



REPUBLIC OF KENYA



**Moriasi v Kimati & another; Registrar of Lands, Nyamira County & another (Interested Parties)  
(Environment & Land Case 43 of 2020) [2025] KEELC 3853 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3853 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 43 OF 2020**

**M SILA, J  
MAY 15, 2025**

**BETWEEN**

**JOHN NYAMBOGA MORIASI ..... PLAINTIFF**

**AND**

**ANGELINA CHEPNGETICH KIMATI ..... 1<sup>ST</sup> DEFENDANT**

**KENNEDY MOKUA MOKO ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**REGISTRAR OF LANDS, NYAMIRA COUNTY ..... INTERESTED PARTY**

**HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY**

**RULING**

(Application to set aside consent and subsequent decree; applicant having been sued by the respondent to enforce a certain sale agreement; no appearance entered by applicant; disputed consent filed and adopted without the applicant being present in court; applicant now asserting that she was not party to that consent; when the consent was adopted in court respondent making the false representation that the applicant is his mother; court persuaded that the consent was clouded by false representations and benefit of doubt given to the applicant; application allowed and the consent and decree set aside)

1. The application before me is that dated 23 September 2024 filed by the 1<sup>st</sup> defendant. The substantive order sought is to have the consent dated 2 March 2021 and the resultant decree set aside. The application is based on grounds that suggest that the applicant was not privy to the consent.
2. In the supporting affidavit, the applicant has deposed that she has now become aware of the instant suit commenced vide a plaint dated 2 December 2020 wherein the plaintiff/respondent asked for specific performance of an agreement dated 14 September 2015 regarding sale of her land parcel North



- Mugirango/Ikonge/1642. She has denied selling the said land to the respondent. She has further deposed that upon perusal of the court record, it shows that on 17 December 2020, she attended the registry to fix a hearing date for an application filed by the plaintiff, which she asserts is not true. She has added that on 2 March 2021, the respondent misrepresented to the court that she is his mother and that they had settled the dispute vide a consent dated 21 March 2021, which again she states is not true. She avers that she had not entered appearance in the suit and she was absent in court on the day that the consent was adopted by court. She points out that the terms of the consent were dictated by counsel for the respondent, and confirmed by the respondent, and that she never authenticated executing the alleged consent, and never confirmed the terms of the alleged consent. She thus contends that the decree issued thereto is a nullity. She deposes that she had not been served with the pleadings and only came to be aware of the case when the respondent, accompanied by officials of Nyamira Lands Office, visited the land and purported to demarcate it. She avers that she has a strong defence as the claim of the plaintiff is baseless and rooted in falsehoods.
3. The plaintiff/respondent filed a replying affidavit to oppose the motion. He has deposed that they settled the dispute herein pursuant to the consent dated 2 March 2021 which consent was adopted by court on the same date. He has deposed that the consent was not obtained through fraud and that the applicant was present in court together with her counsel, who presented her submissions, before adoption of the consent. He has added that after adoption of the consent, the applicant facilitated the transaction that they had vide an agreement dated 26 November 2018, which led to subdivision of the land parcel North Mugirango/Ikonge/1642. He has stated that out of the subdivision, one resultant title, being North Mugirango/Ikonge/3433, measuring 3 acres, got registered in his name, and he has annexed the title deed. He has averred that the Letter of Consent (Land Control Board consent) was obtained through an application by the applicant and he has annexed copies of the application and letter of consent. He has deposed that after following all the legal procedures he paid for issuance of the title deed and he has displayed the receipt thereof. He contends that the application herein is an abuse of the court process and should be dismissed with costs.
  4. When the application came up for directions on 20 November 2024, the respondent stated that he has no problem with the applicant at all, and that she lives with him in Nyamira. Puzzled by this claim, I directed attendance of the applicant for purposes of cross-examination on her affidavit and she duly appeared. She is an old lady who communicated with difficulty but was able to present her position. Inter alia she acknowledged signing an agreement with the 2<sup>nd</sup> defendant but denied selling land to the respondent. When examined she confirmed signing the consent. She stated that she was not in court when the consent was adopted and is not aware of the decree. She denied going to the Land Control Board in Nyamira and not aware of any consent issued. She was not aware of any title deed issued to the respondent in respect of the land parcel North Mugirango/Ikonge/3433. In cross-examination however, she denied signing the consent, and stated that what she signed was an agreement and not the consent. Questioned by the court, she affirmed that the respondent wished to buy 3 acres from her and she signed an agreement with him but he took too long to pay. She denied that she lives with the respondent.
  5. I gave liberty to counsel to file their submissions which they did and I have taken the same into account.



6. The principles for setting aside a consent are now fairly well settled. In *Brooke Bond Liebig (T) Ltd vs Mallya* (1975) EA 266, Law Ag P, stated as follows at page 269 :

“The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani v Kassam* (1952) 19 EACA 131, where the following passage from *Seton of Judgments and Orders*, 7<sup>th</sup> 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.”

7. In *Wasike v Wamboko* (1988) KLR 429, the Court of Appeal, stated as follows at page 431 :

“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: see the decision of this Court in *J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983*. In *Purcell v FC Trigell Ltd* (1970 2 All ER 671, Winn LJ said at 676 ;

It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

8. From the above, it will be seen that a court can set aside a consent more or less on the same principles that a court would allow a party to renege on a contract. Such factors include fraud, mistake, misrepresentation or public policy.

9. Let us now look at what transpired in this matter.

10. I see that the suit was commenced through a plaint filed on 3 December 2020. The respondent alleged to have entered into a sale agreement with the applicant dated 14 September 2015 for sale of 8 acres of land. He seemed to complain that the applicant had now sold the land to the 2<sup>nd</sup> defendant. He sought for orders of specific performance of this sale agreement as amended in another agreement dated 26 November 2018. He also asked for general damages for breach of contract in lieu of specific performance, or in addition to specific performance, together with costs. This alleged agreement of 26 November 2018 was selling 3 acres of the land parcel North Mugarango/Ikonge/1642 at a consideration of Kshs. 1,650,000/= of which Kshs. 480,000/= was stated to have been paid and of the remaining balance of Kshs. 1,170,000/=, Kshs. 200,000/= was to be paid on or before 21 December 2018 and the balance “as the parties shall agree.”

11. Together with the plaint, the respondent filed an application under certificate of urgency dated 2 December 2020 asking for orders to restrain the applicant and the 2<sup>nd</sup> defendant from interfering with the suit land i.e the land parcel North Mugarango/Ikonge/1642. The application went before Onyango J on 7 December 2020 and she granted interim orders and directed that the application be fixed for hearing on 17 December 2020. The entry of 17 December 2020 is an entry in the registry. It reads that



Mr. Ondieki was present for the plaintiff and Angelina (1<sup>st</sup> defendant) was present and there was no appearance for the 2<sup>nd</sup> defendant and interested party. The record states that the application dated 2 December 2020 was fixed for hearing on 1 February 2021. On 1 February 2021 the matter went before the Deputy Registrar, Hon. Mac'Andere as the judge was not sitting. Mr. Ondieki informed court that the defendant is in person and is present and that they will be filing a consent. There is no entry made by the Deputy Registrar of the actual presence of the applicant as 1<sup>st</sup> defendant and the Deputy Registrar directed that the matter be mentioned on 2 March 2021.

12. The file was placed before Onyango J on 2 March 2021. The record as handwritten by the Judge shows that Mr. Okeyo Ondieki was present for the plaintiff and there was no appearance for the defendants. Also present was the respondent and the court recorded in bracket that he is son of the 1<sup>st</sup> defendant. This is what the respondent stated :

“We have settled the matter between myself and my mother who is the 1<sup>st</sup> defendant. I do not intend to pursue the case against the other defendants.”

Mr. Ondieki then addressed court and stated as follows :

“I confirm that this matter is settled. The parties have entered into a consent which I filed this morning. The consent states as follows.

By consent the plaintiff/applicant and the 1<sup>st</sup> defendant/respondent have agreed to compromise the application dated 2.12.20 and the main suit as follows :

1. That the agreement made between them dated 26.11.2018 regarding the suit property North Mugirango/Ikonge/1642 measuring 3 acres for the consideration of Kshs. 1,650,000/= (One million six hundred and fifty thousand) is hereby ratified.
2. That the applicant to clear the balance of Kshs. 600,000/= owed to the 1<sup>st</sup> defendant/respondent.
3. The 1<sup>st</sup> respondent do execute the transfer documents of the said parcels of land measuring 2 acres to the applicant ready for filing at the Lands Registry.
4. That should there be any default of the said conditions execution of the decree shall proceed.

Plaintiff :

I confirm the terms of the consent as dictated by counsel for the 1<sup>st</sup> defendant.

Court : The consent dated 2.3.21 is hereby adopted as the judgment of the court. The matter is therefore marked as settled.

Judge

2.3.21.

13. The contention of the applicant is that she was not a participant in this consent. The respondent of course disputes that and asserts that the applicant was party to the consent and that she even proceeded to subdivide the suit land and transfer to him the land parcel North Mugirango/Ikonge/3433 measuring 3 acres to him. I will not go into the issue of whether or not the applicant subdivided the suit land and actually transferred one of the subdivisions to the respondent, for that is contested, and



may be subject of another dispute. I will restrict myself to the question whether the applicant was a party to the consent.

14. It cannot be in doubt that the applicant was not in court when the consent was recorded. Despite the respondent deposing in his replying affidavit that the applicant was present, and that the terms of the consent were dictated by her counsel, that for sure is a false deposition. The record is clear that the applicant was absent. She had not even entered appearance in the matter and it cannot be alleged that her counsel was present when the consent was entered. The person who was present was the respondent and his advocate, Mr. Ondieki. It is Mr. Ondieki who dictated the terms of the consent and it was the respondent, not the applicant, who affirmed the terms thereof. At no point did the applicant affirm the terms of the consent in court. The purported consent cannot therefore be held against the applicant on the basis that she affirmed it in court because the simple fact is that she did not. That consent now only rests on the validity of the written consent. But even before I embark on the written consent, it is clear that the respondent made a fraudulent misrepresentation to court at the time that the court recorded the consent in open court. He alleged that he was a son to the applicant which information was certainly not true. Thus the recording of the consent in court was clouded by a fraudulent misrepresentation by the plaintiff which probably made the court drop its guard in determining whether or not to have the consent recorded.
15. Coming now to the written consent, the applicant of course asserts that she never signed the written consent that was filed in court while the respondent claims that she did. I am of persuasion that the respondent is not one who can be believed. He cannot be believed because he lied in his affidavit that the consent was entered into in the presence of the plaintiff and her counsel. The applicant also lied to court at the time the consent was recorded that the applicant was his mother. These untruths must lead this court to doubt the authenticity of the written consent. I have looked at that consent and it bears no date. We cannot tell when it was ever executed. The signature therein that purports to be of the applicant is not authenticated and of course I have no way of conclusively telling whether indeed it was executed by the applicant. This court is in a position of doubt as to whether the applicant actually signed the consent but given the lies and half-truths that the respondent has propounded before this court, I will give the benefit of that doubt to the applicant, and I proceed to hold that there is no proof of the consent ever being signed and authenticated by the applicant.
16. That being the case, I must allow this application and I do hereby set aside the purported consent of 2 March 2021. With the setting aside of the consent, I must also set aside the decree herein. I will allow the applicant and any of the defendants to proceed and file their respective defences within the next 14 days. The applicant will have the costs of this application.
17. Orders accordingly.

**DATED AND DELIVERED THIS 15 DAY OF MAY 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Ms. Chepkorir h/b for Mr. Ochoki for the 1<sup>st</sup> defendant/applicant

Mr. Nyambati h/b for Mr. Okemwa for the plaintiff/respondent

Court Assistant – Michael Oyuko

