



**Republic v District Land Adjudication Officer, Rachuonyo District;
Kiriwo (Interested Party); AguoX (Exparte) (Judicial Review
3 of 2023) [2024] KEELC 1575 (KLR) (26 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
JUDICIAL REVIEW 3 OF 2023**

**M SILA, J
MARCH 26, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**THE DISTRICT LAND ADJUDICATION OFFICER, RACHUONYO
DISTRICT RESPONDENT**

AND

ELIZAPHAN AGER KIRIWO INTERESTED PARTY

AND

FARES OGADA AGUOX EXPARTE

RULING

1. What is before me are two applications, one dated 29 November 2023 inter alia seeking to set aside the consent filed on 23 July 2013 which settled this matter, and the second application is that dated 11 March 2024 by the County Government of Homa Bay, seeking to be joined to this suit as interested party.
2. The background is that on 18 March 2011, the ex parte applicant, through the law firm of M/s G.S Okoth & Company Advocates, filed an application seeking leave to commence judicial review proceedings against the District Land Adjudication Officer, Rachuonyo District, in respect of the Riwa Adjudication Section. Leave was duly granted and on 31 March 2011 the main judicial review motion was filed. These were the prerogative orders sought :
 - a. Prohibition directed at the District Land Adjudication Officer for Rachuonyo and Homa Bay Districts prohibiting him from implementation of the adjudication process in the Riwa



Adjudication Section of East Kakdhimu Location in the North Rachuonyo District as proposed in the notice letter reference No. LA/HB/5/62 Vol II/III dated 28 October 2008.

- b. *Mandamus* directed at the District Land Adjudication Officer for Rachuonyo and Homa Bay Districts compelling him to implement the Notices of Declaration of Adjudication Section issued on 20 February 1973 reference No. LA/SN/33/11/2006 (for Koyugi Adjudication Section) and No. LA/SN/33/11/2007 (for Kakdhimu Adjudication Section) as further directed by the report dated 1 August 2001 made to the Director of Land Adjudication by the Provincial Land Adjudication Officer and the District Commissioner for Rachuonyo.
3. The case of the ex parte applicant was that through notices issued on 20 February 1973, two adjudication sections were declared, that is the Koyugi Adjudication Section and the Kakdhimu Adjudication section, and the boundaries for the two adjudication sections were defined. However, a dispute ensued over an area known as Samba, or Riwa, with both the Koyugi and Kakdhimu Clans claiming it. The dispute went to court through a judicial review suit being Miscellaneous Application No. 74 of 1986 and the court made an order referring the dispute to the Director Land Adjudication who appointed two arbitrators. The ex parte applicant averred that the arbitrators, in a letter dated 1 August 2001, recommended the implementation of the 1973 adjudication notice and that the Samba Pastures be considered as part of the Koyugi Adjudication Section. The complaint of the ex parte applicant was that instead of implementing this recommendation, the Adjudication Officer, one E.E Ojala, issued a fresh declaration for a new Adjudication Section on 28 October 2008 which he named East Kakdhimu Location. That is why he asked for an order to prohibit the Adjudication Officer from proceeding as he had intended and for him to be compelled by an order of *mandamus* to implement the recommendation in the letter of 1 August 2001. His view was that the disputed area falls within the Koyugi Section as declared in the 1973 notice. In his suit, he sued the District Land Adjudication Officer, Rachuonyo District, as the respondent, and added Elizaphan Ager Kiriwo as an interested party. It was not disclosed in the main motion who the interested party was but it emerged that he was from the Kakdhimu Clan hence his joinder to the suit.
4. The interested party appointed M/s Nyauke & Company Advocates who filed Grounds of Opposition on 4 October 2011. Inter alia he averred that the ex parte applicant had brought a representative action without authority and that the interest of the interested party had not been set out and the suit was misdirected against him. On 14 November 2011, the interested party filed a replying affidavit. In that replying affidavit, he disclosed that he was a member of the adjudication committee but averred that the action sought to be prohibited was the order of E.E Ojala in a letter dated 28 October 2008. He raised issue that the suit was filed more than six months from this letter and asserted that the proper order ought to have been one of *certiorari*.
5. I have not seen on record any formal appearance filed on behalf of the respondent though I see that Mr. Eredi appeared in court on behalf of the respondent on 4 October 2011 and was given 30 days to file reply. Before the substantive motion could be heard, the following written consent was filed on 23 July 2013 :

By consent of the ex parte applicant and the respondent the following orders be made in the above judicial review proceedings.

The Judicial review proceedings commenced on the 18th March 2011 and filed by Notice of Motion dated 21st March 2011 be and is hereby discontinued wholly by the ex parte applicant with no order as to costs.

The pending dispute be and is hereby referred to the District Adjudication Officer to publish the register for Riwa Adjudication Section for lodging objections to the



Adjudication Register with a view of registering the land in issue in the name of the County Government of Homa Bay.

Dated at Homa Bay this 23rd day of July 2013

(signed)

Phares Ogada Aguo

Ex Parte Applicant

(signed)

G.S Okoth & Company

Advocate for the ex parte applicant

(Signed)

District Land Adjudication Officer

Homa Bay/Rachuonyo District

(signed)

The Principal Litigation Counsel

Advocate for the Respondent

(Signed)

Elizaphan Ager Kirowo

Interested Party

(Signed)

S.O Nyauke

Advocate for the interested party

(Signed)

The Governor

County Government of Homa Bay

6. That appeared to be the end of the matter and indeed nothing happened until the application dated 23 November 2023 was filed on 4 December 2023. That application was filed on behalf of Elizaphan Ager Kiriwo, the interested party, and was filed by the law firm of MOA Advocates. I had hinted that the application seeks to set aside the consent of 23 July 2013 but for completeness these are all the prayers sought :

1. Spent (certification of urgency).
2. That MOA Advocates LLP be allowed to come on record for the interested party.
3. That the Court be pleased to join Griffins Perprodito, Lawrence Obonyo Obinju, Joseph Ado Obwola, Michael Amula Owino as interested parties representing Kakdhimu Clan.
4. The Court be pleased to set aside, vacate or nullify the consent order issued on 6th August 2013.
5. That pending the hearing and determination of this application a conservatory order be issued restraining the County Government of Homa Bay either by themselves, their agents,



servants, representatives, assigns or any other person whomsoever from working, constructing, transferring or otherwise interfering in or any way dealing with the entire land parcel christened Riwa Adjudication Section pending the hearing and determination of this application.

6. Costs of and incidental to this application together with interest and any other order that this Honourable Court deems fit and just to grant in the circumstances.
7. The application is based on the grounds that the consent was entered into without the permission of the interested party; that the consent has affected over 500 people who did not participate in the court case; that the law firm of M/s S.O Nyauke Advocates did not have authority to enter into the said consent; that the consent included a foreign party called the 'Governor of Homa Bay County' ; that the firm of S.O Nyauke Advocates could not represent the Governor of Homa Bay County and the interested party whose interests were diametrically opposite; that the consent was obtained by fraud, misrepresentation and therefore illegal ab initio; that the interested party and the 2nd – 5th interested parties were not consulted and totally give authority to S.O Nyauke to sign off their parcels of land; that the consent order has deprived two locations (Kakdhimu East and Kakdhimu West) a total of 532 acres.
8. The application is supported by the affidavit of the interested party. In it he inter alia deposes that in October 2023, he noticed activities on the disputed land. He proceeded to S.O Nyauke Advocate to find out what happened to their case but did not get a proper answer. He therefore engaged the law firm of MOA Advocates LLP to find out what happened to the matter. He was then informed by his new counsel, James Aggrey Mwamu, that a consent had been filed in the matter. He states that he was totally shocked as he did not agree to the consent. He recalls that sometime in 2011 Mr. Nyauke had sent him a draft consent to sign which he declined. He avers that the advocate did not have authority to enter into the consent compromising the livelihood of over 5,000 people. He adds that there was no way the Governor of the County Government could have one advocate as their interests were diametrically opposed and further that the Governor was not a party to the case thus the consent is void ab initio.
9. The ex parte applicant, through the law firm of M/s G.S Okoth & Company Advocates, filed Grounds to support the application. Inter alia it is averred that the consent was conditional on the County Government satisfying the conditions in paragraph 3 thereof, but by failing to fulfil the said conditions, even after having the land registered in its name the County Government, obtained the said consent by fraud and deceit, and consequently the said consent is null and void ab initio. It is also added that S.O Nyauke were not on record for the interested party and similarly the County Government of Homa Bay were strangers to the pending case and did not have capacity to consent to the withdrawal and consequently the order was illegal and incompetent. It is averred that all subsequent activities being carried out by the County Government of Homa Bay are illegal, null and void, and should be stopped forthwith.
10. It will be recalled that prayer (2) in the application sought an order for the law firm of MOA Advocates to come on record in place of M/s Nyauke & Company Advocates. That application was allowed on 13 March 2023. On that day, I also held the view that conservatory orders against the County Government could not be sought at that time before the County Government came into the suit and I held that in abeyance. At the hearing of the application on 21 March 2024, Mr. Akelo, learned counsel for the County Government of Homa Bay, sought adjournment which I did not find merit in and I declined to adjourn. Mr. Mwamu, learned counsel for the interested party/applicant made brief submissions which I have taken note of. Ms. Adhiambo holding brief for Mr. G.S Okoth for the ex parte applicant submitted in support of the application.
11. I have taken note of all the above.



12. I think the substantive prayer in this application is that seeking to set aside the consent filed on 23 July 2013 and that is where I opt to start.
13. The law regarding the setting aside of consents is now a well trodden path. In the case of *Kelvin Mutua & 197 others v Athi Water Services Board* [2021] eKLR, Angote J, addressed the issue by stating as follows :-
28. The principles upon which a court may interfere with a consent order or Judgment were outlined in *S M N v Z M S & 3 others* [2017] eKLR in which the Court of Appeal held as follows:
- Generally a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt.”
29. In the case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR, the Court of Appeal stated the conditions on which a consent order can be vitiated 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 out: see the decision of this Court in *J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.*”
30. In *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR 485, Harris, J correctly 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.”
14. From the above, it will be discerned that one is at liberty to attack and apply to set aside a consent inter alia if it was obtained by fraud, mistake, or misrepresentation. It can also be set aside if it is contrary to public policy.
15. In our case, one of the key reasons raised is that the interested party never signed the consent and did not give his erstwhile advocates on record any authority to enter into the said consent. This assertion has not been challenged by any quarter. Indeed, the advocate who was practicing in the firm of M/s Nyauke & Company Advocates was served with this application and they filed nothing to deny this allegation. In light of that, it is apparent that somebody forged the signature of the interested party purporting that he was entering into the consent, when in fact, he was not. It is definitely a purported consent falling within the purview of fraud and is liable to be set aside. It is not even necessary for me to go through the other reasons because this by itself is sufficient to have the consent set aside.



16. Given the above, I allow prayer (4) of the application. The purported consent filed on 23 July 2023 and issued on 6 August 2013 is declared null and void. It means therefore that this suit remains pending as filed. The court will at a later stage give orders/directions towards the disposal of the suit.
17. The other prayer is to add other persons, being Griffins Perprodito Otieno, Lawrence Obonyo Obinju, Michael Amula Owino, Joseph Ado Obwola, Joseph Onondi Rowa, and Solomon Osodo as 2nd – 7th interested parties. They are elders from Kakdhimu Clan. Their interest is at stake and I allow them to be joined as 2nd – 7th interested parties. That means that I have allowed prayer (3) of the application.
18. There is prayer (5) which seeks orders against the County Government of Homa Bay. I am not persuaded that the said prayer is one that is fit to be argued within the context of the subject application partly because the County Government of Homa Bay is strictly not yet a party to the suit. I also think that the lumping together of this prayer is not appropriate in the context of the other prayers in the application. I therefore will not make any orders on prayer (5). If the applicant wishes to pursue it he will need to file a separate application for it. There will be no orders as to costs since the ex parte applicant did not oppose the motion.
19. On the application dated 11 March 2024 by the County Government of Homa Bay seeking to be joined as interested party, that application was not opposed. I allow it without any orders as to costs. The County Government of Homa Bay be deemed as 8th interested party in this suit.
20. Orders accordingly.

DATED AND DELIVERED THIS 26 DAY OF MARCH 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

