

THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELCC NO. E036 OF 2022

FAITH WANJIRA KABUI 1ST

PLAINTIFF

DAMARIS MUTHONI MUNGE 2ND

PLAINTIFF

PATRICK GICHOBI KARANI 3RD

PLAINTIFF

VERSUS

FRANCIS WACHIRA MURIITHI.....

DEFENDANT

AND

JUSTIN NGUGI THIAKA 1ST PROPOSED

INTERESTED PARTY

ANN WATHUIYA NJAGI..... 2ND PROPOSED

INTERESTED PARTY

RULING

[Notice of Motion Dated 24th February 2025]

1. The proposed interested parties moved the court through the notice of motion dated 24th February 2025, seeking for inter alia:

- a. To be joined in the suit as interested parties.
- b. Setting aside of the orders entered by consent pending the hearing and determination of **Embu Succession Cause No. 29 of 2005.**

- c. Order restraining the plaintiffs and defendant from interfering with, selling, transferring, utilizing or gifting 17 acres of **Mwea/Tebere/83** belonging to Francis Thiaka Njagi.

The application is expressed to be brought under **Order 1 Rule 8, Order 22 Rule 76 and Order 42 of the Civil Procedure Rules**, as well as **Sections 3A and 6 of the Civil Procedure Act**.

The notice of motion is based on the nineteen (19) grounds on its face marked (1) to (19) and supported by the affidavits of Ann Wathuiya Njagi, 2nd proposed interested party, sworn on 24th February 2025 and 18th July 2025.

2. The Applicants' case, as gathered from the said affidavits, is that **Land Parcel MWEA/TEBERE/B3**, measuring approximately 35 acres, is the subject of succession proceedings and competing claims between two family lines. It is their contention that in **Embu Succession Cause No. 29 of 2005**, a determination was made to the effect that the said parcel was to be shared into two equal portions of approximately 17 acres each, one portion being associated with the family of the late Francis Thiaka Njagi, and the other with the Defendant's side.

That the 1st Proposed Interested Party is a son of the late Francis Thiaka Njagi, while the 2nd Proposed Interested Party is his daughter-in-law, and that they lay claim to the portion said to have been associated with that estate. That notwithstanding the existence of the said succession proceedings and the asserted division of the land, the Defendant herein proceeded to deal with the suit property, and entered into a consent with the Plaintiffs in this matter, pursuant to which portions of the land were transferred.

3. The proposed interested parties further contend that the Defendant lacked the capacity to deal with the entirety of the suit property, on the basis that his entitlement, if any, was limited to only a portion thereof, and could not pass a better title than that which he holds.

It is further their case that the consent recorded in this matter was not based on full disclosure of material facts, particularly the existence of the succession proceedings, and the competing claims over the land. They characterize the said dealings as amounting to intermeddling with the estate of a deceased person and as being unlawful. That they became aware of the consent and the dealings with the suit property when the Plaintiffs sought to be enjoined in the succession proceedings at Embu. They contend that unless they are joined in these proceedings and the consent orders set aside, the portion of land which they claim may be dealt with or dissipated to their prejudice

before the succession court determines the rights of the parties.

They urged the Court to allow their joinder so that they may participate in the proceedings and ventilate their claim, and to grant injunctive orders to preserve the subject matter pending the determination of the succession proceedings.

4. The application is opposed by Patrick Gichobi Karani, the 3rd Plaintiff, through the replying affidavit sworn on 5th May 2025. It is the plaintiffs' case that the matters giving rise to this suit, and the other related suits, being **Kerugoya ELC No^s. E034, E035 and E036 of 2022**, were compromised and fully settled by consent of the parties, which consent was duly adopted as an order of the Court. It is their position that upon entry of the said consent judgment, the Court became *functus officio*, and the proceedings were thereby brought to a final conclusion leaving no pending issues for determination. That the present application is misconceived, as there is no subsisting suit in which the Proposed Interested Parties can be joined. They assert that joinder presupposes the existence of a live dispute, and that the Court cannot exercise its discretion to join parties in proceedings that have already been concluded.

That the proposed interested parties not having been parties to the proceedings or to the consent, lack the legal capacity to seek the setting aside of the consent judgment. They contend that the consent is binding upon the parties who entered into it, and cannot be impugned by persons who were strangers to it.

5. It is also their case that the proposed interested parties have already moved the succession court through a Summons for Revocation of Grant in **Embu Succession Cause No. 29 of 2005**, and that the issues they raise concerning entitlement to the suit property properly fall within the jurisdiction of that court.

That on the prayer for injunctive relief, the plaintiffs contend that the proposed interested parties have not met the threshold for the grant of such orders as they have not demonstrated a prima facie case with a probability of success, nor shown that they stand to suffer irreparable loss that cannot be compensated by an award of damages. That the proposed interested parties cannot seek injunctive or substantive reliefs in proceedings in which they are not parties and that the application is in effect, an attempt to introduce a fresh cause of action through the guise of joinder.

The plaintiffs therefore urged that the application is incompetent, lacks merit, and ought to be dismissed with costs.

6. The learned counsel for the proposed interested parties and plaintiff filed their submissions dated the 20th August 2025 and 19th September 2025 respectively, which the court has considered.
7. In their submissions, the counsel for the proposed Interested Parties filed identified four issues for determination namely: whether the consent orders ought to be set aside; whether the proposed interested parties should be joined in the suit; who stands to suffer prejudice if the orders sought are not granted; and who should bear the costs of the application.

On the issue of setting aside of the consent, counsel submitted that a consent order may be set aside where it is shown to have been obtained through fraud, collusion, misapprehension of facts, or where material facts were not disclosed.

It was submitted that the consent in this matter was entered into without full disclosure of the existence of succession proceedings relating to the suit property, and in circumstances where the Defendant allegedly lacked the capacity to deal with the entirety of the land. Counsel

argued that the consent was therefore contrary to law and ought to be set aside.

On joinder, counsel submitted that the Applicants have a direct and identifiable interest in the suit property, which they claim forms part of the estate of the late Francis Thiaka Njagi.

Counsel further submitted that unless the proposed interested parties are joined, the suit property may be dissipated, thereby rendering the succession proceedings nugatory and occasioning them substantial prejudice.

On the prayer for injunctive relief, counsel invoked the principles in the case of **Giella versus Cassman Brown (1973) EA 358**, and submitted that the Applicants have established a prima facie case, stand to suffer irreparable loss in the form of loss of their claimed inheritance, and that the balance of convenience tilts in their favour.

On costs, counsel urged the Court to follow the general principle that costs follow the event.

8. On their part, the counsel for the Plaintiffs framed a sole issue for determination as whether the application is merited.

On joinder, counsel relied on **Order 1 Rule 10(2) of the Civil Procedure Rules** and submitted that joinder of parties is only available in respect of pending proceedings. It was argued that since the present suit was concluded by a consent judgment, there is no subsisting suit in which the proposed interested parties can be joined.

On the setting aside of the consent, counsel submitted that a consent order has a contractual effect and can only be challenged by the parties to it. Reliance was placed on the doctrine of privity of contract to argue that the proposed interested parties, being strangers to the consent, lack the capacity to seek its setting aside. It was further submitted that the issues raised by the proposed interested parties relate to entitlement to the estate of a deceased person and are therefore properly within the jurisdiction of the succession court, where they have already moved the Court through proceedings for revocation of grant.

On the prayer for injunctive relief, counsel submitted that the proposed interested parties have not met the threshold set out in the case of **Giella versus Cassman Brown (Supra)**, particularly in the absence of a demonstrated legal right capable of protection in these proceedings. Counsel further argued that the application is an attempt to introduce a fresh cause of action through

joinder, and that granting the orders sought would affect parties in related suits who are not before the Court.

The counsel for the plaintiffs urged the Court to dismiss the application with costs.

9. The issues that arise for the court's determination in the application are as follows:

- a. Whether this Court is functus officio following the consent judgment; and*
- b. If not, whether the proposed interested parties, being non-parties, have locus standi to challenge the consent order.*
- c. If the foregoing be answered in the affirmative, whether the proposed interested parties have met the threshold for setting aside the consent.*
- d. Whether the prayers for joinder and injunctive relief are available in the circumstances.*
- e. Who pays the costs?*

10. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both sides, submissions by the learned counsel, superior court decisions cited thereon, the record and come to the following findings:

- a. In my view, the application raises a fundamental question as to whether this Court can reopen

proceedings that were concluded by consent at the instance of persons who were not parties to the suit, on the basis of alleged illegality arising from succession claims over the suit property.

The starting point is that this suit was concluded by a consent of the parties, which was adopted as an order of the Court. A consent judgment, once entered, has the effect of finally determining the dispute between the parties. The doctrine of *functus officio*, therefore, applies.

As was stated by the Supreme Court in the case of **Raila Odinga & 2 Others versus Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR**, adopting the exposition in **Jersey Evening Post Limited versus Al Thani [2002] JLR 542**:

“A court is functus when it has performed all its duties in a particular case... The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision...”

- b. In the present case, the consent judgment disposed of the entire suit. There is no pending issue for

determination, and in that sense, this Court is *functus officio*. However, that is not the end of the matter. The law recognises a limited jurisdiction to revisit a consent judgment in appropriate circumstances.

Section 80 of the Civil Procedure Act provides that:

“Any person who considers himself aggrieved -

a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

The Court of Appeal in the case of **Ramadhan versus Juma (Civil Appeal (Application) 28 of 2018) [2023] KECA 76 (KLR) (3 February 2023) (Ruling)**, held as follows;

“The law is very clear in regard to setting aside of a consent. In Brooke Bond Liebig versus Mallya [1975] EA 266, Mustafa, Ag. VP 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 circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy of 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 material facts and there could not have been any mistake or misunderstandings. None of the factors which could give to the setting aside of a consent agreement existed.”

Similarly, in the case of ***Flora N. Wasike versus Destimo Wamboko [1988] eKLR***, the Court stated that:

“Any order made in the presence and with the consent of counsel is binding on all parties... and cannot be varied or

discharged unless obtained by fraud or collusion... or if the consent was given without sufficient material facts...”

From the above superior court decisions, it is clear that the Court retains a narrow jurisdiction to set aside a consent judgment where proper grounds are established.

- c. The proposed interested parties herein allege, among other things, that the Defendant lacked the capacity to deal with the entire suit property, and that the consent was entered into without disclosure of material facts relating to ongoing succession proceedings. Those allegations, in principle, fall within the category of grounds recognised in law upon which a consent may be set aside.

The question that then arises is whether the proposed interested parties are entitled to invoke that jurisdiction in these proceedings. They were not parties to this suit at the time the consent was recorded. They have approached the Court as Proposed Interested Parties, and their application for joinder is yet to be determined.

It is a general principle that a consent judgment binds the parties to it and those claiming under

them. In the case of **Apollo Mboya & Another versus Cabinet Secretary, National Treasury & 6 Others [2018] eKLR**, the Court held that:

“A consent order can only be set aside by the parties who entered into it and not by strangers.”

While **Section 80 of the Civil Procedure Act** refers to ***“any person who considers himself aggrieved”***, that provision cannot be read in isolation.

It must be understood within the context of the proceedings in which the order was made. It does not operate to permit persons who are not parties to concluded proceedings to reopen those proceedings without first establishing a legal basis for their participation in the suit.

- d. In the present case, the proposed interested parties' claim to the suit property is founded on their alleged status as beneficiaries of the estate of the late Francis Thiaka Njagi. That claim is the subject of ongoing succession proceedings, in which they have already moved the Court. Their interest in the suit property, as presented before this Court, is therefore contingent upon the outcome of those proceedings. It

is not a direct proprietary interest that has been established, in this forum. In those circumstances,

I am not persuaded that they have demonstrated the requisite standing to invoke this Court's limited jurisdiction to set aside the consent judgment in this concluded suit. Put differently, while the grounds advanced by the proposed interested parties are in law, capable of vitiating a consent, the present application is not the proper procedural vehicle through which those grounds can be ventilated.

- e. Having found that the proposed interested parties, not being parties to the consent judgment, have not demonstrated the requisite standing to invoke this Court's limited jurisdiction to set aside that consent, it follows that the foundation upon which the present application rests is not established, and the remaining prayers sought in the application cannot be sustained.

The prayer for joinder is itself untenable. Joinder under **Order 1 Rule 10(2) of the Civil Procedure Rules** is intended to facilitate the complete adjudication of issues in a subsisting suit. In the present case, the proceedings were conclusively determined by consent, and no issue remains pending before the Court. There is therefore no

procedural basis upon which the proposed interested parties can be joined in the suit at this stage.

Equally, the prayer for injunctive relief cannot stand. An injunction is an ancillary remedy granted in aid of a pending cause. Where as here, there is no subsisting suit, and where the proposed interested parties lack standing in the proceedings, there is no legal basis upon which such relief can issue. The effect is that, while the proposed interested parties have raised concerns relating to their alleged interest in the suit property, those concerns cannot be addressed within the confines of this concluded suit.

The law does not permit a concluded matter to be reopened at the instance of non-parties in the manner proposed. The appropriate forum for the ventilation of their claims remains the succession proceedings to which they have already resorted.

Accordingly, the notice of motion dated 24th February 2025 is unmerited.

- f. Under **Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya**, costs follow the event unless where for good reasons the court direct otherwise. In view of the previous litigation history and the related succession cause that was reported

as pending, the court finds it fair and just to order that each party to bear their own costs.

11. Flowing from the foregoing determinations on the notice of motion dated 24th February 2025, the court finds and orders as follows:

a. That the application is without merit, and is dismissed.

b. Each party to bear their own costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS
13TH DAY OF MAY 2026.**

Kibunja

JUDGE

In the Presence of:

Plaintiffs – Mr. Mbau

Defendant – No Appearance

Proposed Interested Parties – M/s Muthoni Njuguna

Court Assistant - Kinyua/Charles

S. M.

ELC

Kibunja

JUDGE

S. M.

ELC

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