



Ogendo & another (Suing as the Personal Representative and Administrator of the Estate of Manason Ogendo Bodo - Deceased) v Abuto & 5 others (Environment & Land Case 23 of 2017) [2025] KEELC 4920 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4920 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 23 OF 2017**

E ASATI, J

JUNE 30, 2025

BETWEEN

RICHARD OGENDO 1ST PLAINTIFF

GRACE AKINYI AJWANG 2ND PLAINTIFF

**SUING AS THE PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF
THE ESTATE OF MANASON OGENDO BODO - DECEASED**

AND

ROSEMARY ATIENO ABUTO 1ST DEFENDANT

LEONIDA ACHIENG NYAGWARA 2ND DEFENDANT

SASAH GENERAL MERCHANTS LTD 3RD DEFENDANT

NATIONAL BANK OF KENYA LTD 4TH DEFENDANT

COMMISSIONER OF LANDS 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. This ruling is in respect of the Chamber Summons dated 14th December, 2023 brought by the 3rd Defendant/Applicant seeking for orders that;
 - a. The honourable court set aside review and/or vary the ruling of the learned taxing officer made on 30th November, 2023 and in its place, an order be made allowing the Applicant's application dated 24th August, 2023 with costs to the Applicant;
 - b. Costs of the application be awarded to the Applicant.



2. The grounds upon which the application was made are that;
 - i. The learned Deputy Registrar erred in law and in fact in failing to find that the Applicant's application dated 24th August, 2001 satisfied the ingredients for the making of an order setting aside the consent the subject of the application.
 - ii. The learned Deputy Registrar erred in law and in fact in failing to find that the facts set forth in and disclosed by the application dated 24th August, 2021 were sufficient to justify the making of an order the subject of the application.
 - iii. The learned Deputy Registrar erred in failing to consider the evidence and submissions placed before her by the 3rd Defendant and as a consequence failed to consider the entire case as presented to her and arrived at a wrong conclusion.
 - iv. The decision of the learned Deputy Registrar was against the weight of the evidence placed before her by the Applicant.
3. In response to the application, the 4th Defendant filed Grounds of Opposition dated 16th February, 2024 that the application is unmerited, unfounded in law and does not lie in the circumstances. That the consent that is being attacked was signed by all the parties and the 4th Defendant already complied with the consent order and made its payment to the Plaintiff's advocates and closed its file. That the 4th Defendant does not believe that the Applicant has fulfilled the requirements of setting aside a consent order. That there was no fraud as the Applicant's advocates duly signed the consent alongside others. That the application is an afterthought.
4. The application being a reference from the decision of the Taxing Master was not supported by a Supporting Affidavit and no Replying Affidavit was filed.
The application was heard by way of written submissions.
5. Written submissions dated 28th October, 2024 were filed on behalf of the 3rd Defendant/Applicant by the firm of Owiti, Otieno & Ragot Advocates. Counsel submitted that the application was a reference from the ruling of the Taxing Officer of the court dated 24th August, 2021. That the application of the law by the Deputy Registrar (Taxing Officer) to the facts of the case was underwhelming to be able to appreciate the substance of the dispute.
6. That the Applicant deposed that it was not aware that there were any negotiations going on regarding the taxation of the Plaintiff's Bill of Costs between its Counsel and other Counsel on record. That the consent was entered into without instructions. That the letter dated 14th June, 2021 marked as SAO6 which contains what was ultimately recorded in court on 17th June, 2021 was signed on behalf of the Applicant's former Counsel by a stranger. That since the letter was written on the letterhead of the Plaintiff's Counsel, the Plaintiff bore the responsibility of disclosing who signed the letter. That there was no explanation and that the Deputy Registrar did not consider this fact. That had the Taxing Master done so, she would have found that the parties and their advocates had not consented to the compromise.
7. That the suggestions that the consent was recorded on 29th April, 2021 was false as there were no proceedings on that date.
8. That the consents and the ultimate one recorded on 17th June, 2021 were tainted by misrepresentation, collusion and fraud and hence should have been set aside.



9. That the consent did not involve the 1st Defendant yet she was ordered to pay costs too. That it was only the 3rd Defendant who was isolated for recovery of costs while letting off the other Defendant completely or with a slap on the wrist.
10. That the consent was part of the Plaintiff's scheme to cause further financial harm to the Applicant who already lost money in the hands of the Plaintiff's family.
11. That the execution of the consent by Counsel for the 2nd Defendant who was not party to the taxation proceedings and the statement by another Counsel that he was holding brief for Ogutu Mboya, a Judge were misrepresentations that vitiated the consent flowing from them.
12. That article 27 of *the Constitution* guarantees every person equality before the law and the right to equal treatment and benefit of the law.
13. That all but the 2nd Defendant were ordered to pay the Plaintiff's costs. That the orders of the court emanating from the consent were discriminatory and in violation of the Applicant's rights in article 27.
14. That all that the Applicant is seeking is a fair hearing. Counsel urged the court to allow the application with costs.
15. On behalf of the Plaintiff, written submissions dated 20th January, 2025 were filed by the firm of Olel, Onyango, Ingutiah & Company Advocates. Counsel submitted that judgement was entered in favour of the Plaintiff who was also awarded costs.
16. That the Plaintiff filed a bill of costs claiming Kshs.14,338,691 being the value of services rendered and disbursement incurred. That the parties in the case through their Counsel begun a process of negotiations with a view of settling on an agreed figure as taxed costs which was eventually agreed at Kshs.7,200,000 which was recorded as the figure of taxed costs.
17. That as between the Plaintiff and the Applicants herein a figure of Kshs.1,800,000 was arrived at as the amount payable by the 3rd Defendant. That this was agreed on and recorded.
18. That the Applicant now represented by a different Advocate seeks to set aside the consent. That the application to set aside the consent was dismissed by the Taxing Officer on 30th day of November, 2023 hence the present reference.
19. Counsel submitted that on the authority of Counsel to enter into consents on behalf of clients, the Taxing Officer relied on the case of Flora N. Wasike -vs- Destimo Wamboko [1988]eKLR wher it was held that a consent order has contractual effect and can only be set aside on grounds which would justify setting a contract aside.
20. That there is no doubt that the firm then on record for the Applicant namely; Ogutu Mboya, Ochwangi, Ochwal & Company Advocates entered into the now impugned judgement on behalf of their client, the Applicant herein.
21. That the total costs taxed was Kshs. 7,200,000/- but the Applicant was to pay Kshs.1,800,000/-.
22. That no evidence was produced on the alleged collusion. That no evidence has been availed that the Advocates acted beyond their authority.
23. That the application for review that was filed before the Taxing Officer is not contemplated under Rule 11 of the Advocates Remuneration Order. That the only recourse available to a party not satisfied with the decision of a Taxing Officer is to file a reference.



24. That the present application is not a reference as contemplated by the law and is therefore not properly before the court.

Counsel urged the court to allow the application.

25. I have considered the application and the grounds of opposition thereto. While the Applicant complains that the consent order was entered into without its participation, there is no evidence of this. There is also no evidence that as at the time the consents were entered into the instructions to its advocates then on record had been withdrawn. As held in the case of *Flora Wasike vs Wamboko* [1982 -88] 1 KA relied on by the Taxing Master an order made in the presence and with the consent of Counsel is binding on and cannot be discharged or varied unless obtained by fraud, collusion or misrepresentation. The court has considered the matters raised by the applicant and finds that the factors vitiating the consent were not proved.

26. Some of the parties, particularly the 4th Defendant, have already complied with the consent order and paid their portion of the costs.

27. The court finds that the application lacks merit and hereby dismisses it with costs to the Plaintiff and the 4th Defendant.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 30TH DAY OF JUNE, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

C. Onyango for the Plaintiff/Respondent.

Oduor h/b for Otieno David for the 3rd Defendant/Applicant.

