



**Kisiara v Onyango & 4 others (Environment and Land Appeal
E043 of 2022) [2024] KEELC 459 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E043 OF 2022
SO OKONG'O, J
FEBRUARY 1, 2024**

BETWEEN

RICHARD OTIENO KISIARA APPELLANT

AND

PAUL OUMA ONYANGO 1ST RESPONDENT

PETER JUMA ONYANGO 2ND RESPONDENT

GABRIEL OTIENO ONYANGO 3RD RESPONDENT

THOMAS OTIENO ONYANGO 4TH RESPONDENT

PRISCA MIRONGO ONYANGO 5TH RESPONDENT

*(Being an appeal from the ruling and order made in the Chief Magistrate's Court at Kisumu
by Hon. S.N.Telewa SRM on 26th October 2022 in Kisumu CMC ELC No. 368 of 2020)*

JUDGMENT

1. The Appellant brought a suit in the lower court against the 5th Respondent (Kisumu CMC ELC No. 368 of 2020) on 2nd September 2020 seeking; an order of specific performance of the agreement of sale dated 10th September 2016 between the Appellant and the 5th Respondent in respect of all that parcel of land known as Title No. Kisumu/Border/3261 (hereinafter referred to only as "Plot No. 3261"), and in the alternative an order that the 5th Respondent refunds to the Appellant the sum of Kshs. 750,000/- that the Appellant had paid to the 5th Respondent as part of the purchase price.
2. The Appellant averred that in breach of the said agreement of sale, the 5th Respondent failed to complete the agreement by delivering to the Appellant the completion documents.
3. The 5th Respondent entered appearance and filed a statement of admission dated 16th October 2020. The 5th Respondent admitted the Appellant's claim in its entirety save that the 5th Respondent prayed



- that she be allowed to transfer to the Appellant all that parcel of land known as Title No. Kisumu/God Abuoro/91 which was registered in her name (hereinafter referred to as “the suit property”) instead of Plot No. 3261 which was the subject of the sale agreement which was registered in the name of her deceased husband Wilson Onyango Okoth.
4. On 5th November 2020, the Appellant and the 5th Respondent entered into a consent in writing compromising the lower court suit which consent was filed in court on the same date. In the consent, it was agreed that; the 5th Respondent would transfer to the Appellant the suit property in default of which the Deputy Registrar of the court/Executive officer shall execute all the documents necessary to facilitate the transfer of the said property to the Appellant, the sale agreement in respect of Plot No. 3261 dated 10th September 2016 was deemed to be in respect of the suit property, the 5th Respondent and whoever else was residing of the suit property at the behest of the 5th Respondent was to give vacant possession immediately in default of which they were to be evicted, that the inhibitions, cautions and restrictions if any placed on the suit property be removed forthwith by the Land Registrar-Nyando to pave way for the transfer of the property to the Appellant, and that the costs of the lower court suit be in the cause. The said consent was endorsed as a judgment of the court on 5th November 2020 and a decree was issued in terms thereof on 21st December 2020.
 5. Following the said consent decree, the Appellant was registered as the owner of the suit property on 1st February 2021 and was issued with a title deed on the same date. On 16th March 2021, the 1st to 4th Respondents filed an Originating Summons against the Appellant and one, Danis Onyuro Onyango seeking an order that they had acquired specific portions of the whole of the suit property by adverse possession and that they be registered as the proprietors thereof in place of the Appellant and the said Danis Onyuro Onyango. The Originating Summons was filed in this court and assigned case reference, ELC No. E059 of 2021(O.S) (hereinafter referred to only as “the adverse possession suit”). The adverse possession suit is pending.
 6. On 22nd March 2022, about a year after filing the adverse possession suit, the 1st to 4th Respondents filed an application in the lower court suit seeking; leave to be joined as interested parties or defendants in the suit and an order setting aside the decree of the lower court that was issued on 2nd (sic) December 2020 following the consent between the Appellant and the 5th Respondent. The application that was supported by the affidavit of the 3rd Respondent was brought on the grounds that the 1st to 4th Respondents were affected by the said decree as they were residing on the suit property and were not aware of the suit in which the decree was issued. The 1st to 4th Respondents averred that they should have been made necessary parties to the suit. The 1st to 4th Respondents averred that if the orders sought were not set aside, they would be evicted from the suit property without having been given a hearing and that their presence in the suit would assist the court in resolving the suit once and for all.
 7. In his affidavit in support of the application, the 3rd Respondent stated that they had been staying on and using the suit property for over 12 years. The 3rd Respondent stated that the suit property was the only home they knew and that the same was also the source of their livelihood as they were engaged in subsistence and commercial farming on the property.
 8. The 3rd Respondent averred that in January 2021 they received a letter from the 5th Respondent’s advocates demanding that they vacate the suit property. The 3rd Respondent averred that they responded to the said letter by stating that they had occupied the suit property for over 12 years and as such were entitled to remain in occupation thereof. The 3rd Respondent averred that following threats of eviction, they filed the adverse possession suit against the Appellant who brought in the 5th Respondent to the suit as an interested party.



9. The 3rd Respondent averred that it was through the replying affidavit filed in the adverse possession suit by the 5th Respondent that they learnt of the lower court suit and the consent decree that had been issued therein which required them to vacate the suit property although they were not parties to the suit.
10. The 3rd Respondent averred that it would be against the rules of natural justice for them to be evicted from the suit property on which they had lived and cultivated for several years without having been given an opportunity to defend themselves. The 3rd Respondent urged the court to allow the application.
11. The application was opposed by the Appellant and the 5th Respondent. The Appellant opposed the application through a replying affidavit filed on 25th May 2022. The Appellant termed the application as frivolous and misconceived. The Appellant averred that the application had been overtaken by events. The Appellant averred that the 5th Respondent admitted his claim after which they entered into a consent settling the dispute. The Appellant averred that at the time of the consent, the 5th Respondent was the registered owner of the suit property. The Appellant averred that the 1st to 4th Respondents' claim that they had occupied the suit property for several years was an issue that was beyond the jurisdiction of the lower court and could only be handled in the adverse possession suit filed by the 1st to 4th Respondents whose hearing was pending. The Appellant averred that there was no reason why the lower court should interfere with its decree since the 1st to 4th Respondents had redress in the adverse possession suit. The Appellant averred that the application was brought in bad faith to deny him a chance to enjoy the fruits of his judgment.
12. The 5th Respondent opposed the application through a replying affidavit sworn on 26th July 2022. The 5th Respondent averred that the suit property was owned by her and that she sold the same to the Appellant because the 1st to 4th Respondents who were her stepsons refused to take care of her. The 5th Respondent averred that after the 1st to 4th Respondents prevented her from selling Plot No. 3261 which belonged to her deceased husband, she decided to sell the suit property which was owned by her.
13. The 5th Respondent averred that the 1st to 4th Respondents were aware of the sale of the suit property. The 5th Respondent averred that the estate of the 1st to 4th Respondents' deceased father had land in which the 1st to 4th Respondents had shares. The 5th Respondent averred that the 2nd Respondent had land registered in his name. The 5th Respondents averred that the 1st to 4th Respondents were her children and as such could not acquire her land by adverse possession. The 5th Respondent averred that the 1st to 4th Respondents' claim could only be determined in the adverse possession suit.
14. The 1st to 4th Respondents' application in the lower court was heard by way of written submissions. In a ruling delivered on 26th October 2022, the lower court allowed the 1st to 4th Respondents' application as prayed. The lower court observed that it was acknowledged in the consent between the Appellant and the 5th Respondent that there were people living on the suit property. The court held that the people who were living on the suit property and who were going to be affected by the consent ought to have been involved in the said consent. The court formed the view that the Applicant and the 5th Respondent wanted to use a shortcut to evict the 1st to 4th Respondents from the suit property. The lower court held that it was necessary to join the 1st to 4th Respondents to the suit so that they could be involved in the proceedings.
15. The Appellant was dissatisfied with the decision of the lower court and filed this appeal on 24th November 2022. In his memorandum of appeal dated 21st November 2022, the Appellant challenged the decision of the lower court on the following grounds;



- a. That the learned trial magistrate erred in law and fact in failing to note that the consent judgment was binding and could not be varied or discharged unless obtained by fraud or collusion, misapprehension and/or ignorance none of which was established by the 1st to 4th Respondents.
- b. That the learned trial magistrate erred in law and fact in failing to apply proper principles on the setting aside of consent judgments.
- c. That the learned trial magistrate erred in law and fact in employing wrong principles thereby arriving at a wrong decision.
- d. That the learned trial magistrate erred in law and fact in holding that the 1st to 4th Respondents would be evicted from the suit property through shortcut and proceeded to set aside the consent judgment while the 1st to 4th Respondents could file a fresh suit.
- e. That the learned trial magistrate erred in law and fact in her finding that there was a need to involve the 1st to 4th Respondents in the consent while the lower court suit concerned the purchase of land by the Appellant in which the 1st to 4th Respondents had no interest.

The Appellant prayed that the appeal be allowed and the impugned ruling dated 26th October 2022 be set aside.

16. The appeal was heard by way of written submissions. The Appellant filed submissions dated 14th August 2023. The Appellant cited *Divisional Integrated Development Programmes Co. Ltd. v. Nelson Mbuva Kithuka & another*[2022]eKLR where the court stated that the variation of a consent judgment can only be on the grounds that would allow for a contract to be vitiated such as fraud, collusion, illegality, mistake, and agreement being contrary to the policy of the court, absence of sufficient facts and ignorance of material facts and submitted that the 1st to 4th Respondents never established any of the foregoing circumstances. The Appellant submitted that in setting aside the consent judgment, the lower court relied heavily on *Fredrick Atanas Ashiono v. Aggrey Sevansson Lihanda* [2014]eKLR, whose facts were distinguishable from those of the case that was before her. The Appellant averred that the 1st to 4th Respondents were aware of the sale of the suit property and that their alleged right over the suit property through adverse possession could only be determined in the adverse possession suit that was pending and not in the lower court suit. The Appellant urged the court to allow the appeal.
17. The 5th Respondent filed submissions dated 21st August 2023. The 5th Respondent cited two decisions one of which I will refer to later in the judgement and submitted that an order made in the presence or with the consent of counsel is binding on all the parties to the proceedings and those claiming under them and cannot be varied or discharged unless obtained by fraud, collusion or by agreement contrary to the policy of the court or for any reason which would enable a court to set aside an agreement. The 5th Respondent submitted that none of these grounds were established by the 1st to 4th Respondents.
18. The 5th Respondent submitted further that when she entered into the impugned consent, she was the registered owner of the suit property and as such she did not need to consult anyone or involve the 1st to 4th Respondents in the sale of the same to the Appellant. The 5th Respondent submitted that she merely dealt with land that belonged to her and as such the lower court erred in suggesting that she was taking a shortcut to evict the 1st to 4th Respondents from the suit property. The 5th Respondent submitted that there was no basis for the lower court's holding that the 1st to 4th Respondents should have been involved in the consent. The 5th Respondent submitted that the 1st to 4th Respondents were neither co-owners of the suit property nor privy to the contract that the 5th Respondent entered into



with the Appellant. The 5th Respondent submitted that the decided case that the lower court relied on in support of its decision was distinguishable.

19. In conclusion, the 5th Respondent submitted that reopening the lower court suit and joining the 1st to 4th Respondents thereto was an exercise in futility since the Appellant had no cause of action against them and they had already filed the adverse possession suit in which they were pursuing their claim over the suit property. The 5th Respondent urged the court to allow the appeal.
20. The 1st to 4th Respondents (hereinafter referred to only as “the Respondents” for ease of reference) filed submissions dated 21st September 2023. The Respondents supported the lower court’s decision. The Respondents submitted that the consent judgment was irregular in that it affected the rights of persons who were not parties to the suit. The Respondents submitted that a consent judgment binds only the parties to it. The Respondents cited a number of decisions on the grounds upon which a consent judgement may be set aside some of which I will refer to later in the judgment. The Respondents submitted that the circumstances under which the consent decree was obtained show the existence of collusion between the Appellant and the 5th Respondent with the malicious intention of evicting the Respondents from the suit property without giving them an opportunity to be heard. The Respondents submitted that fraud and collusion were good grounds for setting aside a consent judgment. The Respondents submitted further that a consent judgment which is to be enforced against a third party cannot also stand.
21. The Respondents submitted that the consent judgment was irregular and tainted with collusion and as such deserved to be set aside. The Respondents submitted that although the Appellant and the 5th Respondent claimed that the Respondents had no right over the suit property, they did not deny that the Respondents were in actual and active occupation of the suit property. The Respondents submitted that the issue of whether or not the Respondents had a right to be on the suit property could only be determined by the court after their joinder to the suit. The Respondents submitted that their problem was with the limb of the decree that directed their eviction from the suit property without giving them an opportunity to be heard. The Respondents submitted that the appeal lacked merit and urged the court to dismiss the same.
22. I have considered the pleadings and proceedings of the lower court, the ruling of the lower court, the grounds of appeal put forward by the Appellant and the submissions of counsels. In my view, the application before the lower court which was brought under Order 1 rule 3 and Order 12 rule 7 of the Civil Procedure Rules had two limbs both of which required exercise of discretion. The issue that arises for determination in this appeal is whether the lower court exercised its discretion properly. The first limb of the application sought the joinder of the 1st to 4th Respondents in the lower court suit as either interested parties or defendants. From the ruling of the lower court, it is not clear in what capacity the 1st to 4th Respondents were joined in the lower court. The lower court made a general order that they be “enjoined” in the suit. The second limb of the application sought the setting aside of the decree issued on 2nd December 2020. I will deal with the appeal as it relates to each limb of the application separately.
23. The Civil Procedure Rules have no definition of an interested party. Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as:

“a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”.



Order 1 rule 3 of the Civil Procedure Rules provides as follows:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

24. As mentioned earlier, the court’s power to join a party to a suit is discretionary and as such must be exercised judiciously. That means that an applicant seeking to join a suit as an interested party or as a defendant must satisfy the court that he has a stake or an interest in the subject matter of the suit. In *Communications Commission of Kenya and 4 Others v. Royal Media Services Limited & 7 Others*[2014] eKLR, the Supreme Court stated as follows:

“(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling in the *Mumo Matemo* case where the Court (at paragraphs 14 and 18) held:

“[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

(23) Similarly, in the case of *Meme v. Republic* [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

(24) We ask ourselves the following questions: (a) what is the intended interested party’s stake and relevance in the proceedings; and (b) will the intended interested party suffer any prejudice if denied joinder.”

25. In *Deported Asians property Custodian Board v. Jaffer Brothers Limited* (1999)1E.A 55 (SCU) that was cited with approval in the case of *Pravin Bowry v. John Ward and another* [2015] eKLR, the court stated among others that:

“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 interest of that person, and that it is desirable, for avoidance of multiplicity of suits to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on application by 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.”

26. In *Werrot and Company Ltd. and others v. Andrew Douglas Gregory and others*, Nairobi (Milimani) HCCC No. 2363 of 1998 (1998) LLR 2848 (CCK), Ringera J. stated that:

“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and, (ii) It should not be possible to pass an effective decree in the absence of the party”.

27. I have at the beginning of the judgment given the facts that gave rise to the lower court suit. The dispute did not relate to the suit property. The dispute concerned an agreement of sale between the Appellant and the 5th Respondent in respect of land Title No. Kisumu/Border/3261 (Plot No. 3261). In her admission in the lower court, the 5th Respondent prayed that judgment be entered for the Appellant against her save that instead of the 5th Respondent transferring to the Appellant Plot No. 3261, she be permitted to transfer to the Appellant the suit property. It was pursuant to that prayer that the Appellant and the 5th Respondent entered into the consent of 5th November 2020 that gave rise to the impugned decree issued on 21st December 2020.
28. Neither the Appellant nor the 5th Respondent denied in the lower court and before this court that the 1st to 4th Respondents were residing on the suit property at the time the 5th Respondent filed the said statement of admission in the lower court and subsequently entered into a consent with the Appellant through which the 5th Respondent not only obtained an order to sell and transfer the suit property to the Appellant but also an order to evict the 1st to 4th Respondents from the suit property.
29. I agree with the lower court that the 1st to 4th Respondents had an interest in the suit property which interest was going to be affected by the prayer that was made by the 5th Respondent in her statement of admission. The 1st to 4th Respondents should have therefore been made parties to the lower court suit so that they could be heard in the 5th Respondent’s prayer to the court to be allowed to transfer the suit property to the Appellant instead of Plot No. 3261. Due to the foregoing, I find no error in the lower court’s order joining the 1st to 4th Respondents to the lower court suit. Since the Appellant had no claim against them and the 5th Respondent had filed a statement of admission, I am of the view that the 1st to 4th Respondents should have been joined in the suit as interested parties to allow them to address the court on the interest which they claimed to have on the suit property and whether or not the prayer by the 5th Respondent in her statement of admission should be granted.
30. With regard to the limb of the lower court application that sought the setting aside of the consent decree of the lower court dated 5th November 2020 and issued on 21st December 2020, this is my view: I think that having held that the 1st to 4th Respondents had an interest in the suit property by virtue of their occupation thereof and that a consent decree was issued by the lower court for the transfer of the suit property to the Appellant and the eviction of the 1st to 4th Respondents from the property in a suit in which they were not made parties and were not heard, the finding by the lower court that the said consent decree was irregular and should be set aside cannot be faulted. In *Wasike v. Wamboko* [1988] KLR 429, it was held that:

“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.”



31. In Brooke Bond Liebig (T) Ltd. v. Mallya [1975] E. A 266, the court stated that:

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani –vs- Kassam [1952] 19 E. A.C.A 131, where the following passage from, Seton on Judgments and orders, 7th Edn. Vol. I, p 124 was approved:

“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.”

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension.”

32. Applying the foregoing principles to this case, the question that I need to answer is whether the 1st to 4th Respondents had established valid grounds that would have justified the setting aside of the consent judgment entered in the lower court on 5th November 2020. Did they establish that there was fraud or collusion or mistake or misapprehension or ignorance of material facts or any other reason that would justify the setting aside of an agreement as concerns the consent judgment aforesaid? The answer is in the affirmative. First, there was collusion between the Appellant and the 5th Respondent to have the 1st to 4th Respondents evicted from the suit property without hearing them. The 5th Respondent was aware that the 1st to 4th Respondents were occupying the suit property. The Appellant who agreed to take the suit property as a substitute for Plot No. 3261 must also have viewed the property and noted the presence of the 1st to 4th Respondents before he entered into the consent aforesaid. The Appellant therefore wanted vacant possession while the 5th Respondent wanted to deliver possession and the consent as observed by the lower court was the shortcut to achieve this without the necessity of filing a suit for possession. Secondly, the judgment of 5th November 2020 was made by the court without being seized of the full facts on the status of the suit property. I am of the view that the court would not have entered the judgment if it had been brought to its attention that the effect thereof would be to evict the 1st to 4th Respondents from the suit property while they were not parties to the suit and had not been heard in the matter. Finally, the consent by the parties was against the policy of the court, namely that, the court will not condemn a person without a hearing.

33. For the foregoing reasons, I find no error of fact or law in the lower court’s decision to set aside the decree dated 5th November 2020 issued on 21st December 2020.

34. In conclusion, I find no merit in the appeal before me. The appeal is dismissed with costs to the 1st to 4th Respondents.

DELIVERED AND DATED AT KISUMU ON THIS 1ST DAY OF FEBRUARY 2024.

S. OKONG’O

JUDGE

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

Ms. Atieno h/b for Ms. Ayose for the Appellant



Mr. P.Onyango for the 1st to 4th Respondents

N/A for the 5th Respondent

Ms. J. Omondi-Court Assistant

