



**Nyakio v Kihara & another (Constitutional Petition E008 of 2024)
[2025] KEHC 3024 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CONSTITUTIONAL PETITION E008 OF 2024**

FN MUCHEMI, J

MARCH 13, 2025

**IN THE MATTER OF ENFORCEMENT OF ORDER 9 RULE 1 & RULE 7
OF THE CIVIL PROCEDURE RULES, LEGAL NOTICE NO. 151 OF 2010**

AND

**IN THE MATTER OF ENFORCEMENT OF ORDER 45 RULE 1 & 2 OF
THE CIVIL PROCEDURE RULES, LEGAL NOTICE NO. 151 OF 2010**

AND

IN THE MATTER OF AN APPLICATION TO BE ENJOINED AS A PETITIONER

BETWEEN

MACMILLAN KARANU NYAKIO APPLICANT

AND

RUTH MAGIRI KIHARA PETITIONER

AND

THE LANDLORD, BARAKA APARTMENTS RUIRU RESPONDENT

RULING

Brief Facts

1. This application dated 29th October 2024 seeks for review or withdrawal of the court orders dated 29th July 2024 or for the said orders to be vacated and the petition be reinstated to be heard and determined in the interest of justice.
2. The respondent filed a replying affidavit dated 25th November 2024 in opposition to the petition.



The Applicant's Case

3. The applicant states that he is the estranged husband of the petitioner and father of their children namely Winifred Nyakio Karanu, aged 13 years, Samuel Kariuki Karanu, aged 11 years, Angel Wambui Karanu, aged 7 years and Blessing Njeri Karanu, aged 4 years, The petition that was withdrawn by consent instituted by the petitioner as their mother in mutual consent with the applicant who is their father.
4. The applicant avers that he was cohabiting with the petitioner and living their children during the period their constitutional rights and fundamental freedoms were infringed by the respondent. On 21st May 2024, the applicant states that the honourable court granted the petitioner a restraining order against the respondent and his advocate due to harassment.
5. The applicant states that as at 29th May 2024, the petition and the notice of motion applications dated 6th May 2024 and 20th May 2024 had not been opposed by the respondent despite the order of the Honourable Court dated 21st May 2024 and was awaiting directions on submissions by the Honourable court. The applicant further states that he was surprised to learn that the instant petition was unlawfully withdrawn by a total stranger without the consent of both parents which made the withdrawal null and void ab initio.
6. The applicant states that the initiation of and the withdrawal of the petition on 29th July 2024 by Makuno Gacoya & Associates is illegal, irregular and a mockery of justice which is an abuse of the court process and should be vacated with immediate effect.
7. The applicant avers that on 6th June 2024, the petitioner representing herself appeared before the Honourable Court live on teams and took directions thereof. Furthermore, the applicant states that there was no Notice of Appointment of advocate filed in the court by any advocate for this matter and therefore Makuno Gacoya & Associates were acting contrary to Order 9 Rule 1 and 7 of the Civil Procedure Rules.
8. The applicant further avers that Makuno Gacoya & Associates are purportedly representing the petitioner's boyfriend in Kiambu Petition No. E019 of 2024 where his advocate and client have been cited for perjury and subordination of perjury. The applicant states that Makuno Gacoya & Associates purposely misled the court in initiating the withdrawal of the petition to which they are strangers, acted in bad faith, ultra petita thus ultra vires and in abuse of the court process by meddling in the petition without being duly appointed as an advocate to do so.
9. The applicant applies to be enjoined as a petitioner on behalf of his children to substitute the petitioner who evidently has been compromised by her boyfriend and his advocate at the expense of the children's best interests and protection of their constitutional rights and fundamental freedoms in the Bill of Rights in *the Constitution* of Kenya.
10. The applicant argues that it is in the interest and administration of justice that this Honourable Court ought to protect, uphold and defend the constitutional rights, fundamental freedoms of the children and give paramount importance to the best interests of the children as enshrined in Articles 48 and 53 of *the Constitution* of Kenya.

The Respondent's Case

11. The respondent states that the court orders issued on 29/7/2024 is a consent order which was voluntarily entered by the parties to the suit, which effectively withdrew the petition filed herein. Thus,



- the respondent argues that there exists no suit on which the present application can be based, the same having been withdrawn by the petitioner on 29/7/2024.
12. The respondent states that the applicant is a stranger to these proceedings and has no capacity to represent the petitioner in the case.
 13. The respondent argues that the consent order sought to be set aside was voluntarily entered by the parties on record and the said court order remain in place. There was no mistake or misrepresentation or fraud perpetrated by the respondent to influence the petitioner's decision to withdraw the petition. Equally there is plausible explanation which has been advanced to set aside the impugned consent order given on 29/7/2024.
 14. The respondent avers that the petitioner is not aggrieved and has not raised any complaint to the consent order. Furthermore, the applicant is not a necessary party and need not be enjoined as a party in the suit.
 15. The respondent further states that on 29th July 2024, Mr. Gachoya Advocate, as such an advocate had capacity to represent and did indeed appear in court in the company of the petitioner where he ably represented the petitioner and informally moved the court to withdraw the petition and was so allowed.
 16. The respondent states that if the interested party is aggrieved by the withdrawal of the petition and or is still interested in pursuing the claim, he has liberty to file fresh and separate proceedings of his own.
 17. The respondent avers that the relation of the petitioner and the respondent is that of a tenant landlord which is the subject of a contract and the issues raised in the petition could only have been addressed in a civil remedy and not a constitutional issue.
 18. The respondent states that the petitioner's children are not the landlord's biological children and children rights (if any) can only be addressed under the *children Act*. The respondent further states that the petitioner and her children moved out of the premises and therefore severed the contractual relationship with the landlord.
 19. The respondent states that the application has no substance as there are no constitutional issues raised in the matter to be addressed by this Honourable Court.
 20. The application was disposed of by way of written submissions.

The Applicant's Submissions

21. The applicant submits that his children stand to suffer irreparable miscarriage of justice to the violations and infringements visited upon their constitutional rights and fundamental freedoms in the Bill of Rights under Article 3, 48, 53 of *the Constitution* by the respondent if the withdrawal order dated 29th July 2024 is upheld and is not vacated or set aside and which was unlawfully obtained by a stranger to the suit contrary to the written law, to wit Order 9 Rule 1 & 7 of the Civil Procedure Rules.
22. The applicant relies on the case of High Court of Kenya at Nairobi Civil Suit No. 118 of 2018 and submits that the firm of Makuno Gacoya & Associates did not file a Notice of Appointment contrary to Order 9 Rule 1 & 7 of the Civil Procedure Rules. The applicant submits that the said firm of advocates were malicious, they did not take the case seriously or accord it the importance it deserved and manipulated the petitioner in total disregard to the advocates professional conduct. The applicant argues that since the firm of advocates is a stranger in the matter, the orders they obtained ought to be vacated or set aside.



23. The applicant further relies on the case of High Court at Kitale, Miscellaneous Application No. 7 of 2022 J.O. Samba t/a Samba & Co. Advocates vs Jackline Jelangat Mengich [2023] KEHC 26997 (KLR) and urges the court to vacate and set aside the withdrawal orders obtained illegally by the firm of Makuno Gacoya & Associates on 29th July 2024 as the court was deliberately misled by the professional misconduct, negligence and assumptions of the advocates who did not conduct themselves in ways that would ordinarily have led the court to arrive at a just and judicious decision.
24. The applicant refers to Article 22(1) (2)(a) of *the Constitution* and Rule 5(c) of *Legal Notice No. 117 of 2013* and submits that the petitioner is a bitter, disturbed and vulnerable woman who was easily and maliciously manipulated to come before the court with unclean hands in the guise of allowing a stranger in the matter to allegedly withdraw the petition. The applicant further relies on the case of Petition (Application) E033 of 2023 Harcharan Singh Sehmi & Another vs Tarabana Company Limited & 5 Others and submits that enjoinder of a party is not as of right but is at the discretion of the court and therefore an applicant must set out sufficient grounds before the court.
25. The applicant submits that the withdrawal of the petition on 29th July 2024 is prejudicial in toto to the best interests of the children and the court has a constitutional obligation to give the best interests of the children paramount importance as anticipated by Article 48 and 53 of *the Constitution*. The applicant further submits that as a father of the children herein, he stands to suffer great prejudice if the application is not allowed as the petitioner has well established and put it that he is well versed with the instant petition to a point of swearing that he filed the matter under her name which means it would serve justice to the children to have him substitute the petitioner.

The Respondent's Submissions

26. The respondent submits that on 29th July 2024, the petitioner together with her advocate, Mr. Gachoya and the respondent's advocate Mr. Mahinda appeared before the court and Mr. Gachoya with express authority from the petitioner applied to withdraw the petition and with Mr. Mahinda's consent, the same was allowed with no orders as to costs. It was further agreed that the Kshs. 50,000/- deposited in court on 29/5/2024 be released to the respondent's advocates.
27. The respondent relies on the case of Brooke Bond Liebig vs Mallya (1975) EA 266 and submits that the applicant has not proved any fraud, collusion, mistake or misunderstanding that would allow a consent judgment to be set aside. Furthermore, the misleading allegation that Mr. Gachoya was not properly before the honourable court has been rebutted by the Notice of Appointment of Advocates dated 16th July 2024 which is on record and the petitioner's presence on 29/7/2024.
28. The respondent submits that a consent order can only be vacated for reasons that would enable a court to set aside or rescind a contract. Thus the applicant who was not privy to the consent order cannot rescind the same notwithstanding the fact that he is the father of the children. By law, the petitioner has every right to withdraw the petition lodged in her name without the consent of other parties not before the Honourable Court.
29. The respondent argues that him and the petitioner both entered into the consent voluntarily and none of them are aggrieved. The applicant has not shown or proven any reason known to law, why the consent order should be vacated.
30. The respondent submits that there is no existing petition for the applicant to be enjoined as a petitioner and the current petitioner to be substituted. The respondent argues that if the consent orders were vacated, Rule 5(c) and (d) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules provides that a court can only enjoin and substitute a party



when proceedings have been instituted in the name of the wrong person, through a mistake made in good faith and when substitution is necessary for the determination of the matter in dispute. The applicant has failed to show that the petitioner was improperly joined through a mistake and that his substitution is necessary for determination of the matter in dispute.

31. The respondent relies on the case of *Technomatic Limited t/a Promopack Company vs Kenya Wine Agencies Limited & Another* [2014] eKLR and submits that the applicant has not told the court why the current petitioner will not suffice or in what way she wrongly instituted the proceedings in her own name. the applicant has failed to show that he is a necessary party, that the ultimate order or decree cannot be enforced without his presence in the matter and that his presence is necessary for the adjudication of all questions arising in the petition.
32. The respondent relies on the case of Lugo *vs Director of Public Prosecution (Pet No. 62 of 2020)* (2022)KEHC 10574 KLR (May 27, 2022) and submits that the instant petition emanates from a tenancy relationship between the parties herein in which the respondent is accused of disconnecting water and electricity. Accordingly, the respondent avers that the dispute is a subject of contract and the issues raised in the petition can only be addressed in a civil court. The respondent submits that even though the consent orders are vacated, the petition will perish on the altar of the doctrine of avoidance.

Issue for determination

33. The main issue for determination is whether the application has merit.

The Law Whether the application has merit.

34. The respondent argues that the petition herein was withdrawn following a consent entered by the parties on 29th July 2024.
35. There is currently a dearth of authorities on the law governing the setting aside of a consent judgment or order. The case of *S. M. N vs Z. M. S & 3 Others* [2017] eKLR summaries the case law and grounds upon which a consent may be varied or set aside as follows:
 - i. Where the consent was obtained fraudulently;
 - ii. In collusion between affected parties;
 - iii. Where an agreement is contrary to the policy of the court;
 - iv. Where the consent is based on insufficient material facts;
 - v. Where the consent is based on misapprehension or ignorance of material facts;
 - vi. Any other sufficient reason.
36. Generally, a court will not interfere with a consent judgment except in circumstance such as would provide a good ground for varying or rescinding a contract between parties.
37. In *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR Hancox JA held the view that:-

It is now settled law that a consent judgment or order has a 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.



38. The Honourable Judge went further and cited Setton on Judgments & Orders 7th Edition Vol. 1 page 124 and reiterated that:-

Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 a court set aside an agreement.

39. In Kenya Commercial Bank Ltd vs Specialised Engineering Company Ltd [1982] KLR 485, Harris J:

1. A consent order entered into by a 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 or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot 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.

40. In Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another [1998] eKLR this court cited a passage in the Supreme Court Practice 1976 (Vol 2) paragraph 2013 page 620 stating:-

“ Authority of solicitor- a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction, and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen) [1903] 1 Ch pp817, 818; Little vs Spreadbury [1910] 2KB 658. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice. Welsh vs Roe (1918-9) All ER Rep 620.”

41. Similarly in the Ugandan case of Lenina Kemigisha Mbabazi Star Fish Ltd vs Jing Jeng International Trading Ltd (HCT-OO-MA-344-2012):-

“ The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”

42. Lastly in Brooke Bond Liebig vs Mallya (1975) EA 266 where Mustafa Ag. VP stated:-

“ The compromise agreement 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 circumstance, e.g on grounds of fraud, collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a 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 the material facts and there could not have been any mistake or



misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

43. Essentially, the above-cited authorities are clear that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason, which would enable a court to set it aside. On 29th July 2024, Mr. Gacoya, counsel for the petitioner and Mr. Mahinda, counsel for the respondent entered into a consent and withdrew the petition with no orders as to costs. By consent the petition was withdrawn and an order made that the Kshs. 50,000/- deposited in court on 29/5/2024 be released to the respondent’s advocates.
44. The applicant has not made any attempt to show that the consent was procured through fraud, misrepresentation, non disclosure of material facts or mistake. Additionally the applicant has not shown that the petitioner’s advocate knowingly mis-represented or concealed material facts in procuring the consent. Therefore it is evident that the consent order entered into was binding on all parties and the applicant who was not a party to the consent cannot set aside the consent as he was not privy to it and further he has not proven any of the grounds to set aside a consent judgment. The applicant in this application was not a party to the petition that was withdrawn on 29/07/2024. Being a stranger to the petition, the applicant has no locus standi to apply for withdrawal of a consent between the parties.
45. The applicant further prays that he be enjoined as a party to the petition. Upon reinstatement. This will depend on the success or otherwise of this application. The applicant has no locus standi in this matter as I have already stated. It is further noted that there is no petition in existence and as such the issue of joinder cannot be actualized.
46. On the issue of the firm of Makuno Gacoya & Company not having filed a notice of appointment to represent the petitioner on 29/07/2024, this issue has not been challenged by any party in this petition. As such, the petitioner who is a stranger herein cannot validly challenge it herein. However, he can take it up with the Law Society of Kenya as a disciplinary issue.
47. I find this application incompetent and misconceived. It is hereby struck out with costs.
48. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

