



**Chome & 5 others v Greenbelt Warehouses Limited (Environment and Land Case E001 of 2024) [2025] KEELC 5828 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 5828 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE E001 OF 2024  
LL NAIKUNI, J  
JUNE 12, 2025  
(FORMERLY MOMBASA ELC NO. 228 OF 2019)**

**BETWEEN**

**JOHN KENGO CHOME & 5 OTHERS & 5 OTHERS ..... PLAINTIFF**

**AND**

**GREENBELT WAREHOUSES LIMITED ..... DEFENDANT**

**RULING**

**I. Introduction**

1. The Honourable Court was called upon to make a determination onto the Notice of Motion application dated 26<sup>th</sup> September, 2024 by Greenbelt Warehouses Limited, the Defendant/Applicant. The Application was brought under the provision of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules 2010, and any other relevant enabling Provisions of the Laws of Kenya.

**II. The Defendant/Applicant's case**

2. The Applicant sought for the following orders: -
  - a. Spent.
  - b. That the Honourable Court be and is hereby pleased to set aside the orders issued on the 12<sup>th</sup> March, 2024 by Honourable Lady Justice Matheka directing the matter to proceed for hearing, and in the alternative the Consent dated 21<sup>st</sup> March, 2022 and filed in court on the 29<sup>th</sup> March, 2022 be adopted as an order of this Honourable Court.



- c. That in the alternative to prayer Two (2) above the Respondents do deposit Kenya Shillings Five Million (Kshs. 5,000,000.00) as a security to cost in a escrow account within 21 days from the day issuance of the Orders without which the suit stand dismissed.
  - d. That the Honourable Court be please to issue any other order it may deem fit in the circumstance.
  - e. That the cost of this application be provided for.
3. The application by the Applicant was premised on the grounds, facts and testimony on the face of the application and the 6 Paragraphed Supporting Affidavit of Ibrahim Dirye Santur, one the Directors of the 1<sup>st</sup> Defendant. The Deponent averred that:-
- a. Through their respective Counsels, they had entered into a consent dated 21<sup>st</sup> March, 2022, terms and conditions stipulated thereof and which was filed in Court on 29<sup>th</sup> March, 2022. Annexed and marked as “IDS - 2” was a copy of the consent.
  - b. The deponent had so far paid a sum of Kenya Shillings Five Million (Kshs. 5,000,000.00) to the Respondents Counsel in compliance with the consent filed herein on the 29<sup>th</sup> March, 2022. Annexed and marked as “1DS - 3” were copies of the cheques and bank deposit slips.
  - c. It was in the interest of justice that the Consent dated 21<sup>st</sup> March, 2022 was adopted as the order of this Honourable Court.
  - d. The Plaintiffs would not be prejudiced if the orders sought herein do issue.

### **III. Further Affidavit by the Plaintiff**

4. The Plaintiff further supported her application through a 6<sup>th</sup> paragraphed affidavit sworn on 23<sup>rd</sup> September, 2024 by Mazera Chigamba, the Plaintiff herein who averred as follows: -
- a. The parcel in dispute was her property courtesy of inheritance and thus was supposed to be registered in his name.
  - b. She had filed a case in Kwale Environment and Land Court, case No. E005 of 2024 seeking to establish the ownership of the suit property.
  - c. The specific parcels in contention in the matter were Kwale/Kigato 1414, 827 and 1423, the same should be corrected in the Plaint.
  - d. The full name of the Respondent was Harrison Mwanaloma Chitumbo.

### **IV. Submissions**

5. On 18<sup>th</sup> March, 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 26<sup>th</sup> September, 2024 be disposed of by way of written submissions and all the parties complied. Unfortunately, despite of checking through the Judiciary CTS, the Honourable Court was not able to access the submissions by the parties, Pursuant to that, the Honourable Court reserved 12<sup>th</sup> June, 2025 as a Ruling date accordingly on its own merit.

### **V. Analysis and Determination**

6. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the parties. In order to arrive at an informed, just and fair decision, the Honorable Court has framed the following three (3) issues for determination.



- a. Whether the orders issued on 12<sup>th</sup> March, 2024 can and should be set aside.
- b. Whether the Consent dated 21<sup>st</sup> March, 2022 and filed in court on the 29<sup>th</sup> March, 2022 be and should be adopted as an order of this Honourable Court.
- c. Who will bear the Costs of Notice of Motion application 26<sup>th</sup> September, 2024.

**Issue No. a). Whether the orders issued on 12<sup>th</sup> March, 2024 can and should be set aside.**

7. Under this sub – title, the main issue is whether the Applicant has made out a case for the setting aside of the Court orders issued on 12<sup>th</sup> March, 2024. A court order may be set aside (overturned or vacated) under certain circumstances if it was issued improperly, unjustly, or in error. Setting aside hearing orders refers to the process where a court cancels or overturns a previous order, often due to procedural errors, lack of proper service, or new evidence. The remedy of setting aside Ex - Parte proceedings, decisions or orders, is available to a party who has been condemned ex parte by an irregular proceeding, decision or order (without notice to the aggrieved party) or if regular (done with notice to the aggrieved party), the aggrieved party was hampered to attend by some sufficient cause (an accident or inadvertence or an excusable mistake or an excusable error) or that notwithstanding the fact that the aggrieved party had notice and actually failed to attend Court, the nature of the subject matter is so solemn (like land, fraud, et alia) that it will occasion grave injustice and hardship to the aggrieved party, if the order is not granted.
8. In the case of “Esther Wamaitha Njihia & 2 Others – Versus - Safaricom Limited [2014] eKLR”, as per Havelock: -
 

“The legal principles which govern setting aside interlocutory or ex parte Judgments and ex parte proceedings or orders are the same”.
9. Thus, with regard to the instant case, the orders of Honourable Lady Justice Matheka directing the matter to proceed for hearing on 12<sup>th</sup> March, 2024 should be set aside thereof.

**Issue No. b). Whether the Consent dated 21<sup>st</sup> March, 2022 and filed in Court on the 29<sup>th</sup> March, 2022 be and should be adopted as an order of this Honourable Court.**

10. Under this sub – title we examine whether or not the Court should adopt the Consent dated 21<sup>st</sup> March, 2022. The provision of Order 25 Rule 5(1) of the Civil Procedure Rules, 2010 which deals with the Doctrine of Consents provides as follows:-
 

“Where it is proved to the satisfaction of the Court and the Court after hearing the parties directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the Defendant satisfies the Plaintiff in respect of the whole or any subject matter of the suit, the Court shall on the application of any party order that such agreement, compromise or satisfaction be recorded and enter Judgment in accordance therewith.”
11. The adoption by Courts of Consents entered into by litigating parties is done in keeping with the spirit of Article 159(2)(c) of *the Constitution* of Kenya which exhorts Courts to encourage all forms of Alternative Dispute Resolution. Through their respective Counsels, they had entered into a consent dated 21<sup>st</sup> March, 2022, and which was filed in Court on 29<sup>th</sup> March, 2022. Annexed and marked as “IDS - 2” was a copy of the consent. The deponent had so far paid a sum of Kenya Shillings Five Million



(Kshs. 5,000,000.00) to the Respondents Counsel in compliance with the consent filed herein on the 29<sup>th</sup> March, 2022. Annexed and marked as “1DS - 3” were copies of the cheques and bank deposit slips.

12. It is trite that a Consent only becomes binding on parties and attains legal character once it is adopted as an order or Judgment of the Court. Authorities to this effect are legion. In the case of:- “Church Road Development Co. Limited – Versus - Barclays Bank of Kenya & Another HCCC No. 296 of 2006”, whereby Hon. Justice Onyancha (as he then was) held as follows:-

“I wish to point out that my examination of the file records, as earlier pointed out, confirms that the “consent orders” were received in court. They were stamped and filed in this file. BUT they were not recorded in the file by the Deputy Registrar. I hold the opinion that no such consents by the parties or their Counsel in a suit, become part of the court proceedings or judicial proceedings until they are so recorded and duly signed by the Deputy Registrar. The act of recording the consent and signing it, is not merely administrative in my view. It is judicial and holds judicial or legal consequences.”

13. Further in the case of “Simon Ayiamba – Versus - Kenya Industrial Estates Ltd Busia Civil Appeal No. 5 of 2001”, Hon. Justice Serگون held:-

“There are only two ways in which a Consent can be legally accepted by the Court; the first instance is when the parties file in Court a fully executed written contract which becomes a Court Order the moment it is domesticated and approved by Court and the second instance is when one of the parties orally addresses the Court on the contents of the proposed Consent thereafter the adversary as called upon to confirm the contents. The names of the parties orally addressing the Court must be recorded and the Court receiving the Consent must then approve and subsequently adopt the terms of the Consent as an Order ...”

14. Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes “functus officio”.

15. A Consent entered into between parties is deemed to be tantamount to a contract between said parties and will have the same binding force as a contract. As such the Court cannot interfere with the terms of a consent unless circumstances are shown to exist that would amount to grounds for rescinding a contract. For instance, if the consent was obtained by mistake and/or fraud or misrepresentation as it were. This legal position was graphically demonstrated in the case of:- “Flora N. Wasike – Versus - Destimo Wamboko [1988]KLR” the Court of Appeal held thus:-

“It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in Hirani – Versus - Kassam (1952) 19 EACA 131, at 134, as follows:

“The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contact between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgments and Orders (7<sup>th</sup> edn), vol 1, P 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 general for a reason which would enable the court to set aside an agreement.”

16. Therefore I find that the said consent has already been perfected. The only thing remaining is the formal validation of the consent by the Court. In the given circumstances, I find no valid grounds in existence for this Court to decline to adopt the consent. Thus, the Consent shall be adopted as an order of this Court whereby leaving nothing else to be deliberated on thereafter.

**Issue No. C). Who will bear the Costs of Notice of Motion application 26<sup>th</sup> September, 2024.**

17. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.
18. I have well stated in previous precedence and most especially in “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:

“ 58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7<sup>th</sup> December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21<sup>st</sup> December, 2021.”

19. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects not to award costs.

**VI. Conclusion and Disposition**

20. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Defendant/ Applicant has a case against the Plaintiffs/ Respondents.



21. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 26<sup>th</sup> September, 2024 be and is hereby found to have merit and is allowed in its entirety.
  - b. That an order be and is hereby issued setting aside the orders issued on the 12<sup>th</sup> March, 2024 by Honourable Lady Justice Matheka directing the matter to proceed for hearing.
  - c. That the consent dated 21<sup>st</sup> March, 2022 and filed in Court on the 29<sup>th</sup> March, 2022 be and is hereby adopted as an order of this Honourable Court.
  - d. That there shall be a mention on 21<sup>st</sup> July, 2025 on the progress made.
  - e. That there shall be no orders as to the cost of the Notice of Motion application dated 26<sup>th</sup> September, 2024.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT KWALE THIS 12<sup>TH</sup> DAY OF JUNE 2025.**

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**HON. MR. JUSTICE L. L. NAIKUNI**

**ENVIRONMENT AND LAND COURT AT KWALE**

Ruling delivered in the presence of:

- a) Mr. Daniel Disii, the Court Assistant.
- b) M/s. Kayatta Advocate for the Plaintiffs/Respondents.
- c) M/s. Kyalo Advocate for the Defendant/Applicant.

