



Omariba & another (Suing as the Legal Representatives of the Estate of Florence K Opini) v National Land Commission & 5 others (Environment and Land Case 1 of 2017) [2025] KEELC 5505 (KLR) (23 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5505 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE 1 OF 2017**

**CK NZILI, J
JULY 23, 2025**

BETWEEN

**VINCENT MOSE OMARIBA 1ST PLAINTIFF
ABEL GICHANA OMARIBA 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF FLORENCE
K OPINI**

AND

**NATIONAL LAND COMMISSION 1ST DEFENDANT
THE CHIEF LAND REGISTRAR 2ND DEFENDANT
THE LAND REGISTRAR 3RD DEFENDANT
THE TRANS NZOIA GOVERNMENT 4TH DEFENDANT
DAVID NDEGWA MWAI 5TH DEFENDANT
ANTHONY MUNENE 6TH DEFENDANT**

RULING

1. The court is asked to stay the proceedings before the Deputy Registrar pending the hearing and determination of this application, seeking the partial setting aside of the consent dated 14/5/2024 in terms of paragraphs 11 and 12 for being irregular, illegal and fraudulent. The grounds are set out on the face of the application and a supporting affidavit sworn by Anthony Munene on 14/5/2025. The 6th defendant, as an applicant herein, alleges that he had been sued together with the other defendants by the plaintiffs claiming ownership of L.R No. Kitale Municipality Block 8/88.



2. It is deposed that parties got into negotiations and agreed on the consideration payable and the terms of payment, following which a consent was drawn and a decree subsequently issued on 18/11/2024, attached as AM-1. The applicant deposes that he learned with great dismay that the 4th respondent had filed a party-to-party bill of costs drawn at Kshs.715,894/=, to be shared between himself and the plaintiffs/respondents. The applicant deposes that his instructions to his then advocates, Apollo Ambutsi & Co. Advocates, were limited to the deposition of the suit land and the terms of payment, which he is honouring.
3. The applicant deposes that he only became aware of the clause on costs after appointing the firm of Mbugua Atindo & Co. Advocates to come on record for on his behalf. The applicant deposes that he should not be condemned to bear the 4th respondent's costs and there is a clear indication that there was collusion between my former advocates and the 4th respondent, meant to unjustly enrich themselves.
4. Further, the applicant deposes that, having never issued instructions on costs, it is necessary that the consent judgment be partially set aside, to prevent an injustice from happening against him. The applicant deposes that the bill of costs is due for taxation, who has no jurisdiction to tax the said bill of costs. The applicant deposes that it will be unfair to be condemned to pay costs to a fellow defendant when he is not the one who instituted the suit.
5. The application is opposed through a replying affidavit of Karani O. Aggrey, sworn on 5/6/2015, for being inept, incompetent, misconceived, made in bad faith and an abuse of the court process. It is deposed that the suit was amicably settled after an agreement was reached, which culminated in a consent dated 14/5/2024, that was executed by all the parties and filed in court, as per annexure marked KOA-1, more than one year ago. The respondent deposes that the applicant herein is the sole beneficiary of the consent he is aggrieved of and has been comfortable for a year, enjoying the fruits of his judgment, having taken possession of the suit property as per Clause 7 of the consent.
6. The deponent states that it is strange that the applicant is happy with part of their consent but against the other part and the consent should not allow him to align with one and not the other; otherwise, he has not provided any documentary evidence to demonstrate the precise instructions.
7. A party seeking the setting aside of a consent judgment has the burden to demonstrate that there are exceptional circumstances and or justification why the court should exercise its discretion in its favour.
8. The grounds to apply were considered in Brooke Bond Liebig (T) Ltd -vs- Mallya [1975] EA 266. The court held that a compromise that has been made as an order of the court can only be set aside on grounds of fraud or collusion, that there was no consensus between the parties, public policy or such other reasons as would enable the court to set aside or rescind a contract.
9. In Flora N Wasike -vs- Destimo Wamboko (1982-1988) KAR 625, the court cited Setton on Judgments and Orders (7th edn), Vol. 1, P 124, that any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under it and cannot be varied or discharged unless obtained by fraud, collusion or by agreement contrary to the policy of court or if the consent was given without sufficient material facts or in general, for a reason which could enable a court set aside an agreement.
10. In Attorney General -vs- Orbit Chemical Industries Ltd [2019] eKLR, the court cited Samuel Mbugua Ikumbu -vs- Barclays Bank of Kenya Limited [2015] eKLR, that there is an exception to the general rule that, a solicitor has general authority to compromise on behalf of a client, that a solicitor must act bona fide and not contrary to express negative direction. The court cited Samson Ole Tina vs Clerk Transmara County Council [2010] eKLR, that whereas an advocate had general authority to



compromise on behalf of his client, he can only do so if he acts bona fide and not contrary to express or negative direction.

11. Applying the foregoing case law to the instant matter, the burden is on the applicant to show to the satisfaction of the court that the consent judgment is fraudulent, was procured through collusion, is against public policy, there was mistake, material facts were omitted and there was misrepresentation to demonstrate that his advocate acted bona fide or contrary to his instructions.
12. In Kenya Commercial Bank Ltd -vs- Specialized Engineering Co. Ltd [1982] KLR 485, the court held that a duly instructed advocate has an implied general authority to compromise and settle the action and that 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. In National Bank of Kenya Limited -vs- Otieno Ragot & Company Advocates [2020] eKLR, the court said that a consent judgment has a contractual effect.
13. The applicant has come to court too late. The delay has not been explained at all. The applicant is said to have been the sole beneficiary of the consent judgment and has been enjoying the fruits of the judgment for almost a year; hence cannot choose one part of the consent and ignore the rest. The applicant blames his former advocate for collusion and or fraud. He says that he had not given the lawyer instructions on costs and should not be condemned to pay costs to the co-defendant.
14. However, the applicant is silent on the principle that costs follow the event. The basis of saying that the advocate had limited or no instructions to compromise the costs has not been laid out. No document has been attached showing that the applicant had given his lawyers specific instructions, which did not extend to compromising on costs and binding him to pay the same. Allegations of collusion or fraud on the part of one's lawyer are grave issues that should not be made without basis. They border on criminality and amount to professional misconduct.
15. In Ndirangu -vs- Commercial Bank of Africa [2002] 2 KLR 603, the court held that one had to show that the advocate had no instructions to enter into a compromise, otherwise, in a case, a lawyer has full control over the conduct of a trial and has apparent or implied authority to compromise of matters connected with the action.
16. From the material presented before this court, I think the applicant has not made a case for the court to partially set aside the consent order. The applicant has given a good deal by his extrudate advocates on record. It is difficult to imagine that the applicant only saw the part that favoured him and lived with the rest for a whole year, without objecting to it at the earliest opportunity possible.
17. The applicant has not denied that he was the sole beneficiary of the judgment and has enjoyed the fruits for about a year without raising an objection. I find the application incompetent, lacking merits and an abuse of the court process. It is dismissed with costs.
18. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 23RD DAY OF JULY 2025.

In the presence of:

Court Assistant - Dennis

No appearance

HON. C.K. NZILI

JUDGE, ELC KITALE.

