



REPUBLIC OF KENYA



**EMM v JMC & another (Environment and Land Appeal E002 of 2023)
[2024] KEELC 6417 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6417 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E002 OF 2023
LN GACHERU, J
OCTOBER 3, 2024**

BETWEEN

EMM APPELLANT

AND

JMC 1ST RESPONDENT

GMM 2ND RESPONDENT

*(Being an appeal from the Ruling of the Court in Murang'a Chief Magistrate's E.L.C
Case No. E094 of 2022 as delivered on 29/6/2023 by Hon. Eric Musambai, SRM)*

JUDGMENT

1. The Appeal herein emanates from a Ruling delivered by the trial court, (Hon. Eric Musambai SRM), on 29th June 2023, wherein, the trial court disallowed an Application for review of a Consent Judgement entered between, the 1st and 2nd Respondents on 15th February, 2023.
2. Being aggrieved by the said determination, the Appellant herein, EMM, who was joined in the proceedings after the Consent Judgement had been filed by the parties and adopted by the trial Court, filed the instant Appeal.
3. Vide a Memorandum of Appeal dated 20th July, 2023, the Appellant challenged the decision of the trial Court delivered on 29th June, 2023 in Murang'a CMEL No 94 of 2022, and urged this Court to allow the Appeal and set aside the said Ruling of the trial court.
4. The Appeal is anchored on the following grounds:
 1. The trial Court erred in law and in fact in its failure to find that the Appellant had satisfied the element of collusion sufficiently to warrant a review of the consent judgment.



2. The trial Court erred in law and in fact by totally ignoring the Appellant's evidence and thus failing to find that the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts.
3. The trial Court erred in law and in fact in its failure to find that the appellant in her evidence had provided a sufficient reason which would enable the Court to set aside a consent judgment/agreement.
5. The Appellant herein was joined in suit as an Interested Party. She had filed a Notice of Motion Application dated 27th February 2023, before the trial Court seeking to be joined to the proceedings at the post-Judgment stage. In this suit the 1st and 2nd Respondents herein were Plaintiff and Defendant respectively.
6. The basis of the Appellant's said Application is that she had allegedly contracted a marriage with the 2nd Defendant (2nd Respondent herein) in year 1999, and which marriage was later dissolved vide a Divorce Cause No E003 of 2021, and a Decree Nisi was issued on 22nd July 2022.
7. She had alleged that land parcel No Muranga Municipality Block x/x (the suit property), was registered in the name of the 2nd Respondent in year 2001, and at that point it became the matrimonial home of the 2nd Respondent and the Appellant herein together with their children.
8. The suit before the trial was initiated by the 1st Respondent seeking a change in the registered ownership of the suit property from the 2nd Respondent's name, who his son, to the 1st Respondent's name on grounds that the registration of the 2nd Defendant was as a result of fraud.
9. The 1st Respondent argued before the trial Court that the suit land was originally registered in the name of his brother Dr. J.F.C. Munene, (deceased), and the said land was an ancestral land which his deceased brother was holding in trust for the 1st Respondent.
10. Before the suit could commence before the trial court, the 2nd Respondent conceded to the allegations of fraud, culminating in a Consent Judgment dated 15th February, 2023, wherein the ownership of the suit property changed hands from the 2nd to the 1st Respondent.
11. Thereafter, the Appellant filed an Application for joinder and review of the Consent Judgement. The Respondents opposed the Appellant's prayers for joinder and setting aside of the Consent Judgment, and argued that the suit property is an ancestral land, and does not comprise the matrimonial property of the 2nd Respondent, and the Appellant herein, as it was not acquired by them during the subsistence of their marriage.
12. The trial Court, in its Ruling delivered on 29th June, 2023, while allowing the Appellant's prayer for joinder, disallowed her other prayer wherein, she had sought the setting aside of the Consent Judgment, and resultant decree issued on 15th February, 2023, and held that the 1st and 2nd Respondents demonstrated that they had the necessary capacity to execute the aforesaid Consent Judgement.
13. The Appellant claimed that she is not a busybody in respect of the suit property, and her main contention in this Appeal is that the trial Court's decision dated 29th June, 2023, of upholding that the Consent Judgment recorded on the concurrence of the 1st and 2nd Respondents who are related as father and son respectively, ignored the material fact that she is related to the 1st and 2nd Respondents by being a former-daughter-in-law and former wife respectively of the Respondent herein.
14. The Appellant alleged that she lives with her children on the suit property, which she considers her matrimonial property, and that the suit before the trial court, and the Consent Judgement entered



thereon, was a collusion between father and son to deprive her a share of matrimonial property, and or defeat her suit pending before the High Court, for distribution of Matrimonial property being Murang'a HCC Matrimonial Cause No 2 of 2023 (OS)

15. This Appeal was admitted under Section 79B of the *Civil Procedure Act*, and the court directed the parties to canvass the said Appeal by way of written submissions.

The Appellant's Submissions

16. The Appellant filed her written submissions dated 19th April, 2024, through the Law Firm of Charles Mbugua & Co Advocates, wherein, she identified two (2) issues for determination as follows:
 1. Whether the appellant has satisfied the requirement for the granting of an order for review of a consent judgment under Order 45 rule 1.
 2. Whether the consent judgment was 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 misapprehension of material facts.
17. The Appellant submitted that at the trial Court, the 1st and 2nd Respondents did not disclose her relationship to them, following her recent Divorce with the 1st Respondent, and the fact that she was residing on the suit property with the children of their marriage. That the said non material disclosure amounted which to collusion.
18. It was her further submissions that the suit before the trial court was an illegality, as it was time barred, and offended the provisions of Section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, as the suit land was registered in the name of the 2nd Respondent in the year 2001, and that is when the 1st Respondent cause of action arose. However, this suit was filed after 22 years, when the suit was already time barred, and without leave of the court.
19. The Appellant relied on various decided cases among them; *Samson Munika practicing as Munika & Co Advocates v Wadube Estates Limited* NRB Civil Appeal No 126 of 2005, where the court held;

“This appeal raises the vexed question (of) what are the circumstances in which a consent judgment may be set aside? In *Broke Bond Leibig (T) Ltd v Mallya* (1975) EA 266, the then Court of Appeal for East Africa set out the circumstances in which a judgement freely entered into by parties to a dispute in Court would be set aside.”
20. Further reliance was placed in the Case of *Hiram v Kassan* (1952) 19 EACA 131, where the court held;

“prima facie, any order made in the presence and with consent is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharge unless obtained by fraud of 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.”
21. The Appellant urged the court to allow her Appeal with costs to be borne by the Respondents herein.

The Respondent's Submissions.

22. The 1st and 2nd Respondents jointly filed their written submissions dated 23rd April 2024, through Kirubi Mwangi Ben & Co Advocates, and submitted that the present suit is sub-judice in light of



another suit pending, being Murang'a High Court Matrimonial Cause Case No 2 of 2023(OS) filed by the Appellant herein.

23. Further, the Respondents submitted that the trial Court properly interpreted the following authorities in its decision now under challenge in the instant Appeal: *Flora Wasike v Destimo Wamboko* (1982-1988) 1KLR; *Brooke Bond Liebig v Maliya* (1975) EA 266; and, *Hirani v Kassam* (1952) 19 EACA 131.
24. It was their further submissions that the suit property herein was not a matrimonial property, but was an ancestral land for 1st Respondent, Julius Mukigi Chege, and his late brother, Dr J.F.C. Munene, who had been registered as the owner of the suit land, to hold it in trust for himself and the 1st Respondent.
25. That in recognition of the existing trust, the said Dr. J.F. C Munene, attempted to dissolve the said trust, by commencing the process of transferring the suit property to the rightful owners, and beneficiaries of the trust in the year 2001.
26. It was submitted that the said Dr J.F.C Munene, gave the transfer documents to 1st Respondent (his brother), who gave them to 2nd Respondent (his son) to carry out the said transfer. However, the 2nd Respondent, fraudulently caused the suit property to be transferred to his name, through fraud.
27. That when 1st Respondent discovered the said fraud, he filed the suit before the trial court, and 2nd Respondent conceded that he committed fraud, and thus the Consent Judgement was filed and adopted as the Judgement of the Court. They submitted that the suit land is not a matrimonial property, and the Appellant is not entitled to it.
28. The Respondents further submitted that the trial court appreciated the above facts, and dismissed the Appellant's application for review, and they urged the court to dismiss the instant Appeal with costs to the Appellant.
29. The Court has considered the instant Appeal vide the Memo and Record of Appeal. The court has also considered the rival written submissions and the relevant provisions of law, and finds the issues for determination are;-
 - i. Whether this Appeal is merited?
 - ii. Who shall bear the costs of the suit?

(i) Whether this Appeal is merited?

30. For this court to make a determination of this issue, it will rely on various decided cases. Further as the court determines the issue herein, it will bear in mind that the law on variation of a consent judgement is now settled that such variation can only be on the grounds that allow a contract to be varied or vitiated. Those grounds include but are not limited to fraud, collusion, illegality, mistake, and being contrary to public policy.
31. In the case of *Flora Wasike v Destimo Wamboko* (1982 -1988)1 KAR 625 the Court held as follows:

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



32. Further, the Court of Appeal in the case of *Brooke Bond Liebig v Mallya* 1975 E.A. 266, held as follows:
- “ A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the Court to set aside an agreement.”
33. Again in the case of *Hirani v Kassam* (1952), 19EACA 131, the Court of Appeal with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 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.
34. The Court of Appeal in the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* (1982) KLR P. 485 held that:
- “ A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.”
35. It is evident that the Respondents herein are father and son, and the suit land was registered in the name of the 2nd Respondent in the year 2001. The 1st Respondent did not raise a finger over the said registration until the year 2022, which is a period of over 22 years.
36. It is evident that the Appellant herein and the 2nd Respondent were married in 1999, and in 2001, they were husband and wife when the suit land got registered in the name of the 2nd Respondent in 2001. The Appellant alleges that she has lived on the suit land all along, and has considered it as her matrimonial home.
37. From the available evidence, the Appellant and the 2nd Respondent divorced in 2022, vide a Divorce Cause No E003 of 2021, wherein a Decree Nisi was issued on 22nd July 2022. The suit before the trial court was filed on 14th November 2022, after the divorce was finalized.
38. It is therefore curious as to why the 1st Respondent only filed the suit before the trial court after the divorce and not before. It is also very curious that in less than a month after the suit at the trial court was filed, a Consent Judgement was filed, which settled the said suit. Was the suit at the trial court filed to defeat the Matrimonial Cause pending before the High Court, or to have the Appellant evicted from the suit property before being given an opportunity to advance her case?
39. Further, could the actions of the Respondents herein amount to collusion, and concealment of material facts? With the inclusion of the Appellant as a party to the suit, she should have been allowed to advance her claim for justice to be seen to be done. This haste Consent Judgement goes against the public policy, and should not be allowed to stand.
40. The Appellant’s claim may or may not succeed before the trial court, but she should be allowed an opportunity to advance her claim, and have her day in court. This is a constitutional requirement, and



a rule of natural justice. See the case of case of *Egal Mohamed Osman v Inspector General of Police & 3 others* [2015] eKLR, where the Court referred to the case of *Management of Committee of Makondo Primary School and another v Uganda National Examination Board*, HC Civil Misc Application No 18 of 2010, wherein the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”

41. Having analysed the evidence as above, this Court is satisfied that the non-disclosure of the Appellant's relationship with the 1st and 2nd Respondents before the trial Court and the fact that the Appellant occupies the suit property together with her children amounted to a material non-disclosure of fact.
42. Further, this Court is persuaded that following the divorce between the Appellant and the 2nd Respondent, things are not what they were before the Divorce, and the aspect of collusion between the 1st and 2nd Respondents cannot be discounted. Consequently, this Court finds and holds that the Appeal herein is merited and thus is allowed entirely.
43. Having allowed the Appeal, this court proceeds to sets aside the consent Judgment dated 15th February, 2023, recorded before the trial court on grounds of non-disclosure of material facts, and / or collusion between the Respondents herein, who are father and son.
44. The Respondents' claim that there are other live proceedings involving the suit property, which is evident from annexures attached to the Replying Affidavit of the Respondents dated 20th March 2023, filed before the trial court, being a Matrimonial Cause. This Matrimonial Cause was filed on 22nd March 2023, at Murang'a High Court for distribution of matrimonial property after Divorce, and the suit before the trial court was filed on 14th November 2022.
45. The suit at the trial court was filed earlier, between the Respondents herein, wherein the Appellant was not a party. The question of whether the 2nd Respondent fraudulently transferred the suit property to his name, has not been determined with the setting aside of the Consent Judgement.
46. That issue needs to be determined, in the suit before the trial court. On whether the suit before the trial court is sub judice or not, this court will leave it for determination by the two courts handling the matter, that is the trial court, and the High Court in the Matrimonial Cause. However, it is evident that the suit before the trial court was filed earlier.
47. Having set aside and/or vacated the Consent Judgement recorded before the trial court on 15th February 2023, this court directs that the original file be remitted back to the Chief Magistrates Court at Muranga, for full hearing and the said suit be determined on merit after granting the Appellant an opportunity to advance her case.
48. Therefore, this Court orders and directs that the suit before the lower court being Muranga CMELC No E094 of 2022, do proceed for inter-parties hearing, before another trial court, and not before Hon, Eric Musambai, who delivered the impugned Ruling.



49. On the issue of costs, the court is guided by Section 27 of the *Civil Procedure Act*, which provides that costs are granted at the discretion of the court. The Appellant herein is the successful litigant and is granted costs of this Appeal and at the trial court.

50. For avoidance of doubt, the Appeal herein is allowed with costs to the Appellant.

The Appeal is allowed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 3RD DAY of OCTOBER 2024.

L.GACHERU

JUDGE

3/10/2024

Delivered online in the presence of;

Joel Njonjo - Court Assistant

N/A for the Appellant

Notice on the entry of Judgement to issue.

N/A or the Respondent

L.GACHERU

JUDGE

3/10/2024

