



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 678 OF 2017**

**KENIA REALTY  
LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SALOME WAIRIMU MIANO.....1<sup>ST</sup>  
DEFENDANT/APPLICANT**

**JOSEPH KARIUKI MIANO.....2<sup>ND</sup>  
DEFENDANT/APPLICANT**

**MAINA MWANGI.....3<sup>RD</sup>  
DEFENDANT/APPLICANT**

**RULING**

1. On the **5<sup>th</sup> July 2022** the firm of PC Onduso wrote to the Deputy Registrar seeking to record the following consent;

- 1) THAT the Respondents being the Administrators of the estate of the late Abdalla Ali Miano do facilitate the endorsement of the confirmed Grant on Title known as Land Reference No.1159/118 Karen within 14 days.**
- 2) THAT the confirmed Grant in High Court Succession Cause No. 78 of 1997 be RECTIFIED to reflect the agreed subdivision of Land Reference No.1159/118 into 7 portion acknowledging sale of 4 portions to the Applicant (namely portion Nos.1,4,5 and 6) within 60 days.**
- 3) THAT the Applicant to engage a professional surveyor to complete the survey in accordance with the layout plan and current respective occupation for the 7 portions as agreed in the Sale Agreement dated 30<sup>th</sup> January 2009 at its own costs.**
- 4) THAT the Applicant shall release the sum of Kshs.3,000,000/= immediate upon execution of this consent for purposes of the renovations of the**

**old house as originally contemplated in the Agreement for Sale.**

**5) THAT Immediate upon the registration of the Deed Plans and Certificate of Titles in the names of the Administrators, the Respondent do execute the Transfers in respect of the 4 portions described as 1, 4, 5 and 6 or resultant Certificate of Titles to the Applicant or its assigns within fourteen (14) days of such registration.**

**6) THAT the Respondent shall be liable for the payments of the sum of Kshs.9,600,000/= as stamp duty for purposes of effecting the transfers.**

**7) THAT the Respondents shall be liable for the payment of all outstanding arrears of service charge in respect of Houses No. 2 and 3 occupied by them.**

**8) THAT the Cost of this suit and all previous proceedings attaching to this matter agreed at Kshs.10,800,000/= shall be borne by the Respondents.**

**9) In default of Clause 3 above, the Deputy Registrar to execute the transfer of the four (4) resultant land parcels to the Applicant.**

2. After court appearances before the Judge on 19<sup>th</sup> July 2022, 27<sup>th</sup> July 2022, 30<sup>th</sup> September 2022 and 26<sup>th</sup> October 2022, the consent was adopted in the presence of Mr Onduso for the Applicant and Mr Miano representing the Respondents.
3. On the 8<sup>th</sup> August 2024 the Defendants filed the present application praying for the following orders;
  - 1) THAT this honourable court be pleased to certify this matter urgent and fit to be heard ex-parte in the 1<sup>st</sup> instance and or on priority basis.
  - 2) THAT pending hearing and determination of this application the Honourable Court do grant Temporary Orders staying execution/implementation of the Judgement and decree of Court given on 26<sup>th</sup> October, 2022 and issued on 20<sup>th</sup> December 2022.
  - 3) THAT this Honourable Court do review, revoke and/or set aside the consent dated 5<sup>th</sup> July, 2022 purportedly made by the parties to the suit and the subsequent/resultant

Decree of court given on 26<sup>th</sup> October, 2022 and issued on 20<sup>th</sup> December, 2022.

- 4) THAT an order be and is hereby issued declaring the purported consent drawn on the letter head of P.C. Onduso & Company Advocates and solely witnessed by the said advocates null and void, unlawful, irregular and incompatible with the terms of engagement or agreement entered into between the Plaintiff and the Defendant(s)/Applicant (s) dated 30<sup>th</sup> January, 2009 jointly and or severally.
- 5) THAT purported consent dated on 5<sup>th</sup> July, 2022 which crystalized the decree of court issued on 20<sup>th</sup> December 2022 is strange to the applicants and utterly fabricated by the Plaintiff/Respondent and incapable of contractual or legal force.
- 6) THAT this Honourable Court be pleased to give such further orders or directions as it may deem fit and just in the circumstances.
- 7) THAT the cost of this Application be provided for.

4. The Defendant/ Applicants contend that the consent which was filed by the firm of PC Onduso was unknown to them. The Defendants specifically Salome Miano aver that she did not execute the consent which bears her signature and did not at anytime appear before the advocate of the Plaintiff to execute the consent which it is alleged she signed.
5. On the claim by the Plaintiff that the consent has been substantially complied with, it is the Defendants claim that the alleged payments were made to one Michael Miano who had no authority to receive any money on behalf of the estate of the deceased.
6. Having considered the grounds of opposition, the Replying Affidavit and the submissions filed herein the sole issue for determination is whether the court should set aside the consent
7. In the Court of Appeal case of Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269 Law Ag P said:

*“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”*

In **Hirani V. Kassam [1952] 19 EACA 131** the Court of Appeal held;

*“It is now well settled law that a consent judgment 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 Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-***

*“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the 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.”*

In **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd** [1982] KLR 485, Harris J held inter alia, that -

*1. 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.*

*2. 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.*

8. The principles from this case law is that for a consent to be set aside it must be established that there was fraud,

collusion, an agreement contrary to the policy of the court. The Kenya Commercial Bank case further states that the advocate must be a duly instructed advocate.

9. In the instant case there is no evidence at all that the law firm of Onduso and Company advocates were representing the Defendants. There was no rebuttal to the claim by Salome Miano that she did not execute the consent or give authority for the law firm of PC Onduso who did not represent the Defendants to record the consent. I find that this is sufficient ground to set aside the consent. More so, considering the consent purported to rectify a Confirmed Grant in a Succession case over which this court has no jurisdiction.

10. The Court of Appeal had occasion to speak to the exercise of the courts inherent power to do justice. In the case of Kenya Power and Lighting Company versus Benzene Holdings T/A as Wyco Holdings the court stated, "The extent of inherent powers of the court was eloquently explained by the authors of the **Halsbury's Laws of England, 4<sup>th</sup> Edn. Vol. 37 Para. 14** as follows;

***“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the***

***inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.***” See also **Meshallum Waweru Wanguku** (supra)

The court summed it up thus “This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice. I find that this is such a case would be an injustice to allow the consent to remain in place.

11. The application dated 8<sup>th</sup> August 2024 is allowed in the following terms;

**a) The consent adopted as an order of the court on 26<sup>th</sup> October 2022 and all consequential orders are hereby set aside.**

**b) Costs shall be in the course.**

**Dated, Signed and Delivered virtually at Kajiado this 19<sup>th</sup> day of February 2026.**

**JUDY OMANGE**

**JUDGE.**

**IN THE PRESENCE OF:**

N/A for the Plaintiff.

N/A for the Defendants.

Peter - Court Assistant.