



**Otieno (Suing as the Administrator Ad Litem of the Estate of Theresa  
Gisler - Deceased) v Nyaga & another (Environment & Land Case  
341 of 2016) [2025] KEELC 3767 (KLR) (13 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3767 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 341 OF 2016**

**EK MAKORI, J  
MAY 13, 2025**

**BETWEEN**

**LINDA OTIENO (SUING AS THE ADMINISTRATOR AD LITEM OF THE  
ESTATE OF THERESA GISLER - DECEASED) ..... PLAINTIFF**

**AND**

**JUSTUS NJUKI NYAGA ..... 1<sup>ST</sup> DEFENDANT**

**PENINAH MUCOGO NJUKI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application submitted by the Plaintiff/Applicant on 1st April 2024 seeks orders to compel the Defendants/Respondents to execute transfer instruments concerning the suit property – Malindi Municipality portion No. 7602 CR 26258(the suit property), alleged to have been sold to the Plaintiff. If the Respondents default, the Deputy Registrar shall take the necessary action in execution of the same. In opposition to the aforementioned application, the 1st Defendant/Respondent did not submit any response.
2. However, the 2<sup>nd</sup> Defendant/Respondent submitted a replying affidavit dated 10 September 2024. Furthermore, the 2<sup>nd</sup> Defendant filed an additional application dated 10 September 2024, seeking to set aside the existing consent judgment. She claimed a lack of service of summons to enter an appearance and stated she was never a party to the consent judgment, since she had not instructed the advocate who entered the consent on her behalf. In light of these developments, the Plaintiff/Applicant submitted a Preliminary Objection dated 30 October 2024, accompanied by a replying affidavit dated 29 October 2024. This objection contests the filing of the application after the judgment, incorporating the involvement of a new advocate for the 2<sup>nd</sup> Respondent, which he asserts constitutes a violation of the law which requires consent to be obtained from the former advocate or an appropriate application made to the court.



3. The aforementioned shall serve as the foundational basis for the issues to be determined by this court.
4. Learned counsel Mr. Wanga, representing the Plaintiff, and Ms. Njeru, representing the 2<sup>nd</sup> Defendant, submitted written submissions about the issues raised in the pending motions which were heard concurrently as directed by the court. They also provided the legal framework and judicial precedents that the court shall consider in addressing these issues, for which the court expresses its gratitude.
5. Learned counsel representing the 2<sup>nd</sup> Defendant, Ms. Njeru, contends that her client was never served with the pleadings about this suit and asserts that she was not a party to any consent orders subsequently issued. Moreover, counsel argues that in her response, the Plaintiff has failed to demonstrate that she served the 2<sup>nd</sup> Defendant with the pleadings, thereby entitling the 2<sup>nd</sup> Defendant to a hearing before any adjudication takes place.
6. I concur with Ms. Njeru's citation of the decision in *In Adermen Limited v Shah & 3 others* [2022] KLR, wherein the court reiterated the cardinal rule of natural justice that no individual should be condemned unheard.
7. The 2<sup>nd</sup> Defendant asserts that while this suit was resolved through a consent judgment, she contends that she was not a party to the mentioned consent. That the consent submitted to the court was executed solely by an advocate whom the 2<sup>nd</sup> Defendant claims she did not instruct.
8. The 2<sup>nd</sup> Defendant is the sole proprietor of the suit property, and it would have been expected that she would execute any such consent and/or appear in court to affirm the same.
9. The 2<sup>nd</sup> Defendant disclaims the consent orders in place and avers that she was never solicited to agree to it by signing as an acknowledgment of her consent, as noted in *Wema Foundation Trust Company Limited v County Government of Nairobi City & another* [2022] eKLR and *Protus Hamisi Wambada & another v Eldoret Hospital* [2020] eKLR, in which the court the latter suit annulled a consent order because the Defendant disowned it and was absent from court when the consent order was recorded.
10. Furthermore, the 2<sup>nd</sup> Defendant contends that the consent judgment in this matter was entered into due to the collusion of the Plaintiff and the 1<sup>st</sup> Defendant, who was her ex-husband. When the alleged consent judgment was entered, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were estranged and engaged in a protracted matrimonial property dispute, specifically in Embu HCCC No. 3 of 2011 (OS). It is questionable whether the 2<sup>nd</sup> Defendant would simultaneously be involved in signing a consent judgment that forfeited one of her properties.
11. Thus, it is asserted that she has demonstrated the principles requisite for setting aside a consent judgment.
12. Mr. Wanga, representing the Plaintiff, argues that the advocate for the 2<sup>nd</sup> Defendant is attempting to persuade the court that she was not served, despite the record indicating that the Defendants were represented by the firm of Mwaure and Mwaure Waihiga Advocates, who were involved in executing the consent dated 22<sup>nd</sup> September 2017.
13. In his replying affidavit dated 29th January 2025, the 1<sup>st</sup> Respondent recounted how, as the OCPD of Malindi, he lived with the 2<sup>nd</sup> Defendant, his wife, and their children, and together they purchased the suit property, mutually deciding to sell it to the Plaintiff's parent the late Theresa Gisler at a consideration. The complete purchase price was settled, and the buyer took possession of the property, which was excluded from the Embu HCCC No. 3 of 2011 (OS), because it had already been sold.



14. 1<sup>st</sup> Respondent averred that the law firm of Mwaure and Mwaure Wahiga advocates which represented them, received full instructions from both parties, and the 2<sup>nd</sup> Defendant is not being honest when she claims she was unaware of the suit, in his view the bringing of this application is an afterthought aimed at disinheriting the heir who has been joined in this suit.
15. In the case of Sarovar Hotels Pvt Limited India v Placid View Properties Limited; A.F. Gross & Co. Advocates (Third party) [2022] KEHC 85 (KLR), The court ruled that a consent order can be set aside in certain circumstances, as submitted by Ms. Njeru representing the 2<sup>nd</sup> Defendant:
  - “29 The principles that appertain to settling aside of consent orders are well established in a line of cases, including Brooke Bond Liebig vs Mallya (1975) EA 266, where Mustafa Ag. VP stated thus;  
“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, e.g., on grounds of fraud or 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.”
16. Weighing the evidence on record and the averment by the parties, summons to enter appearance were served on all Defendants. They elected to instruct the firm of Mwaure and Mwaure Wahiga advocates, who in turn filed an admission and later a consent dated 22<sup>nd</sup> September 2017 on their behalf. As highlighted by the Plaintiff and the 1<sup>st</sup> Defendant, the sale agreement was signed mutually by the two Defendants in 1995. The purchaser (the mother of the Plaintiff) was put in possession of the property, and the heir resides in it to date. This chronology of events was not negative by the 2<sup>nd</sup> Defendant, who only alleges non-service without proof. The burden of proof fell on her to controvert what both the Plaintiff and 1<sup>st</sup> Defendant stated that the sale was mutual, all the purchase price was paid in full, and the heir has been in possession since the demise of her mother. I say so because how is it that since the sale in the year 1995, the 2<sup>nd</sup> Defendant has never acted to eject the Plaintiff from the suit property? Besides, it has been shown through averment of the Plaintiff and 1<sup>st</sup> Defendant that she has been sending her children to harass the Plaintiff and disturb her quiet possession of the suit property, an issue reported to the Malindi Police.
17. Further, it emerges from the record that thereafter the Defendants divorced and have been wrangling over their matrimonial properties, which were subject to the Embu Matrimonial Cause now pending in the Court of Appeal. The current property was left out because it had been sold to the Plaintiff.
18. To my mind, the 2<sup>nd</sup> Defendant pleads collision and fraud on the part of the Plaintiff and the 1<sup>st</sup> Defendant in the entry of the impugned consent judgment, but has failed to substantiate the same. I see no reason to disturb or set aside the consent judgment in place. Consequently, the application dated 10<sup>th</sup> September 2024 is hereby dismissed with costs.
19. Since, significantly, the 2<sup>nd</sup> Respondent has failed to execute the transfer instruments, in favour of the Plaintiff, the application dated 1<sup>st</sup> April 2024 is hereby allowed in its entirety.
20. Having declined the application for setting aside judgment, it follows that the Preliminary Objection dated 30<sup>th</sup> October 2024 is academic, and I need not consider it. It should have been subsumed in the answer to the application dated 10<sup>th</sup> September 2024.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 13<sup>TH</sup> DAY OF MAY 2025.**



**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Wanga for the Plaintiff

Justus Njuki Nyaga (1<sup>st</sup> Defendant in person)

Court Assistant: Happy

In the Absence of:

Ms. Njeru for the 2<sup>nd</sup> Respondent

