



**Fenysan Construction Ltd v Yeri (Environment & Land Case
179 of 2016) [2024] KEELC 732 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 732 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 179 OF 2016
EK MAKORI, J
FEBRUARY 15, 2024**

BETWEEN

FENYSAN CONSTRUCTION LTD PLAINTIFF

AND

JOSEPH KASENA YERI DEFENDANT

RULING

1. The application dated the 29th day of November 2023 seeking the following orders:
 - a. Spent.
 - b. The firm of Richard O. & Co Advocates be allowed to come on record for the Defendant/Applicant in place of the firm of Ms. Onchangu & Associates.
 - c. The Notice of Change of Advocates herein be deemed as properly filed and served.
 - d. The consent judgment and the decree herein be set aside and/or varied.
 - e. The Defendant/Applicant herein be allowed to refund to the Plaintiff/Respondent all the purchase price.
 - f. Costs to this application be provided for.
2. Parties to this suit had entered into a sale agreement wherein the Plaintiff purchased a piece of land that was to be carved out from a land parcel known as Ngomeni Squatter Settlement Scheme/1407. The plaintiff who is a limited liability Company was the named purchaser in the said sale agreement. An alleged dispute arose which was all about enforcement of the said agreement which led to the filing of this suit. This suit was later on, in its early stage compromised by a consent judgment which defined the rights of the parties herein and laid a guideline on the way forward. It is dated 1st August 2016.



3. Upon signing of the said consent judgment, the Defendant/Applicant herein in a bid to implement the same applied to the Land Control Board for Consent to have the land subdivided and have a transfer registered in favor of the Plaintiff herein. The applicant avowed that It is at this point when it was discovered that the Plaintiff which is a Limited Liability Company is not entitled to Consent under Section 9(c) of the *Land Control Act* which requires that all the Directors of the plaintiff company should be Citizens of Kenya. The Directors of the Plaintiff are all Italian Citizens.
4. The Defendant/Applicant submitted he wishes to be represented by the firm of Richard O. & Co Advocates. Such change can only take effect with leave of the court since there is a judgment on record. It is as a result of Order 9 Rule 9 of the *Civil Procedure Rules* that the firm of Richard O. & Co. Advocates seek leave of this court to file its Notice of Change of Advocates.
5. The issues that stand for the determination of this Court is whether to allow the firm of advocates now on record to represent the applicant coming after the judgment in place. Whether to set aside the consent judgment on record for reasons proffered by the applicant. Who should bear the costs of the suit?
6. The respondents were allegedly served but did not come to Court to either oppose or support the pending motion.
7. On the issue of representation, since there exists no dispute the firm of Richard O. & Co. Advocates is allowed to come on record for the applicants.
8. On the issue of setting aside the consent judgment record, the single reason proffered for such action is that the Directors of the Plaintiff/Respondent Company are said to be Italians and by operation of the law, they cannot be registered to own a freehold property in Kenya as in this case.
9. Consent judgments like contracts cannot be rescinded easily unless there is some form of mistake, misrepresentation, fraud, coercion, or undue influence. The operation of the law of course falls under this category. See the case of *E.T. v Attorney General & another [2012] eKLR*:

“Compromises negotiated and agreed upon by the parties to litigation are favoured and encouraged by the courts and parties are bound to abide by them and since they have the force of law, no parties can discard them unilaterally. I therefore hold that the Agreement subject of the preliminary objection is a valid agreement signed by parties where each party took a benefit that has now been endorsed by a court.

47. The law concerning the status of consent orders has been stated in several cases among them *Flora Wasike v Destino Wamboko* (supra) where the Court of Appeal stated as follows, ‘It is now 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 In *Purcell vs. FC Trigal 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 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.”

48. This general principle is so well established in our legal system and this court cannot by a judicial side wind disregard it. See the case of *Hirani v Kassam*



[1952] 19 EACA 131, Brooke Bond Liebig Ltd v Mallya [1975] EA 266, Diamond Trust Bank of Kenya Limited v Ply and Panel Limited & Another [2004] EA 31 amongst others.”

10. The applicant seeks to have the consent entered herein rescinded because the directors of the Plaintiff/ Respondent Company are all Italians. In *Mara North Holdings Limited v Sanaet Ole Masek & 4 others* [2015] eKLR, the Court had the following to say on foreigners holding freehold titles in Kenya:

“There is also the other question of how the 3rd respondent, which is wholly owned by foreigners (Canadians) managed to get a freehold title. That may need some explanation for *the Constitution* of Kenya, 2010, which is the supreme law of the land, does at Article 65, bar the issuance of anything more than a 99-year-old lease to foreigners. The said provision is couched as follows:-

65. A person who is not a citizen may hold land on the basis of leasehold tenure
- (1) only, and any such lease, however granted, shall not exceed ninety-nine years.
 - (2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more.
 - (3) For purposes of this Article—
 - (a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and
 - (b) property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.
 - (4) Parliament may enact legislation to make further provision for the operation of this Article.
25. Unless a company is fully owned by citizens, it is to be regarded as a foreign entity for purposes of Article 65 of *the Constitution*. The 3rd respondent is fully owned by foreigners and this brings to question the freehold title that they hold.”

11. Foreigners by operation of the law cannot hold freehold titles in Kenya by dint of Article 65 of *the Constitution*. Now, in this application, the applicant pleaded that all the Directors of the Plaintiff / Respondent's Company were all Italians, he did not demonstrate any proof of the same by producing a certificate from the Registrar of Companies showing such foreign Directorship. A look at the record and the consent dated 1st of August 2016 shows that one of the signatories to the agreement exhibited a Kenyan identification Card No.10830307. Could he be said to be Italian? The applicant did not even mention whether the land is still intact and has not changed hands, or what use the plaintiff /applicant has put on it. He did not say how much is the whole purchase money he needs to refund and why the Plaintiff/Respondent could not enter another consent to rescind the Contract they entered way back in 2016. On the consent from the Land Control Board, he has annexed the application for consent. The resolution by the LCB is lacking.



12. This is one of those cases this Court will find difficulties in setting aside the Consent judgment in place. The upshot is that the application dated 29th day of November 2023 is hereby dismissed. Since the other side did not participate, there will be no order as to costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 15TH DAY OF FEBRUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Otara for the Applicant

Court Clerk:

In the absence of:

Mr. Ogeto for the Respondent

