



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ELC CASE NO. 1 (O.S) OF 2021**

**IN THE MATTER OF: ORDER 45 RULE 1, ORDER 1 RULE**

**10(2), AND ORDER 40**

**RULE 1 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF: ARTICLE 40, ARTICLE 47, AND**

**ARTICLE 50(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: SECTION 38 OF THE LIMITATION OF**

**ACTIONS ACT, CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION**

**ACT, NO. 4 OF 2015**

**AND**

**IN THE MATTER OF: ARTICLE 62(1) OF THE  
CONSTITUTION AND THE PUBLIC TRUST DOCTRINE**

**BETWEEN**

**VICTOR KUTO MARANDU AND 243**

**OTHERS.....PLAINTIFFS/RESPONDEN  
TS**

**VERSUS**

**JACK FRANCIS**

**PAUL.....DEFENDANT/RESPONDENT**

**THE LAND REGISTRAR, MOMBASA COUNTY ..... 2<sup>ND</sup>**

**INTENDED DEFENDANT/RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup>**

**INTENDED DEFENDANT/RESPONDENT**

**AND**

**M'MBETSA BEJA M'MBETSA**

**NANCY MAWODO**

**SIDI KARISA**

**DAVID MGOMOLO**

**BERNARD CHACHA.....INTENDED**

**PLAINTIFFS/APPLICANTS**

**RULING**

1. Preliminary Objection (PO) dated May 2, 2025, seeks that the Applicants' Notice of Motion dated April 7, 2025, be dismissed *in limine*.
2. The court directed that the parties dispose of the matter through written submissions. I acknowledge receipt of the submissions from learned counsels for the parties for which I am grateful.
3. From the PO and the submissions before me, the issues I frame for the court's decision are whether the PO is sustainable and who should bear the costs associated with it.
4. In the leading case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, the Court stated that:

***“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may***

***dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.***

***. ..a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

5. The Respondents argue their objection based on the finality of the 31st May 2021 consent judgment, claiming the Applicants cannot challenge it. The court is *functus officio*, so to speak.
6. On the other hand, the Applicants believe that joinder of parties can occur at any stage of the trial and that a consent judgment can be reviewed at any time, as long as it is demonstrated that it was vitiated by known factors that can invalidate a contract.
7. I agree with the Applicants that the legal position on the variation of a consent judgment is well established. In **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited**

**[2015] KECA 390 (KLR)**, the Court of Appeal in that case held that:

*"The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.*

*Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625, said in his judgment at page 626 -*

*"It is now settled law that a consent judgement 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 v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983,*

*This Court in the case of Brooke Bond Liebig v. Mallya 1975 E.A. 266 held:-*

***“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”***

- 8.** The Applicants have petitioned the court to rescind the existing consent, citing several vitiating factors. I cannot dismiss the issues raised summarily. They will be addressed substantively in their motion dated May 2, 2025.
- 9.** In summary, the PO dated May 2, 2025, has no legal merit and is therefore dismissed with costs.

**Dated, signed, and delivered virtually at Malindi on this 8<sup>th</sup> day of October, 2025.**

**E. K. MAKORI**

**JUDGE**

**In the presence of**

**Mr. Nyanje for the Applicants**

**Ms. Waswa 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

**Mr. Lijoodi and Ambwere for the 4<sup>th</sup> and 5<sup>th</sup> Respondents**

**Happy: Court Assistant**

