



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otieno & another v Bodo (Civil Appeal 195 of 2019)  
[2025] KECA 73 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 73 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 195 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JANUARY 24, 2025**

**BETWEEN**

**LUKIO OTIENO ..... 1<sup>ST</sup> APPELLANT**

**WALTER OKEYO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CHURCHIL OMOLLO BODO ..... RESPONDENT**

*(Being an appeal against the Judgment of the Environment & Land Court at  
Kisumu (Kibunja, J.) dated 27th February, 2019 in ELC Case No. 21 of 2012)*

**JUDGMENT**

1. The background to the present appeal is fairly straightforward and can be easily stated. Vide a plaint dated 25/07/2012 drawn and filed by M/s Kowinoh & Company Advocates, the respondents brought an action at the Environment and Land Court (ELC) in Kisumu against the appellants primarily asking for a declaration that the award in Kisumu East/West Tribunal Case No. 47 of 2006, and Nyanza Appeals Committee Case No. 76 of 2008, and decree in Kisumu CMCC Land Case No. 9 of 2008 were made without jurisdiction and hence a nullity.
2. The appellants entered appearance through a memorandum dated 04/10/2013 but filed in court on 08/10/2013. It was drawn and filed by M/s Meshack Okoth Obura & Company Advocates. Through the same memorandum, that firm also came on record for the appellants. Subsequently, the same firm filed the appellants' statement of defence dated 24/10/2013.
3. After several aborted hearing dates, a letter of consent dated 08/04/2016 duly signed by counsel on record for both the appellants and respondents was filed in court on 17/06/2018. The consent letter was drawn on the letterhead of Kowinoh & Co. Advocates. It stated as follows

“ Kindly record the following consent between the parties herein in the case file:



1. That by consent it is agreed that the award in Kisumu East/West Land Disputes Tribunal Case Number 47 of 2002, Nyanza Land Disputes Appeals Committee Case No. 76 of 2008 dated 21<sup>st</sup> July, 2011 and the order and/or decree in Kisumu CMCC Land Case Number 9 of 2008 was made without jurisdiction and in breach of the law and are therefore a nullity.
2. That all the orders made pursuant to the said Kisumu East/West Land Disputes Tribunal Case Number 47 of 2002, Nyanza Land Disputes Appeals Committee Case No. 76 of 2008 dated 21<sup>st</sup> July, 2011 and the order and/or decree in Kisumu CMCC Land Case Number 9 of 2008 be and are hereby nullified and set aside.
3. That there be no order as to costs.”
4. The consent letter is signed by an advocate from the firm of Kowinoh & Co. Advocates, for the plaintiff; and the firm of Meshack Okoth Obura & Company Advocates, for the defendants. That consent was adopted as an order of the court on 30/06/2018.
5. Subsequently, through newly appointed counsel, M/s Bruce Odeny & Company Advocates, the appellants (who were defendants in the suit at the ELC) brought an application dated 19/03/2018 seeking to set aside the consent judgment and set down the suit for inter partes hearing. The application was opposed by the respondents. Through a ruling dated 27/02/2019, the ELC (Kibunja, J.) dismissed the application with costs.
6. The appellants are aggrieved by that ruling of Kibunja, J. and have filed the present appeal. In their memorandum of appeal, the appellants have raised the following grounds of appeal:
  1. The Learned Judge of the superior court erred in law and fact by dismissing the Appellants’ Notice of Motion Application dated 19<sup>th</sup> March, 2018 that sought to set aside a consent order that had been entered without ostensible authority, and by collusion.
  2. The Learned trial Judge acted on wrong principles in arriving at his findings that the disputed consent that compromised the Appellants suit was entered by a counsel not licensed to practice and hence the same had no force of law and outright illegal hence did not bind the Appellants.
  3. The Learned trial Judge grossly misdirected himself in considering irrelevant issues while arriving at his decision.
  4. The Learned trial Judge erred in law in failing to consider the Appellants submissions while arriving at his decision
7. Directions in the appeal were given and it was set down for plenary hearing on 27/11/2023. During the plenary hearing, Mr. Odeny, learned counsel, appeared for the appellants. There was no representation from the respondents. We satisfied ourselves that the respondents had been properly served with the hearing notice and proceeded with the hearing. Only the appellants’ counsel had filed written submissions.
8. We have exhaustively considered the short record of appeal, the ruling of the trial court, the appellants’ grounds of appeal, their submissions as well as the law.
9. In reviewing decisions of this nature, as a first appellate court, the legal standard of review to be deployed is an abuse of discretion standard. A trial court Judge is entitled to exercise his discretion in determining whether to set aside a consent judgment. Our case law has established the principles



governing applications to set aside consent judgments. Under this standard, this Court will only review a discretionary decision if it was made capriciously, arbitrarily, in plain error, or otherwise not in accordance with the law or logic. A reversal under this standard can only happen where this Court is persuaded that the reviewed decision lies beyond the pale of reasonable justification or range of permissible outcomes under the circumstances. In reviewing affidavits and other pieces of evidence placed before the trial court to assist it in using its discretion, the standard set in *Selle vs. Associated Motor Boat Co. Limited* (1968) EA 123) on a first appellate court's duty to reappraise the evidence and come up with its own independent evaluation and conclusions is applicable.

10. The singular issue for determination is whether the trial court erred in dismissing the appellants' application to set aside the consent judgment adopted by the court on 30/06/2018.
11. The appellants concede that there is a consent judgment adopted by the court on 30/06/2018. However, they proffer two reasons why the trial court should have set aside the consent judgment. First, they argue that the consent judgment was entered into without the appellants' authority or knowledge and was a product of fraud perpetrated by the appellants' former counsel with the collusion of the respondent's counsel. The appellants argue that they had always been keen to insist on their rights to the land subject matter of the suit and were dismayed by the consent allegedly entered into on their behalf. They cite two cases which, they say, should guide the court in reaching a decision in their favour: *Jane Muchori Maina v Kenya Power & Lighting Company Ltd* [2005] eKLR and *John Waruinge Kamau v Phonex Aviation Limited* [2005] eKLR.
12. Second, the appellants argue that the learned Judge erred in not setting aside the consent order on the grounds that their former advocate did not have a valid practising certificate when he entered into that consent judgment. In aid of this argument, the appellants point to a letter dated 15/06/2017 from the Law Society of Kenya which suggests that their former lawyer, Meshack Obura Okoth, did not have a valid practicing certificate when he entered into the consent judgment. Citing sections 9(c) and 34 of the *Advocates Act* (Chapter 16 of the Laws of Kenya) and various decisions from different courts, the appellants argue that the consent judgment entered into was, therefore, null and void. This is because, they argue, it was procured by an unqualified person.
13. Both these arguments were raised before the learned Judge of the ELC. He dismissed both upon consideration. Regarding the argument that the consent judgment was a product of fraud on the part of the former advocates for the appellants, the learned Judge had the following to say:

“That having considered the affidavit evidence by the defendants and the grounds on the motion, the court does not find any evidence tendered to show the existence of any collusion between their counsel on record, and the plaintiff or his counsel in the entering of the consent to compromise the suit that they seek to set aside. The court finds no evidence of fraud,

misapprehension or mistake that can be said to have led to the entering and filing of the consent, and upon which the court could set it aside.”

14. This Court enunciated the grounds upon which consent judgment may be set aside in *Board of Trustees National Social Security Fund versus Micheal Mwalo* [2015] eKLR (a decision cited by both parties before the learned Judge) as follows:

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. 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. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

15. In that case, this Court cited with approval the decision in *Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd* [1982] KLR 485 where Harris J. held 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.”

16. Similarly, in the celebrated *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR, Hancox JA cited Setton on Judgments discharged unless obtained

17. It is fairly obvious that the learned Judge had these principles in mind as he decided the case. Like him, we are unable to see any scintilla of evidence that there was collusion between the appellants’ former advocates and the respondent’s advocates. Neither did the appellants place before the court any evidence of fraud on the part of their former advocates. All they put before the court was their bald say-so. A consent judgment is a contract of record between the parties entered into with the approval of the court. It is not to be undone easily. To prove fraud or collusion, the appellants needed more than mere statements in their affidavit. It is telling, for example, that the appellants did not present any evidence of any action they have taken against the advocate for acting without instructions if he so acted. In other words, like the trial court Judge, we are not persuaded that the appellants established any of the grounds for setting aside of a consent judgment as established in our case law. We conclude that on the evidence there was no showing of fraud.

18. Regarding the second reason argued by the appellants, that is that the consent judgment should be set aside because their former advocate did not have a valid practising certificate at the time he so entered into it, the learned Judge held as follows:

“That the defendants did not question the capacity of their then counsel on record in any of the grounds of the motion or their deposition in the supporting affidavit. They had also not questioned their advocates’ capacity from the time they filed the memorandum of appearance, to the time the consent order was filed and entered. That in any case, the defendants had not notified the plaintiff, and or his counsel, and for that matter the court, that their counsel on record had not taken out the practising certificate. That, it is therefore strange that counsel now on record for the defendants submitted at paragraph 8 that upon their writing to the law society of Kenya, they were advised that the advocate had not taken out their “..... practicing certificate hence not allowed to practice. Hence, all his actions were fraudulent.” That the court has found that part of the submissions on the lack of practicing certificate strange as the defendants are the ones who instructed the said counsel to enter appearance for them, file their defence and indicated that their “address for the purposes of this suit shall henceforth be care of Meshack Okoth Obura & Co. Advocates”. That the



defendants cannot now disown the consent that was duly signed and filed through their advocates on record. That the defendants may possibly consider pursuing whatever relief of damages if any that they believe they have against the counsel.”

19. In our view, the learned Judge stated and applied a salutary rule of law: it is not open to a party who has procured an advocate to act for them in a litigation and has so informed the court and the other parties to the litigation through a formal notice of appointment to turn around at a later stage and seek to undo things done by that advocate in that particular litigation on the claims that the advocate did not have a valid practicing certificate. This rule has been accepted by all courts notwithstanding the side one takes on the debate whether pleadings done by an unqualified advocate are liable to be struck out at the instance of the other party. In all instances, a party that instructed an unqualified advocate is not permitted to benefit from their own failure to exercise due diligence by undoing, to the prejudice of the other party, the actions consented to or done by his duly appointed advocate.

20. In any event, this Court has consistently taken the position that pleadings and other court actions taken by an advocate who is qualified and admitted but who did not, at the time of filing the pleading or engaging in the action, have a valid practicing certificate, are not null only for that reason. For example, in *James Kanyiita Nderitu & Hellen Njeri Nderitu v Marios Philotas Ghikas & Mohammed Swaleh Athman* [2016] KECA 470 (KLR), this Court held:

“ 23. Regarding the validity of instruments or documents other than of conveyance, prepared by an advocate who at the time was not holding a current practising certificate, we are persuaded by the decision of Ngugi, J. in the case of *R V Resident Magistrate’s Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 Others* [2016] eKLR .....

24. By parity of reasoning of the Supreme Court decision in the *Anaj Warehousing Case*, we find and hold that no pleadings, documents or submissions become invalid under Section 31 of the *Advocates Act* only by dint of their having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons such as non-advocates whose names have been struck off the roll of advocates shall be void for all purposes.”

21. Similarly, in *Amigos Nuts and Commodities Limited v Kam Hung Tsui* [2020] KECA 108 (KLR), this Court reasoned:

“ 13. Going by the aforementioned cases, we resonate and associate ourselves fully with the holding that documents or pleadings drawn and filed by an advocate who does not possess a current practicing certificate does not become invalid and should therefore not warrant being struck out.”

22. It follows that the second reason the appellant proffered to set aside the consent judgment does not hold. The result is that the appeal before us is devoid of merit. We hereby dismiss it in its entirety. Since the respondent did not participate in the proceedings before us, there shall be no order as to costs.

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF JANUARY, 2025.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**



**H.A. OMONDI**

.....

**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

