adopt the consent in terms of orders 1 and 2 above. I however allowed items 3 and 4 as to representation to enable the counsels to be properly before court.

Submissions

9. The appellant submissions were filed on 27/02/2025 and are dated 26/2/2025. Rehashing the events leading to the dismissal of the application dated 3/4/24 counsel submitted that the Appellant should in the interest of justice be given an opportunity to be heard and that the mistake of his previous counsel can be rectified. Reliance is placed on the case of *Belinda Muras & 6 Others v Amos Wainaina* [1978] KLR. That the consent order should be allowed in the interest of justice. The Respondent did not file submissions.

Determination

10. The main issue for determination is whether the court should adopt the consent herein.
11. The history of the matter has already been clearly set out in the background to this ruling. Of importance is the fact that the judgement that is sought to be set aside is a judgement that was subject of a full hearing where both the parties participated. The Appellant made an attempt to have the same set aside before the trial court and the court declined to do so and gave its reason. It appears to me that



the same parties through their new counsels now want to on their own motion and agreement between themselves to set aside the said judgement.

12. It is trite that a consent between the parties remains as a contract between the parties until it is adopted as an order of the court. Although parties are encouraged to resolve matters outside the court, I am afraid in so doing, the principles of law and the procedures that guide the court, must be brought to bear. The consent filed herein therefore remains just an agreement between the parties. I pondered over whether the court is automatically obliged to accept and enter consents presented before it? Is there room for rejection?
13. Firstly, I must state that it is not just a coincident adoption by the court has been made a requirement. It is to allow the court to have an opportunity to consider the proposals vis a vis the facts of the case. It is to allow the court to interrogate and or apply itself to whether it would be the proper agreement to adopt given the circumstances of the case in as much as parties have consented. It does not to me oust the discretion of the court. It is a check. What if a court records a consent which is illegal and or oppressive to one of the parties?
14. It is therefore a discretion of the court. Discretion must be exercised judiciously. What then should guide the court in the present case. I think one guideline that would stand out is the legality of the proposed consent and which will entail whether the same is procedural. Others would be to ensure the terms of the consent are not vague, ambiguous and un-ascertainable. See SC Petition No.21 of 2015 between *Geoffrey M. Asanyo Vs Makana Motors, Multiple Sales Promoters & 2 Others* where the court cited the Supreme Court of Nigeria in finding the court of appeal right in refusing to record the terms of a consent for the same reasons.
15. I also find it appropriate to add alignment to public policy which I have drawn from the Court of Appeal in the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR P. 485 where the court held thus; -

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.” (Emphasis is mine.)
16. Now back to the present consent. I see the consent as one that seeks to get the very orders that parties were seeking in the lower court through the back door. This is circumventing the merit review of the judgement and ruling of the lower court on appeal to this court. This is an abuse of the court process and unprocedural. It would be in my view to set a very dangerous precedent. I say so because the consent being sought for adoption is not aimed at ultimately resolving the dispute of ownership but to have the retrial of the entire suit.
17. For the foregoing reasons this court declines to adopt terms 1 and 2 of the proposed consent dated 4th November 2024.
18. The upshot of the foregoing is that I decline to adopt the consent filed by the parties in the letter dated November 4, 2024. The appeal will therefore proceed for determination on its merits.

DELIVERED AND DATED AT SIAYA THIS 10TH DAY OF MARCH 2025

HON. LADY JUSTICE A.E. DENA

JUDGE



10/3/2025

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

Mr. Lugano for the Applicant

No Appearance for the Respondent

Court Assistant: Ishmael Orwa

