



**Magiri v Abongo (Environment and Land Case Civil Suit
184 of 2010) [2025] KEELC 2987 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 2987 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT 184 OF 2010**

AY KOROSS, J

APRIL 1, 2025

BETWEEN

PATRICK MWANGI MAGIRI PLAINTIFF

AND

MICHAEL ABONGO DEFENDANT

RULING

Plaintiff's case

1. The notice of motion filed by the plaintiff dated 4/11/2022 is the subject of determination and is brought under several provisions of the law. In it, the plaintiff sought the following reliefs from this court:
 - a. Spent.
 - b. That the honourable court be pleased to set aside orders issued on 19/02/2018, dismissing this suit for want of prosecution.
 - c. That the honourable court be pleased to reinstate the suit herein and enforce the consent order dated 7/12/2011 by effecting clause (c) of the plaint dated 10/09/2010 as the judgment of the court.
 - d. That the honourable court be pleased to issue a decree in terms of prayer (c) above.
2. The motion is premised on the grounds set out on its face and on the supporting affidavits of counsel Ms. Nelius Njoki Macharia and of the plaintiff, which they both deposed on 4/11/2022.
3. The plaintiff also swore a further affidavit dated 14/03/2024. The contents of these affidavits were more or less the same.



4. Briefly, they averred the parties entered into a consent dated 7/12/2011, which was adopted by the court; however, part of the consent was fulfilled whereby the defendant paid the plaintiff the sum of kshs. 800,000/- but defaulted in transferring land reference no. 12715/4584 (original no. 12715/426/36) to the plaintiff and cater for the transfer fees.
5. As a result, the plaintiff was constrained to transfer land reference no. 12715/4577 (original no. 12715/29) to the defendant. They contended that the plaintiff had numerously pursued the defendant to settle the consent judgment to no avail.
6. That in the process of the plaintiff's alleged pursuit of the defendant, this court dismissed his claim on 19/02/2018 under the provisions of Order 17 Rule 2 (1) of the Civil Procedure Rules (CPR).
7. The plaintiff asserted the delay in prosecuting the suit was not deliberate, as he was accommodating the defendant, the motion had not been brought with delay, and the mistakes of his advocates should not be visited upon him.
8. They stated the portion of the consent whereby the defendant was to transfer land reference no. 12715/4584 (original no. 12715/426/36) to the plaintiff was unattainable as the defendant had since transferred this land to one Joab Henry Omondi.
9. They were apprehensive the plaintiff's enforcement of the judgment could be caught by effluxion of time and stated he had always been ready, willing and able to comply with the terms of the consent and urged this court to invoke Article 159 (2) (d) of *the Constitution* and grant the orders sought.

Defendant's case

10. The defendant opposed the motion by the replying affidavit of his counsel, Ms. Masara Gecheo, which she swore on 27/02/2024.
11. In it, counsel admitted the defendant had complied with parts of the consent; however, he was constrained from complying with other terms as the plaintiff neglected to hand over the title document to the defendant, hence the default.
12. Counsel argued a consent order is binding on the parties and it could only be set aside on grounds of misrepresentation, mistake or fraud, and the only way to approach the court in such an instance is by way of a review.
13. As for the dismissal of the suit, she stated the motion had been filed with inordinate delay and re-opening the case would prejudice the defendant, and maintained litigation must come to an end.

Parties' submissions

14. The court directed parties to file written submissions, and the submissions were capped at 5 pages.
15. In compliance, the plaintiff's alleged law firm on record M/s. Maina & Macharia Advocates LLP filed written submissions dated 25/06/2024, and in them, the counsel framed one issue for determination: whether the plaintiff's suit against the defendant should be reinstated and whether the court should proceed to issue judgment in terms of the consent recorded on 7/12/2011.
16. The defendant's law firm on record M/s. Rachier & Amollo LLP filed written submissions dated 8/11/2024 and framed the following issues for determination: whether the suit should be reinstated, whether the court should issue a judgment based on the consent and whether the motion has been unreasonably delayed.



17. Unfortunately, the defendant's submissions did not comply with the directions of the court for surpassing the page nos. and this court adopts the position taken by the apex court in *Okoit & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others* [2023] KESC 69 (KLR) and hereby strikes out these submissions.
18. Therefore, upon identifying and considering the issues for determination, this ruling shall, later on in its analysis and determination, consider the plaintiff's counsel's arguments on the particular issue and also bear in mind the law and judicial precedents.

Issues for determination

19. I have carefully considered the motion, grounds in support, and affidavits either in support or in opposition to the motion together with the plaintiff's submissions, and the issues arising for determination which shall be dealt with separately are: -
 - a. Whether a consent judgment was adopted by the court on 7/12/2011.
 - b. If (a) is in the affirmative, did this court have jurisdiction to dismiss the suit?
 - c. Whether the law firm of Maina & Macharia Advocates LLP is properly on record for the plaintiff.
 - d. What orders should this court issue, including an order as to costs?

Analysis and Determination

Whether a consent judgment was adopted by the court on 7/12/2011.

20. It is settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out.
21. In the instance of this case, on 7/12/2011, the parties' counsels appeared before the court and entered a consent in the following terms: -

“By consent the defendant to pay the plaintiff within 60 days from today the sum of kshs. 800,000/- and further transfer plot no. 12715/4584 original no. 12715/426/36 as more delineated in land survey plan number 263931 to the plaintiff PATRICK MWANGI WAGIRI.

The plaintiff PATRICK MWANGI WAGIRI do transfer plot no. 12715/4577 (original no. 12715/426/29) as delineated in survey plan number 263932 to the defendant MICHAEL ABONGO.

The transfer fees and other incidentals to give effect to the transfer to be met by the defendant.

In default of any one clause above, the prayer (c) of the plaint dated 10/9/2010 to be effected as the judgment of the court.”

22. From the record, this prayer (c) that has been alluded to in the plaint states as follows: -

“An order directed as against the defendants (sic) requiring them (sic) to restore the plaintiff's property to its original state and/or alternatively demolition and eviction orders”



23. From the record, the advocates for the parties signed the said consent judgment, and it was adopted as a judgment of the court.
24. Afterward, the matter was slated for mention, and only the defendant's counsel attended court on the mention date of 23/5/2012. From that date onwards, all parties were a no-show, leading to the dismissal of the suit on 19/2/2018 under the provisions of Order 17 Rule 2 (1) of the CPR.
25. It is unfortunate that the defendant's counsel, who was present in court on 19/2/2018, did not inform the court of the existence of the consent judgment because had she done so, the court would not have issued the orders it did.
26. From the record, the said consent judgment has never been set aside, stayed, or appealed against. This court therefore finds the consent judgment was and still is a conclusive valid judgment of this court.
27. The plaintiff contends there was a breach of the terms thereof, nonetheless, the said judgment gave him an alternate relief as found in clause (c) of the plaint.
28. It follows the reasons for not extracting a decree since the consent was adopted as a judgment close to 14 years ago to date are best known to the plaintiff, and he has to bear the legal consequences of his inaction.

If (a) is in the affirmative, did this court have jurisdiction to dismiss the suit?

29. Order 17 Rule 2 (1) of the CPR by which the suit was dismissed deals with suits which have not been concluded, and it provides as follows: -

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”
30. In light of the existence of a judgment as of 19/2/2018, this court finds it did not have jurisdiction to dismiss the suit in the manner it did, save for if the consent judgment had been set aside by an order of the court, which is not so.
31. Consequently, this court finds the dismissal was a nullity ab initio, and any determination it made on 19/2/2018 is amenable to being set aside ex debito justitiae.
 - c. Whether the law firm of Maina & Macharia Advocates LLP is properly on record for the plaintiff.
32. Order 9, Rule 9 of the CPR captures the post-judgment process where an advocate or party seeks to come on record in place of an advocate who was previously on record. This provision provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”



33. This proviso does not impede a litigant from choosing an advocate of his choice, and the mischief of this legal provision is to cure instances of a litigant circumventing paying the legal fees of an advocate who was previously on record and also to inform the court and parties of such change.
34. However, it outlines procedures to be adhered to and if a party seeks to change Advocates, post-judgment, the first scenario is that the incoming advocate or litigant who now wants to act in person must make a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person.
35. In the alternate scenario, the incoming advocate or litigant in person has to obtain the written consent of the previous advocate on record, file the consent in court, and then seek leave to come on record.
36. In the circumstances of this case where there is a consent judgment that was adopted as a judgment of the court on 7/12/2011, it follows the law firm of Maina & Macharia Advocates LLP did not adhere to the legal steps envisaged in the law when they filed the motion and notice of change of advocates dated 4/11/2022.
37. Thus, this court finds the instant motion is incompetent and hereby strikes it out, and since it is trite law costs follow the event, this court awards costs to the defendant. Ultimately, and in dealing with the last issue, this court hereby issues the following final disposal orders: -
 - a. The notice of motion dated 4/11/2024 is hereby struck out with costs to the defendant.
 - b. The orders given on 19/02/2018 dismissing the plaintiff's suit with costs are hereby set aside and/or vacated in their entirety.
 - c. This file is hereby effectively marked as closed.

Orders accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 1ST DAY OF APRIL, 2025.

HON. A. Y. KOROSS

JUDGE

01. 04. 2025

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFRENCING PLATFORM**

In the presence of;

Mr. Macharia for plaintiff/applicant.

M/s Masara for respondent.

Ms Kanja- Court Assistant

