



Omino & 3 others (Suing as Personal Representatives of Henry Micah Omino - Deceased) v Tich Housing Co-operative Society Ltd (Environment and Land Case Civil Suit 43 of 2020) [2025] KEELC 5211 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 43 OF 2020
SO OKONG'O, J
JULY 10, 2025**

BETWEEN

**JOSEPHAT KOLA OMINO 1ST PLAINTIFF
LINDA ATIENO OMINO 2ND PLAINTIFF
PHILISTAS OLILO OMINO 3RD PLAINTIFF
ELIZABETH ANYANGO OMINO 4TH PLAINTIFF
SUING AS PERSONAL REPRESENTATIVES OF HENRY MICAH OMINO -
DECEASED**

AND

TICH HOUSING CO-OPERATIVE SOCIETY LTD DEFENDANT

RULING

Background

1. The Plaintiffs brought this suit through a plaint dated 10th July 2020 seeking the following reliefs;
 - a. A declaration that the transfer of all that property known as L.R No. 6096 (I.R 3411) comprising 162 acres (hereinafter referred to as “the suit property”) registered on 20th January 2009 was illegal, irregular and fraudulent and as such null and void.
 - b. An order directing the cancellation of entry No. 34 by which the title to the suit property was transferred to the Defendant and restoration of the property to the deceased.
 - c. An order directing the Defendant to vacate the suit property and in default be evicted therefrom at its costs.



- d. A permanent injunction restraining the Defendant whether by itself, its agents or anyone claiming through it from interfering with the Plaintiffs' use and possession of the suit property.
 - e. General damages for trespass
 - f. Costs of the suit
2. The Plaintiffs averred that at the time of his demise, the deceased, Henry Micah Omino, was the registered owner of the suit property. The Plaintiffs averred that the deceased and the Defendant entered into an agreement dated 4th September 2007 under which the deceased agreed to sell and the Defendant agreed to purchase a portion of the suit property measuring 70 acres or thereabouts at a consideration of Kshs. 150,000/- per acre, making an aggregate total price of Kshs. 10,500,000/-. The Plaintiffs averred that under the terms of the said agreement, the deceased deposited the title for the suit property with the advocates who were representing both parties in the transaction. The Plaintiffs averred that in breach of the terms of the agreement, the Defendant failed to facilitate the subdivision of the suit property and instead irregularly, illegally and fraudulently caused the entire parcel of land to be transferred to its name before proceeding to take possession thereof. The Plaintiffs averred that the transfer of the suit property to the Defendant was null and void and its entry into the suit property amounted to trespass. The Plaintiffs averred that due to the Defendant's failure to comply with the terms of the agreement of sale, the Defendant forfeited the deposit it had paid to the deceased.
 3. The Defendant filed a statement of defence on 29th July 2020. The Defendant admitted that it entered into an agreement dated 4th September 2007 with the deceased for the purchase of a portion of the suit property. The Defendant also admitted the terms of the said agreement. The Defendant denied, however, that it irregularly, illegally and fraudulently transferred the whole of the suit property to its name and thereafter took possession thereof. The Defendant averred that Rachier & Amolo Advocates who were acting for both parties in the transaction erroneously transferred the entire parcel of land in the name of the Defendant instead of the portion thereof measuring 70 acres which was purchased by the Defendant and which was to be transferred to the Defendant after the subdivision of the suit property.
 4. The Defendant averred that upon realising the error, the said common advocates sought to correct the same but were unable to do so since the Original Grant (title) for the suit property and the consents that had been obtained were misplaced and later declared lost. The Defendant averred that it paid to the deceased Kshs. 8,208,033/- leaving a balance of Kshs. 2,291,967/- only, which it has always been ready, able and willing to pay to the Plaintiffs once they agree to receive the same. The Defendant averred that it had commenced the process of obtaining a provisional title in place of the lost original title so that the erroneous transfer could be corrected. The Defendant averred that contrary to the allegation that it had occupied the whole of the suit property, the Plaintiffs were in occupation of a portion of the suit property measuring 92 acres. The Defendant averred that it would be inequitable to cancel the transaction between the Defendant and the deceased and that it was ready and willing to complete the agreement of sale between it and the deceased. The Defendant urged the court to dismiss the suit with costs.
 5. The suit was fixed for hearing on 8th May 2023. On that day, the advocates for the parties informed the court that the parties had discussed the matter and there was a likelihood of an out-of-court settlement being reached. They asked for time to reduce the settlement in writing. The court took out the matter from the hearing list and fixed it for mention on 15th May 2023 to record a consent if reached. When the matter came up on 15th May 2023, the advocates for the parties informed the court that they needed a few more days to finalise the consent. The matter was fixed for mention on 14th June 2023 and again



on 9th October 2023. When the matter came up on 9th October 2023 and there was no settlement, the suit was fixed for hearing on 9th April 2024.

6. When the matter came up on 9th April 2024 for hearing, at the request of the advocates for the parties who were all present in court, the parties were given a few minutes to discuss the matter if they could reach a settlement. When the matter was called out again at 11.55a.m, the advocates for the parties informed the court that they had reached a partial consent in the matter which they wished the court to record. The consent was read to the court by the advocate for the Defendant, and the terms thereof were confirmed by the advocates for the 1st to 3rd Plaintiffs and the advocate for the 4th Plaintiff. The consent was adopted as an order of the court in the presence of the advocates for all the parties, and the 1st and 4th Plaintiffs. The order made by the court was on the following terms:

“By consent;

This suit is settled on the following terms;

1. The deceased Henry Micah Omino sold to the defendant, Tich Housing Co-operative Society Limited a portion of L.R. No. 6096 (I.R. 3411) measuring seventy (70) acres.
2. The transfer of the entire parcel of land, L.R. No. 6096 (I.R. 3411) to the defendant was erroneous and the same is revoked.
3. The ownership of L.R. No. 6096 (I.R. 3411) shall revert to the deceased, Henry Micah Omino upon the said revocation of the defendant’s title.
4. The caveats and/or cautions registered against the title of L.R. No. 6096 (I.R. 3411) are hereby lifted.
5. The parties shall take accounts to determine the balance of the purchase price due to estate of the deceased in respect of the portion of L.R. No. 6096 (I.R. 3411) measuring 70 acres that was sold by the deceased to the defendant.
6. Once the balance of the purchase price due is ascertained, the parties shall agree on the mode of payment thereof.
7. Once the balance of the purchase price has been paid to the estate of the deceased, L.R. No. 6096 (I.R. 3411) shall be subdivided into two (2) portions and the portion thereof measuring 70 acres that was sold by the deceased to the defendant shall be transferred to the defendant.
8. The balance of the purchase price ascertained and found to be due to the estate of the deceased shall attract interest at court rates from the date of filing this suit until payment in full.
9. The costs for the transfer of L.R. No. 6096 (I.R. 3411) from the name of the defendant to that of the deceased and the costs for the subdivision of L.R. No. 6096 (I.R. 3411) into two (2) portions as aforesaid shall be met by the defendant.
10. The parties shall agree on the costs of the suit failure to which the same shall be determined by the court.
11. Either party shall be at liberty to apply.”



The application before the court

7. What is now before the court is the Notice of Motion application dated 30th January 2025 brought by the 1st Plaintiff, Josephat Kola Omino (hereinafter referred to only as “the applicant”) in person seeking the following orders;
 1. That the court be pleased to set aside and/or vary the consent judgment entered on 9th April 2024.
 2. That upon the judgment being set aside, the court be pleased to allow the parties to sit down and agree on the possible consent if they so wish.
 3. That the costs of the application be provided for.
8. The application was brought on the grounds set out on the face thereof and on the applicant’s affidavit sworn on 30th January 2025. The applicant averred that the advocate who acted for him when the consent judgment was delivered did not brief him on the consent. The applicant averred that it would serve the interest of justice if the application were allowed. The 2nd and 3rd Plaintiffs supported the application.
9. The application was opposed by the Defendant and the 4th Plaintiff. In its grounds of opposition dated 5th February 2025, the Defendant contended that the consent judgment sought to be set aside was entered in the presence of and with the participation of the parties and their respective advocates. The Defendant contended that the application did not disclose sufficient grounds for setting aside a consent judgment which is contractual in nature. The 4th Plaintiff opposed the application through a replying affidavit sworn on 11th March 2025. The 4th Plaintiff averred that the impugned consent judgment was entered in her presence and the presence of the 1st Plaintiff/applicant and other beneficiaries of the estate of the deceased. The 4th Plaintiff averred that the application was an attempt by the applicant to avoid the implementation of the judgment for personal reasons. The 4th Plaintiff averred that the applicant was benefiting from the delay in the implementation of the judgment in that he was exclusively using the suit property for personal benefit. The 4th Plaintiff averred that the applicant had prevented the other beneficiaries of the estate of the deceased from using the suit property on the pretext that there was a court case over the same. The 4th Plaintiff averred that further delay in the execution of the judgment of the court would affect the distribution of the estate of the deceased. The 4th Plaintiff averred that the applicant was acting selfishly in his own interest to the detriment of the interests of the other beneficiaries of the estate of the deceased. The 4th Plaintiff termed the application bad in law, unmeritorious and an abuse of the process of the court.

Analysis and Determination

10. The application was argued on 24th June 2025. I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition and the replying affidavit filed in opposition to the application. Finally, I have considered the submissions by the applicant in person and the advocates for the Defendant and the 4th Plaintiff. The following is my view on the matter. What the court has been called upon to determine is whether it should exercise its discretion in favour of setting aside the consent judgement entered herein on 9th April 2024. In Board



of Trustees of National Social Security Fund v. Michael Mwalo, Nairobi [CA No. 293 of 2014](#) the court stated as follows:

“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.”

11. In *Flora Wasike v Destimo Wamboko* (1982 -1988)1 KAR 625, the court stated at page 626 as follows:

“It is now settled law that a consent judgement 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.”

12. In *Hirani v. Kassam* (1952), 19EACA 131, the court cited a passage from *Seton on Judgments and Orders*, 7th edition, Vol.1 page 124, where the author has stated as follows:

“Prima facie, any order made in the presence and with the 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 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.”

13. It is common ground that the applicant was represented by an advocate when the impugned consent judgment was entered in the matter. It is also common ground that the applicant was personally present in court when the consent was read out to the court by the Defendant’s advocate, confirmed by the advocates for all the Plaintiffs and adopted by the court. The burden was on the applicant to establish the grounds for setting aside the consent judgment. Apart from claiming that he was not consulted before the consent was recorded, the applicant has not claimed that the consent was illegal, fraudulent or was entered into through misrepresentation or collusion between any of the parties or their advocates. The applicant has not even told the court how he is affected or prejudiced by the impugned consent judgment. Since the applicant was present in court when the consent by the parties was read to the court and adopted as a judgment, I am not persuaded that the applicant’s previous advocates entered into the consent without consulting the applicant. There is no evidence that the applicant has lodged a complaint against his previous advocates with the relevant authorities for professional misconduct or malpractice. I have also noted that the applicant’s application was brought 9 months after the consent judgment was entered by the court. If indeed the applicant was not consulted on the consent that was read to the court in the presence of the parties and their advocates, it could not have taken the applicant 9 months to move the court to set aside the said consent judgment.

Conclusion

14. The upshot of the foregoing is that no grounds for setting aside a consent judgment have been established. The Notice of Motion application dated 30th January 2025 has no merit and the same is accordingly dismissed with costs to the Defendant.

DELIVERED AND SIGNED AT KISUMU ON THIS 10TH DAY OF JULY 2025

S. OKONG’O



JUDGE

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

The 1st Plaintiff/Applicant in person

The 2nd and 3rd Plaintiffs in person

Ms. Ouma for the 4th Plaintiff

Mr. Onsongo for the Defendant

Ms. J.Omondi-Court Assistant

