



**Job v Tenga; Tenga (Interested Party) (Environment & Land Case 56 of 2013) [2023] KEELC 21365 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21365 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 56 OF 2013**

**BN OLAO, J**

**NOVEMBER 9, 2023**

**BETWEEN**

**CELESTINE OLUBAI JOB ..... PLAINTIFF**

**AND**

**DARIO NIKOLAU TENGA ..... DEFENDANT**

**AND**

**JOSEPHAT RASTO MATETE TENGA ..... INTERESTED PARTY**

**RULING**

1. The dispute between Celestine Olubai Job (the Plaintiff) and Dario Nikolau Tenga (the Defendant) over the land parcels No South Teso/Angoromo/972, 2447 and 2448 was compromised vide a consent order dated 29<sup>th</sup> April 2019 following a consent letter dated 15<sup>th</sup> March 2019 signed by all the parties counsel and adopted by the Deputy Registrar on 24<sup>th</sup> April 2019. The said consent was signed both by Mr Fwaya Advocate for the Plaintiff and Mr Jumba Advocate for the Defendant. A decree dated 24<sup>th</sup> July 2019 followed after the order was endorsed by the Deputy Registrar.
2. I now have for my determination the Plaintiff's Notice of Motion dated 13<sup>th</sup> March 2023 and predicated under the provisions of Order 10 Rule 11, Order 22 Rule 25 and Order 51 Rule 3 of the [Civil Procedure Rules](#) by which the following orders are sought.
  1. Spent
  2. That a stay of execution of the consent order dated 29<sup>th</sup> April 2019 and the consequential decree dated 24<sup>th</sup> August 2019 be and is hereby granted pending the hearing and final determination of this application.
  3. That the consent order dated 29<sup>th</sup> April 2019 and the consequential decree dated 24<sup>th</sup> August 2019 be and are hereby set aside.



4. That the Defendant be and is hereby granted leave to proceed with the suit herein to be heard and determined on merit.
5. That costs of this application be provided for.
3. The application is predicated on the grounds set out therein and is supported by the Plaintiff's affidavit also dated 13<sup>th</sup> March 2023.
4. The gravamen of the application is that one Josephat Rasto Matete Tenga who has been impleaded in these proceedings as an Interested Party has commenced execution of the consent judgment herein yet the Defendant is now deceased. That the said Interested Party has now obtained a Court order to enable him get security to execute the decree herein yet the Defendant has not been substituted.
5. The Plaintiff adds that she did not consent to the order that led to the decree herein and neither did her advocate consult her. That the consent lacks the spirit of good faith and the Interested Party has been using money to influence powerful public agencies like the land office and the police. The consent order should therefore be set aside in the interest of justice.
6. The Plaintiff has annexed the following documents to the application:
  1. The consent order signed by the Deputy Registrar.
  2. The Decree.
  3. An order directing the Officer Commanding Busia Police Station to provide security to the Interested Party herein.
  4. A letter dated 9<sup>th</sup> March 2023 by Omeri & Associates Advocates addressed to the Land Registrar, the Officer Commanding Busia Police Station and the County Surveyor Busia.
  5. A letter dated 9<sup>th</sup> March 2023 by the Chief Angorom location addressed to whom it may concern.
  6. Minutes of a meeting held on 19<sup>th</sup> December 2022 by the family of Olubai & Dairo.
  7. The application is opposed and the Interested Party filed grounds of opposition dated 24<sup>th</sup> April 2023 raising the following:
    1. That the Court lacks jurisdiction to set aside a consent order entered into and endorsed as Court order by the parties.
    2. That there is no suit pending, the same having been settled by consent.
    3. That in any event, the Court order has already been implemented on the ground to the fullest.
    4. That the firm of Advocate for the Applicant is not properly on record and hence the proceedings are wanting in the eyes of the law.
8. The Interested Party also filed a replying affidavit questioning the jurisdiction of this Court and adding that the consent order has already been implemented. That the Applicant is a busy body with no locus in this matter and the land in dispute has already mutated and no longer exists.
9. Annexed to the replying affidavit are the following documents:
  1. The consent order dated 29<sup>th</sup> April 2019.



2. The resultant decree 24<sup>th</sup> July 2019.
3. An order issued by Hon. P. A. Olengo on 3<sup>rd</sup> March 2023 Busia CM MISC Application No E010 of 2023.
10. The Defendant did not file any response to the application which has been canvassed by way of written submission.
11. I have considered the application, the grounds of opposition and the submission by Mr Omeri instructed by the firm of Omeri & Associates Advocates for the Plaintiff and by Mr Okutta instructed by the firm of Ouma Okutta & Associates Advocates for the Interested Party.
12. The starting point is whether the firm of Omeri & Associates Advocates are properly on record for the Plaintiff. The record shows that when the consent order was adopted as a judgment of this Court, the Plaintiff was represented by the firm of Ms Gabriel Fwaya Advocates. Order 9 Rule 9 of the [\*Civil Procedure Rules\*](#) that:
  - “Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court –
    - a. Upon an application with notice to all the parties; or
    - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
13. The firm of Omeri & Associates Advocates filed a Notice of Change of Advocate dated 13<sup>th</sup> March 2023 citing Order 9 Rule 5 of the [\*Civil Procedure Rules\*](#). However, since there is already a consent order herein which resulted in a decree issued on 24<sup>th</sup> July 2019 and providing, Inter alia, for the rectification of the register of the land parcel No South Teso/Angoromo/972 to read 4.5 hectares instead of 3.8 hectares and for the Plaintiff to sign the mutation form, that means there is in fact a judgment on record even though the record reads consent order rather than consent judgment. In my view however, since a decree followed the said consent order, that order can only be interpreted as a decree of this Court. A decree is defined in Section 2 of the [\*Civil Procedure Act\*](#) as:
  - “... the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 34 or section 91, but does not include -
    - (a) any adjudication from which an appeal lies as an appeal from an order; or
    - (b) any order of dismissal for default:Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;”



14. The term final judgment is defined in *Black's Law Dictionary* 10<sup>th</sup> Edition as:

“A Court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and sometimes, attorney fees) and enforcement of the judgment.”

Clearly therefore, the firm of Omeri & Associate Advocates are not properly on record for the Plaintiff. The application offends the provisions of Order 9 Rule 9 of the Civil Procedure Code as there is neither a consent filed between that firm and the firm of Gabriel Fwaya Advocates who were on record when the consent order was filed and adopted and neither was there any application allowing the said firm of Omeri & Associates Advocates to come on record. On that basis alone, the Notice of Motion dated 13<sup>th</sup> March 2023 is for striking out.

15. I will nonetheless consider the said application on the merits or otherwise.

16. Josephat Rasto Matete Tenga who has been impleaded as an Interested Party in the application dated 13<sup>th</sup> March 2023 was never a party at all in these proceedings from the inception of the suit. He was therefore not a party at the time when the consent order dated 24<sup>th</sup> April 2019 was adopted as an order of this Court followed subsequently with the decree dated 24<sup>th</sup> July 2019. The said Interested Party has simply been introduced into these proceedings vide the application dated 13<sup>th</sup> March 2023.

17. Order 1 Rule 10(2) of the *Civil Procedure Rules* provides for the manner in which an Interested Party may be enjoined in proceedings. It reads:

“The court may at any stage of the proceeding, 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 and settle all questions involved in the suit, be added.”  
Emphasis added.

There is nothing on the record to show that the Court, either on its own motion or upon application by either the Plaintiff or Defendant or the said Interested Party allowed the joinder of any other party as an Interested Party in these proceeding. Therefore Josephat Rasto Matete Tenga who has been enjoined in these proceeding as an Interested Party is basically a busy body.

18. On the prayer for the setting aside of the consent order dated 29<sup>th</sup> April 2019 and the consequential decree, the short answer to that is that the said Interested Party not being properly on the record, he cannot, being a stranger, benefit from any orders by this Court either through this application or by the decree herein.

19. The above notwithstanding, the grounds upon which a consent judgment or order can be set aside were set out in the case of *Hirani v Kassam* 1952 19 EACA 131 wherein the Court adopted the following passage from *Seton On Judgments and Orders* 7<sup>th</sup> Edition Vol 1 Page 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 the 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.”

20. In *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* 1982 KLR 485, it was 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 collusion or by an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts. Further, that a duly instructed advocate has an implied general authority to compromise and settle the action. The client cannot therefore avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

21. Then in *Brooke Bond Liebig Ltd v Mallya* 1975 E.A 266, the Court said: per LAW Ag. P:

“A Court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for varying or rescinding a contract between the parties.”

That is the thread that runs through the cases in which this issue of setting aside consents judgments or orders has been discussed.

22. According to the supporting affidavit of the Plaintiff herein, he was in Uganda when he received information that the Interested Party was implementing a Court order which was strange to him. It was then that he discovered that his then counsel Mr Gabriel Fwaya had compromised the suit without his knowledge. That he never instructed his then counsel to sign such a consent and the same is irregular, unjust and also prejudicial to him.

23. It is of course a good practice, as Nyarangi JA stated in the case of *William Karani & Others v Wamalwa Kijana & Others* 1987 KLR 555, and which has been cited by counsel for the Plaintiff, that:

“It would be recommended to Judges to adopt the practise of requiring parties and their advocates to append their respective signatures to consent orders as this practice might reduce subsequent arguments about the consent order.”

While that is a good practise, the judge was not saying that is mandatory. It is only “recommended” as a good practice. I too have no hesitation recommending it. It must be remembered, however, that counsel on record has ostensible and general authority to compromise a suit and his client cannot avail himself of any limitation by him of such authority unless the same was brought to the notice of the other side – *M&E Consulting Engineers Ltd v Lake Basin Development Authority* 2015 eKLR [C.A. Civil Appeal No 263 of 2009].

24. I have not heard the Plaintiff allege fraud or collusion on the part of his then counsel Mr Gabriel Fwaya when he signed the consent letter dated 15<sup>th</sup> March 2019 together with Mr Eric Jumba then acting for the Defendant and which compromised the suit with the signing of the consent order by the Deputy Registrar on 24<sup>th</sup> April 2019. No doubt Mr Gabriel Fwaya had both general and implied authority to do so. If that authority was in any way limited, I have not heard the Plaintiff state to which extent it was limited and neither has the Court been shown any communication by the Plaintiff to his then counsel to that effect. This Court must rule that Mr Gabriel Fwaya had the authority to sign the consent letter dated 15<sup>th</sup> March 2019 on behalf of the Plaintiff who is therefore bound by the consent order and subsequent decree. The threshold to warrant the setting aside of the consent judgment and decree has not been met.

25. It has also been deposed in paragraph 4 of the Plaintiff’s supporting affidavit as follows:



4: “That further to the foregoing, I know that the Defendant herein is deceased and has not been substituted by anybody to proceed with the same.”

I have no reason to doubt that averment as it has not been rebutted. Infact it was confirmed by the Interested Party in paragraph 7 of his replying affidavit. And since the deceased Defendant and the Plaintiff were the only parties to the consent order, it means that there is no other party against whom the orders sought herein can be made.

26. Finally, I have seen annexed to the Plaintiff’s application an order issued by Hon. P. A. Olengo Senior Principal Magistrate on 3<sup>rd</sup> March 2023 purportedly in both this case as well as Busia Cm’s Court Miscellaneous Application No E010 of 2023 involving the Plaintiff and deceased Defendant and in which Josephat Rasto Matete Tenga is named as the Applicant. The order reads in paragraph 2 thus:

2: “That the Officer Commanding Station Busia Police Station to provide security to the County Surveyor, Land Registrar and the Applicant as they mark and plant boundaries on land parcel No S. Teso/Angoromo/972 in pursuance with the Court decree of 24/7/2019”.

27. There is nothing to show that this suit was ever consolidated with Busia CM’S Court Miscellaneous Application No E010 of 2023 for hearing and final determination. Further, the consent order that led to the decree in this case did not include any other suit between the parties herein i.e Celestine Olubai Job and Dario Nikolau Tenda. Finally, no application was ever filed and granted in this case for the police to provide any security to the County Surveyor, the Land Registrar and the Plaintiff with respect to the survey and marking of boundaries on the land parcel NO South Teso/ANgoromo/972. If such an order was obtained in other proceedings in the subordinate Court, it cannot be imported into these proceedings. To that extent, that order is improperly in this file and must be expunged from the record.

28. The up-shot of all the above is that having considered the Notice of Motion dated 13<sup>th</sup> March 2023, I make the following disposal orders:

1. The application is dismissed with costs to the Interested Party.
2. The order issued on 3<sup>rd</sup> March 2023 purportedly in Busia CM’S Court Miscellaneous Application No E010 of Case No 56 of 2013 by Hon. P. A. Olengo directing the Officer Commanding Busia Police Station to provide security was issued unprocedurally. It cannot be used to execute any order in this suit. It is hereby expunged from the record.

**BOAZ N. OLAO**

**JUDGE**

**9TH NOVEMBER 2023**

**RULING DATED, SIGNED AND DELIVERED ON THIS 9TH DAY OF NOVEMBER 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

**BOAZ N. OLAO**

**JUDGE**

**9TH NOVEMBER 2023**

