



**Rop & 2 others v Kipruto & another (Civil Appeal (Application)
128 of 2018) [2025] KECA 1610 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1610 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) 128 OF 2018
MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
OCTOBER 3, 2025**

BETWEEN

**JULIUS KIPROP ROP 1ST APPLICANT
JOSEPH LANGAT ROP 2ND APPLICANT
TAPSABEA KOSGEI 3RD APPLICANT**

AND

**LEAH KIPRUTO 1ST RESPONDENT
ESTHER C. KIPRUTO (SUING AS ADMINISTRATOR OF RICHARD
KIPRUTO SIGILAI) 2ND RESPONDENT**

*(Being an application to stay a consent order dated 6th April 2023 and adopted
12th day 2023 from the judgment and decree of the Environment and Land
Court at Kisumu (Kibunja, J.) dated 5th October 2016 in Case No. 105 of 2007)*

RULING

1. Vide Civil Appeal No. 128 of 2018, Leah Kipruto and Esther Kipruto suing as Administrators of Richard Ruto Sigilai had appealed against the judgment and decree of the Environment and Land Court at Kisumu dated 5th October, 2016 in which Kibunja J, found that both parties had failed to prove their respective claims against each one of them to the standard required of balance of probabilities and dismissed both the suit and the counterclaim.
2. When the appeal came up for hearing on 24th January, 2023, the Court was of the view that due to the nature of the dispute, the parties should try to negotiate a settlement.
3. On 12th May 2023, the parties recorded a consent settling the appeal in the following terms:



- i. The appellants shall transfer to the respondents a portion of LR Kisumu/Fort-Tenan Settlement Scheme Plot No. 068/289 measuring 10 acres.
 - ii. The appellants are to settle the costs of subdivision of the property LR Kisumu/Fort- Tenan Settlement Scheme Plot No. 068/289.
 - iii. The costs of the transfer shall be borne by the respondents.
 - iv. Each party to bear its own costs.
4. The applicants are now before this Court with a notice of motion dated 25th April, 2024 brought under Sections 3A of the *Appellate Jurisdiction Act*, Rules 41, 42 and 47 of the Court of Appeal Rules seeking a review and setting aside the aforesaid consent order, and that pending the hearing and determination of this application, the respondent be restrained from dealing in any manner with L.R No. Kisumu/ Fort Ternan/289 [suit land].
 5. The application is premised on the grounds that the respondent has sought to implement the consent orders which they seek to be reviewed and set aside; that the respondents have destroyed and continue to destroy a live fence that pre-existed in an attempt to get rid of evidence and take over the suit land; that their counsel on record fraudulently entered into and signed the impugned consent with the respondents' counsel without their instruction and or consent, occasioning an unfavourable judgment that led to the loss to them of more than 73.3 acres.
 6. That the applicants should not be punished for the mistake of the advocate nor should they be condemned unheard as the suit herein was heard and determined in their absence and unless the orders sought are granted, the applicants will suffer irreparable loss and damage.
 7. The application is opposed by a replying affidavit sworn by Otieno David Advocate and the grounds are that the firm of Onsongo and Company Advocates has been on record for the applicants in this suit since 2007 up to 8th June, 2017 when judgment was delivered and even in the instant appeal.
 8. Due to the history of the matter, the Court, in the presence of the representatives of both parties, advised the parties to try and negotiate a settlement. By a letter dated 30th January, 2023, he communicated to the applicants' counsel and in response, the applicants' counsel vide a letter dated 3rd February, 2023 communicated the applicants' request that they be allowed to retain the portion of land which they were using.
 9. On 5th April, 2023, counsel drafted the consent and shared it with the applicants' counsel for approval and signing which was done, filed, and was on 12th May, 2023 adopted as an order of the court.
 10. The applicants have now sought to stop or delay the implementation of the consent, and have even complained against their former advocate on record, with the Complaints Commission a move to intimidate and blackmail the former counsel on record.
 11. It is further deposed that the application is factually and legally misconceived; and is an abuse of the court process as it has not met the criteria for the grant of the orders sought.
 12. In support of the application, the applicants submitted that on 24th January, 2022 when the Court gave an order for a negotiated settlement, it definitely meant that both parties were expected to sit, mediate, agree and bring back the resolution to the Court for adoption. However, when the impugned consent was being recorded, none of the parties was present. The former counsel on record fraudulently misled the Court to the detriment and loss of the applicants which they seek to review and set aside.



13. It is submitted that the consent adopted did not conform to the requirements under Order 25 Rule 5. Further, the consent executed between the applicant's advocate and the respondent's advocate on 23rd May, 2023 was an agreement to dispose of the land which ought to have been in writing and signed by all parties as required by section 3[3] of the Contract Act.
14. That contrary to the Section 127 Law Society of Kenya [Code of Standards of Professional Practice and Ethical Conduct] 2016 the applicants' counsel on record knowingly misled the Court that he had instructions from the client to record the consent yet his instructions were only limited to defending the appeal.
15. On whether there are sufficient reasons to warrant the setting aside of the consent order, the applicants contend that the Court was misled to believe that a mediated settlement was reached yet there was none. This prompted the applicants to file a complaint against the previous advocate which is awaiting the hearing and determination of the case.
16. In reply, the respondents contend in their submissions that the instant application is unmerited for reasons that first, it is anchored on unknown provisions of the law, secondly; this Court lacks jurisdiction to review its orders; and thirdly, the applicants have not satisfied the threshold for the grant of the orders sought as no evidence has been led to prove mistake, fraud or misrepresentation on the part of the applicant's advocate.
17. The respondent maintains that the power to set aside or review a decision is a matter of discretion which has no limit to the number and class of factors that the Court takes into account.
18. In determining the instant application, the respondent urges the Court not to consider the applicants' submissions on the proposal on how the land ought to be shared, as those were the arguments raised on appeal, the suggestion that every compromise must be signed by the parties themselves yet both sides were represented by counsels who were authorised to execute the subject consent; and despite alleging fraud, the same was never proved as such the application is for dismissal.
19. Having carefully considered the motion, the grounds thereof, the supporting affidavit, the respondent's replying affidavit, the rival submissions by the parties, the cited authorities, and the law, the main issue for determination is whether the applicant has met the threshold for varying or setting aside a consent order.
20. The guiding principles used by courts in setting aside consent judgments or orders are well established. In *Flora Wasike v Destimo Wamboko* [1982 – 88] 1 KAR 266, the Court of Appeal held that:
 - i. "It is settled law that the consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example, fraud, mistake, or misrepresentation.
 - ii. An advocate would have ostensible authority to compromise a suit or consent to a judgment so far as the opponent is concerned.
 - iii. The court would not readily assume that judgment recorded by a Judge as being by consent was not so unless it was demonstrably shown otherwise."
21. Similarly, in *Brooke Bond Liebig v Mallya* (1975) EA 266, Mustafa Ag. VP stated thus;

"...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. 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 that could give rise to the setting aside of a consent agreement existed.”

22. And in the English Case of *Purcel v F. C. Trigell Ltd, (trading as Southern Window and General Cleaning Co. & Another)*, (1970) 3 ALL ER671, where Winn, LJ, opined:

“It seems to me that, if a consent order is to be set aside, it can 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.”

23. 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 aside a contract. So, was this a case of fraud, non-disclosure of material facts or misrepresentation, or mistake by the applicant’s advocate that would lead to setting aside of the consent order adopted on 12th May, 2023?

24. Black’s Law Dictionary 10th Edition defines the term “fraud” as;

“ 1. Knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (esp. when the conduct is wilful) it may be a crime.”

25. The same dictionary defines misrepresentation as:

1. The Act or an instance of making a false or misleading assertion about something, usually with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.
2. The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.

27. While “mistake” is defined as;

“ 1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (1) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.”

26. The burden is on the applicant to show to the satisfaction of the court that the consent judgment is fraudulent, was procured through collusion, is against public policy, there was a mistake, material facts were omitted and there was misrepresentation to demonstrate that their advocate did not bona fides or contrary to his instructions.

27. The applicants’ case is that they have been condemned unheard since the impugned consent was adopted in their absence, they were never informed of the contents of the consent and further that they never instructed their former advocate on record to record the consent. It is the applicant’s case that counsel deliberately misled this Court and recorded the consent order through fraud or collusion.



- 28. In response to the claims by the applicants that they were not involved, the respondents maintained that the applicants were represented by counsel who had the authority to record the consent on their behalf. Contrary to their assertions, the applicants were made aware of the consent and its applications as early as 29th August, 2023, but took no steps until the implementation of the order was put in motion.
- 29. In *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* [1982] KLR 485, Harris J held inter alia, that;
 - “A consent order entered into by 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.
 - 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.
- 30. The applicants blame their former advocate for collusion and or fraud. They claim that they had not given the advocate instructions on the consent. The basis of saying that the advocate had limited or no instructions to compromise the appeal has not been laid out. No document has been attached showing that the applicants had given their lawyers specific instructions, which did not extend to compromising the appeal. Allegations of collusion or fraud on the part of one’s lawyer are grave issues that should not be made without basis. They border on criminality and amount to professional misconduct.
- 31. In *Ndirangu v Commercial Bank of Africa* [2002] 2 KLR 603, the court held that one had to show that the advocate had no instructions to enter into a compromise, otherwise, in a case, a lawyer has full control over the conduct of a trial and has apparent or implied authority to compromise of matters connected with the action.
- 32. From the material presented before this Court, the applicants have not made a case for the court to set aside the consent order adopted on 12th May, 2023 nor have they placed any evidence to show illegality in the consent, and the allegations of fraud and connivance had not even a scintilla of evidence to support them. Indeed, the complaints by the applicants that their advocate had been involved in malpractice by misleading the court regarding instructions by clients were referred to the Advocates Complaints Commission by a letter dated 3rd October 2023; but they remained mere allegation as the applicants failed to furnish this Court with the outcome of the said complaint. We are satisfied that the application lacks merit and is dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF OCTOBER 2025.

ASIKE-MAKHANDIA
JUDGE OF APPEAL

.....
H. A. OMONDI

JUDGE OF APPEAL

.....
A. O. MUCHELULE



JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

