

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC LOS NO. E013 OF 2023

KISERO OLUTELE LEMEH APPLICANT

= VERSUS =

**MATHIAS ETYANG OMANIA (sued as the Legal
Representative of the Estate of OMANIA
ONGINGO KAMORU) RESPONDENT**

R U L I N G

1. **KISERO OLUTELE LEMEH** (the Applicant) moved to this Court vide his Originating Summons dated 5th October 2023 and filed on 11th October 2023 in which he impleaded **MATHIAS ETYANG OMANIA** (the Respondent herein and sued as the legal Representative of the Estate of **OMANIA ONGINGO KAMORU**) seeking the main order that he has acquired by way of adverse possession a portion of land measuring 12 acres (4.856 Hectares) out of the land parcel **NO SOUTH/TESO/APOKOR/366** (the suit land). I need not delve into the details of his claim for purposes of this ruling except to state that in paragraphs 3 and 8 of his supporting affidavit, he averred that he had purchased 12 acres out of the suit land from

OMANIA ONGINGO KAMORU in 1986 and has been in possession thereof, having extensively developed it, for a period exceeding 12 years.

2. In response to the Originating Summons, the Respondent filed a replying affidavit un-dated but filed on 18th January 2024 in which he averred in paragraph 7 thereof as follows:

7: “That I know for a fact that the Applicant’s claim over 12 years of L.R. NO SOUTH TESO/APOKOR/366 is unfounded and ought to be dismissed.”

However, in paragraphs 5 and 6 of the same replying affidavit, he averred that:

5: “That the Applicant is only in occupation of the 2½ acres of L.R NO SOUTH/TESO/APOKOR/366 he bought and has been using the same peacefully without any interference.

6: “That the Applicant herein is a liability to the estate of OMANIA ONGINGO KAMORU and has been listed.”

From the above pleadings by the parties, it must be clear to any impartial observer that the only dispute between the parties and which the Court would eventually have to determine at the trial could be the acreage of the suit land which the Applicant is

actually in occupation and possession of. That must have been obvious to both **MR OKEYO** counsel for the Applicant and **MR OUMA** then counsel for the Respondent.

3. Therefore, when the Respondent approached this Court vide his application dated 11th July 2024 seeking to injunct the Applicant from accessing the suit land on the claim that the Applicant has trespassed thereon, it was obvious to me that given the Respondent's averments in paragraphs 5 and 6 of his replying affidavit in response to the Applicant's Originating Summons, there would be no need canvassing the Originating Summons nor the Respondent's application dated 11th July 2024 seeking to injunct the Applicant from accessing the suit land and referring to him (Applicant) as a trespasser. I took the view that whereas the **Constitution** guarantees the right to a hearing under **Article 50**, such a hearing should only be held to determine real disputes. And the real dispute, from the pleadings, was the acreage of the suit land occupied by the Applicant. Both **MR OKEYO** and **MR OUMA** agreed and a consent order was recorded on 17th September 2024.
4. The proceedings of 17th September 2024 read as follows:

“COURT: I have looked at the Notice of Motion dated 11th July 2024 and it is clear to me that this is a matter in which the whole suit can be determined by a surveyor’s report.

MR OKEYO: That is correct. We can record a consent on the whole suit.

MR OUMA: I am agreeable.”

Arising out of the above, this Court made the following order:

“By consent, the Land Registrar and Surveyor Busia to visit the land parcel NO SOUTH/TESO/APOKOR/366 and determine the acreage which is occupied by the plaintiff/Applicant. We can mention on 25th November 2024 to find if the report has been filed and for further orders. The Plaintiff/Applicant to meet fees for the survey.”

To-date, the report has not been filed and although this Court subsequently fixed a hearing date for 27th November 2025, the hearing did not proceed.

5. I now have for my determination the Respondent’s Notice of Motion dated 8th September 2025 anchored under the provisions of **Section 1A, 1B, 3 & 3A** of the **Civil Procedure Act** and

Order 51 Rule 1 of the **Civil Procedure Rules**. By the Motion, the Respondent seeks the following orders:

1) Spent

2) Spent

3) That this Honourable Court be pleaded to set aside the consent order dated 19th September 2024 (it is actually dated 17th September 2024 not 19th September 2024 as pleaded).

4) That costs to be in the cause.

6. The Motion is based on the grounds set out therein and is also supported by the Respondent's affidavit of even date.
7. The gist of the Motion is that when the Respondent's former counsel **MR OUMA** consent to the consent order recorded on 17th September 2024, he did not have directions to do so. That the Respondent was not aware of any such consent and neither did his then counsel inform him about it as he was not in Court on 17th September 2024 when the same was adopted. That the Applicant's claim is for adverse possession of 12 acres which he purports to have bought from the Respondent's late father and therefore there is no need for a surveyor to visit the land. That if

the orders sought are not granted, the Respondent will suffer irreparable damages.

8. In response to the Motion, the Applicant filed a replying affidavit reiterating his claim to have acquired a portion of the suit land measuring 12 acres (4.856 hectares) by way of adverse possession. That when the suit came up on 17th September 2024, the parties agreed by consent that the County Surveyor visits the suit land to determine the acreage being occupied by the Applicant for purposes of expediting the disposal of the suit. The consent was recorded in the presence of and with the full participation of **MR OUMA** who was then representing the Respondent. The matter was then mentioned severally to confirm the filing of the surveyor's report.
9. That the Respondent's Motion has not satisfied the legal threshold for setting aside a consent order as set out in the case of **HIRANI -V- KASSAM 1952 E.A. CA 131** as it has not been demonstrated that the consent was obtained either by fraud, collusion and/or misapprehension of material facts. That after the consent had been recorded **MR OUMA** who has been representing the Respondent wrote to the Applicant's counsel on 24th October 2024 requiring compliance with the order and upon

receipt of the consent order, the county surveyor issued summons that he would be visiting the suit land on 29th August 2025 but that did not happen. A notice was issued that the surveyor would visit the suit land on 12th September 2025 and he did so in the presence of all the parties, conducted the survey and compiled a report dated 17th September 2025. Therefore, the Respondent's Motion is over-taken by events. Further there has been inordinate delay in filing this Motion as the consent was filed one (1) year ago. This Motion is therefore an abuse of the Court process.

10. The following documents are annexed to the Applicant's replying affidavit:

- 1) Notice of appointment by the firm of **BARASA MOSES OUMA & COMPANY ADVOCATES** to act for the Respondent.
- 2) Copy of the consent order recorded on 17th September 2024.
- 3) Copy of the letter dated 24th October 2024 from the firm of **BARASA MOSES OUMA & COMPANY ADVOCATES** addressed to the firm of **OKEYO OCHIEL & COMPANY**

ADVOCATES requesting the Applicant to comply with the Court order recorded on 17th September 2024.

- 4) Copy of the letter from the County Surveyor dated 15th August 2025 addressed to the parties and inviting them to be present on 29th August 2025 when the suit land will be surveyed in accordance with the Court order.
- 5) A copy of the letter from the County Surveyor dated 29th August 2025 informing the parties that the site visit will be done on 12th September 2025.
- 6) Copy of the report by the County Surveyor **MR GEOFFREY KAMADI** dated 17th September 2025.

11. When the Respondent's Motion dated 8th September 2025 was placed before me on 9th September 2025, I directed that it be canvassed by way of written submissions. The same were to be filed on or before 6th October 2025. However, on that day, only **MS ACHALA** who had now come on record for the Respondent in place of **MR OUMA** had filed his submissions. **MR OKEYO** counsel for the Applicant informed the Court that he would only be relying on the Applicant's replying affidavit.

12. I have considered the Respondent's Notice of Motion dated 8th September 2025, the rival affidavits, the annexures and the

submissions by **MS ACHALA** as instructed by the firm of **ABALO & COMPANY ADVOCATES** now acting for the Respondent in place of the firm of **BARASA MOSES OUMA & COMPANY ADVOCATES**.

13. The only issue for determination is whether the consent order dated 17th September 2024 should be set aside. The contents of the order are clear and have been set out in extenso earlier in this ruling and I therefore need not rehash it.
14. The principles that guide a Court faced with an application to set aside a consent order have been discussed in various cases. In the case of **BROOKE BOND LIEBIG -V- MALLYA 1975 E.A 266, MUSTAFA Ag V.P** stated thus:

“The compromise agreement was made an order of the Court and was thus a consent judgment. 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 which could give rise to the setting aside of a consent agreement existed.”

In her submissions, counsel for the Respondent has stated thus:

“The Applicant was not present in Court when the matter came up on 17th September 2024 and so the Applicant expected his former counsel MR OUMA to have adjourned the matter or sought for more time for the purpose of consulting with the Applicant about the issue of County Land Registrar & Surveyor or visiting the suit parcel. And this extent, the Applicant can be right when he states that there was some sort of collusion between the two advocates to defeat his interest in the matter.”

Other than the fleeting remark **“that there was some sort of collusion between the two advocates to defeat his interest in the matter”**, the Respondent, who is the owner of the Motion under consideration, has not given any reason(s) why his then counsel **MR OUMA** could have colluded with **MR**

OKEYO “to defeat his interest in the matter.” I do not think that remark was made with any seriousness and I treat it as such because if indeed there was any collusion between his then counsel and counsel for the Applicant in recording the consent dated 17th September 2024, it should not have taken him a whole year to approach his Court vide this Motion dated 8th September 2025 and long after he had been summoned to the suit land by the county surveyor.

15. The Respondent states that he was not present when the consent order was made. However, in the case of **FLORA N. WASIKE -V- DESTIMO WAMBOKO 1988 eKLR, HANCOX JA** citing **SETTON ON JUDGMENTS AND ORDERS 7TH EDITION VOL. 1** page 124 reiterated that:

“Any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action and those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion or by any agreement contrary to the policy of the Court ...; or if the consent was given for a reason which would enable a Court set aside an agreement.”

Other than the issue of collusion between counsel and which I have already dismissed as not having been raised with any seriousness, I have not heard the Respondent raise any issue of fraud in the manner in which the consent was obtained or that the same is contrary to public policy or without sufficient material facts or for any reason which would enable this Court to set aside the consent. If anything, it must be clear from the proceedings of 17th September 2024 that the consent recorded on that day was as a result of this Court prompting the parties to take that route. And I have not heard the Respondent complain that this Court was motivated by fraud, collusion, acted without sufficient material facts or any other vice. Given the above circumstances, there is no reason to warrant the setting aside of the consent order recorded on 17th September 2024 as sought by the Respondent.

16. The up-shot of the above is that the Respondent's Notice of Motion dated 8th September 2025 is devoid of any merit. The same is accordingly dismissed with costs.

BOAZ N. OLAO
JUDGE

26TH FEBRUARY 2026

**Ruling dated, signed and delivered by way of electronic mail
on this 26th day of February 2026 with notice to the parties.**

**BOAZ N. OLAO
JUDGE**

26TH FEBRUARY 2026

Explanatory notes:

This ruling was due on 3rd December 2025. However, following my transfer from Busia to Iten Court and which was w.e.f 15th January 2026, I had to prioritize hearing my part heard cases. That caused the delay. The same is regretted.

**BOAZ N. OLAO
JUDGE**

26TH FEBRUARY 2026