



Kiptanui v Oyugi & 2 others; Oyugi & another (Applicant) (Suing as the Administrators of the Estate of Hezekiah Nelson Oyugi) (Environment and Land Case E004 of 2024) [2025] KEELC 6022 (KLR) (17 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE E004 OF 2024
MAO ODENY, J
SEPTEMBER 17, 2025**

BETWEEN

PATRICK KIPTANUI PLAINTIFF

AND

DOREEN OYUGI 1ST DEFENDANT

BETTY OYUGI 2ND DEFENDANT

BEATRICE OYUGI 3RD DEFENDANT

AND

JOB OKUNA OYUGI APPLICANT

DOUGLAS ODHIAMBO OYUGI APPLICANT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF HEZEKIAH NELSON OYUGI

RULING

1. This ruling is in respect of the Applicant’s Notice of Motion application dated 31st May, 2024 which seeks the following orders:
 - a. Spent
 - b. The Applicants’ herein be joined to this Suit as Defendants.
 - c. The Consent Judgment entered on 6th September 2006 between Patrick Kiptanui and Doreen Oyugi, Betty Oyugi and Beatrice Oyugi be and is hereby reviewed by setting it aside.
 - d. Spent



- e. Pending hearing and determination of this suit a temporary injunction be granted restraining the Plaintiff either acting by himself, his officers, beneficiaries, employees' agents, and/or any other person from alienating, advertising for sale, offering for sale, selling, leasing, transferring, encroaching and or otherwise disposing of that parcel of land known as Olenguruone/ Kiptagich/183.
 - f. This Honourable Court be pleased to join the Land Registrar Nakuru County as a party to this suit.
 - g. Costs of this Application be provided for.
2. The application is supported by the annexed affidavit of Douglas Odhiambo, the 2nd Applicant, sworn on 31st May, 2024, where he deponed that the Estate has an interest in this matter as it was the proprietor of the suit property before it was unlawfully transferred to the Defendants and then to the Plaintiff by the consent order.
 3. It was his deposition that the administrators of the estate only discovered the dealings on the suit property when their advocates on record obtained a copy of the Green Card on 4th May, 2024. He further deponed that none of the Applicants were made aware of this suit and therefore did not have the opportunity to bring these issues to Court before the consent judgment was entered into.
 4. Douglas Odhiambo, the Applicant, stated that by a consent of both parties (the Plaintiff and the Defendants) dated 6th September 2006 which was adopted as a judgment of the court declaring the Plaintiff as the lawful owner of Olenguruone /Kiptagich /183 (the suit property) and annulling all previous entries on the title. He further deponed that the consent ought not to have been recorded, as the defendants had no capacity to enter into the consent as the suit property was fraudulently transferred to them from the estate of the late Hezekiah Nelson Oyugi.
 5. The Applicant averred that they discovered that the suit property had been unlawfully transferred on 7th May 2024 when they applied and obtained a copy of the Green Card for the suit property.
 6. It was the Applicants' case that there were two restrictions lodged as entries Nos 4 and 6 at the land registry preventing any dealing with the suit property until the Succession Cause for the estate was heard and determined. Further that they periodically obtained official searches to ensure that there were no unlawful dealings with the suit property, more specifically on 4th November 2003, 14th March 2000, and 8th October 1998, which confirmed that the Applicants were still registered as the proprietors in their capacity as the Administrators of the estate.
 7. The Applicant also stated that the Defendants had previously attempted to register the transfer to the Plaintiff but the Land Registrar had rejected it citing, fraud because of the previous entries on the title including the two restrictions and the caution.
 8. Douglas Odhiambo averred that the Defendants' actions have been the subject of litigation in the courts, namely, in P& A Cause No. 1581 of 1992 in the High Court at Nairobi where the Defendants sought orders for the sale of properties belonging to the estate to be sold which was dismissed vide a Ruling dated 8th July 1999. Further in ELC Case No. 211 of 2018 Job Okuna Oyugi & 2 Others V Laban Cheptarus with Doreen Oyugi an Hon. Attorney General as Third Parties vide a judgment delivered on 23rd April 2024, the court found that the transfer of land belonging to the Estate of the 1st Defendant and to a third party was unlawful having been done without the knowledge or participation of the Applicants, being the Administrators of the Estate. He therefore deponed that the manner in which the suit property was transferred is similar to this case.



9. The Applicant also stated that a review of a copy of the green card reveals that the discrepancies, namely, the transfer to the defendants purportedly occurred on 8th August 2000, long after the late Hezekiah Oyugi had died on 7th August 1992 and before any distribution had been done vide a Succession Cause.
10. Secondly, that the transfer is recorded as entry No. 7 but dated 8th August 2000, before entry No. 6 which is dated 6th July 2001, which is not sequential and that there are no supporting documents for the transfer to the defendants.
11. The 2nd Applicant further deponed that the joinder of the Applicants and the Land Registrar to this suit will enable the Court have all the relevant parties and facts before it and aid in coming up with a just resolution to the dispute.
12. Patrick Kiptanui, the Plaintiff, filed a Replying Affidavit sworn on 22nd May, 2025, and deponed that he entered into an agreement with the Defendants for the purchase of the suit property known as Olenguruone Kiptagich/183 then registered in the name of the Defendants. It was further his disposition that he fully paid the purchase price, but the Defendants failed to transfer the property to him, prompting the filing of Nakuru Civil Suit No 160 of 2006. He deponed that they subsequently entered into a consent agreement, which was recorded as an order of the court on 6th September, 2006 and the property was transferred to him.
13. The Plaintiff/Respondent further deponed that the Defendants had a clear and undisputed ownership to the subject property at the time of entering into the agreement for sale, and that it has been eighteen years since he purchased the suit property from the Defendants. He stated that the Applicants have not explained the delay in following up of this property. The Plaintiff/1st Respondent denied any allegations of fraud or collusion as stated by the Applicants.
14. The Respondent also stated that the restrictions on the suit property placed by the P&A Cause No. 1581 of 1992 and all other entries were cancelled by the consent order issued by the court dated 6th September 2006. He further deponed that he was not a party to Civil Suit No. 1205 of 2001 allegedly involving his late father; hence, any claims or issues arising from that suit should not prejudice his legitimate and independent ownership rights to the suit property.
15. Douglas Odhiambo, the 2nd Applicant filed a Supplementary Affidavit sworn on 12th June, 2025, and deponed that the Respondent feigns ignorance of the case wherein the Applicants stated that the records of the suit property were placed under lock and key for several years due to a general caveat placed on the area as a result of the Ogiek case namely African Commission on Human and Peoples' Rights vs Republic of Kenya Application No 006/2012.
16. It was his deposition that the unavailability of the records for inspection to the public including administrators was a direct consequence of the said general caveat.

Applicants Submissions

17. Counsel for the Applicants filed submissions dated 30th June, 2025, and submitted that the joinder of the applicants and the Land Registrar Nakuru County would enable the court to determine the questions before it.
18. Counsel also submitted that the Plaintiff acknowledges in his submissions that joinder may be granted post judgment where a party was not given an opportunity to be heard and adverse orders are granted against them as par the case of Merry Beach Limited V Attorney General & Others [2018] KECA 18 (KLR) Counsel further referred to the case of Michael Otieno Wagude V Morris Olwal [2012] KE ELC2131(KLR) cited by the Plaintiff where the court held that , “in law joinder should be permitted



of all parties in whom any right to relief in respect of or arising out of the same act or transaction or services of acts or is alleged to exist whether jointly , severally , or in the alternative , where if such persons brought separate suits , any common question of law or fact would arise”

19. Counsel therefore submitted that the joinder of the Applicants and the Land Registrar Nakuru County is necessary to allow the court to determine the common question.
20. Counsel further submitted that it is trite law that only administrators of the deceased Estate who have the authority to bind the estate and a transfer can only be done after a confirmed grant has been obtained and relied on the cases of In the Estate of Isaac Kaburu Marete (deceased) 2017 eKLR and the Succession Cause No. 108 of 2014 In the Matter of the Estate of M’Ngarithi M’Miriti alias Paul M’Ngarithi M’Miriti, where the court held that acquisition of land before confirmation of grant is unlawful and does not enjoy property rights under the onstitution.
21. On the issue raised by the Respondent that the Applicants were not vigilant, counsel submitted that the Applicants did not participate in this case and only discovered the existence in May 2024 when they obtained a copy of the green card for the suit property which was extensively captured in the supporting affidavit.
22. Counsel relied on the Supreme Court case of Dina Management Ltd v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) where the court held that the protection offered to a bona fide purchaser for value without notice does not apply where the title to the property was obtained irregularly or illegally.
23. Mr. Torutua submitted that equity follows the law and where fraud is alleged , the law of Limitation of Actions provides that time starts running from the time fraud was discovered as per Section 26 of the Limitation of Actions Act which in this case was in May 2024 and the Application was filed on 31st May 2024.
24. Counsel relied on Order 45 Rule 1 of the Civil Procedure Rules and submitted that the consent order ought to be reviewed and set aside on the ground that the Applicants have discovered new evidence that could not have been produced at the time the order was made Further that the Applicants were not parties to the suit and were never served with the court papers and that the copies of the green card showing the proprietor interests together with restrictions were never produced in court.
25. Counsel distinguished the cases relied upon by the Plaintiff namely Brooke Bond Lieberg V Mallya (1975) EA 266, Flora N. Wasike V Destimo Wamboko (1998) eKLR and Kenya Commercial Bank Ltd V Benjo Amalgamated & Another [2017] KECA 98 9KLR) and submitted that the common thread in these cases is that the party seeking review by setting aside the consent order was a party to the said order, and in the current case the Applicants were not parties to the consent order.
26. Mr. Torutua relied on the case of Kisiara vs Onyango & 4 others [2024] KEELC 459 (KLR) where the court set aside the consent order on the basis that the court was not seized of the full facts as there were necessary parties that were not heard and ought to be heard.
27. Counsel submitted that the applicants have met the test for grant of an injunction and relied on the cases of Giella vs Cassman Brown & Co Ltd (1973) E.A 358 and Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR. It was counsel’s submission that the Applicants have further established a prima facie case through the recordings on the green card, the Defendants have previously been cited for intermeddling and there were at least two cautions registered against the title of the suit property at the time it was transferred to the Defendants and subsequently to the Plaintiff via the consent order.



28. Counsel relied on the case of Robert Mugo Wa Karanja vs Ecobank(Kenya) Limited & another [2019] eKLR and submitted that the value of land cannot be adequately compensated by an award of damages. Counsel submitted that the applicants are duly bound to ensure it is preserved for the benefit of the estate and that the balance of convenience tilts in favour of granting the application.

Plaintiff's Submissions

29. Counsel for the Plaintiff filed submissions dated 4th June, 2025 and identified the following issues for determination:
- a. Whether the Applicants should be joined as Defendants and the Land Registrar Nakuru County as a party to the suit?
 - b. Whether the Consent Order should be reviewed and set aside?
 - c. Whether the Court should grant the Applicants a temporary injunction?
 - d. Who should bear the cost of the Application?
30. On the first issue, counsel submitted that the Applicants have not shown that they have a legal, possessory or beneficial interest in the suit property as it was the subject of litigation in this matter and vested in the Plaintiff herein vide the consent order. Counsel relied on Order 1 Rule 10 (2) of the Civil Procedure Rules and the cases of: Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others [2016] eKLR, JMK vs MWM & Another [2015] eKLR, Merry Beach Limited vs Attorney General & Others [2018] KECA 18 (KLR), Robert Githua Thuku vs William Ole Nabala [2018] KECA 137 (KLR), Lucy Nungari Ngingi & 128 others vs National Bank of Kenya Limited & another [2015] KEHC 6117 (KLR) and Michael Otieno Wagude vs Morris Olwal [2021] KEELC 2131 (KLR).
31. Counsel submitted that a party can only be joined in a case post-judgment in exceptional circumstances when damages are yet to be assessed as was held in the case of JMK vs MWM & Another [2015] eKLR, Counsel submitted that in this case there is nothing left in terms of assessment of damages which would allow joinder of parties as the matter was fully settled by the consent judgment in September 2006.
32. Counsel further submitted that the other exceptional circumstance is when adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute as was stated in the Court of Appeal case of Merry Beach Limited vs Attorney General & Others [2018] KECA 18 (KLR), It was counsel assertion that the consent judgment did not issue any adverse orders against the Applicants herein because they have no locus standi or actionable interest and right to the suit property.
33. Counsel urged the court to find that the Applicants have not shown that the consent judgment was obtained through fraud, collusion or that it is contrary to public policy
34. On the second issue, counsel submitted that the Applicants have not been in occupation of the suit property for more than eighteen years since the recording of the consent order and they have never bothered to either enter or take possession of the suit property for those years, Counsel submitted that Section 7 of the Limitation of Actions Act prohibits the institution of suits to recover land after the expiry of twelve years.
35. It was counsel's submission that the Applicants have a remedy against the Defendants in the succession cause and relied on the cases: Brooke Bond Liebig vs Mallya (1975) EA 266, Flora N. Wasike vs Destimo Wamboko [1988] eKLR, Kenya Commercial Bank Ltd vs Benjo Amalgamated & Another, Nairobi



City Council vs Commissioner of Lands & 2 others ELC CASE 5 of 2021 and Mwalambe & another vs Freedom Limited; District Land Surveyor (Interested Party) KEELC 14687 (KLR).

36. On the third issue, counsel submitted that the court should not grant the Applicants a temporary injunction as they have not established a prima facie case and there is no injury they have suffered that cannot be compensated by way of damages. Counsel relied on the cases of *Giella vs Cassman Brown & Co Ltd* (1973) EA 358, *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] KEELC 2424 (KLR), *Nguruman Limited vs Jan Bonde Nielsen and Another* [2014] KECA 606 (KLR), *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General & 4 others* [2017] eKLR, *Dina Management Limited vs County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), *Samuel Kamere vs Lands Registrar Kajiado Civil Appeal No 28 of 2005* [2015] eKLR and *Moses Lutomia Washiali vs Zephaniah Ngaira Angweye & another, Civil Appeal No 139 of 2013*.
37. On the fourth issue, counsel submitted that the Applicants should be condemned to bear the costs of the Application and relied on Section 27 (1) of the *Civil Procedure Act* and the case of *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others* [2014] eKLR and urged the court to dismiss the application with costs.

Analysis and Determination

38. The issue that arises for determination are as follows:
- a. Whether the consent order dated 6th September 2006 should be reviewed and set aside.
 - b. Whether the Applicants and the Land Registrar Nakuru County should be joined as parties to the suit.
 - c. Whether the court should grant an order of temporary injunction to the Applicants against the Respondents from interfering with the suit land.
39. This matter was previously filed in the High Court of Kenya Nakuru, but was subsequently transferred to the Environment and Land Court on 24th December 2024. The Applicants and the Plaintiff have extensively given the background to this case which I have enumerated above as per their sworn affidavits, annexures and submissions. There would be no need to repeat the same in the analysis.
40. The issue that the court must deal with first is whether the consent judgment should be reviewed and set aside before handling the issue as to whether the Applicants should be joined as parties to this suit. As we speak, there is no suit for the Applicants to be joined to unless the consent judgment is set aside.
41. There are many authorities on the issue of setting aside consent Judgments from our courts, which have also been cited by both counsel. In *Setton on Judgments and Orders* (7th Edn), Vol.1 pg 124 it states 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...cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”



42. This was also echoed in the Court of Appeal case of 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.”
43. Similarly, in the case of Flora N. Wasike v Wamboko the High Court at Kakamega (Gicheru J, as he then was) held as follows:
- “ 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.
- 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.
- In this case, there were no grounds which would justify the setting aside of the consent judgment. Appeal dismissed.”
44. It is trite law that a consent judgment entered into by the parties is binding on them but there are exceptions where the same can be set aside if it is proven that the judgment was procured fraudulently, irregularly, through collusion or the same is against public policy. The court cannot endorse or sanitize an illegality. It is incumbent upon the Applicant seeking to set aside the consent judgment to prove the above.
45. In this case, it is not disputed that the Applicants are the Administrators of the Estate of the late Hezekiah Oyugi, it is further not in dispute that the Defendants are the wives of the Deceased who entered into a consent judgment in respect of the suit property on 6th September 2006, It is also not disputed that the Applicants were not parties to this suit and were never served with summons to enter appearance to enable them participate in the suit as administrators of the Estate.
46. It is also on record that the suit property by 25th July 1995 was registered in the names of Job Okuna Oyugi, Douglas Odhiambo Oyugi and Joshua Onyango Ogango while the deceased died in 1992. The subsequent searches indicated that Applicants were the registered owners of the suit land.
47. I will not go into how the suit land was registered in the names of the defendants as alleged by the Plaintiff, as that will await the determination of the suit. It would be detrimental to the parties to determine the suit without hearing the parties on how the transfer of ownership was conducted. However, the court cannot overlook the glaring reasons why the consent judgment should not be set aside to enable the parties ventilate the issues. The Plaintiff will also be able to table the evidence of his ownership of the suit property and debunk what the Applicants are claiming.
48. The Plaintiff relied on the Brooke Bond Liebig V Mallya (1975) EA 266, Flora N. Wasike V Destimo Wamboko (1998) eKLR and Kenya Commercial Bank Ltd V Benjo Amalgamated & Another [2017] KECA 98 9KLR) on setting aside consent judgments, however, in these the parties seeking review and setting aside the consent order was a party to the said order, and in the current case the Applicants were not parties to the consent order.
49. Setting aside the consent judgment is not an end in itself, as it does not close out the parties ‘rights to be heard. The Plaintiff claimed that he has been on the suit land for more than 18 years since the



consent judgment therefore the application is barred by the *Limitation of Actions Act*. The Applicants on the other hand, stated that they came to know that the transfer had been effected vide the consent judgment in May 2024 and filed the Application in December 2024.

50. Section 26 of the *Limitation of Actions Act* provides that where fraud is alleged, time starts running from the time fraud was discovered. The Applicant has alleged irregularity and attached copies of a judgment and ruling where the Defendants had urged the court to sell movable properties before a confirmed grant, which was dismissed, and a similar case where they sold a property before the Succession was done.
51. I subscribe to the finding of the case of *Kisiara vs Onyango & 4 others* [2024] KEELC 459 (KLR) where the court set aside the consent order on the basis that the court was not seized of the full facts as there were necessary parties that were not heard and ought to be heard.
52. From the averments of the Applicants and the Plaintiff, together with their submissions, I find that this is a suitable case for setting aside the consent judgment as it was procured irregularly.
53. Having set aside the consent judgment, I will now deal with the issue of joinder, Order 1 Rule 10(2) of the Civil Procedure Rules states 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 or settle all questions involved in the suit, be added.”

54. In the case of *Joseph Njau Kingori v Robert Maina Chege & 3 Others* [2002] eKLR, the court outlined the requirements that a party must meet to be joined as:
 1. He must be a necessary party.
 2. He must be a proper party.
 3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
 4. The ultimate order or decree cannot be enforced without his presence in the matter.
 5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.”
55. In the case of *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55, the court pronounced itself as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a



person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, on an application of a Defendant to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."

56. The Applicants have demonstrated that they are necessary parties in this suit being the Administrators of the estate of the late Hezekiah Oyugi. They therefore have proprietary interest in the suit property and hence should be joined to explain to the court how their interest as administrators is affected. The joinder of the land Registrar Nakuru County is also necessary to give light to what transpired at the land registry in respect of the entries in the green card of the suit land.
57. The Applicants sought for injunction to restrain the Plaintiff from interfering, disposing of, selling, leasing, or transferring the suit property. It is acknowledged that the Plaintiff is in occupation of the suit land and the court therefore grants an order of status quo to be maintained pending the hearing and determination of the case. Plaintiff not to sell or dispose of the suit land.
58. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF SEPTEMBER 2025.

M. A. ODENY

JUDGE

