



**Republic v Chief Land Registrar & 3 others; Patel (Exparte); Warrakah & another  
(Interested Parties); Patel (Applicant) (Environment & Land Miscellaneous  
Case 3 of 2021) [2023] KEELC 751 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 751 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND MISCELLANEOUS CASE 3 OF 2021  
AE DENA, J  
FEBRUARY 2, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT  
COUNTY LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT  
DIRECTOR OF SURVEYS KENYA ..... 3<sup>RD</sup> RESPONDENT  
COUNTY SURVEYOR-KWALE ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**RAOJIBHAI G PATEL ..... EXPARTE**

**AND**

**DZOCHERA ALI WARRAKAH ..... INTERESTED PARTY  
WELLINGTON OSORE OPIMBI ..... INTERESTED PARTY**

**AND**

**URMILABEN RAOJIBHAI PATEL ..... APPLICANT**

**RULING**

**The Application**

1. This ruling is subject of the application dated June 18, 2021 filed by the firm of Chamwada & Company Advocates on behalf of the Interested Parties herein. The Interested Parties seek for the following prayers;



- i. The consent judgment orders issued on May 22, 2017 be stayed pending hearing and determination of this application inter-parties
  - ii. The consent judgement orders issued on May 22, 2017 be varied, lifted and/or set aside pending the hearing and determination of the substantive Notice of Motion on merit
  - iii. Costs of proceedings
- 2 The application is supported by grounds listed on its face and which in summary state that the consent judgement issued on May 22, 2017 was entered without the knowledge, attendance and participation of the interested parties/applicants herein yet the orders obtained cancelled the applicants title no's Kwale/Msambweni A/3583, Kwale/Msambweni A /3633 and Kwale/Msambweni A /3594. It is stated that the applicants acquired the said properties for value and deserve to be given an opportunity to file a response and be heard. The applicants state that they are likely to incur serious losses to a tune of over Kshs 50,000,000/- in the event that the application is not allowed.
  - 3 The application is further supported by an affidavit sworn by one Dzochera Ali Warrakah. He avers that he is the proprietor of subdivision title no Kwale/Msambweni A /3594 hived from Kwale/Msambweni A/1706. The deponent states that sometime in the year 2014 she was introduced to Ms Mwanajuma Ali Buwa through his uncle one Jumaa Makopa with a view of purchasing land parcel Kwale/Msambweni A /3594. That the purchase price was agreed at Kshs 2 million to be paid in instalments for one year. That he made an initial deposit of Kshs 600,000/- and proceeded to clear the balance. Upon completion of payment of the purchase price the applicant received his title deed in the December 2015. According to the Applicant, he has maintained ownership of the suit property by fencing the same and maintaining the grounds and conducted various site visits.
  - 4 That sometime in early June of 2021 he wanted to develop the land and proceeded to carry out a search on the same but was informed that there was change of ownership to one Mr Raojibhai G Patel. That he was also informed that the green card to the parcel was missing and there was a court order prohibiting any dealings on the land. The deponent states that after consulting his advocate who perused the court file, he was informed of the consent judgement. That the advocate informed him that there was an affidavit of service on record sworn by John K Kalongo alleging that the he had been served with court process on the February 10, 2017.
  - 5 On the above he avers that he works as a pilot at Kenya Airways and on the date, it is alleged he was served with the Notice of Motion dated December 8, 2016 he was due to depart to Bangui-central Africa Republic where he arrived at 2 pm and flew back to Nairobi where he arrived at 7:21 pm. Leave was sought for the process server to be examined. The Applicants state that the consent judgement was entered without his knowledge, attendance and participation yet the orders granted affected a suit property he had lawfully acquired. That the orders issued were prejudicial to him and the subsistence of the same is causing him untold suffering and serious financial loss to the tune of Kshs 5,000,000/-. That the court acted without jurisdiction in granting the orders yet the affected parties were not given an opportunity to be heard.
  - 6 There is also filed with the application the supporting Affidavit of Mr Wellington Osore Opimbi sworn on June 18, 2021 where he avers to be the proprietor of the subdivision title deed number Kwale/Msambweni A 3583 hived off from the from Kwale/Msambweni A/1706. That he purchased the same from one Ms Mwanajuma Ali at a purchase price of Kshs 9 million. That he subsequently purchased an additional half acre for which he was later added another half-acre for which he was issued with title deed number Kwale/Msambweni A 3633. That in 2021 he was informed by Mr Warakah herein about the impugned court order/proceedings. The rest of his averments echo what is stated in the supporting



affidavit of Dzochera Ali Warrakah culminating into the filing of the present application. It is further stated that his name did not feature in the affidavit of service sworn by John K Kalongo meaning he was not served yet he deserved to be given an opportunity to respond to the substantive application. That his response would raise triable issues as a purchaser for value.

## Response

7. In response to the application, the exparte applicant Raojibhai G Patel filed a replying affidavit before court on November 5, 2021. He avers that he is the registered owner of LR No Kwale/Msambweni A/1706. That sometime in the year 2016 he discovered some illegal and unlawful entries had been procured and fraudulently registered against his title. The same purported to have acquired the land by way of adverse possession and registered and forged fake court orders on the register. He avers that there have never been adverse possession proceedings over the land.
8. It is further deponed that the land was subdivided into various plots by way of fraud. That he filed judicial review proceedings as per the Notice of Motion dated December 8, 2016. That he then sent his agents one Mwashirifu and John Kalongo at the office of the area chief for all the parties interested in the plots to hold a meeting. That the meeting was held on February 6, 2017 and he was informed by the said agents that all the interested parties were present and those that were absent were represented by their family members. That Twalib A Raganda and Dzochera Ali Warrakah were represented and service was accepted by their representatives. That the titles held by these two individuals were acquired illegally, unlawfully and fraudulently. That whoever sold them their respective parcels had no legal right over the said land and as such the titles held by them are fake. That by an order of this court the Rajiobhai G Patel was declared as the lawful and legally registered owner of the property Kwale/Msambweni 'A'/1706 and he still has his original title intact. That pursuant to the court order issued on May 22, 2017 the registrar of lands Kwale rectified the records on the suit property and had his name restored as the registered proprietor of the land. That upon such rectification the court became functus officio.
9. The Attorney General who was acting on behalf of the respondents did not put in any response to the application despite leave to respond to the application out of time on November 9, 2022.

## Submissions

### Applicants Submissions

10. The application was canvassed by way of written submissions. The Applicants submissions are filed before court on November 11, 2021. It is submitted that there was no service of the court process. The applicant states that if non service is established or the service is held to be insufficient then the judgement ought to be set aside together with all subsequent orders. Reference is made to the case of *Yalwala Versus Indimuli & Another [1989] KLR P 373* where it was held that service of process is so crucial a matter in litigation that courts must encourage the best service that is personal service. It is submitted that there was no personal service on both Applicants, the replying affidavit to the instant application confirms that the first Applicant was not present in the alleged meeting that it is stated the judicial review application was served. That it has not been explained who the representative that was served on behalf of the applicants was and the relationship between him and the applicant. The court is urged to find that no service was effected upon the applicant.
11. It is also submitted that the replying affidavit states that the alleged disputed land was illegally and fraudulently acquired. The court is referred to a similar situation in *Republic Versus the Chief Land Registrar & Another Exparte James Njoroge Njuguna [2012] eKLR* where Justice Majanja stated that the court exercising jurisdiction has inherent jurisdiction to set aside judgement wrongly entered. The



court is referred to the principles of setting aside *ex parte* judgement as was stated in the case of *Gandhi brothers versus HK Njage T/A HK enterprises HCCC No 1330 of 2001*. The applicant states that even if service was properly affected, the court still has unfettered discretion to set aside judgement as was set out in *Philip Chemwolo Vs Augustine kubende CA No 103 of 1984*.

- 12 That the orders issued on May 22, 2017 are prejudicial to them and the continued subsistence of the same has caused them untold suffering as they have lost their developed properties without being heard. They seek that the court grants unconditional leave to defend.

### **Ex parte/Applicants submissions**

- 13 The Ex parte/Applicants submissions are filed before court on October 6, 2022. Three issues for determination have been curved out;
1. Whether the Interested Parties application dated June 18, 2021 has been overtaken by events
  2. Whether the Interested Parties application dated June 18, 2021 is estopped by the doctrine of laches
  3. Whether the interested Parties/Applicants have exhausted all their remedies.
14. On above 1) above, it is submitted that the application by the interested parties herein was filed on June 18, 2021 and consent judgement had been entered on May 22, 2017. That the period between the two events is 5 years 1 month. That the consent judgement took effect and was acted upon by the Land Registrar where the title to the suit property Kwale/Msambweni /A/1706 was rectified to reflect the name of the *ex parte* applicant Raojibhai G Patel. That upon gazettelement of the same by the Land Registrar Kwale there was no objection that was raised by any individual.
15. It is submitted if this court was to proceed and determine the substantive application as prayed in the instant application and allows the same in their favor the court will have issued orders of judicial review quashing its own decision. That the application having brought under the provisions of Order 53 Rule (1)(2)(3) and (4) the Applicants have not sought for the writ of certiorari as well as leave to seek orders of judicial review. That even if they did, the same would have been brought 6 months after grant of the orders being 5 years.
16. On whether the Interested Parties application dated June 18, 2021 is estopped by the doctrine of laches, it is submitted that estoppel by laches is an equitable relief by which some courts deny relief to a claimant who has unreasonably delayed or been negligent in asserting a claim. That in the present case the circumstances have changed, the illegal subdivisions were cancelled and the title LR No Kwale/Msambweni/ A 1706 rectified to the original owner and proprietor Raojibhai G Patel who passed away in 2021.
17. On whether the interested parties/applicants have exhausted all their remedies, it is contended that the applicants claim to have purchased their portions from some of the respondents herein. That the respondents were served with pleadings but failed to file a response or produce the High Court order purportedly granting title by adverse possession vide a non-existent court case no HCC No 916 of 2007[OS]. That the respondents procured forged documents which are non-existent to date. That the interested parties have not made any attempts to justify that the persons who sold them the plots were in possession of valid court orders. That the Ex parte Applicant who is the legal owner of the land did not sale the suit property to the applicants and they thus have no legal claim against him. It is submitted that the interested parties are at liberty to seek both civil and criminal redress to recover their monies. That the court is being invited to sit on appeal of its own matter. That the same is not the purpose of



the courts special and residual jurisdiction. The court is urged to dismiss the application dated June 18, 2021 for being incurably defective.

### Analysis And Determination

18. This application has been brought pursuant to the provisions of Article 49 of the *Constitution*, Order 53 Rule 1[1][2][3] and [4] of the *Civil Procedure Rules*, Sections 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya, the inherent jurisdiction of the court and all other enabling provisions of the law. Of course, article 49 is on rights of arrested persons maybe counsel meant article 48 on access to justice. Article 50 is on the right to fair hearing. Section 8 and 9 of the *Law Reform Act* provides leave. Order 53 Rule 1 is on procedure for Applications for mandamus, prohibition and certiorari leave and related matters. It is clear from the present application that the applicants seek orders to set aside the consent judgement issued on May 22, 2017 and to allow for them to be heard on the substantive Notice of Motion dated December 8, 2016. The overriding objective of the *Environment and Land Court Act* 2011 is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act as read together with Article 162[2] of the *Constitution* of Kenya 2010. Indeed, the overriding objective provided for under Sections 1A and 1B and the inherent power of the court under Section 3A are meant for the attainment of justice to the parties who come to court, efficient disposal of proceedings at a cost affordable by the respective parties. I will therefore overlook the technicality and invoke the courts inherent powers under section 3A to hear this application.
19. Having considered the application, the response, submissions and authorities placed before the court, the main issue for determination is whether the Interested Parties/Applicant have met the threshold for reviewing or setting aside a consent judgment. These have been outlined in myriad decisions of the court.
20. The Court of Appeal in the case of *Samson Munikah practicing as Munikah & Company Advocates vs Wedube Estates Limited Nairobi Civil Appeal No 126 of 2005* where the court stated that:

' This appeal raises the vexed question: (of) what are the circumstances in which a consent judgment may be set aside? In *Broke Bond Liebig (t) Ltd V Mallya* (1975) EA 266 the then court of appeal for East Africa set out the circumstances in which a judgment freely entered into by parties to a dispute in court would be set aside: -

'The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani V Kassan* (1952)19 EACA 131 where the following passage from Section on judgments and orders, 7<sup>th</sup> Edition vol 1, P 124 was approved:

'Prima Facie, any order made in the presence and with the consent of the 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 the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement'.

For his part Ag Vice President Mustafa had this to say:

'The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, eg, on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind



a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all material facts and there could have been no mistake or misunderstanding’.

21. 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.

22. The court has been informed that the Interested Parties/Applicants herein were not served with the judicial review application subject of the consent judgement issued on May 22, 2017. That they were therefore without the knowledge of cancellation of their title deeds until a search was conducted at the land’s office. The attention of the court has been drawn to the affidavit of service sworn by one John J Kalongo on May 12, 2017. It is averred at paragraph 6 of the same that on December 6, 2017 through the Exparte Applicants agent Mr Mwasharifu, it was organized with the chief of Kigwede Shirazi location to invite the Respondents and interested parties who are the people who had acquired ownership of the exparte applicants land for a meeting at the chief’s office. At paragraph 8 the process server states that on February 10, 2017 in the company of Mr Mwasharifu they went to the chief’s office where they found the parties mentioned present.
23. The averments as stated by the process server are vehemently opposed by the first Interested Party who states that he is a pilot and on the February 10, 2017 he was at work as evidenced by the flight schedule produced before court. From this it is confirmed that indeed the said party was not present at the meeting as alleged by the process server and could not have been served. On the other hand, Mr Opimbi states that his name is not at all referred to in the said affidavit of John K Kalongo and to me rightly so because he was not one of the interested parties listed which I will address later in this ruling. For that reason, it is my view that proper service was not effected upon Mr Warakah.
24. The court has further perused the contents of the consent judgement, the same was by Mr Opolu counsel for the Applicant and Mr Makuto for the Respondents. The Interested Parties/applicants have not been represented in the said consent and the same is proof that they indeed did not take part in the same and could not have consented to the same. Applying the guidelines herein on the circumstances under which the court can set aside a judgement this alone would be a reason to set aside the consent judgement. The other basis this court would be inclined to set aside the consent judgement herein is that the court was ignorant of some facts in that at the time of adopting the said consent as the judgement of the court, the court was not aware of the fact that not all parties listed in the suit had consented and or were aware of the said consent since in relying on the said affidavit of service all the respondents were deemed to have been aware and having participated in the discussions at Chiefs office about the proceedings herein.
25. The 1<sup>st</sup> interested party produced a copy of title deed issued on December 14, 2015 and Mr Opimbi presented copies of his two titles as well allegedly excised from the mother title. The *Constitution* of Kenya 2010 is instructive on the protection of right to ownership of land as envisaged under Article 40. Section 24 of the *Land Registration Act* No 3 of 2012 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25 of the said Act provides that the



rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act. The consent judgement had the effect of determining the applicant's rights to their property and for me this in addition to the foregoing a reasonable ground upon which this court should set aside the consent judgement to enable the applicants ventilate before the court their side of the story. This is what justice requires.

26. I have observed that Mr Wellington Osore Opimbi has been brought in as interested party in these proceedings yet he was not one of the respondents listed in the initial proceedings. Leave of this court ought to have been first obtained. His tiles are 3583 and 3633 and are included in the paragraph 1(b) 3 and 4 and ought to have been included as one of the parties. Invoking the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules he shall be deemed as duly added as an interested party to these proceedings. He ought to have been added then. His presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. Additionally, any orders issued will clearly affect him. Also see *Zephir Holdings Ltd Versus Momosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya [2014] eKLR* and in *Departed Asians Property Custodian Board Versus Jaffer Brothers Ltd [1999] 1EA 55*.
27. The upshot of the foregoing is that the application dated June 18, 2021 is hereby allowed in the following terms;
1. The consent judgement orders issued on May 22, 2017 be and are hereby set aside.
  2. The status quo with regard to the register in respect of Kwale/Msambweni /A/1706 and status quo in regard possession thereof shall be maintained.
  3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are hereby prohibited from registering any disposition against Kwale/Msambweni /A/1706 until final determination of this matter.
  4. Costs shall be in the cause.

It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023**

**A.E. DENA**

**JUDGE**

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

Mr. Maithya holding the brief for Mr. Opulu for the Exparte/Applicants

Chamwada for Applicants

Mr. Disiii- Court Assistant.

