



Makokha (Suing as the Widow and Personal Representative of the Estate of James Aggrey Makokha (Deceased)) v Rwenji (Civil Appeal 149 of 2019) [2025] KECA 266 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 266 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 149 OF 2019
SG KAIRU, S OLE KANTAI & JM MATIVO, JJA
FEBRUARY 21, 2025**

BETWEEN

**ROSEMARY WAMBUI MAKOKHAA APPELLANT
SUING AS THE WIDOW AND PERSONAL REPRESENTATIVE OF THE
ESTATE OF JAMES AGGREY MAKOKHA (DECEASED)**

AND

GEOFFREY KARANU RWENJI RESPONDENT

(Being an appeal from the ruling and order of the Environment and Land Court of Kenya at Kajiado (C. Ochieng, J.) dated 25th February 2019 in ELC Case No. 453 of 2017 (formerly Machakos ELC No. 35 of 2015))

JUDGMENT

1. By a plaint dated 10th May 2015, the appellant in her capacity as the personal representative of the estate of the late James Aggrey Makokha instituted Machakos ELC No. 35 of 2015 against Geoffrey Karani Rwenji (the respondent), Isaac Masidza and County Government of Olkejuado. The suit was subsequently transferred to the Environment and Land Court (ELC) at Kajiado and allocated number ELC 453 of 2017. The appellant's claim was that the deceased was allocated plot number 193 situated at Ongata Rongai, and in 2009, the deceased fell sick and entrusted the plot to his confidant, the said Isaac Masidza. The appellant averred that the deceased paid all the rates due to the County Council of Olkejuado until his death on 15th February 2010. She contended that prior the deceased's death, the said Isaac Masidza and the County Government of Olkejuado fraudulently transferred the said plot to the respondent herein. She prayed for the nullification of the said transfer, an injunction restraining the respondents from in any manner dealing with the property, mesne profits, general damages for trespass, costs of the suit, interests and any other relief the Court could deem fit.



2. However, the said suit was not determined on merit. The advocates for both parties compromised the suit by a consent letter dated 30th November 2015 duly signed by both of them and filed in Court. Accordingly, on 1st December 2015, a consent judgment was entered by the Court as per the said consent letter as follows:
 - a. That judgment is entered in favour of the plaintiff (i.e. the appellant) against the 1st defendant (i.e. the respondent) in the sum of Kshs.4,000,000 in terms of the report and valuation by M/s Tysons Limited.
 - b. That judgment amount in the sum of Kshs.4,000,000 be paid to the plaintiff (the appellant) by the 1st defendant (the respondent) as follows:
 - i. Kshs.400,000 within 14 days of filing /recording the consent.
 - ii. Kshs.900,000 on or before 31st June 2016.
 - iii. Kshs.900,000 on or before 30th June 2016, and
 - iv. Kshs.900,000 or 31st December 2016.
 - c. In default of any installment execution to issue.
3. After the consent judgment was entered, the respondent paid only Kshs.680,000.00 and defaulted in payment of the balance prompting the appellant to apply for execution of the decree, pursuant to which the property was sold by way of public auction to Christian Community Calvary Ministry for a sum of Kshs.5,200,000.00.
4. Following the auction, by an application dated 20th February 2018, the appellant moved the ELC seeking an order that the County Secretary of the County Government of Kajiado transfers the said property from the respondent to Christian Community Calvary Ministry. In opposition to the application, the respondent filed a replying affidavit dated 12th April 2018 claiming that the auction was opaque, unlawful and maliciously conducted to his detriment. He claimed that as the proprietor of the property, he was neither served with the application for attachment or the notification of sale nor was he involved in the sale of the property. It was also his case that the consent limited the appellant to recovery of Kshs.3,320,000.00.
5. In the impugned ruling dated 25th February 2019, Ochieng, J. held that after the property was auctioned, ownership passed to a third party, therefore, the auctioneer and the decree holder had a duty to ensure that the property is transferred to the purchaser. The learned judge ordered the balance of the purchase price less the auctioneer's, court and lawyers' charges to be paid to the respondent.
6. Aggrieved by part of the ruling which ordered that the balance of the purchase price less the auctioneer's and lawyer's charges to be paid to the respondent, the appellant instituted this appeal. In her memorandum of appeal dated 15th April 2019, she seeks to set aside the said order. The gravamen of her appeal is that the learned judge granted an order, which was not part of the application before her nor was the issue canvassed by the parties. She also faults the trial judge for failing to appreciate that the respondent never owned the property, and that he fraudulently acquired it from her late husband. Lastly, the appellant faults the learned judge for failing to appreciate that the auction price was due to the property's appreciation of value over the passage of time and that a fraudster cannot profit from his own fraud.
7. During the hearing of the appeal on 4th June 2024, Mr. Ombete appeared for the appellant while Mr. Anzala appeared for the respondent. Both counsel highlighted their written submissions.



8. The appellant maintained that the respondent was not entitled to the proceeds of the auction since he never sought them and that the parties had not canvassed the issue before the court. The appellant maintained that the respondent never owned the suit property nor can he benefit from his own fraud. Consequently, the court lacked the jurisdiction to issue the impugned order. She contended that notwithstanding the consent, she owned the property, and that the respondent merely held the property as her a constructive trustee. Further, the respondent could only have owned the property if he had complied with the terms of the consent order. In support of her submissions, she cited Hanbury's Modern Equity, 9th Edition by R.H. Maudsley at Pg. 235 in support of the proposition that where property is acquired fraudulently, the defendant may be compelled to hold it as a constructive trustee.
9. It was also the appellant's submission that by the time the suit property was auctioned on 4th December 2017, it had appreciated in value, therefore, she was entitled to its whole value and it is for that reason that she sued the respondent to recover the property and it was only after valuation that they agreed on Kshs.4,000,000.00 so that the respondent could own the property. However, because the respondent defaulted in the payment of the Kshs.4,000,000.00, he cannot claim the balance of the proceeds of the sale.
10. In opposing the appeal, the respondent submitted that the argument that the learned judge granted an order not prayed for or decided an unpleaded issue is ambiguous because it is not clear which order the appellant is challenging. In support of this submission, the respondent cited Fredrick Mutonyi Gitoonga vs. Isaiah Mutonyi Wambugu & Another [2013] eKLR where the High Court failed to consider two grounds because they were ambiguous.
11. The respondent submitted that the issue of the balance of purchase price less the auctioneer fees was raised at paragraph 9 of his replying affidavit, therefore, it formed part of the issues for determination by the court. The respondent submitted that through annexures, he demonstrated that the amount recoverable by the appellant by virtue of the consent order was Kshs.3,320,000.00, and claimed the balance of the purchase price less the auctioneer's and advocate's fees. On what constitutes an issue for determination before a court, he cited this Court's decision in Independent Electoral and Boundaries Commission & Ano vs. Stephen Mutinda Mule & 3 Others [2014] eKLR in support of the proposition that a court is bound by the parties' pleadings and it is only required to adjudicate upon the specific matters in dispute arising from the pleadings.
12. Addressing the grounds that the learned judge failed to appreciate that the respondent was not the owner of the property and whether the learned judge conferred the respondent, a right to a property he had fraudulently acquired, the respondent maintained that he was the registered owner of the suit property as evidenced by the letter of allotment dated 4th August 2009. To buttress his submission, the respondent cited Dr. Joseph N.K Arap Ngok vs. Justice Moiyo Ole Keiwua & 5 Others [*CA No. 60 of 1997*](#) where this Court held that Section 23 (1) of the [*Land Act*](#) gives an absolute and indefeasible title to the owner of the property and takes precedence over other alleged equitable rights of title.
13. The respondent also submitted that Section 26 of the [*Land Registration Act*](#), 2012 provides for an exception to indefeasibility of title if it is acquired through fraud. The respondent asserted that there is no finding that the title was acquired fraudulently and relied on the decision of the ELC in Mike Maina Kamau vs. Attorney General [2017] eKLR in support of the holding that in absence of fraud, the title cannot be defeated. Therefore, it is for that reason that the appellant after sale moved the trial court to have the suit property transferred to Christian Community Calvary Ministry.
14. Regarding the ground that the learned judge failed to appreciate that the property's value had appreciated, the respondent maintained that pursuant to the consent order dated 30th November 2015,



the appellant's claim against the respondent was for only Kshs.3,320,000.00 which was to be recovered from the proceeds of the auction. Therefore, the court applied itself correctly when it ruled that the respondent was entitled to the balance of the purchase price less the auctioneer's fees and that the appellant as the registered proprietor of the suit property was entitled to the value of the property.

15. Rule 31(1) (a) of the Court of Appeal Rules, 2022 requires this Court to re-appraise the evidence and to draw its own independent inferences of fact. (See this Court's decision in *Kenya Anti- Corruption Commission vs. Republic & 4 Others* [2013] eKLR). Where the exercise of judicial discretion is involved, we remain guided by the principles articulated in *Selle vs. Associated Motor Boat Company Ltd* [1968] EA 123 that we will not interfere with the trial court's findings unless we are satisfied that the trial court misdirected itself in some matters and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the trial judge was clearly wrong in the exercise of his or her discretion and occasioned injustice by such wrong exercise.
16. Upon considering the entire record, the parties' rival submissions, the authorities cited and the law, we find that the following three issues fall for determination; whether some of the grounds urged in this appeal fall outside the scope of the consent judgment, whether the learned judge granted orders not sought by the parties; and, who is entitled to the balance of the purchase price.
17. Regarding the first issue, it is common ground that the parties filed a consent letter which was adopted by the court the terms of which we highlighted earlier. It is common ground that the pursuant to the said consent, the respondent only paid a total sum of Kshs.680,000.00 to the appellant and defaulted in payment leaving an unpaid balance of Kshs.3,602,700.00. In execution of the decree issued pursuant to the consent judgment, the suit property was sold by way of public auction to Christian Community Calvary Ministry for a sum of Kshs.5,200,000.00.
18. Pivotal to this dispute is the terms of consent judgment recorded by the parties. A consent judgement is arrived at pursuant to an agreement by the parties. Therefore, it cannot be open to this Court to enquire why the parties have not presented to court certain aspects of the dispute. The remedy to party aggrieved by a consent judgment lay with having it set aside by proving any grounds which would invalidate a binding contract. The moment the parties reduced their agreement in writing then the consent judgement/order superseded prior discussions, correspondences, agreements or any aspect of the claim not covered by the consent. A consent judgement does not have to determine all the matters in controversy but only involves a judgement on agreed terms. It is a fresh agreement as was held by the East African Court of Appeal in *Hiran vs. Kassam* [1952] 19 EACA. Furthermore, in the consent, no point was reserved for determination by the court on the merits on the case. Buckley LJ in *Purcell vs. F. C. Trigell Ltd* [1970] 3 All ER 671 at page 677 asserting the binding nature of a consent judgment, stated:

“In my judgment, this order should be regarded as having a binding contractual effect on which the Plaintiff was perfectly entitled to insist.”

19. A consent order also operates as an estoppel against someone trying to assert a different position from that stipulated in the agreement of the parties. Lindley L.J. in *Huddersfield Banking Co. Ltd vs. Henry Lister & Son Ltd* [1895] 2 Ch D page 273 at page 280 said:

“A Consent Order ... is an order and so long as it stands it must be treated as such, and so long as it stands it is as good an estoppels as any other order.”

20. The doctrine of estoppel acts as a shield against a party trying to assert a different position from that stipulated or represented. In absence of any grounds for setting aside the consent Judgment, it can only



be varied or set aside by another agreement of the parties. By endorsing the agreement, the court gives it the solemnity of an order of the court. It can only be set aside on grounds for varying or setting aside a contract between the parties. The doctrine of estoppel is incorporated by Section 44 of the *Evidence Act* which provides:

1. A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.
 2. Such judgment, order or decree is conclusive proof—
 - a. that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;
 - b. that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;
 - c. that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;
 - d. that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.
21. The appellant faults the trial judge for failing to appreciate that the respondent never owned the property, and that he fraudulently acquired it from her late husband. She also faults the learned judge for failing to appreciate that the auction price was due to the property's appreciation in value over the passage of time and that a fraudster cannot profit from his own fraud. In our view, the above issues fall outside the consent recorded by the parties and as discussed above, the parties willingly narrowed down the dispute by recording a clear consent. In this appeal, the appellant cannot seek to re-open the consent or expand its scope.
22. We now turn to the second issue, which is whether the learned judge granted an order, which was not part of the application before her nor was the issue canvassed by the parties. The appellant's contestation is that the issue whether the balance of the purchase price less the auctioneer's and lawyer's charges should be paid to the respondent was not raised before the court nor was it pleaded, and that it was not left for the court's determination by the parties.
23. True, the appellant never raised the above issue in her application that yielded the impugned ruling. However, in opposition to the appellant's aforesaid application, the respondent filed a replying affidavit dated 12th April 2018. At paragraph 9 of the respondent's replying affidavit, he averred as follows:

“Further to paragraph 8 hereinabove, the plaintiff recovered the outstanding decretal sum of Kshs.3,320,000.00 from the proceeds of the sale. I verily believe a total sum of Kshs.1,880,000.00 is being held by the plaintiff which ought to be released to me less the auctioneer's taxed costs.”



24. This Court in *Rosemary B. Koinange (suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 Others vs. Isabella Wanjiku Karanja & 2 Others* [2017] eKLR stated:

“The law on unpleaded issues and parties being bound by their pleadings, as relates to this question, is amplified by a long line of authorities as correctly illustrated by the appellants. But there is an equally long line of authorities unequivocally asserting the power of a court to determine issues which the parties have not raised in their pleadings. They may allow the court to do so by consent, as stated, for example, in *Chalicha FCS Ltd vs. Odhiambo & 9 Others* [1987] KLR 182, that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

25. The exception to the general rule that parties are bound by their pleadings, expounded in such cases as *Odd Jobs vs. Mubia* [1970] EA 476 and *Vyas Industries Ltd. vs. Diocese of Meru* [1982] KLR 114 arises where the parties raise and address un-pleaded issues and leave them to the court to decide.

26. We note that in the application dated 20th February 2018, the respondent only sought for the transfer of the suit property from the appellant to Christian Community Calvary Ministry having successfully sold the same to it by public auction on 4th December 2017 in satisfaction of the decree that emanated from the consent order dated 30th November 2015. It is noteworthy that even though the issue of refund of the balance of purchase price less the auctioneer and lawyer’s charges was not specifically pleaded, the appellant in his response to the application made a case for the refund and indeed both parties addressed the issue of refund of the balance of the purchase price in their written submissions. The appellant even filed further submissions dated 23rd July 2018 reiterating its position that the respondent cannot benefit from his own fraud. Consequently, we find and hold that the having made arguments on the issue of refund of the balance of the sale price, the parties left the issue to be determined by the trial court. Therefore, it was within the court’s mandate to determine the said issue.

27. Regarding the third issue, which is, who owns the suit property, we find that the parties having recorded a consent order the terms of which we detailed earlier, the suit was compromised in terms of the said consent. The consent order never dealt with the question of ownership of the land. It is also clear the issue of ownership was not dealt with by the trial court and therefore this court cannot entertain the said issue. In the case of *OpenDoc vs. Ann* [1983] KLR, this Court observed:

“The Court of Appeal cannot consider or deal with issues that were not canvassed pleaded and or raised at the lower court. For a matter to be a ground of appeal, it has to have been sufficiently raised and succinctly made an issue at the trial ”

28. Flowing from our conclusions on the issues determined above, the inevitable conclusion is that this appeal is devoid of merit. Accordingly, we dismiss it. Each party shall bear his/her own costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

S. GATEMBU KAIRU, CIArb, FCIArb

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JUDGE OF APPEAL

S. OLE KANTAI



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JUDGE OF APPEAL
J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR

