



**Ngoge v Otieno; Ngoge (Interested Party) (Environment and Land
Case E005 of 2023) [2025] KEELC 5322 (KLR) (9 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND CASE E005 OF 2023**

FO NYAGAKA, J

JULY 9, 2025

BETWEEN

PETER ODIWUOR NGOGE PLAINTIFF

AND

JOSEPH ODAK OTIENO DEFENDANT

AND

LUCAS ACHUKU NGOGE INTERESTED PARTY

RULING

Brief Facts

1. The proposed Interested party/Applicant filed the instant application dated 9th September, 2024 seeking the following orders:
 1. That leave be granted to enjoin Lucas Achuku Ngoge as a Co-Plaintiff in this matter.
 2. That this Honourable court be pleased to set aside judgment delivered on 25th October, 2023 by the Honourable Justice G.M.A. Ongondo (J).
 3. That the costs of this application be provided for.
2. The Application was based on grounds set out and supported by the Affidavit of Lucas Achuku Ngoge the Applicant sworn on 9th September, 2024.
3. He stated that he was the brother to the Plaintiff/1st Respondent and the Defendant/2nd Respondent's nephew. He went on to state that he was one of the beneficiaries of the estate of Meshack Ngoge Otieno (deceased) whose estate the Plaintiff wished to be registered in his name as a trustee of the rest of his siblings.



4. He further stated that together with the rest of the beneficiaries, they had not consented to the Plaintiff being issued with the Grant Ad Litem. He stated that the Plaintiff went ahead to this court and was issued with orders that the suit be divided equally between himself and the Defendant.
5. He stated that the judgment ought to be set aside on the grounds that the Defendant and his deceased father should share the portion of the suit land West Kasipul/Kotieno Kochich/384 equally.
6. He also stated that together with his siblings, they are all adults of sound mind and did not agree to the land being held by a trustee. He added that together with his siblings, they were never aware of the Plaintiff's actions touching on the suit property.
7. He urged the court to allow the application as prayed.

Response

8. The Plaintiff filed a Relying Affidavit sworn on 31st October 2024. In it he deposed that in 1993, his late grandmother, Sarah Otieno Opere who was the biological mother of the Defendant partitioned her parcel of land known as West Kasipul/Kotieno Kochich/354 into two portions using euphorbia trees. She then gifted the portion of the right side of her homestead to the Defendant and his children. The portion to the left side of the homestead was gifted to the Plaintiff and his siblings because the Plaintiff's father Meshack Ngoge Otieno who was the plaintiff's grandmother's last-born son, was deceased. Further, according to the grandmother, the defendant was instructed to hold his portion on his own behalf and in trust for all of her children while the Plaintiff as the first-born son of the late Meshack. The Plaintiff was to hold the portion which would have been gifted to the late Meshack Ngoge Otieno and his children on his behalf as the plaintiff and in trust for all the siblings including the applicant.
9. He deposed that therefore the consent letter presented and recorded before the court which was one which had culminated into the consent judgment of 25th October 2023 accurately captured the wishes and the trust which was created by the deceased grandmother. He added that the applicant had no authority and legal right to rewrite the said gift wishes and trust which were created by the grandmother as captured in the said consent judgment.
10. Further, since the applicant was not the administrator of the estate of the late Sarah Opere, he had no locus standi to apply to be enjoined in the suit that had already been amicably settled in his own best interest via the consent entered on 25th October 2023 in line with the grandmother's wishes.
11. He added that the need by the applicant to be enjoined as a Co plaintiff implied that he fully agreed and wanted to be fully associated with everything which the plaintiff had pleaded and stated in the plaint together with the subsequent consent recorded. Further, it was irresponsible and contradictory for the applicant to apply to set aside the said consent judgment as recorded contrary to the wishes of the deceased grandmother and the detriment of the family of the late grandmother. He added that the late grandmother did not instruct the defendant to subdivide and distribute the portion which was gifted to the children of the late Meshack Ngoge, his biological father. He added that as an advocate of the High Court of Kenya and the eldest son of the late Meshak Ngoge to whom the responsibility as a trustee was vested by the grandmother, he, the plaintiff applied for the death certificate (sic) (correctly known as Certificate of Death) of the late Sarah Opere Otieno before petitioning the courts to issue letters of administration and late term so that he could bring an action which fortunately culminated into the consent judgment entered into in the best interest of the surviving family. It was spurious, unfounded and annoying for the allegations by the applicant to be made to the effect that the plaintiff



had threatened to bring down the applicant's house and evict him violently from the rural homestead which had hosted the entire family since the childhood.

12. The plaintiff deponed further that none of the siblings except the applicant had filed an application in the matter to complain about the consent judgment, which was recorded before the court. He denied abusing his responsibility as a trustee for the children of the late Meshack Ngoge Otieno, arising from the consent judgment. He added that the applicant was just rebellious and jealous about the trust which was vested upon the plaintiff by the late grandmother. Further, the applicant had not explained to the court why he had not petitioned the High Court as the administrator and beneficiary of the estate of the late Meshak Otieno and why he did not apply for the death certificate of the late Sarah Opere. He added that the applicant had never applied to be an administrator of the estate of Sarah Opere. He denied the contents of the supporting affidavit to the application. He added that the Court lacked jurisdiction to review and set aside the said consent judgment under the provisions cited by the applicant and that the applicant should have moved the court by a Notice of Motion and not through a baseless, incompetent Chambers Summons. He prayed that the Summons be dismissed with costs.
13. Equally, the Respondent/ defendant filed a Relying Affidavit he swore on 31st October, 2024. He repeated most of the contents of the depositions in the Replying Affidavit sworn by the plaintiff in Reply to the application. This court need not reproduce them. However, he added that he was the biological son of the late Sarah Opera Otieno and the late Meshack Ngoge was his younger brother. Further, the consent judgment recorded on 23rd October 2023 captured the wishes of the grandmother and the trust she had created in respect of the parcel of land in issue. Further, his two married sisters, namely WilKister and Salome, fully agreed and supported the said consent judgment as reflecting the wishes of the deceased mother. He repeated the deposition about the late grandmother dividing the land in 1993. He added that the problem with the applicant was that he did not want to cooperate and live peacefully and in harmony with his elder brother, the plaintiff who was an advocate and everybody else in the family. Further, the plaintiff had acted in good faith and in the best interest of everybody in the family, including the applicant, by bringing the instant suit by which the consent judgment was entered, reflecting their wishes and the trust committed by the deceased mother. He added that the applicant wanted belatedly to be enjoined in the matter, yet he fully agreed with the pleadings of the plaintiff. Further, he stated the applicant did not explain why he would want the consent judgment recorded to be set aside in line with Article 159(2)(d) and (c) of *the Constitution*.
14. His further position was that if the consent judgment was set aside, then the whole title in respect of the parcel of land parcel No. 354 would revert to his name. His further deposition was that the applicant was being disrespectful by bringing the gender summons without consulting the defendant, the family and the oldest son of the late Sarah Opere. He added that the applicant was procedurally abusing the process of the Court and disrespecting the wishes of his late mother.
15. The proposed party filed a Further Affidavit in response to the replying ones which had been filed.

The applicant swore a Further Affidavit on 15th December 2024. He deponed that he was the son of the late Meshach Ngoge who passed away in 1992 and Mrs. Felista Anyango Okoth who passed away in 2006 and the grandson of Sarah Opere Otieno who passed away in 1997. Both his father and mother lived, worked and died in Nakuru. He and the Plaintiff went to primary and secondary school in Nakuru before he was relocated to the rural home in 1995 where the suit land lies.

He denied that there was such a meeting in which the alleged trust was created because his late mother was still alive by that time. He denied that his grandmother created a trust, as alleged



and that there were no documentations or minutes or even a letter from the chief to support the existence of a trust. He annexed, as LC 1 a copy of the chief's letter.

He added that his late father was gifted by the grandmother with a portion of land being part of the suit land and the title deed was held in trust by his uncle Joseph Otieno for land parcel No. 354. While parcel No. 359 and the parcel held in the name of Omondi Mesa was collected and kept by Mr. Okayo Naaman under instructions from the 1st Respondent. His father's position was that the late mother demarcated the two portions. In 1995 and not 1993.

He added that one of the portions being parcel No. 354 was gifted to the defendant and the other portion to his late father. The grandmother did not mention which of the sides, whether the left or right belonged to anyone. He added that the plaintiff misled the court to issue the consent judgment which did not correctly capture the wishes of the grandmother. Further, the consent was not entered into in good faith. He added that the grandmother instructed the defendant to hold his portion on his behalf and his children, and the other portion was to be held by the late mother Felista Anyango for herself and her children before she died in 2006.

He deposed that the 1st Respondent had threatened him with death, eviction and demolition and the jail should he happen to build a house or put up a structure on the parcel of land in known as parcel No. 354. Further, it was wrong for the 1st Respondent to claim he was the bona fide owner of the parcel of land No. 354 merely because of the consent judgment herein.

He then gave instances when alleged threats had been made. He showed this through the acts of the first respondent. For instance, he deposed that on 10th February 2023, the 1st Responded together with one Namaan threatened to beat him and hire thugs to kill him. He reported the matter to Nyang'ieia Police Station and was issued with Occurrence Book (OB) number 05/10/2/2023. He annexed as LC3, a copy of the OB. Further, on diverse dates when the 1st Responded visited the rural home, he called on Mr. Denis Ochieng Oduol and warned him not to talk to him and cautioned that if he (applicant) built any structure on the suit parcel of land he would hire a tractor and demolish it.

He denied being rebellious or jealous. He added that the plaintiff was out to disinherit him. He deposed that the application was both procedural and any technicality on it would be cured by Article 159(2)(d) of *the Constitution* of Kenya and Section 3A of the *Civil Procedure Act*. He urged the court to look at two principles of equity to guide it. These are equity looks at the intent rather than the form and also that equity imputes an intention to fulfill an obligation. That equity is about the notion of fairness, morality and justice. He added that he would be prejudiced if the application was not allowed since he would be disinherited. He urged the court to dismiss the replying affidavits sworn in reply.

Submissions

16. Counsel for the Plaintiff filed his submissions dated 16th April, 2025. They were pretty long but the Court had the opportunity to read and consider them. Counsel for the Applicant filed his dated 24th February 2025. They were short but precise to the point. The Court has considered them too.
17. When the Court insisted to get the submissions of the Defendant, the Plaintiff who is also counsel and in whose office the Defendant's Replying Affidavit was drawn and filed through informed the Court that the said party was too and sickly as not to submit.
18. This Court wondered why it was that the Plaintiff was the one speaking on behalf of the said Defendant if not one way of shielding the truth from the fore. It wondered also when that happened and if indeed



it was the case, how it was that the said party was healthy enough to swear the affidavit in reply and even enter into the consent. This shall be considered in the analysis herein later.

19. Analysis and Determination

20. This court has carefully considered the application and submissions and the main issue for determination is whether or not to issue an order enjoining the Applicant as a Co-Plaintiff in this suit.

21. Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 provides for joinder of parties and sets the criteria for who can be joined. It provides as follows:

“The court may at any stage of the proceedings, either upon or without 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 the suit, be added”.

22. The above rule grants this court power to enjoin a party to a suit so that the issues in dispute can be effectively adjudicated upon where the court is of the view that it would be necessary to enjoin such a party to the suit.

23. In the instant case, the Applicant in line with prayer (1) seeks to be enjoined as a Co-Plaintiff. However, it is noteworthy that the citation and body of the application cites that the Applicant be enjoined as an interested party to the case.

24. The Applicant contends that he has a direct interest in the suit land West Kasipul/Kotieno Kochich/384 both on his own behalf and on behalf of his siblings by virtue of being beneficiaries to the estate of his late father Meshack Ngoge Otieno.

25. He particularly seeks that the judgment delivered on 25th October, 2023 by virtue of the consent entered into between the Plaintiff and Defendant be set aside on the ground that they never consented to the Plaintiff being their trustee to their deceased's father's estate or the right to be issued with the grant ad litem.

26. Consent judgments are not easily set aside. It is not a walk in the park to do so and it is for good reason that they be not set aside. It can only be set aside on account of fraud, coercion, misrepresentation and collusion.

27. In Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR,

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

28. In Wasike v Wamboko the High Court at Kakamega (Gicheru J, as he then was) held -

“1. A consent judgment or order has 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.



2. The *Civil Procedure Act* (Cap 21) Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid ab initio and should be rescinded or that there exist circumstances to warrant varying the decree.
 3. In this case, there were no grounds which would justify the setting aside of the consent judgment. Appeal dismissed.”
29. In *Brooke Bond Liebig Ltd V Mallya* [1975] EA 266 at 269 in which Law Ag P said:
- “A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”
30. In opining on when a consent judgment may be set aside, the Court of Appeal, in *SMN v ZMS & 3 others* [2017] eKLR, held as follows:
- “There is now a dearth of authorities on the law governing the setting aside of consent judgments, or orders, and we are grateful to counsel for citing some of them before us. Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is a necessity slightly higher than on balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High Court that he was involved in fraud or colluded with another advocate or person to subvert the cause of justice in a matter pending in court is certainly one of utmost gravity. It destroys the advocate’s honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charges....”
31. This court has carefully considered the court record together with the Plaintiff dated 14th September, 2023. It is a fact that the Defendant despite being the Plaintiff’s uncle, failed to file a defence to the suit. It is also noteworthy that in the consent dated 24th October, 2023 between the Plaintiff and Defendant, the Defendant signed the same using a thumb print. At this point this Court deduces that either there were negotiations between the Plaintiff and the defendant leading to the consent being recorded or the defendant was misled into signing it.
32. Further, the Court notes that the plaintiff prayed, especially at paragraph 15 of the Plaintiff and the reliefs sought, to be declared registered as owner of the suit parcel of land. There is no paragraph in the Plaintiff that alludes to the fact that he was to be registered as such in trust for the siblings of the late Meshack Ngoge and late Felista. Additionally, there is nowhere it is pleaded that the Plaintiff was given authority by will or testament of the deceased original owner of the land to be the one to be registered as owner of the land in trust for the siblings of the late parents to their exclusion. Thus, all that has been deposed in the Relying Affidavits about the late Sarah Opere or any other person giving instructions that he, the Plaintiff, being the one to hold the land in trust is an afterthought and a narrative designed to hoodwink this Court into believing buying into the acts of collusion or misrepresentation and fraudulent activities of both the Plaintiff and the Defendant.



33. A mark of collusion exhibited herein and or a choreographed plan by the Plaintiff to circumvent the truth and work towards ensuring that the consent herein is not set aside is the fact that it was the Plaintiff's law firm that filed the Replying Affidavits of the Defendant. Additionally, it appears from the font and print of the Replying Affidavit when compared with the Plaintiff's that it was typed using the same typewriter and bore the same Font and size and other features. Additionally, it was drawn and filed by the law firm of O. P. Ngoge & Associates of the same email address and mobile number as those of the Plaintiff. Essentially, the document was drawn and filed by the said office which is the law firm representing the adverse party. This is the greatest height of professional malpractice, to say the least: that an advocate for an adverse party can purport to and act for another adverse party in the same matter. It is unheard of and a sure demonstration of collusion. It is akin to inbreeding or professional incest in other circles of life.
34. It is this court's view that the question begs as to how a sickly and aged Defendant would participate voluntarily and fully without a doubt in a matter let alone give consent to have his late brother's property be given to him yet the deceased left his children including the Applicant.
35. Going to the court proceedings of 23rd April, 2025, it is worthwhile to note that the Plaintiff admitted before the court that the Defendant was old and sickly. It goes without saying, as noted above, that there arises a question as to whether the Defendant's health and age was such that he would voluntarily enter into and understand the terms of the consent, particularly, when it gave the ownership of the parcel of land in issue to the Plaintiff without specifying for whom it was to be held in trust for and in what shares or proportions.
36. It is not in dispute that the Plaintiff is not opposed to the fact that the Applicant is his brother and that Meshack Ngoge Otieno (deceased) was their father. It is not in dispute that the consent judgment is vague as to the nature and extent of the ownership of the land. It is curious as to why the rest of the Meshack Ngoge children are left out of the suit proceedings while a consent touching on the ownership of the land which they are beneficiaries to is being granted to one of the family members only through this case, and not the Estate of the late parents for purposes of distribution later. These are issues that point to either collusion or misrepresentation of the facts relating to the suit. Therefore, they would entitle the Court to set aside the consent judgment herein to enable the other beneficiaries to be included in the proceedings.
37. It is curious in this case that the Plaintiff and Defendant are opposed to the application yet the suit, if taken to be genuine, was meant to be for the benefit of all the children of Meshack Ngoge (deceased). I am of the opinion that the Plaintiff's actions since filing of the suit, the consent and fast delivery of judgment was rather suspicious and appears as ploy by the Plaintiff to disinherit his siblings from their father's estate.
38. In the circumstance, I find that the consent dated 24th October, 2023 was irregular having been signed by a sickly and old Defendant.
39. It is noteworthy that the court in delivering its judgment solely based the same on the consent as entered into by the Plaintiff and Defendant who were the only parties to the case at the time.
40. In light of the above consent being irregular, I find that the Judgment delivered on 25th October, 2023 was improper as it was based on a consent entered into by collusion, misrepresentation and fraud. I thus set it aside.
41. I find that the Applicant ought to be joined in this suit as a Co-Plaintiff to ensure that the interests of the estate of his late father are safeguarded.



42. The upshot is that the instant application is therefore merited and accordingly allowed as prayed. The Applicant is given 21 days to amend the Plaint to add himself as the Co-Plaintiff and state his claim and file the Amended Plaint and serve. The suit shall be mentioned on 22nd September 2025.
43. The Plaintiff and Defendant shall bear the costs of the application.
44. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 9TH DAY OF JULY 2025.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Otieno for the proposed int. party

No appearance for Plaintiff/ Respondent

