



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND CASE NO. 42 OF 2017

**HARRISON NGUNYI NYOTA.....PROPOSED INTERESTED
PARTY**

VERSUS

ELVIS NYANGENA OMANWA.....PLAINTIFF/1ST

RESPONDENT

DANIEL NYAMBUTORA OBWAYA.....1ST

DEFENDANT

THERESIA HACKL MULLER.....2ND

DEFENDANT

MERCY CHARO MANYIKA MOKA.... ..PROPOSED 3RD

DEFENDANT

DIGBY ANTONY MATTHEW

DANVERS.....PROPOSED 4TH

DEFENDANT

DEFENDANT

RULING

- 1.** The Notice of Motion, filed on December 20, 2024, urgently requests the temporary joinder of Harrison Ngunyi Nyota (the applicant) as an interested party pending the hearing of the suit. It also seeks to join Mary Charo Manyika Moka, Digby Antony Matthews Danvers, and Gillian Mary Danvers as 3rd, 4th, and 5th defendants, respectively, with an injunction against them to prevent dealing with land parcels Gede/Dabaso/2143, 2144, and subdivision Gede/Dabaso/314 until the case is heard.
- 2.** The applicant further requests that the interlocutory injunction remain in place until the hearing and determination of the suit. It is also urged that the court be pleased to add the applicant as a plaintiff in the counterclaim and that the applicant's draft defense and counterclaim, attached to the supporting affidavit, be deemed duly filed.
- 3.** Finally, the applicant respectfully requests that the court set aside the consent recorded in this case on October 31, 2018.

- 4.** The 1st respondent filed a Preliminary Objection (PO) dated January 15, 2025, claiming that the applicants lack locus standi to initiate the application. The court is functus officio; the application violates the principles of setting aside a consent order or judgment, breaches Section 4 of the Limitation of Actions Act, contradicts Law Society sale guidelines, offends Article 40 of the Constitution, and Section 8(1) of the Land Control Act.
- 5.** The 3rd, 4th, and 5th proposed defendants, in opposition to this application, filed a replying affidavit dated February 4, 2025, sworn by Mercy Mkanyika Moka, along with a joint replying affidavit dated February 4, 2025, sworn by Digby Anthony Mathews Danvers and Gillian Mary Danvers.
- 6.** The court directed that the application be handled through written submissions. I acknowledge receipt of submissions from the learned counsel for the applicant, Mr. Masore, and the learned counsel for the proposed 3rd, 4th, and 5th defendants, Mr. Mbura, with appreciation, as they played a significant role in helping to resolve the issues raised in the application.

7. Based on the materials provided, I outline the following issues for the court's determination: whether this Honourable Court is functus officio; whether the applicant can be joined in these proceedings; whether this Honourable Court can set aside the Consent Order dated October 31, 2018; whether the applicant has satisfied the principles for granting a temporary injunction; whether the applicant can seek to enforce an agreement that is legally time-barred; and who should bear the costs of the application.

8. The application was filed on several grounds. These include that the applicant purchased land parcel No. L.R. Gede/Dabaso/314 from the plaintiff in this case. The plaintiff had previously had the suit land transferred to him from the 1st defendant through a court-endorsed consent entered into between the plaintiff and the 1st defendant on March 1, 2017. After the sale, the plaintiff handed all the registrable documents to the applicant, including the title deed, transfer form, application to the Land Control Board, and court order, to facilitate the transfer of the property to the applicant's name. The applicant was also given vacant possession of the land,

which he subsequently developed. However, before the applicant could transfer the land to himself, the plaintiff colluded with the 1st defendant and secretly and fraudulently applied to the court, consenting to have the suit property revert to the 1st defendant. Additionally, the 1st defendant fraudulently sold the property to the 3rd defendant, who subdivided it into Gede/Dabaso/2143 and Gede/Dabaso/2144. The 3rd defendant then secretly transferred these two parcels to the 4th and 5th proposed defendants.

9. The applicant further alleges that the consent orders of October 31, 2018, were a deceitful ploy to mislead the court into validating an otherwise fraudulent transaction. The applicant also claims that the defendants have trespassed onto the subject property and commenced construction there.

10. As stated, the 1st respondent opposed the application with a PO dated January 15, 2025, but notably did not file a replying affidavit to confirm or deny collusion with the plaintiff to deprive the applicant of his interest.

11. Mercy Chao Manyika Moka, the 3rd proposed defendant, opposed the applicant's application through her replying

affidavit, sworn on February 4, 2025. She states that the application is legally flawed, is barred by Section 4 of the Law of Limitation of Actions Act, and also contravenes the Law Society Conditions of Sale [1989] edition. Additionally, it breaches Section 8(1) of the Land Control Act and violates paragraph 11 of the Sale Agreement entered into on November 27, 2017.

12. The 3rd proposed defendant further argues that the applicant's claim is against the plaintiff and not against the actual defendants or the proposed defendants. They assert that the court is now functus officio and that the application has been overtaken by events, as the consent of October 31, 2018, has been finalized. The applicant was not a party to that consent, and in any case, neither the plaintiff nor the 1st defendant is challenging the consent, which the applicant is contesting.

13. The deponent further states that the applicant has no claim against either the 1st or 2nd defendants, who were parties to the consent. The deponent also notes, without referring to the applicant's draft plaint, that the applicant's claim should be for

a refund of money. It is additionally claimed by the 3rd proposed defendant that the applicant has not shown any proprietary interest in the suit parcels of land and that the applicant lacks standing, as he has never been the registered owner of any of the plots.

14. Furthermore, the properties have been transferred to other individuals who are not parties to this suit. The 3rd proposed defendant further states that she purchased plot No. L.R. Gede/Dabaso/2143 from the 1st defendant after due diligence and without any defect in the title.

15. It is further claimed that no fraud has been demonstrated against her, that upon her purchase of the land, she applied for and obtained a change of user without any objection from any party, that she has now legally and procedurally sold and transferred the property to other individuals, namely, Russel Christopher Franklin Buckley and Sabine Helga Maria Hartl Buckley. She states that these individuals have developed the property by erecting a perimeter wall and are currently constructing a house.

16. The deponent also states that she sold land parcel No. Gede/Dabaso/2144 to the 4th and 5th proposed defendants, who she claims have developed the property by building a perimeter wall and are in the process of constructing a house. It is further alleged that the applicant's claim has been defeated in equity; the counterclaim does not raise any triable issues. The applicant has not established the conditions necessary for an injunction, and they can be compensated with damages. The application is filled with lies, nondisclosures, and dishonesty, and granting it would prejudice the respondents.

17. Digby Anthony Mathews Danvers and Gillian Mary Danvers, the 4th and 5th proposed defendants, have opposed the application through their joint affidavit sworn on February 4, 2025. Their position aligns with that of Mercy Charo Manyika Moka, and there is no need to restate what they have expressed in their response. In summary, they claim to be innocent purchasers for value and without notice of any defect in the title of Mercy Charo Manyika Moka or the previous proprietors.

18. It should be noted that, based on the above, the suit property has changed significantly since the consent order was issued. The original property has been transferred through various owners and subdivided multiple times, and it is now owned by different third parties who have not been included in this suit.

19. The issues raised here can be addressed sequentially; therefore, I will start with the issue of joinder.

20. The Court in **Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] KEHC 2227 (KLR)** reiterated the longstanding test for joinder, as established in **Kingori v Chege & 3 Others [2002] 2 KLR 243**, outlining the factors to consider in applications for joinder of parties. These factors include whether the party is necessary and proper, and whether their participation would avoid the multiplicity of proceedings. The Court held that when a party is directly affected by a decree, the court should exercise its discretion in favor of including them. Additionally, the Court referenced the decision of the

Court of Appeal in Tanzania in **Tang Gas Distributors Ltd v Said & Others [2014] EA 448**, where the Court stated that:

“the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

21. Regarding joinder after judgment. The Court of Appeal in **Rose Wakanyi Karanja & 3 others v Geoffrey Chege Kirundi & another; Everton Coal Enterprises Limited (Interested Party) [2020] KECA 616 (KLR)** held:

“However, there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been delivered. One such exception is where a matter has been determined and adverse orders issued against a party who was neither given notice of the suit nor heard on the issue in dispute, as was the case in this appeal.”

22. In this matter, the applicant has demonstrated that he holds a proprietary interest in the suit property through purchase and that the consent entered by the parties affected his rights. Therefore, I believe the applicant is eligible to join these proceedings.

23. This leads me to the following question: whether the consent order in place can be set aside.

24. The legal position on the variation of a consent order/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."

25. It is undisputed that the original parties to the suit—the plaintiff, Elvis Nyangena Omanwa; the first defendant, Daniel Nyambutura; and the second defendant, Theresia Hackl Muller—resolved this case through a consent agreement dated

October 31, 2018. This consent amended and/or reviewed an earlier agreement that was adopted as a court order on March 9, 2017. The consent from October 31, 2018, effectively granted rights to the original Plot No. Gede/Dabaso/314, which measures approximately 0.5 hectares, to the first defendant. Once the parties reached this agreement and it was later adopted as a court order, it became a final judgment that fully settled all issues of the case.

26. The orders of the consent judgment dated October 31, 2018, which vested the original Plot No. Gede/Dabaso/314 in the 1st defendant, Daniel Nyambutura, were executed by the Lands Registrar in Kilifi, who issued a title deed to the 1st defendant. It is not disputed that the 1st defendant subdivided this plot into Plot No. Gede/Dabaso/2143 and Plot No. Gede/Dabaso/2144, both of which were legally and procedurally sold to the 3rd proposed defendant, Mercy Chao Makanani Moka.

27. The 3rd proposed defendant, Mercy Chao Makanani Moka, also legally and procedurally sold and transferred Plot Nos. Gede/Dabaso/2143, which is currently registered in the names

of Russell Christopher Franklin Buckley and Sabine Helga Maria Hartl Buckley, who are not parties to this suit or application. Russell Christopher Franklin Buckley and Sabine Helga Maria Hartl Buckley have since developed the plot by erecting a perimeter wall and fence and are in the process of constructing a house.

28. The orders sought by the applicant are therefore alleged to be prejudicial to them, since it is claimed they are innocent buyers who acquired the plot legally and following proper procedures. The same applies to Plot No. Gede/Dabaso/2144, which is currently registered in the names of Digby Anthony Mathews Danvers and Gillian Mary Danvers, the proposed 4th and 5th defendants, respectively. These individuals have also developed the plot by constructing a perimeter wall and are currently building a house.

29. It is also asserted that the orders sought by the applicant are therefore prejudicial to these innocent purchasers, who also acquired the plot lawfully and procedurally. The orders sought by the applicant, if granted, would cause hardships in light of

uncontradicted evidence that the suit properties no longer belong to the plaintiff.

30.

believe that the applicant's motion seeks equitable relief; however, there has been unreasonable delay and acquiescence on his part—equity does not support inaction. The Consent Order of October 31, 2018, made as a court order on that date—more than six years ago—was intended to be binding on the parties involved in the case. The applicant is now trying to set it aside without providing a valid or convincing reason for not raising this issue earlier.

31. The applicant was not a party to that consent, nor has he presented any convincing evidence of factors that would invalidate the Court's Consent Order. Furthermore, none of the involved parties, including the plaintiff, Elvis Nyangena Omanwa, from whom the applicant claims to derive his interest concerning Plot No. Gede/Dabaso/31, are contesting the consent. Since there are no claims from the plaintiff against the 1st defendant or other parties involved in the consent order dated October 31, 2018, and all parties agreed that the

aforementioned Plot No. Gede/Dabaso/314 should be vested in the 1st defendant, Daniel Nyambutora; any claim the applicant has should be directed against the plaintiff for a refund of any alleged payments.

32. In my opinion, although the applicant can be involved in these proceedings, there will be no active suit, as it was settled through a consent on October 31, 2018 — such orders are untenable because, in the absence of a suit, no counterclaim can stand alone. The application is unmeritorious at this stage and is hereby dismissed with costs

33. Arising from the foregoing discussion, the other issues as framed will be academic since we have no suit worthy of resuscitating.

34. Consequently, the application dated December 20, 2024, is hereby dismissed with costs.

Dated, signed, and delivered electronically in Malindi on 5th November, 2025.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Masore for the Applicants

Mr. Ragira for the 1st Defendant

Mr Mbura for thr 3rd 4th 5th intended Defendants

Happy: Court Assistant